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NOTES OF CASES.

SUPERIOR COURT.

MONTREAL, March 20, 1879.

SALVAS v. THE NEW CITY GAS COMPANY.

Contributory Negligence—Accident to horse running without a driver—Responsibility for negligence of Agents.

JOHNSON, J. Action for damages for the destruction of a horse that fell into a pit made under the defendant's authority. The plea is 1st, that the defendants agreed with one Parker to do the work which made this opening necessary, and therefore they are not responsible. That might give them a recourse against Parker to indemnify them; but the public have nothing to do with Mr. Parker; they only know the Gas Co., and cannot even know the names of their servants or agents who do their digging for them, on whatever terms they may do it. Then the second plea is that every precaution was used, and there was no negligence except on the part of plaintiff himself. The facts, as deposed to by the plaintiff's witnesses, are that the horse was found harnessed to the carriage, and having fallen into this ditch about 6 a.m.; that there was no light, and no watchman, at the time, and when there was one, he was always drunk. The defendants' witnesses, however, contradict this. A man named Arcand appears to have been in charge of this horse on the night of the accident, and I gather from the evidence that the animal must have escaped from Arcand and run away, probably in the direction of its stable, which was near the spot. The poor creature was terribly injured; but for all that appears in evidence it must have been without a driver at the time. There is no evidence to make the defendants liable. Their negligence even as to watchmen and lights, supposing all that to be true, would not make them liable for accidents happening to horses running about the town without drivers. The action will be dismissed, but without costs.

Duhamel & Co. for plaintiff.

Lacoste & Co. for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, March 22, 1879.

Sir A. A. DORION, C.J., MONK, RAMSAY, TESSIER & CROSS, JJ.

RENNY et al. (contestants in the Court below), appellants; and MOAT (claimant below), respondent.

Subrogation—C. C. 1155, 1156.

CROSS, J. (*dis.*). On the 20th March, 1871, W. P. Bartley subscribed an obligation in favor of Robt. Hamilton for $20,000, payable in five years, with interest at 7 per cent. per annum, payable half-yearly, and hypothecated certain real estate in security, Messrs. Mulholland & Baker also becoming security for the amount. Mr. Hamilton only paid part of the amount to Bartley, retaining $9,570.20, which he deposited in the Merchants' Bank to the credit of Bartley subject to Hamilton's approval. Mulholland & Baker made three semi-annual payments of interest on the mortgage amounting to $2,100. On the 17th March, 1876, the amount of the obligation in capital and interest was settled by Mulholland & Baker giving their check for $9,087, and by Bartley giving his check on the Merchants' Bank for $11,613.07, the fund there deposited by Hamilton to the credit of Bartley which had increased to that amount by the addition of interest. This check was drawn to the order of Jackson Rae, Mr. Hamilton's agent, and the money withdrawn on his endorsement. Mulholland & Baker had borrowed from Robert Moat the $9,087 which they paid to Hamilton, and the 13th July, 1876, they became indebted to Moat for another sum of $15,000 borrowed on the 17th March, 1876, to pay Hamilton, and for which they gave their promissory note payable in 12 months. In order to secure Moat for his advances, a deed was executed 23rd June, 1877, 15 months after Hamilton had been paid in the manner already mentioned, the parties being, 1st. Robert Hamilton; 2nd. Mulholland & Baker; and 3rd. Robert Moat. The deed was prefaced by the recital of the execution of the

obligation with hypothec, Mulholland & Baker having become security, and contained in addition the following enunciation:—"And whereas the said parties of the second part as such sureties have at divers times paid instalments of the interest on said debt, and finally paid the entire principal thereof to the said party of the first part upon the agreement and with the understanding that they should receive a subrogation of his rights under the said deed." Further, that Moat had advanced the money for the payments, and it had been agreed that he should receive the subrogation instead of Mulholland & Baker. It went on to declare that Moat was subrogated in the rights of Hamilton, Bartley consenting.

