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SUPREME COURT OF CANADA.

Quebec.]

McINTOSH v. THE QUEEN.

Criminal appeal—Criminal Code, 1892, *sec.* 742—*Undivided property of co-heirs—Fraudulent misappropriation — Unlawfully receiving—R. S. C. ch.* 164, *secs.* 85, 83, 65.

Where on a criminal trial, a motion for a reserved case made on two grounds is refused, and on appeal to the Court of Queen's Bench (Appeal side) that Court is unanimous in affirming the decision of the trial judge as to one of such grounds, but not as to the other, an appeal to the Supreme Court can only be based on the one as to which there was a dissent.

A conviction under sec. 85 of the Larceny Act, R. S. C., ch. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under sec. 65.

A fraudulent appropriation by the principal and a fraudulent receiving by the accessory may take place at the same time and by the same act.

Two bills of indictment were presented against A. and B. under sections 85 and 83 of the Larceny Act.

By the first count each was charged with having unlawfully and with intent to defraud, taken and appropriated to his own use $7,000 belonging to the heirs of C. so as to deprive them of their beneficiary interest in the same.

The second count charged B. (the appellant) with having unlawfully received the $7,000, the property of the heirs, which

had before then been unlawfully obtained and taken and appropriated by said A, the taking and receiving being a misdemeanour under sec. 85, ch. 164 R. S. C. at the time when he so received the money. A. who was the executor of C's estate and was the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving.

On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A. who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. Lacoste, C. J., dissenting, held the conviction good.

At the trial it was proved that A. and B. agreed to appropriate the money, and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of it, took it to B's store, handed it to him, saying: "Here is the boodle; take good care of it." On the same evening, he absconded to New York.

Held, affirming the judgment of the Court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B., or previously, B. was properly convicted under sec. 85, ch. 164, R. S. C., of receiving it, knowing it to have been unlawfully obtained.

Gwynne, J., dissenting.

Appeal dismissed.

St. Pierre, Q. C., for appellant.
J. F. Quinn, Q. C., for respondent.

Quebec.]

HUNT v. TAPLIN.

Appeal by defendant—Amount in controversy—Pecuniary interest—R. S. C. ch. 135, sec. 29.

The plaintiff, who had acted as agent for the late M. S., brought an action for $1470 for a balance of account as *negotiorum gestor* of M. S. against the defendants, executors of M. S. The defendants, in addition to a general denial, pleaded compen-

sation for $3,416 and interest. The plaintiff replied that this sum was paid by a *dation en paiement* of certain immovables. The defendants answered that the transaction was not *a giving in payment* but a giving of a security. The Court of Queen's Bench held that the defendants had been paid by the *dation en paiement* of the immovables, and that defendants owed a balance of $1154 to the plaintiff. On application being made to the Registrar of the Supreme Court in Chambers, the security for appeal to the Supreme Court was allowed.

On motion to quash the appeal by the plaintiff for want of jurisdiction, on the ground that the amount in controversy was under $2000 :

Held, that the pecuniary interest of the defendants affected by the judgment appealed from, was more than $2000 over and above the plaintiff's claim, and therefore the case was appealable under R. S. C. ch. 135, sec. 29. *MacFarlane* v. *Leclaire* (15 Moo. P. C. 181) followed.

Motion to quash refused with costs.

Buchan, for motion.
Butler, Q. C., contra.

Quebec.]

MONTREAL STREET RAILWAY CO. v. THE CITY OF MONTREAL.

Street Railway contract with municipal corporation—Taxes.

By a by-law of the city of Montreal, a tax of $2.50 was imposed upon each working horse in the city. By sec. 16 of the appellant's charter it is stipulated that each car employed by the company shall be licensed and numbered, etc., for which the company shall pay "over and above all other taxes, the sum of $20 for each two-horse car, and $10 for each one-horse car."

Held, affirming the judgment of the court below (R. J. Q., 2 B. R. 391, that the company are liable for the tax of $2.50 on each and every one of its horses.

Appeal dismissed with costs.

Branchaud, Q.C., and *Geoffrion, Q.C.*, for appellant.
L. J. Ethier, Q.C., for respondent.

