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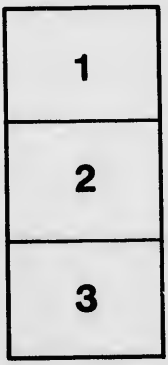

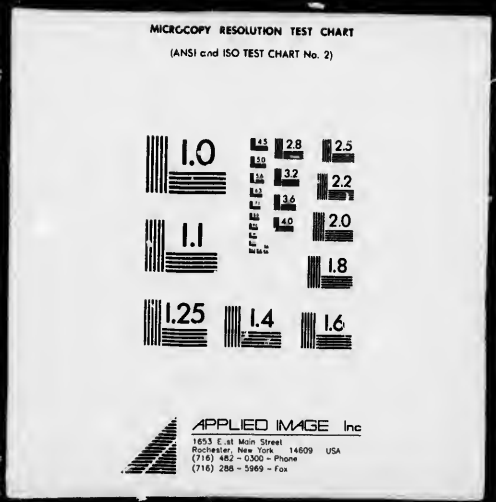
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PROVINCE OF LOWER-CANADA.

IN APPEAL.

James Shepherd, Applt.
AND
Jean Bept. M'Clure, Respdt.

APPELLANT'S CASE.

A. STUART for Appellant.

PROVINCE OF LOWER-CANADA. } *Court of Appeals.*

In a Cause Between

JAMES SHEPHERD, Esquire,
(Defendant in the Court below) Appellant;

AND

JEAN BAPTISTE MACLURE,
(Plaintiff in the Court below) Respondent.

THE APPELLANT's CASE.

THIS was an action of Revendication brought by the Respondent against the Appellant in the Court of King's Bench, for the District of Quebec, for the recovery of a large quantity of timber which the Respondent alleged that the Appellant detained from him.

The Delaration states that on the fifteenth day of July, one thousand eight hundred and ten, at Quebec, the said Respondent was proprietor and in possession of the quantity of timber therein specified and described.

That on the seventeenth day of the same month of July, one Mary Barrows obtained permission to have the said timber seized as her property, and accordingly on the eighteenth of the same month sued out of His Majesty's Court of King's Bench for the District of Quebec, a Writ of *arret simple*, returnable on the first day of October then next, commanding the Appellant, Sheriff of the said district, to seize the said timber.

That the said Appellant did in consequence seize the said timber, and dispossess the said Respondent thereof.

That after the return of the said writ of *arret simple*, to wit, on the ninth day of October aforesaid, the said Mary Barrows discontinued her suit and *main levée* was granted of the said seizure, and the said Appellant ordered to deliver the said timber immediately to the said Respondent; but that the said Appellant hath hitherto refused to do so. The conclusion of the Declaration is the ordinary one in an action of Revendication.

To this declaration the Appellant pleaded several pleas;

1st The General issue.

2d That on the same eighteenth day of July, one thousand eight hundred and ten, the said timber so attached by the said Appellant was by the irresistible force and violence of the winds and waters carried away, and the said timber (save and except a certain portion thereof

thereof in the said plea specified) was wholly and altogether lost and destroyed without any fault or negligence on the part of the said Appellant.

That the said Appellant thence-forward to the time of fyling the said plea had used great diligence and incurred great and heavy expences in recovering and saving as much of the said timber as was possible, and had recovered and saved for the said Respondent a part thereof, viz. &c.

That the monies by him laid out and expended in and about the salvage of the said last mentioned timber amounted to a large sum, to wit, to the sum of three hundred pounds.

That the said appellant had a special *lien* and privilege on the said timber, and a right to hold and detain the same until as well the said sum of three hundred pounds, as his lawful fees were paid to him.

3d. The third plea is the same as second, leaving out all that is said about the salvage, &c.

The Appellant fyled at the same time an incidental demand for the monies laid out by him in the salvage of the last mentioned timber.

To the first plea the Respondent fyled a General Replication.

To the second a special answer, was fyled by the Respondent alledging that immediately after the seizure of the said timber, the said Respondent had notified the Appellant to take great care of the said timber and to employ men in sufficient number to guard and preserve the same, which the Appellant had not done, and that, if any part of the timber was lost, it was by the *culpa lata* of the Appellant, &c. To the third plea, a special answer was also fyled, substantially the same as the above.

Replications were fyled by the Appellant to the two last special answers, and the issue thus perfected upon the demand in chief.