Bartley having become insolvent, Moat, on the 2nd March, 1878, filed a claim on his estate for $22,950.45, claiming to be a hypothecary creditor for that amount on the real estate described in the obligation of the 20th March, 1871. Renny *et al.*, the inspectors of the estate, contested the claim, setting forth the manner in which Hamilton had been settled with on the 17th March, 1876, and the facts so appearing in proof, the Superior Court (Mr. Justice Mackay) on the 14th May, 1878, rejected all the hypothecary claim, save for the $9,087. The case being afterwards heard in review, the Court there, Mr. Justice Dunkin dissenting, reversed the first judgment, and maintained the claim of Moat for the full amount. It is from the latter judgment that the present appeal has been taken by the inspectors, Renny *et al.*

I think the different members of the Court are agreed as to the manner in which the payment of $11,613.07 was made, that is, that it was not made by Mulholland & Baker with their own money, but by Bartley with the money of Hamilton. The controversy turns chiefly upon the effect to be given, under the circumstances, to the deed of the 23rd June, 1877. This deed, which is styled a transfer and subrogation, purports to deal with two distinct transactions which it is necessary to separate for the right understanding of the legal relations of the parties to each other. It is most appropriately termed a transfer as regards the dealing between Mulholland & Baker and Moat, and it is enunciatory of an alleged subrogation as regards the dealing between Mulholland & Baker and Hamilton. Mulholland & Baker borrowed money from Moat, and proposed to give him a claim they held against Bartley, which they said was secured by a mortgage Bartley had given to Hamilton, they being entitled, as they alleged, to represent the rights of Hamilton, whom they had paid. This proposal Moat accepted after he had loaned the money, but whether before or after made no difference, because if the security they so offered was on the condition they represented, they had the right to transfer it, and if the mortgage which had been given to Hamilton were then existing and legally vested in them (Mulholland & Baker) it would undoubtedly pass by their conveyance, but as they could convey no more rights that they had themselves, it was fairly incumbent on Moat to see to the condition of the security at the time he accepted it. Mulholland & Baker represented to Moat that they had been subrogated in the rights of Hamilton as the creditor of Bartley with hypothec upon immoveable property. This was either true or not true. If true, Mulholland & Baker were in a position and had a right to convey the claim, with its accessories; but if untrue, as, for instance, if the claim had been in part extinguished by a payment not proceeding from Mulholland & Baker, in such case, as they could convey no more rights than they were themselves possessed of, they could not vest Moat with what had already become extinct and was non-existent. True it is, that Bartley, the debtor, himself recognized the existence of the claim, and he was no doubt bound personally by his declaration; but, however much he was so bound personally, he could not, by this false declaration, restore the hypothec which had been so extinguished. He could have created a new one, but to resuscitate the one that was dead was beyond his power. He became bound towards Moat for the claim he recognized, and for the consequences of declaring that the claim and hypothec existed; but he could not by such declaration make the hypothec revive which, by the fact of payment, was dead and annihilated. The like may be said of Hamilton's declaration. If he were paid by Bartley, and not by Mulholland & Baker, he had neither claim nor hypothec to subrogate to anyone, and, moreover, his interposition was altogether