Quebec.]

CHAMBERLAND v. FORTIER.

Appeal—56 Vic., ch. 29, sec. 1—Action negatoire—Rights in future —R. S. C., ch. 135, sec. 29 (b), amended.

In an action *negatoire*, the plaintiff sought to have a servitude, claimed by the defendant, declared non-existent, and claimed $30 damages.

Held, that under 56 Vic., ch. 29, sec. 1, amending R.S.C., ch. 135, sec. 29 (*b*), the case was appealable, the question in controversy relating to matters where the rights in future might be bound.

Vineberg v. *Hampson* (19 Can. S. C. R. 369), distinguished.

Motion to quash refused.

Languedoc, Q.C., for motion.

Amyot, Q.C., contra.

Quebec.]

MCLACHLAN v. MERCHANTS BANK.

MCLAREN v. MERCHANTS BANK.

Partnership—Dissolution—Married woman—Benefit conferred on wife during marriage—Contestation—Priority of claims.

On the 10th April, 1886, J. S. McL., a retiring partner from the firm of McL. & Bros, composed of the said J. S. McL and W. McL., agreed to leave his capital, for which he was to be paid interest, in a new firm, to be constituted by the said W. McL. and one W. R., an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full. The new firm undertook to carry on business under the same firm name up to 31st December, 1889. J. S. McL. died on the 18th November, 1886. Mrs. A. McL., the wife, separate as to property of, J. S. McL., had an account in the books of both firms. On the 17th April, 1890, an agreement was entered into between the new firm of McL. Bros., and the estate of J. S. McL. and Mrs. McL., by which a large balance was admitted to be due by them to the estate of J. S. McL. and to Mrs. J. S. McL. The new firm was declared insolvent in January, 1891. Claims having been filed respectively by Mrs. J. S. McL. and the executors of the estate of J. S. McL. against the insolv-

ent firm, the Merchants Bank of Canada contested the claims on the following grounds, *inter alia*: 1st, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886; 2nd, that Mrs. J. S. McL.'s money formed part of J. S. McL.'s capital; and 3rd, that the dissolution was simulated.

Held, reversing the judgment of the Court of Queen's Bench (R. J. Q., 2 B. R. 431), and restoring the judgment of the Superior Court, that the dissolution of the partnership was simulated; and that the moneys which appeared to be owing to Mrs. J. S. McL., after having credited her with her own separate moneys, were in reality moneys deposited by her husband, in order to confer upon her during marriage benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors. Fournier and King, JJ., dissenting.

Appeal allowed with costs.

Laflamme, Q.C., and *Greenshields, Q.C.*, for appellants.
Hall, Q.C., and *Geoffrion, Q.C.*, for respondents.

Quebec.]

PARÉ v. PARÉ.

Accounts—Action—Promissory note—Acknowledgment and security by notarial deed—Novation—Arts. 1169 *and* 1171 *C. C.—Onus probandi—Art.* 1213 *C. C.—Prescription—Arts.* 2227, 2260 *C. C.*

In an action of account instituted in 1887, the plaintiff claimed, *inter alia*, the sum of $2,361.10, being the amount due under a deed of obligation and constitution d'hypothèque, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and the manner mentioned in the said promissory note. The defendant pleaded that the deed did not effect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), R. J. Q., 2 B. R. 489, that the deed

did not effect a novation. Arts. 1169 and 1171 C. C. At most it operated as an interruption of the prescription and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue (Art. 2264 C.C.) And as the onus was on the plaintiff to produce the note, and he had not shown that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years. Art. 2260 C. C.

As to the other items of the accounts, the Supreme Court restored the judgment of the Court of Review, whereby the amount found due to plaintiffs was compensated by the balance to the credit of the defendant, which appeared in the plaintiffs' books.

Appeal allowed with costs.

C. A. Geoffrion, Q.C., for appellant.

A. Ouimet, Q.C., for respondent.

Quebec.]

ROYAL ELECTRIC CO. v. CITY OF THREE RIVERS.

