

**CIHM
Microfiche
Series
(Monographs)**

**ICMH
Collection de
microfiches
(monographies)**



Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1994

Th
co
ma
of
sig
ch



This
Ce d

10X



Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- Coloured covers/
Couverture de couleur
- Covers damaged/
Couverture endommagée
- Covers restored and/or laminated/
Couverture restaurée et/ou pelliculée
- Cover title missing/
Le titre de couverture manque
- Coloured maps/
Cartes géographiques en couleur
- Coloured ink (i.e. other than blue or black)/
Encre de couleur (i.e. autre que bleue ou noire)
- Coloured plates and/or illustrations/
Planches et/ou illustrations en couleur
- Bound with other material/
Relié avec d'autres documents
- Tight binding may cause shadows or distortion
along interior margin/
La reliure serrée peut causer de l'ombre ou de la
distorsion le long de la marge intérieure
- Blank leaves added during restoration may appear
within the text. Whenever possible, these have
been omitted from filming/
Il se peut que certaines pages blanches ajoutées
lors d'une restauration apparaissent dans le texte,
mais, lorsque cela était possible, ces pages n'ont
pas été filmées.

- Coloured pages/
Pages de couleur
- Pages damaged/
Pages endommagées
- Pages restored and/or laminated/
Pages restaurées et/ou pelliculées
- Pages discoloured, stained or foxed/
Pages décolorées, tachetées ou piquées
- Pages detached/
Pages détachées
- Showthrough/
Transparence
- Quality of print varies/
Qualité inégale de l'impression
- Continuous pagination/
Pagination continue
- Includes index(es)/
Comprend un (des) index

Title on header taken from: /
Le titre de l'en-tête provient:

- Title page of issue/
Page de titre de la livraison
- Caption of issue/
Titre de départ de la livraison
- Masthead/
Générique (périodiques) de la livraison

- Additional comments:
Commentaires supplémentaires:

Docket title page is bound in as last page in book but filmed as
first page on fiche. Includes some text in French.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

The copy filmed here has been reproduced thanks to the generosity of:

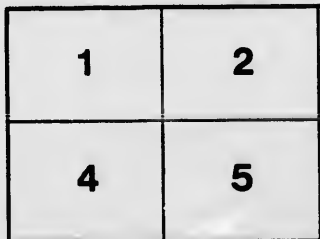
Seminary of Quebec
Library

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol \rightarrow (meaning "CONTINUED"), or the symbol ∇ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:



L'ex
géné

Les
plus
de l
con
film

Les
pap
par
der
d'In
plat
orig
pre
d'In
la d
em

Un
der
cas
syn

Les
fil
Lon
rep
de
et
d'In
illu

duced thanks

L'exemplaire filmé fut reproduit grâce à la générosité de:

Séminaire de Québec
Bibliothèque

st quality
d legibility
ith the

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

s are filmed
nding on
ated impres-
riate. All
ning on the
l impres-
h a printed

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

rofiche
ng "CON-
"END"),

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ∇ signifie "FIN".

med at
large to be
filmed
er. left to
mes as
strate the

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

	3
--	---

1
2
3

1	2	3
4	5	6

15
FROM
MONTREAL, }

IN APPEAL.

KERR, Esquire,

(Plaintiff in the Court Below)

APPELLANT ;

and

LA CROIX, Esquire,

(Universal Legatee of his late Mother)

RESPONDENT.

APPELLANT'S CASE.

THIS Appeal is insituted from a judgment rendered at Montreal, in February, 1815.

The declaration states that before making a pretended assignment, on 30th September, 1796, the Respondent's Mother represented herself and the children of her late husband to be co-seigneurs and co-proprietors of a Fief called Villeray, near Quebec, and that large sums of money were due to them for *Lods et Ventes*, by one John Fraser of London, in virtue of certain wharves which had been conceded by the widow as part of the pretended Fief Villeray, and which wharves were before that time enjoyed by Mr. Fraser; that, on said 30th September, 1796, it was agreed between the widow and the Appellant, that in consideration of £120 to be paid by the Appellant, she would on her own behalf, and that of the heirs, by a valid and legal deed of assignment, make over all arrears of *Lods et Ventes* due by John Fraser to the 21st October, 1788, and it was then agreed that the widow had a lawful right to transfer all such sums of money as were due by Mr. Fraser by reason of the said wharves; that although the Appellant did afterwards, on 30th September, 1796, pay to her £120, yet the widow La Croix, contriving to deceive and defraud the Appellant, did not perform her agreement, but craftily signed and executed a pretended assignment, and had no right to sell or assign such *Lods et Ventes*, and by means of the premises he was not only deprived of the benefits which might have accrued from a legal transport, but was induced to lay out £1200 in bringing suits against Mr. Fraser. Then follows a more general Count, and a Count for money lent, and advanced, and paid, laid out, and expended.

