

Personal action now against the defendants, in the absence of any personal undertaking on their part; but merely the action *hypothécaire* against them as *détenteurs*. It was answered that by Art. 99 of the *Coutume de Paris*, there is a personal liability; but it is clear that that article does not apply to *mere rentes constituées*; article 100 of the *Coutume* makes that quite clear; and the commentary on it of Mr. Ferrière is in these words: "Cet article a été mis à la réformation de la coutume pour servir d'interprétation au précédent; mais parce que l'article précédent ne se peut entendre que des rentes foncières, et autres charges réelles et annuelles, et non des rentes constituées à prix d'argent, et que ce qui est dit en cet article ne convient qu'aux rentes constituées, il a été ajouté très mal-à-propos par les réformateurs, comme plusieurs autres." So that Ferrière is of opinion that Art. 100 is superfluous, and there never could have been any doubt, even without it, that Art. 99 never reached to *rentes constituées*.

Then the plaintiff made further answer that the defendant had acknowledged the personal obligation, and made a payment. There is nothing in this. He made a payment of his father's debt—not of his own.

Judgment reversed.

Laflamme & Co., for plaintiff.

A. Rochon, for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 23, 1881.

DORION, C.J., MONK, RAMSAY, TESSIER & CROSS, J.J.

FRECHETTE (def. below), Appellant, and LA COMPAGNIE MANUFACTURIÈRE de ST. HYACINTHE (plff. below), Respondent.

Servitude—Land on lower level.—C. C. 501.

The action *en démolition de nouvel œuvre* lies against the owner of land on a lower level of a stream, who has built a dam so as to obstruct the flow from a higher level, and thus weaken the power which has been previously used by the owner of the upper level to propel his machinery.

The fact that the work complained of has been completed does not affect the right of action for its demolition.

The Statute, *Consol. Stat. L. C., Cap. 51*, which provides that proprietors of lands may improve water courses adjoining them, and may erect

dams, etc., but shall pay damages, to be ascertained by experts, which result from such works to others, does not apply to the case where the owner of the upper level already has works in operation, and does not deprive him of the action en démolition.

The appeal was from a judgment of the Superior Court, District of St. Hyacinthe, Nov. 4, 1880, maintaining an action *en démolition de nouvel œuvre*.

RAMSAY, J. (*diss.*) This is an action *en démolition de nouvel œuvre* and for damages. There does not appear to me to be anything particularly mysterious or difficult in understanding the nature of this action, nor am I aware that the Code has in any way modified it. Like all other civil actions no sacramental words are required for its validity, but the plaintiff must express in ordinary language what is necessary to obtain it. The code has, therefore, said nothing more in this respect than was said in the *Judicature Act of 1849*. The learned judge in the Court below seems to have been desirous of escaping from the *dictum* of the Privy Council in the case of *Brown v. Gogy*, (2 Moore's P. C. cases, p. 341, N. S.) and I do not wonder at it. But the proper mode of getting over such a difficulty is to put in question the correctness of the decision. I think it may safely be said that neither the Roman law nor any other law laid down the rule that a work could not be demolished on an action brought after the work was finished. What the Privy Council found was that the Roman interdict was given where there was shown to be a possible injury. The interdict obliged the party who was making the construction to give security that if it proved injurious he would demolish and pay damages. The work being finished, such an interdict would have been of no use. Not observing this distinction, the Privy Council have unfortunately been induced to say: "By the old French law in force in Lower Canada, the action *dénonciation de nouvel œuvre*, can only be brought by a person to stop the progress of a work, which, if completed, would be injurious to him. Such action must be brought whilst the work is in progress." I do not know if my colleagues concur in the view I take, but I presume they do, as they are going to confirm.

The judgment of the Court below gave the plaintiff \$100 damages, and ordered the demo-