Contract—Electric plant—Reference to experts by court—Adoption of report by two courts—Reference clause in contract to arbitration.

The Royal Electric company having sued the city of Three Rivers for the contract price of the installation of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side) on an appeal, affirmed the judgment of the Superior Court. On appeal to the Supreme Court of Canada,

Held, Where there are concurrent findings of two courts on a question of fact, this court will not interfere, unless the findings of fact are conclusively wrong.

2. *Held*, also, when a contract provides that no payment shall be

due until the work has been satisfactorily completed, a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.

Quære: Whether a right of action exists although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration. See *Quebec Street Railway Co.* v. *City of Quebec.* (13 Q. L. R. 205).

Appeal dismissed with costs.

Béique, Q. C., & Geoffrion, Q. C., for appellant.

Geo. Irvine, Q. C., for respondent.

Quebec.]

ROYAL ELECTRIC CO. v. LEONARD & CO.

Action en garantie—Contract—Sub-contract—Legal connection (Connexité).

The appellants, who had a contract with the city of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the city of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works, having sued the city of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents.

Held, affirming the judgments of the Courts below, that there was no legal connection (*connexité*) existing between the contract of the defendant, and that of the plaintiffs with the city of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple* was properly dismissed.

Appeal dismissed with costs.

Béique, Q. C., for appellant.

A. R. Oughtred, for respondent.

Quebec.]

ATLANTIC & NORTH WEST R'Y CO. v. JUDAH.

Railway expropriation—Award—Additional interest—Confirmation of title—Diligence—The Railway Act, secs. 162, 170, 172.

On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited in court under sec. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confirmation of title in order to proceed to the distribution of the money, the company pleaded that the court had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner who had unsuccessfully appealed to the higher courts for an increased amount.

Held, reversing the judgment of the courts below, that by the terms of sec. 172 of the Railway Act, it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon.

Held, further, that, assuming the court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence is not obtaining a judgment in confirmation of title. The Railway Act, sec. 172. Fournier, J., dissenting.

Appeal allowed with costs.

H. Abbott, Q. C., for appellant.

Branchaud, Q. C., for respondent.

Ontario.] 29 March, 1894.

MCGEACHIE v. NORTH AMERICAN LIFE ASSURANCE CO.

Life insurance—Condition in policy—Note given for premium—Non-payment—Demand of payment after maturity—Waiver.

A policy of life insurance contained a condition that if any premium, or note, etc., given for a premium, was not paid when due, the policy should be void. M. who was insured by this policy, gave a note for the premium, and when it matured he paid a part and renewed for the balance. The last note was twice renewed, and was overdue and unpaid when M. died. After

the last renewal matured the manager of the company wrote demanding payment. In an action by M's widow to recover the sum insured with interest,

Held, affirming the decision of the Court of Appeal for Ontario (20 Ont. App. R. 187) which reversed the judgment of the Divisional Court (22 O.R. 151), that the policy was void under the said condition, and that the demand of payment after the last renewal was not a waiver of the breach of the condition so as to keep it in force.

Appeal dismissed with costs.

Aylesworth, Q.C., for the appellant.

Kerr, Q.C., for the respondents.

RETRAIT SUCCESSORAL — PHILLIPS v. BAXTER.

[Concluded from 192.]

Such are the principles that govern the matter and which we acknowledge and maintain in the litigation between plaintiff and defendant. If, by *ricochet*, to make use of an expression of Demolombe, our decision reacts upon Mrs. Beique, it is a legal sequence we cannot prevent.

Besides we hope that these remarks may, perhaps, have the effect of putting an end to all litigation in this succession, although our decision cannot be *res judicata* as regards Mad. Beique. This is one of the reasons which prevented us from remitting the record to the Superior Court to have her (Mad. Beique) impleaded (*mise en cause*), which, at first, we thought of doing. We considered that by so doing, far from attaining the desired result, we might perhaps prolong the litigation. Besides, it would have virtually deprived the plaintiff of a judgment against the defendant to which she has an undeniable right. If, hereafter, from the omission of Mad. Beique from the record, the plaintiff suffers any damages, be it merely prolonged delays or the inconvenience of a new suit, she will only have herself to blame.