First Plea. General issue and general demurrer.

Second. Admits that Respondent is legatee universal of his Mother, but denies that he ever intermeddled with her estate.

Third. Alleges that the transport of 30th September 1796, was an assignment of *droits litigieux et incertains*, and made *sans aucune garantie quelconque*, and that the Appellant having used diligence to recover the said *droits* at his own risk, it is not competent to him to have recourse against the Respondent, and that in law the cession of *droits incertains* produces no right of action against the *cédant*.

Fourth. Alleges no right of action accrues on the transport of an uncertain debt.

Fifth. That deed is void because it was an assignment of *droits litigieux et incertains* made to a practising advocate.

On these pleas issue was joined, and the parties being heard on the question of law, the Court on the 18th June, 1813, dismissed the Respondent's exception with costs, and ordered proof on the allegations of fact.

The following points are proved.

First. That on 30th September 1796, and for twenty-four years before, i. e. from the year 1773, the widow La Croix for herself and as *commune en biens* with her late husband, held herself and her children out to the world as *Seigneurs Primitifs* of a Fief called Villeray.

Vide No. 18, on Record.

Secondly. That they claimed a large sum of money from Mr. Fraser for *cens* and *Lods et Ventes* in respect of the wharves enjoyed by him.

Vide Mr. Voyer's evidence.

Thirdly. That they executed a free and unconditional assignment on the same day (not of uncertain and doubtful rights) but of a debt which is unequivocally declared to belong to them.

Vide No. 2.

Fourthly.

Fourthly. That the consideration for the same was £120, i. e. sixty pounds in cash paid and an obligation for £60 to be paid when the *transport* should be ratified.

Vide Declaration of Paul La Croix, and judgment of 11th June 1799, No. 16, in Record.

Vide Appendix A, Letter A.

Vide Mr. Prentiss and Mr. Bernal's evidence.

Fifthly. That no such *Fief* as Villery existed, and that the wharves in question were within the *cessive* of His Majesty and of course that their claim of *Lods et Ventcs* was unfounded and known so to be by the widow and heirs; and

Sixthly. That in consequence of the misrepresentation and *fraud* of the widow La Croix, the Appellant has sustained an actual loss of £1000, independent of the £60 and £5 15s. paid at the time of executing the assignment, and of all benefit the Appellant would have reaped had the pretensions of the widow and heirs been well founded.

These being the allegations in the Appellant's declaration, it is difficult to conceive how the Court below could have dismissed his action. And, lest it should have been led away by the belief that the Appellant, in obtaining the assignment, had purchased a *doubtful and uncertain debt, a droit litigieux* (as is falsely pretended) to be prosecuted at his *own risk and expence*, he takes the liberty of stating the following circumstances which preceded and followed the assignment.

Vide Mr. Bernal's evidence.

Vide Letter B. to the effect of the Record.

Vide Appendix Letter B.

Vide Mr. Bernal's Letter to Mr. Vice-Treasurer, dated 4th January the end of the Record.

In the year 1796, being a practising Barrister at Quebec, he was applied to by Mr. Bernal agent for Mr. John Fraser, for his opinion and advice. Mr. Fraser having at that time a sum of £3000 due to him as *Baillcur de fond* on the two wharves, and the vendees refusing to pay the balance of their purchase money until Mr. Fraser produced the Seigneur's acquittance of all arrears of *rents* and *Lods et Ventcs*, the Appellant recommended that the acquittance of Madame La Croix, (who had conceded the two wharves as *pretended Seigneur* in 1773, and who had been acknowledged as such by a judgment of the Court of Common Pleas in the year 1793, should be obtained. But Mr. Bernal, not having, as he thought, an authority from John Fraser to advance money for this purpose, declined making any purchase of the rights of the widow and heirs until he should hear from Mr. Fraser. The Appellant, who proposed to visit England in the Autumn of 1796, and with the intention of serving Mr. Fraser, and with the knowledge and approbation of Mr. Bernal, obtained the necessary acquittance and assignment of all sum due by Mr. Fraser on these wharves, thinking that on seeing the Appellant, Fraser would naturally adopt and use this acquittance obtained for so small a sum as £120, to recover the £3000 then due to him. However, in this expectation he was disappointed, for after waiting five years he found that Mr. Fraser entered into an agreement to allow a deduction of £600 to the purchasers of his wharves, provided they took all risks upon themselves for the payment of the Seigneurial dues.

June 1801.

10th April, 1807, No. 7.

19th Oct. 1808, and 20th Febr. 1809, No. 9, & 10.

No. 12.