To the incidental demand of the Appellant the Respondent pleaded a *defense au fonds en fait* and *defense ou fonds en droit*, upon both which issue was joined.

The parties were heard upon the demurrer of the Respondent to the Appellant's incidental demand and the Court below over-ruled the demurrer with costs.

The cause was then inscribed upon the Roll of *Enquêtes*, for the adduction of evidence, as well upon the demand in chief as upon the incidental demand.

The facts as disclosed by the evidence are as follow:—

On the seventeenth of July, one thousand eight hundred and ten, Mary Barrows, entitling herself Seigneuresse of the Fiefs and Seigneuries of Saint Charles, Bonsecours, Bourg Marie de l'Est, Bourg Marie de l'Ouest and one half of Bourchemin, sued out of the Court of King's Bench for the District of Quebec a writ of *Saisie Revendication* to attach a quantity of Timber in the possession of the said Respondent, and which she alledged belonged to her.

The

The ground of the claim and seizure was that the Respondent had cut this Timber upon her lands.

On the eighteenth of the same month of July the Bailiff employed by Mary Barrows proceeded with the Sheriff's warrant to the place where the Timber lay, at some distance above Quebec, for the purpose of seizing it.—The Bailiff offered the Respondent to nominate him Guardian of the Timber and to leave it in his care and custody, which the Respondent refused.

The Bailiff then nominated one Wiseman, who resided near the spot, Guardian of the Timber, and thus acquitted himself of *his* duty.

Early on the succeeding morning a violent storm arose, which broke the fastenings of the raft, to which a guardian had been so appointed, and drove it from its moorings. The weight of the raft and its unusual height above the level of the water gave to the wind greater effect.

Upon this accident happening, the Appellant used every exertion to recover the timber and laid out the large sum of two hundred and fifty pounds, in recovering a considerable portion of it.

On the twentieth of July, (one day after the raft had been driven from its moorings and carried down the river) the Respondent notified the Appellant to take great care thereof, employ men, &c. and it is this notification which the Respondent refers to in his special answers.—It will be recollected that the seizure took place on the evening of the eighteenth that the Respondent refused to take charge of the raft or to assist in keeping it, and that between the evening of the *eighteenth* and early in the morning of the *nineteenth* when the raft went adrift, it could not be expected that the Appellant could take all the precautions, which an experienced lumber dealer might have used, or could even in this short interval procure the men necessary for the purpose.—The Respondent, feeling the weakness of his cause on this point, deemed it necessary to make the protest of the twentieth, which is drawn up with more ingenuity than honesty, in a way to produce an impression that the Timber was still in the possession of the Appellant, without directly stating that to be the fact, which the Respondent knew could be shown to be otherwise.

Upon the return of the Writ of *Saisie Revendication*, Mary Barrows and the Respondent confederated for the purpose of throwing the loss of this Timber upon the only person who was entirely innocent in the transaction, viz. the present Appellant. A Consent Rule was drawn up, whereby Mary Barrows discontinued her suit, and the Appellant was ordered to deliver up the Timber seized to the Respondent.—It is hardly necessary to observe that this order did not operate as a final Judgment against the Appellant, and left him at full liberty to shew any good Cause which he might have for not delivering up either the whole or any part of the Timber in question.

From the above plain statement of facts it is apparent, that if it were even taken as a principle that the Sheriff is bound upon a Seizure, under a Writ of *Saisie Revendication*, at his own costs to employ men and manage the effects seized, every thing was done by the present Appellant, which the time and circumstances permitted;

That

That the Timber was not lost by any fault or negligence on his part; and that the loss having arisen from a *vis major*, the Appellant is discharged.

But the Appellant does not recognize this principle, he denies that he was bound to furnish either money or men, that having offered to the Respondent the care of the effects seized, and having afterwards nominated a guardian to whom the Respondent made no objection—the recourse of the Respondent is now against such Guardian and against the Plaintiff making the seizure (*le saisissant*).