The defendant has advanced the proposition that, inasmuch as he had sold to Mad. Beique only a determinate portion of an immovable of the succession, the *retrait* does not lie for that part, and he asked us, for this reason, to reform the judgment of the Court of Review whereby the exemption from *retrait* of such part was refused. But this proposition is entirely erroneous and the demand upon which it is based cannot be granted. According

to him it would suffice for him to have sold all parts by him acquired, say to five different persons, each for a determinate part, to deprive the plaintiff of her right to *retrayer* the whole.

Such is not the law. The right of *retrait* would be altogether illusory if such were not the case, and if the co-heirs could be so easily thwarted. Only, in such cases, it is necessary to see against whom the action should be directed. In matters of *retrait lignager*, when only one immovable was in question, according to certain authors, the first purchaser should be ignored and the action directed against the holder, subassignee, alone. But in cases of *retrait successoral* when, as in the present instance, the original purchaser has resold merely a determinate portion of an asset of the succession, and the balance of the hereditary rights still remains in his hands, the plaintiff must of necessity direct her action against him, with the faculty or privilege, if she deems proper, of calling in the holder of the part so resold. Now, in such a case, that is to say, if between the time of the purchase and the *retrait*, the purchaser has resold, which by law he has a perfect right to do, if there be a difference between the prices of the first purchase and the resale, which price has the *retrayant* to reimburse?

It will be, as the judgment *a quo* declares, the price of the first purchase, the sale made by the co-heir of the *retrayant*. L'Abbé, Vol. 6, Rev. de *Legis. & Juris.*, 142. There are authorities to the contrary, among others, Dutruc, No. 515; Laurent, Vol. 10, No. 382, and an *arrêt* in 1857 of the Court of Besançon, *re* Dautriche, S. 58-2-292; D. 58-2-111. But the opposite opinion has prevailed and, agreeing with the judgment *a quo*, we adopt it. Pothier, Retraits No. 341; Merlin Quest. v. dr. suc. par. 2, No. 2. Aubry & Rau, Vol. 6, p. 529; Demolombe, 4 des Suc. No. 110; Benoit dr. suc. No. 135. 3 Hureaux No. 330. "The action for *retrait* (says Le Caron on the Coutume de Peronne, p. 351), should be instituted against the holder and possessor; at the same time, the price of the first purchase only should be paid." And Loysel (in his Institutes Coutumières, Vol. 3, p. 63), whose learned commentators Dupin and Laboulaye (Ed. of 1846), in speaking of his works say, "ce n'est pas de la théorie, de la divination, de la conjecture, it is the law itself, such as our forefathers recognized and practised," Loysel, I say, expressed himself in very clear terms as follows: "The retrayant is only obliged to pay the price, costs and *loyaux coûts* of the first sale, though the thing may have been

through many other hands during the year and day of the *retrait.*" And, add the commentators, "if it were otherwise, the purchaser, by reselling to another, could impair the condition of the retrayant, which would be an injustice." And Dunod des Retraits, p. 6. "But if the second alienation be by onerous title, which price should be reimbursed by the retrayant? It seems that it should be that of the first, because it alone has given rise to the *retrait.*"

The question, as to whether one share in an undivided succession can be seized and sold *en justice*, has been discussed at the hearing. The plaintiff contended for the negative, and based her pretentions upon the doctrine adopted in France by Art. 2205 of the Code Nap. Thomine de Mazure C. P. No. 743; Sirey, Code Annot. sous Art. 2205. The defendant replied that this article has not been reproduced in the Quebec Codes, and that such seizure and sale were perfectly legal in that Province. There is, doubtless, an apparent contradiction between the principle of hereditary law and the seizure of an undivided share in a succession; but I do not see in this suit the propriety of such a discussion. Here, there has been a duly authorized sale of Charles' hereditary rights by the curator. The defendant became purchaser. I see nothing illegal in that. If any nullity there be in it, it is at most only a relative nullity of which the defendant certainly could not take advantage. He could not be allowed to invoke the nullity of his own title in order to defeat the plaintiff's suit. And as to the plaintiff, far from asking the cancellation of this sale, she asks to be subrogated therein. The defendant at the hearing as well as in his factum has said that if a sale by a curator, like that in question, is to be subjected to the *retrait successoral*, the creditors will suffer, for it is evident that it is a rare thing to get purchasers disposed to run such a risk. But there is, it seems to me, a conclusive answer to that objection, which is that the creditors, instead of doing what was done in the case of Charles Phillips, can themselves provoke a partition and *then* sell that portion falling into their debtor's lot. All authorities are unanimous in recognizing their right so to do. Moreover a purchaser in good faith of an undivided share of hereditary rights is assured that when a *retrayant* presents himself he will obtain subrogation upon having previously perfectly indemnified him.