Thus the *alleged* debtor refusing to pay, and the *pretended* creditor to refund, the Appellant brought in the Court of King's Bench for Quebec an action against Mr. Fraser for arrears of *Lods et Ventcs* on one of the wharves, and though both Mr. Fraser and the Attorney-general for the Crown alleged that the widow and heirs only held the property *en roture* the Court by a more formal judgment than that of 1793, recognized the widow and heirs as *Seigneurs Primitif* of Villery.

No offers of arrangement being made by Mr. Fraser, actions were brought for the arrears due by him on the other wharf, and two judgments were pronounced confirming the former decrees, which judgments were carried into the Court of Appeals, and afterwards before the King in council.

Four judgments being thus rendered directly on the question, all confirming the existence of Villery, and that the widow and heirs held in *Fief*, the Appellant conceived had set this matter for ever at rest. But during the dependence of these suits in England, one of the wharves was sold by the Sheriff, and the Appellant was compelled to come before the Court as an opponent to preserve and render effectual the rights which had been decided in his favor. The Respondent representing his mother, also filed his opposition claiming the arrears of *Lods et Ventcs* since the year 1788. To these a counter opposition was given in for the Crown claiming the *Lods et Ventcs*, and denying the rights of Madame La Croix and heirs to the Seigneurial duties, they not holding in *Fief*, and the question being therein raised with some animation, and with a more complete knowledge of the matter, the Respondent conscious that he had throughout this long contest, asserted and maintained a title which he could not support, did by his brother and Attorney Paul, withdraw his opposition.

No. 16.

Vide Letter of Paul La Croix to Appellant, No. 9, A.

No. 16.

Vide Appendix C.

Thus abandoned by his authors, who had for thirteen years, encouraged the Appellant by the most deceitful means, to believe that their claims were well founded, the question came before the Court for a *fifth* time, and after perusing the various titles, hearing evidence of witnesses, and maturely considering the question, it pronounced a judgment whereby in point of effect, all its former decisions were overthrown, and the pretended *Fief* was definitively declared to be within the *cessive* of His Majesty.

It would, under these circumstances, have been quite unbecoming as well as impolitic in the Appellant to proceed farther in the Appeals depending in England, and in addition to cost incurred in this country, he was thus through the misrepresentation of the widow and heirs involved in the heavy expenses incident to suits depending before His Majesty in Council. To recover back the money he advanced and damages he sustained by the fraudulent conduct of the La Croixs, he brought the action which is the subject matter of this Appeal.

The Respondent asserts that the claim of his mother and the heirs was in September, 1796 expected

expected to be litigated. They indeed might justly have anticipated that their assumed claim as Seigneurs of this pretended Fief, would become the subject of judicial inquiry. But neither at that time nor for many months afterwards did such an idea enter into the Appellant's mind, for neither were the facts nor their fears and apprehensions communicated to him.

It is also pretended that the claim was transferred as doubtful and uncertain, and that it was understood it would be prosecuted at the Appellant's risk and expence. If these assertions were made out in evidence, it would indeed be a complete answer to the Appellant's demand, to whatever profession he might belong. But not a syllable of this is true.

Not satisfied with perverting the facts, the Respondent has endeavoured to mislead the Court on the questions of law. He says that the deed of 30th September, 1796, was made *sans aucune garantie quelconque*, and of course that this action cannot be maintained. But there is a wide distinction between a *silence* in the deed on the subject of warranty, and an express declaration that the assignor transfers *sans aucune garantie*. In the latter case the parties make the law for themselves. In the former, as in this instance, where there is no mention of warranty, the law supplies the omission. In the *Praticien Français*, Lange puts this question, and gives this emphatic answer.

" Cette garantie est-elle toujours due par le cédant ? "

" Elle est toujours due, à moins qu'il ne soit dit que la cession ou vente est faite sans aucune garantie ni restitution de deniers, et aux risques, périls et fortunes du cessionnaire, ou autres termes équivalens. Et même en ce cas, s'il y a du dol, comme quand le cédant ou vendeur a été le vice, et que le cessionnaire ou acquéreur l'a justement ignoré, (as in this very case,) la garantie a lieu nonobstant cette clause."

The Respondent with the same crafty spirit which has throughout this transaction distinguished the widow and heirs, attempts to cast an odium from himself on the Appellant for obtaining these pretended rights (the extent of which was not known till long after the acquiescence of them) and for bringing suits against Mr. Fraser. But has the Respondent shown that any endeavours were used to undeceive the Appellant, by expressing even a doubt of the La Croix's pretensions, or that, *touché de repentir*, offers were made by them to refund the money they had fraudulently received from him? Besides, who was the guilty author of all the litigation which took place, but the widow La Croix whom the Respondent represents?