unnecessary. It was the operation of law, and not the act of Hamilton, which subrogated Mulholland & Baker in Hamilton's rights to the extent to which, as the sureties of Bartley, they paid Hamilton. This Moat was bound to know, and, instead of relying upon the declarations of the parties to the effect that the claim and hypothec of Hamilton still existed, he should have required direct proof *aliunde* that the payments had all been made to Hamilton by Mulholland & Baker. To illustrate this, suppose when Bartley paid Hamilton the cheque for $11,613.07, he had procured a registration of the fact, it would undoubtedly have discharged *pro tanto* the hypothec and claim held by Hamilton. If, notwithstanding, the deed of 23rd June, 1877, had been executed exactly as it has been done, and the transaction had taken place exactly as now represented to the Court, would it be contended that notwithstanding the discharge of the claim and mortgage on the registry books, the declarations of Hamilton, Mulholland & Baker, and Bartley would have re-established the hypothec? If not, it shows that it is only the evidence of the fact that is wanting to establish the insufficiency of the declaration to restore the hypothec. That evidence has now been produced, and, as regards the extinction of the hypothec, should have the same force as if it had been patent on the registry books. It is not going too far to say that any person interested might still demand the registration of the fact of this payment, and claim the benefit of it, and the record in this case should now be considered to stand in as favorable a condition for the discharge as if it had been proved that Bartley had made that registration. Bartley remains liable to Moat, not because his declaration supersedes the effect of the payment he made to Hamilton, but because he chose to represent to Moat that the claim was unpaid. He revived his personal responsibility, but could not revive the hypothec which was an accessory and incident to the debt which had become extinct by the payment. In conventional subrogation the party requiring it must not only have lent his money for the purpose, but he must himself see that his own identical money is employed in paying the privileged or hypothecary creditor in whose rights he wishes to be subrogated, and the subrogation must be obtained at the time the money is paid, so as to leave no room for suspicion that the debtor may have applied the money to other purposes and subsequently got other money to satisfy his creditor. Does not this manifestly show that for legal subrogation it was necessary that the identical monies of Mulholland & Baker should have been used to effect it, and that in order to be aware that he would obtain the benefit of such subrogation it was necessary for Moat to satisfy himself that Hamilton had been actually paid by the money of Mulholland & Baker? To illustrate this, I refer to Dalloz, Dec. de Jur., t. 4, Vo. Subrogation, Nos. 17, 42, 48, 52, 53, 61, Merlin, Rep. de Jur. Vo. Subrogation, t. 16, p. 468, sec. 2, ss. 8, No. 4; also to Renusson, Subrogation, cap. 11, Nos. 21 to 37. The law, I understand, to be so declared for the prevention of frauds, not that there should in every case be fraud to call for the application of the law, but the law before hand declares the nullity of such pretended subrogations *après coup*, so that fraud and complications likely to involve fraud may be prevented chiefly to intervening creditors between the payment and the alleged subrogation, but to discountenance transactions which may be made the occasion of frequent frauds. Toullier, t. 7, No. 116. As regards conventional subrogation, arrêts may be cited from Sirey maintaining that the holder of an authentic title of subrogation will have priority over the bearer of an inferior title from the same party, even of an anterior date, and some may even go the length of excluding proof of an acquittance, although it be of an anterior date, if only evidenced by a *sous seing privé* writing which has acquired no fixed date. This difficulty applies merely as an objection to proof, nor can it be said that such decisions form a jurisprudence or any approach to it; on the contrary they have given rise to great controversy among the modern writers, nor do they apply under article 1155 of our civil code, which requires something like an authentic title made at the same time as the payment, which the article 1250 of the code Napoleon does not require. A sufficient answer to these arrêts may be found in a citation from Gauthier, Traité de Subrogation Personnelle. I have not met with an arrêt which maintained a subrogation where proof was made of previous payment by the debtor

with his own monies, although authentic instruments were afterwards executed acknowledging the existence of the debt, and declaring a subrogation. If I found such I could not believe it was law. In legal subrogation, the identity of the money which goes to pay the debt and whence it proceeds is the essential fact. The payment must be made by the party whom the law entitles to subrogation. The law thereupon, from that fact alone, operates subrogation. It is not the declaration or avowal of the parties that does so, nor can such declaration or avowal of the parties contrary to the fact have any such effect. Again, it is said the only parties who could have a right to complain would be creditors whose claims date anterior to the act of subrogation. On the contrary, I think that any posterior creditor has the right. All that the law requires is to have an interest. The chirographary creditor has always the right to question the validity or sufficiency of the hypothec which is collocated to the detriment of his claim. He may also prove the non-existence or extinction of the prior claim. To my mind the distinction is clear where the prior interest is required, where a fraudulent preference or unfair advantage is obtained over the debtor's estate by one creditor to the prejudice of another, where the deed is not void but is voidable by reason of such preference, it requires a demand in revocation to set it aside, and that demand can only be made by a creditor who has been injured by the execution of the instrument if allowed to stand. And if the act be a nullity, it has not had the effect of alienating, withdrawing or affecting any part of the debtor's estate, and only requires the nullity to be pronounced to exhibit a true record of the debtor's property. Any subsequent creditor has a right to demand that this nullity should be pronounced. Such creditor may very well say, I trusted my debtor on the faith of all the property he had, or had not validly alienated, and to show that he was possessed of means available for my payment, I claim the nullity of a pretended subrogation which was inoperative, the debt having been paid and extinguished before the act of subrogation. The doctrine of subrogation is founded on a legal fiction. The authors say it is *de droit étroit*, and therefore not to be extended beyond the cases where it has been admitted in practice. It may proceed from the creditor or from the debtor, or from both, or from the mere operation of law, when a party pays whom the law entitles to subrogation; but if the debtor has once, with his own moneys, satisfied his creditor, then neither can subrogate any one, because the debt is gone. The facility for frauds by means of pretended subrogation is so great that from its first introduction its admission was guarded with watchfulness, and strict rules were adopted to prevent its abuse. These were explained in Renusson's Treatise, and at a later date recognized in a liberal form by the arrêt of the Parlement de Paris of 1690, to be found in the fourth volume of the Journal des Audiences, at p. 284. They are substantially the same as contained in the Art. 1155 of our Civil Code. They were acted upon in the case of *Filmer* v. *Bell*, decided by this Court in 1852, and reported in 2nd volume L. C. R. It is a case about as near in point as could be had, and is valuable as determining that the after declarations of the parties, although by authentic instruments, are of no avail to effect subrogation. In that case the *bonâ fide* advancer of the money failed in his recourse, although his titles were authentic. The debtor, when he paid, declared in the notarial receipt he obtained, that he had borrowed the money from the new creditor, whom he subrogated, and the new creditor, although not present at this act, afterwards by notarial deed, accepted the subrogation so declared in his favor. In that case the form only was wanting; in the present it is the substance that is absent. No notarial documents were needed here; the essential fact to be proved was that the money had been paid by Bartley's sureties. That fact not being proved, but being disproved, as regards the $11,613.07, the notarial documents could be of no avail.