Two other questions of secondary importance have been raised

by the parties. The first is by defendant who contended, in a feeble manner, it seemed to me, that the plaintiff had lost her right to the *retrait* by having tacitly renounced, or having refused to accept from defendant, Henry's share when offered by him. This is a question of fact, and without hesitation we say, in accord with the Court *a quo*, there is not in the record sufficient proof to sustain this objection.

The second comes from the plaintiff; she complains of the judgment *a quo* upon an intervention, filed in the case by Henry Phillips, her co-heir and vendor, because while dismissing this intervention the Court below did not grant the costs thereof against the defendant. It suffices for me to say that we have time and again decided that we will never interfere with a decision as to the costs in a lower court unless under very special circumstances, which are not to be found in this suit.

I now will add, to the authorities already cited, those of general application which I have met with in studying the case. They are principally taken, it will be seen, from the authors on the *droit lignager*. The expression *droit successoral* is ignored in ancient French law, even in Bourjon where a passage, which I cite, nevertheless decrees it in unequivocal terms. But the rules of *retrait* are in general the same. And, as says L'Abbé (loc. cit.): "There is often much of value to be found in treatises on institutions that are now suppressed. For instance, *retrait lignager* is abolished, nevertheless the solutions given by our ancient authors, on the effects of this *retrait*, can be of service to us in deciding similar questions arising in our day respecting *retrait successoral*, *retrait* of litigious rights, and *retrait d'indivision*. They are, in reality, rights of the same nature and produce the same consequences." And the learned professor adds that in matters of *retrait successoral* he adopts as his guide Tirangeau's treatise on *retrait lignager*. And Demolombe, 4, des suc. nos. 6, 8, says, in the same sense, that one is justified, in matters of *retrait successoral*, in invoking the application of the principles which governed *retraits* in general in the ancient jurisprudence. Besides this doctrine is generally admitted, Bourjon, Vol. 1, p. 1053. "When a first purchaser has sold to a second . . . the retrait, although it reacts upon the second purchaser, is exercised against the first contract of sale and not the second." And at pages 105 *et seq.* "Notwithstanding the sale made by a first purchaser of a *propre*

(*subject to retrait*), the action of retrait should always be instituted against him, the first purchaser, because it is by his contract or deed of acquisition the *heritage propre* has gone out of the family. We will see by the following propositions, the other formalities of such *retrait* and how it affects the second purchaser, which are based upon the fact that the action for *retrait* is mixed, that it arises from the contract made with the first purchaser, against whom there is a personal recourse (*une personalité*) to which he always remains subject . . . "But this first purchaser, being no longer in possession of the *heritage* for which he is sued *en retrait*, should denounce the action taken against him, and if he neglects to do so, his negligence does not affect or injure the *retrayant* who may ignore this sale and who is only obliged to take action against the first purchaser; nevertheless, if the second purchaser and his right are known to the retrayant, he may, in order to accelerate matters, implead him in the case in order to have the judgment to be rendered against the first purchaser declared executory against him (commune avec lui). Again, the omission on his part to denounce the action *en retrait* taken by him would in no way affect (ne donnerait aucune atteinte à) his right which militates against the first purchaser and which he has fully preserved by the suit he has taken against him. It would be the same if the purchaser during the year of the retrait (*lignager*) had been dispossessed of the *heritage* by a *décret* executed against him at the suit of one of his creditors. The publicity of this *décret* does not affect the rights of the *retrayant*, who is always justified (*fondé*) in saying that he recognises only the first purchaser; therefore he can in this case, also, proceed and act against him notwithstanding the *décret* made of the object of the *retrait*. In one and the other case, the retrait adjudged is only executed against the first purchaser; it is however prudent, although not necessary to denounce this execution to the second purchaser, as we have already said with regard to the suit (*demande*), which influences the execution now under consideration (having heretofore only examined or considered as to the suit), and if there be a difference of price, the indemnity (garantie) depends upon circumstances. The execution of such a *retrait* being made against the first purchaser, in the hypothetical case under consideration, namely, when he, on his part, has resold the *heritage* within the year of the retrait (*lignager*), this execution militates against the second purchaser, against whom thereafter it will be only neces-