It is a constituent part of the Respondent's defence that he did not intermeddle with the estate of his mother. But the Court is in possession of three documents, (which, were it necessary,) will substantiate this fact, these are his opposition, the power of Attorney to his brother in which he is designated *Legatee universel* of his mother, and the judgment of distribution of 20th June, 1809, in which as such he is ranked for ground rent.

The Appellant was, it is true, a Practising Barrister when he obtained this acquittance and assignment, but as the instrument as well as the whole transaction exhibit none of the essential characters of a sale of *Droits Litigieux*, he confidently and respectfully submits he is not by any rule of jurisprudence, placed beyond the aid of the law, and that he is entitled to recover back the money so fraudulently received by the Respondent's mother above 24 years ago, together with a compensation in damages for the injury he has sustained by the assignment of pretensions which on 30th September 1796, were perfectly known to the widow and heirs to be "*mal fondés*."

Quebec, 21st January, 1821.



APPENDIX.

A

Mr. Brehaut, in his answer to the sixth interrogatory, says,—

" I recollect that at the time Paul La Croix told me that he had come down from Montreal for the purpose of withdrawing the opposition of Joseph Hubert La Croix, (February, 1809,) he told me that from the beginning he knew that the heirs La Croix had no claim for *Lods et Ventes*, in respect to the Fief Villery, not being *Seigneurs Primitifs*."

In giving Mr. Paul La Croix, who acted as a *Quasi Principal* in this transaction, full credit for the truth of this declaration, how is it to be reconciled with the following Letter, written immediately after the first judgment obtained, unless we attribute their whole conduct to a pre-concerted plan of fraud and deceit?—

" *Montréal, 24. Avril, 1802.*

" *Monsieur,*
" *Ayant reçu l'honneur de votre Lettre, du 15e. présent, j'ai été la communiquer à ma mère et à mon frère Joseph La Croix. Ils en ont ressentis, ainsi que moi, toute la satisfaction qu'un tel évènement peut produire.*" A

*Vide l. p. 55.
Vide also Pothier, No. 384, of the contrat de Vente.*

*No. 18, & 19, of the Record.
Vide No. 1, A.*

*Particularly.
Vide No. 507, of Pothier's contrat de Vente on this point.
Vide appendix D*

" A votre première réquisition mon frère et moi, s'il est nécessaire, ratifieront la transaction que notre mère vous a passé, n'ayant rien tout à cœur que de vous prouver combien vos cédés nous sont agréables: n'ayant encore pas vue les autres héritiers, je ne puis pas exprimer leurs sentiments, mais j'espère qu'ils seront conforme aux nôtres.

" Nous envoyons notre Procuration à Monsr. J. A. Panet, Ecr. notre Avocat, le priant de loir bien se charger de tous nos affaires dans le District de Québec.

" J'ai l'honneur d'être, &c.

" P. LA CROIX."

" Monsr. J. Kerr, Ecr. }
" Québec." }

Lord Ellenborough, in Campbell's Reports, vol. 1, p. 590, lays down this as the law: " what a thing is carried on by one as a *Quasi Principal*," (and it will be observed that Paul appears in all the characters of heir of his father, brother of the Respondent, and his correspondent Agent and Attorney,) " what he says in the course of the transaction has been held, on consideration, to be evidence against those he represents."

B

Mr. Burns, in his answer to the last interrogatory, says,—

" There were considerable sums of money due to Mr. John Fraser, of London, secured in the wharves on the alleged Fief of Villamay, and prior to the 30th September, 1796, when the Plaintiff intimated to me his intention of purchasing Madame La Croix's claims " the said John Fraser, he declared it was for the purpose of facilitating the recovery of the sums of money, and which he appeared decidedly of opinion it would."

Mr. Justice Perrault, in his answer to the same, speaks thus:—

" That such were the intentions of the said James Kerr," (*i. e.* to enable Mr. Fraser to cover his claims on the wharves,) " I entertain no doubt, and I have a perfect knowledge, " he waited for near five years, from September 1796, to June 1801, before he brought action, and that, after every means of recovering his money amicably, failed."

C

The effect, in England, of the judgment of the Court of King's Bench of Quebec, of the 1st June, 1809, proceeding *in rem*, (the proceeds of the wharf) may be seen from the following extract from the Letter of the Appellant's Solicitors, of the 26th May, 1812.

" We have, since the hearing, read Mr. Fraser's case, and we have no hesitation in saying that no Counsel or statement, on your part, before the Council, could have served you. " last decision, in Canada, was conclusive."

D

" Les dommages et intérêts sont tout ce qu'une personne a perdu, ou manqué de gagner par le fait ou la faute de l'autre partie."

POTHIER—*Procédure Civile*, ch. 1, art. 2, p. 161.

A. Maud
amr