It was argued, and much learning expended, to prove that Bartley's obligation was for a sufficient cause and valid. It is quite true that there is a valid obligation on the part of Bartley, and a sufficient cause for it. It is not, however, the obligation which he first contracted towards Hamilton, but the obligation which he contracted towards Moat, by the declaration he made in the deed of the 23rd June, 1877. The obligation contracted towards Ham-

ilton, in so far as the payment made towards it by Bartley, was gone, and the hypothec, which was necessary to it, was gone, and had no existence. Mulholland & Baker pretended to hand it over to Moat; they had not got it; it did not exist, therefore they could not convey it. It was not the cause of the obligation of Bartley that was wanting, it was the subject matter of the sale or conveyance, viz., the hypothec that was wanting, that was non-existent, and could not be conveyed. There being no subject to convey, it is a question of want of power to convey. What does not exist, cannot be conveyed. In my opinion the Judge who rendered the first judgment in the Superior Court acted on correct principles, as also the dissenting Judge in Review. I do not go so far as he is reported to have done in expressing an opinion that the entire debt was extinguished. It was the undoubted right of Mulholland & Baker to be subrogated for what they themselves had paid. For their own check of $9,087.00 and the interest they paid, they were subrogated by operation of law from the time the payments were made, but for the money proceeding from Bartley, drawn from the Merchants' Bank with the approval of Hamilton, I think, they can have no subrogation, and could convey no right to Moat. I would therefore, without interfering with Moat's personal claim, declare, as claimed by the contestation, that he had no right to be collocated by privilege or priority, as subrogated to Hamilton, under the obligation of the 20th March, 1871, in so far as regards the check for $11,613,07, and would reverse the judgment rendered in Review, and give judgment according to the ruling above expressed, confining Moat's privilege or priority of hypothec to the sums actually paid by Mulholland & Baker with interest thereon.

Tessier, J., also dissented, expressing views similar to those stated above.

Sir A. A. Dorion, C. J., for the majority of the Court, was of opinion that the judgment should be confirmed.