sary to use the formalities of any ordinary suit in demanding that, in virtue of the execution of the *retrait*, such judgment be declared executory (soit *déclaré commune avec*) against him. Such being declared, the judgment ordering retrait is executed against him; but this form is necessary for the execution *réelle*, otherwise it would no longer be a judicial but a military manner of execution."

Pothier, des Retraits No. 17: "The action is personal-real (*personnelle réelle*) because the law in burdening the strange purchaser with this obligation, affects or charges at the same time, the *heritage* acquired by him, with the fulfilment of this obligation. The ownership of this property is merely transferred to him subject to the retrait, and he cannot consequently transfer it to others without his incumbrance (charges). *Nemo plus juris in alium transferre potest quam ipse haberet.* Therefore, as long as the right of retrait lasts, the *lignagers* can institute this action not only against the person who has purchased from their relative, but also any person to whom it may have since passed and in whose possession it is." And at No. 26: "The action is personal real, *in rem scripta*, and it follows the possession." No. 189, "When, before any demand *en retrait* has been made upon the stranger purchaser, he has alienated the *heritage* subject to the retrait, the *lignager* has the option of suing *en retrait* either the purchaser or the third person. This is a personal real action which arises from the obligation *ex quasi contractu* undertaken at the time of acquisition by the stranger purchaser towards the *lignagers*, to transfer his bargain to any one of them willing to accept it and abandon to him the *heritage*; it is to the warranty of this obligation that the law affects this *heritage*. This action, as personal, can be instituted against the stranger purchaser, who is the real debtor and who could not, by alienating the heritage, relieve himself of the obligation to abandon it to the *lignager* who might wish to exercise the right. This action, as *real*, can be instituted directly against the third party in possession, the heritage being by law subjected to the accomplishment of the obligation."

And at paragraph 190, Pothier says that when the defendant in a suit for *retrait* pleads that he has resold to a third person it is equitable that the plaintiff should be sent back to take his recourse against such third person (this applies to the case of *retrait lignager* where only a determinate piece of property is in

question, and which has been resold in its entirety. Pothier, Introd. au Cout. d'Orléans, p. 651. But if one of the children had ceded his portion to a stranger, the other children can exclude this stranger from the partition by reimbursing him the price of the cession or sale, (Bourjon, Vol. 1, p. 820). And in his chapter on *retrait lignager*, p. 1032, he says: "In case the vendor has co-heirs and consequently the sale comprises only a share of the succession, each co-heir has the right to withdraw (*retrayer*) the whole of such share when the sale is made to a stranger, and such *retrait* is subject to no formalities and is preferable to the *retrait lignager*. (This is evidently the *retrait successoral.*)" Ferrière, under art. 129 of the Cout. de Paris, says: "The action (*en retrait lignager*) can be instituted against the person in possession of the heritage at the time of the institution of the action, or against the first purchaser, under the provisions of the *Cout.* de Reims and others; but in those *Coutumes* that are silent, it rather seems that the action should be instituted against the person in possession, the more so as the conclusions for *retrait* cannot be taken against a person no longer in possession." The author is here treating of an action *en retrait lignager* against a determinate and distinct immovable. Duplessis, Vol. 1, p. 286: "When the purchaser has resold the *heritage* to a third person . . . a distinction has to be made as whether it was so resold before or after the suit for *retrait* was taken; in the former case, the retrayant can always apply to the purchaser (because he could not sell to the prejudice of the suit and the litigious flaw); but in the latter case (resale before action taken), then the *retrayant* must apply to the new purchaser and last holder of the property, it is *actio in rem scripta*. And in both cases he has only to reimburse the price of the first purchase saving to the second purchaser his recourse against the first for the surplus he has paid. But it may be asked whether, in the second case, the *retrayant* is absolutely forced to look to the last purchaser only, without the option of a recourse to the first, for truly it may be said on the one hand that the action for *retrait* being *in rem scripta* should only be instituted against the holder, and to what could the first purchaser be condemned since he no longer possesses the piece of property; if he has disposed of it, he had the right to do so, no action having yet been taken against him. On the other hand it may be answered, that the action for *retrait* being mixed and arising out of a contract made with the first purchaser, there is a personal liability (*personnalité*) to which he always remains subject . . . therefore I hold that in this case the *retrayant* has the choice of acting against either the first or the second purchaser; it avails nothing to say that, since the first is no longer the holder, no condemnation can run against him, for by the action his right is resiliated at the same time as that of the second, and, in fact, it is generally admitted that such judgment should be given in the first instance.

Grande Coutumier de France, Edit. Laboulaye, p. 326, 336.

"*Usage, Coutume est notoire et commune observance du royaume de France et mesurement de la prévosté et viconté de Paris sont tels et tous* notoires que, quand aucune personne a propre héritage à lui venu et descendu, et telle personne le vend à aultre personne, tout étrange de lui et du côté et ligne dont l'héritage lui est eschu vient un aultre dedans l'an et le jour à commencer du jour de la vendue ou dessaisine et fait ajourner l'acheteur de la vente principale pour l'avoir par *retrait* en lui rendant son argent . . . telle demande est recevable." *Item anno retractus pendente, emptor rei retrahibilis eam vendidit alteri queritu r contra quem illirem emptorem aget retrahere volens, aut contra primum aut contra secundum?* Respondetur: "En supposant que action de l'héritage se faiet contre le détenteur d'iceluy et pour ce je distingue, ou le premier acheteur l'a vendu avant l'ajournement du retrait, ou non; si primo, l'action se fera contre l'acheteur second par la dite supposition; si autem *post dictum adjournamentum*, l'action se fera contre l'acheteur premier . . . Item, le retraieur ne doubt pas estire voie de saisine et de nouvelleté, si le premier acheteur a vendu à un aultre la chose contentieuse, mais doubt faire ajourner l'acheteur et le vendeur, pour ouvrir une requeste qu'il entend faire à l'encontre d'eux tendant afin que le contrat soit mis au néant."

Art. 205 of the Coutume of Reims: "The plaintiff for *retrait lignager* has the choice either to act against the first purchaser who since has resold within the year and a day the *héritage* subject to *retrait* against the second purchaser and holder thereof, to whom it will be obliged to pay only what the first purchaser may have paid, saving to the second purchaser, his recourse against the first. Such is certainly the *Common Law of France.*"

One more remark before I end. "It is a question, says Demolombe, whether the benefits arising from *retrait successoral* compensate the inconveniences resulting therefrom." And, says Laurent, "*Le retrait successoral* is purely an arbitrary law and founded on bad reasons." "It is with just cause," adds a very recent author (1893) Hue, Com. du Code Civil, Vol. 5, p. 383, "that it has been prescribed by the Italian Civil Code." The eminent jurisconsult who presided in the Court of Appeal at Montreal at the rendering of judgment in the case of Durocher v. Turgeon (loc. cit.) evidently shared these opinions by expressing his surprise that our codifiers should have retained this *retrait.*

Under the circumstances, although, it is true, it is not a question that comes within the attributes, strictly speaking, of a Court of Justice, nevertheless we may be permitted to call the attention of the Provincial Legislature to it. It may perhaps be found expedient to abolish entirely this right of *retrait* as was done with the retrait lignager in 1855.

Appeal dismissed with costs.