Ramsay, J., concurring. This case has been subject to various fortunes. The Judge of first instance maintained respondent's claim for the debt in whole, but rejected his claim to be a hypothecary creditor, for everything beyond $9,087. In review the full claim was maintained, one Judge dissenting, and the contesting parties appealed. This shows that the case is one of difficulty, although the question upon which, I think, it should turn, will be recognized as a very simple one. The facts are these: On the 20th March, 1871, one Bartley granted a deed of obligation to Hamilton for $20,000, with hypothec, and Messrs. Mulholland & Baker became Bartley's securities. On the 23rd of June, 1877, Hamilton, Mulholland & Baker and Bartley appeared before a notary and, in effect, declared the existence of the deed of obligation and hypothec, and that Mulholland & Baker became the *cautions solidaires* for the repayment of the debt and interest, that the said *cautions solidaires* had paid at different times the interest and finally the entire debt, that the respondent Moat had advanced Mulholland & Baker the money to make these payments, and consequently that they wished them subrogated in their place and stead. Thereupon Mr. Hamilton subrogated them in his rights. Since there is such divergence of opinion on the Bench, it will not, I hope, be considered a very severe criticism if I say that the parties to this deed did not perfectly understand their relative positions under the law of the code. They did not, perhaps, distinguish between the legal and conventional subrogation, and, perhaps, they did not know that in the latter case, when a third party paid, the payment and the subrogation must take place *at the same time.* But what were their relative positions? Mulholland & Baker, as the *cautions solidaires* of Bartley, by paying Hamilton, became subrogated in his rights by operation of law (1156,3). Then the respondent was their *cessionnaire*, for valuable consideration, of the rights they had acquired by their payments to Hamilton. In truth, Hamilton's signature was of no importance in the matter, except to give a *quittance.* On the face of it this is a perfectly legitimate transaction, and it vested in Moat the whole rights of either Hamilton or Mulholland & Baker or Bartley, in the obligation and hypothec, and this so perfectly that none of these would be allowed to contradict the enunciation of that deed. It will also be admitted, that no one deriving his rights *wholly* from any of these parties could successfully attack the deed. In other words, the deed cannot be set aside by any one but a *tiers* damnified by the transaction.

Now, are the appellants such *tiers?* There can be no doubt that the position of the creditors of an insolvent as regards his rights is not identical with his, nevertheless the general rule unquestionably is that the creditors represent the debtor. The exception to this rule is when the creditor has done something in fraud of his creditor, or something which the law deems to be fraud. I therefore think, that in the absence of any allegation of fraud, the appellants cannot go behind the declarations of the debtor they represent, to upset the rights of one they admit to be an innocent holder. In a word the subsequent insolvency of Bartley cannot affect Moat. It seems to me that this view of the case recommends itself so completely to the understanding, that I should not have considered it necessary to go further had the case been submitted to me alone in the first instance. But out of deference to the opinions of my learned colleagues, to that of the learned Judge who dissented in Review, and to that of the learned Judge of first instance, I feel constrained to offer some observations on the opposite side of the question.

In support of appellants' pretensions it is said that although the view just expressed is generally true, where the law prescribes a certain mode of doing a thing, that mode must be followed, that this is a conventional subrogation, that consequently the payment of the debt, without a simultaneous subrogation, extinguished the hypothec, and that it could not be revived, whatever might be declared in the deed. And here I would make the preliminary remark, that it seems to me that if the payment annulled anything it was the debt; and to say that it annulled the hypothec and left the debt subsisting is to get into an illogical position. This is so self-evident that it hardly requires authority to support it, nevertheless, I may quote what Toullier says on the point:—"Si le paiement éteint la créance, et tous les droits des créanciers, dès l'instant où le paiement est fait, le créancier est sans pouvoir pour transmettre ou céder des droits qu'il n'a plus."—(Vol. 7, p. 137). "Celui qui a payé ne peut plus avoir contre le débiteur que l'action *negotiorum gestorum*, ou telle autre action nouvelle, qui n'a plus aucun rapport avec celle du créancier."—*Ib.*

Again, it seems perfectly clear that appellants' pretension cannot extend to what was unquestionably paid by Mulholland & Baker, for, as has been already said, they were the *cautions* of Bartley, and having an interest to pay the debt, by its payment they were subrogated *de plano* in all the rights of Hamilton. The only question then that remains is as to the amount of $11,000 paid by Bartley's cheque. We have, therefore, only to consider paragraph 2 of Art. 1155 C. C. It is evident that with paragraph 1 we have nothing to do in this case. Paragraph 1 only provides for the payment made by a *tiers*, and consequently it cannot affect a payment made by the debtor Bartley to Hamilton. Paragraph 2 provides for the debtor borrowing a sum for the purpose of *paying* his debt, and of subrogating the lender in the rights of the creditor. Now, what are the formalities he must pursue? It is necessary to the validity of the subrogation in this case, (1.) That the act of loan and the acquittance be notarial [or be executed before two subscribing witnesses] (2) That in the act of loan it be declared that the sum has been borrowed for the purpose of paying the debt, and (3) That in the acquittance it be declared that the payment has been made with the money furnished by the new creditor for that purpose. If these three conditions are complied with the law positively declares that the subrogation is valid. It will be observed that there is not a word to require that the deed shall be made at the time of the payment. The old notion of the subrogation being necessarily made at the time of the payment, and which gave rise to so much difficulty in practice, is confined to payments under paragraph 1—that is, to payments made by a third party. Not only it is not applied, but it was not intended to apply it to payments by the debtor with borrowed money. This becomes evident if we look at the last sentence of Art. 1155, which is declared to be new law: "If the act of loan and the acquittance be executed before witnesses, the subrogation takes effect against third persons from the date only of their registration," &c.; so that the object of these formalities is to fix the date of the deed, so that third parties pleading fraud may have a certain date to go by. This system is absolutely contradictory of the idea that the test of absence of fraud should be that it was all done at once.

This appears to me to be not only the positive law of the question, but also the common sense way of looking at it. Why should a debtor who borrows money to pay his debt not to be allowed to come in at any time without fraud, and make a declaration to the effect that he borrowed money to pay his creditor, and that now he wishes his lender to be subrogated in the rights of his old creditors? He might do it by a new deed at any time, why should he not by a deed made later, the date of which is fixed, recognize the former obligation? Now, which of these formalities is wanting in this case? The act of loan and the *quittance* are notarial, the act of loan declares that the sum was borrowed by Hamilton, and the *quittance* declares he was paid with the money so borrowed, and the deed was enregistered into the bargain. I therefore think that for a double reason the judgment of the Court below should be confirmed; 1st, the appellants have not shown any legal interest to disturb the arrangement of these people; 2nd, the forms of law necessary to a valid subrogation have been observed.

I had almost forgotten to allude to the case of *Filmer & Bell* (2 L. C. R. p. 130) which has come under our notice. It certainly has some resemblance to this case, but I do not think it can guide us in coming to a conclusion. In the first place it is before the code, and it can hardly be very confidently affirmed that articles 1155 and 1156 C. C. accurately express the old law. In some particulars article 1156 does not pretend to express it. If the *arrêt* of 1690 expressed the law as it stood here before the Code, namely, that the payment and the subrogation should be of the same date to make the subrogation valid, then *Filmer & Bell* was correctly decided. But the authority of this case may perhaps be questioned. Mr. Justice Aylwin said that the arrêt of 1690 was a declaration of the common law. The annotator of the *arrêt* in the *Journal des Audiences* expressed an opinion somewhat different. After speaking of the difficulties to which subrogation had given rise, and the efforts to clear them away, he adds:—"Mais enfin le Parlement de Paris a mis la dernière main à cette matière de subrogations très-difficile d'elle-meme, car le 6 Juillet 1690, les Chambres étant assemblées, il a ordonné," &c., the *arrêt* in question. If, then, it was new law, it was not enregistered here, and it is not binding on us, even if it came from the Roman Law, which is not to be proved by simple assertion.

MONK, J., also concurred, and stated that he agreed entirely with the opinions which had been expressed by the majority of the Court.

Judgment of the Court of Review confirmed.

Bethune & Bethune for appellants.

Abbott, Tait, Wotherspoon & Abbott, for respondents.

ROLFE et al., Appellants, and CORPORATION OF THE TOWNSHIP OF STOKE, Respondent.

Appeal to Queen's Bench in action to set aside a municipal roll.

The appeal was from the Circuit Court, District of St. Francis.

RAMSAY, J. This is a motion on the part of the respondent to reject the appeal, the case not being appealable. It is argued on the part of the respondent, that by Art. 100 of the Municipal Code, the jurisdiction to set aside a municipal roll is given jointly to the District Magistrate's Court and to the Circuit Court, that the proceedings are all under Chap. 7 Municipal Code, and therefore are summary, that the evidence may be taken orally or in writing, and that there is no express appeal given to the Circuit Court, while it is expressly taken away from the Magistrates' Court. All this, it is contended, shows that the Legislature did not intend to give an appeal, or to make the general rule of Art. 1142, C. C. P. apply to the class of cases of which this is one. That on the contrary, by Art. 1033 C. C. P., the appeal to the Queen's Bench is limited in matters relating to municipal corporations and offices, and it is added that if 1142 C. C. P. is generally applicable, it does not touch this case, as it is for no sum of money, and binds no future right.

This point is not a novel one for this Court. In the case of *Cooey & The Corporation of the County of Brome*, which was as to the validity of a by-law, we distinctly held that there was jurisdiction in this Court to hear the appeal, and we reversed the judgment of the Court below. The case of the *Corporation of the County of Drummond & Corporation of the Parish of St. Guillaume* was cited to show that

the jurisprudence of this Court on the point was not uniform. The citation is unfortunate, for in that case we allowed the appeal, but we sent the case back to the Court below on account of irregularities. It came back, and on the merits we confirmed the judgment. If any doubt should exist as to the correctness of the opinion which the Court expresses, there can be no question at all events of the uniformity of the jurisprudence of this Court, for there is still another case of *McLaren & Corporation of Buckingham* (June, 1875), where we decided exactly as in this case. The motion of respondents is dismissed with costs.

Brooks, Camirand & Hurd for Appellants.
Hall, White & Panneton for respondent.

JOLY et al., Appellants, and MACDONALD, Respondent.

Appeal to P. C. from judgment dissolving an injunction.

SIR A. A. DORION, C. J. The respondent moved for leave to appeal to the Privy Council from a judgment of this Court setting aside an injunction. The respondent claimed that he should be maintained in possession of the railway which he was constructing for the Provincial Government, until he had been paid a million of dollars which he said was due to him. The Court below gave judgment in favor of Macdonald, and this Court reversed the judgment. The question now was whether Macdonald had an appeal to the Privy Council. The Court was of opinion that the appeal should be granted. Whether the case were considered as relating to the possession of real estate, or as involving an amount of a million dollars, Macdonald had a right to go to the Priv y Council. The statute respecting injunctions stated that there should be an appeal in these as in other cases. Motion granted, security to be given within six weeks.

E. Carter, Q. C., for Appellants.
Doutre & Doutre for Respondent.

FLETCHER, Appellant, and MUTUAL FIRE INSURANCE CO., Respondent.

Procedure—Record before Court of Review.

SIR A. A. DORION, C. J. This was a motion by the appellant for a rule against the Joint Prothonotary of the district of Sherbrooke to compel them to return a record. They answered that the record was before the Court of Review upon a motion for a new trial. There was no fault on the part of the Prothonotary. The proper course to adopt would be to ask the Court of Review for an order that the record be transmitted to the Court below, and then it could be brought up to this Court. No doubt the Court of Review, on being apprised of the appeal, would grant such order. Motion rejected.

Ives, Brown & Merry for Appellant.
Brooks, Camirand & Hurd for Respondent.

ANGER et al., Appellants, and O'MEARA, Respondent.

Procedure—Report of distribution—Record missing—Refusal to give order for monies.

SIR A. A. DORION, C. J. A report of distribution was made in the Court below; the report was never homologated, but a contestation was filed, and the judgment dismissed the contestation. From that judgment the four contestants had appealed to this Court. It appeared, however, that the portion of the record which referred to the contestation could not be found. The case had remained in that position for several terms. Now an application was made under these circumstances. The appeal was by four heirs who claimed that they had a right to a certain sum of money. The appeal had been desisted from by three of the appellants, and there now remained, apparently, only one appellant. The respondent now moved, that as there were seven entitled to the money, and only one had appealed, six-sevenths of the money lying in the Sheriff's hands be paid over to them. This appeared at first sight to be reasonable enough, but the difficulty was that the Court had not the record. The report of distribution had not been homologated by the Court below, and until the contestation was over, the Court could not give an order to the Sheriff to pay the money. Motion rejected without costs.

Lacoste & Globensky for Appellants.
Duhamel, Pagnuelo & Rainville for Respondents.