The Court below appear to have been led into error from taking it for granted that the Sheriff in this country, executing the civil process of the Courts, is liable to more extensive obligations than the *Huissier* of the French Courts, and this is not the first instance of this error having been fallen into. In the case of Shep.ard, Appellant, and McAulay, Respondent, before his Majesty in his Privy Council on an Appeal from a Judgement rendered in this Honorable Court, Lord Camden said that "It was of great consequence that men "should know with precision under what Law they are acting. The "Laws of Canada being, by the Quebec Act, made the Rule of de- "cision in all civil cases, no part of the Law of England could "operate there, except in as far as it may be clearly and expressly "introduced by an Ordinance of the Province. To say that the "bare mention of the word Sheriff in an Ordinance should have the "effect of introducing the whole body of English Law relative to "that office, was absurd. That officer existed before the Ordinance "passed and had a duty to execute under the criminal Law of En- "gland. If the Ordinance had been silent, he would have had no- "thing to do with civil process under the Law of Canada. It is "the Ordinance that gives him the execution of civil process, and "further than it charges him, he cannot be liable. If it was intended "to have adopted the Law of England with regard to escapes, it "ought to have been done in clear and unambiguous language, that "the officer might have known whether he would accept of the "office under such conditions. Sir Lloyd Kenyon acceded to this." Taking it then both from the authority and the reasoning of this Decision, that the Sheriff is not liable further than the Ordinance charges him or giving his obligations the widest extent consistent with this decision and taking it that his obligations are coextensive with those of the *Huissier* in the French Courts, it is clear that no action lay against him in the Case before the Court.

The Sheriff in execution of the Writ addressed to him and for the purpose of making in legal form the Seizure, which he was commanded to make, was bound to nominate and appoint a Guardian. (Pigeau, Proc. Civ. I. 622, Note d: Ord. de. 1667. Tit. 19, & 33. Art. 8.) the principal duty of whom was to see that the defendant did not secrete or make away with the effects (Jousse p. 196) and if the Sheriff had reason to apprehend that the Effects seized would be rescued he would have been justifiable in establishing for the keeping of them, an armed force; (Nouveau Denisart, *verbis* Guardian & Garnison) the Guardian once appointed became the officer of the Court to that effect, was liable therefore to the *Constrainte par Corps* and could only be discharged by the Court, (Pigeau I. 640 & *Omnes Autores*) the *Plaintiff* and not the *Sheriff* or Huissier was bound to make the necessary advances, (Pig. ib.) and the remedy of the defendant, according to all the authorities, was against the Plaintiff or Saissisant and the Guardian.—It is every where said that if the Guardian does not, when required produce *représenter* the effects seized, he

he, not the *Huissier* shall be compelled thereto by imprisonment—No one Case can be shown in the Law of this Country nor even a *dictum* produced that the Seizing Officer who has appointed a Guardian to effects seized is bound to produce *representer* those effects.

It is also well worthy of remark, that by the Law of no Country is the person upon whom a Seizure is made, prevented from doing those things which are necessary for the preservation of the things Seized, and by the Law of England, he is bound at his own risque to do so.

It has been decided that Raw Hides could not be tanned although alledged to have been done to preserve them from Rotting, and the principle has been carried so far that it seems to be the better opinion that milch kine cannot be milked by the distrainors in order to prevent them from being damaged. (Bradby on Distresses, p. 241.)

The Right of the owner to Milk his Cows and to give food to and take care of his Cattle under Seizure, is recognized in the Edict of the Month of September 1674, as also the obligation of the distrainer to furnish the means to the guardian if the owner neglects it. (Jousse p. 297.)

The Court below however (dissentiente Mr. Justice Kerr,) pronounced the following Judgment:

The Court having heard the parties by their Counsel, upon the pleadings and proofs adduced as well upon the issue joined upon the peremptory exceptions *perpetuel en droit* as upon the *defense au fond en fait* in this cause filed, it is considered, ordered, & adjudged that James Shepherd the defendant in this cause do on or before the twenty-first day of November next, well and truly deliver over to Jean Baptiste M'Clure, the plaintiff in this cause, all and every, the pieces of Pine, Birch and Lath-wood, Spars, oars and Staves, now being in the custody or possession of the said James Shepherd and being also part and parcel of the Pine, Birch and Lath-wood, Spars, Oars, and Staves by him seized as Sheriff of the District of Quebec, under and by virtue of the writ of attachment issued out of this Court, on the seventeenth day of July, which was in the year of our Lord one thousand, eight hundred and nine, at the suit of Mary Barrows, of London, widow, against the said Jean Baptiste M'Clure; and it is further considered, ordered and adjudged that by *Experts* to be named by the said parties at the office of the Prothonotaries of this Court, on or before the tenth day of December next, and in default of such nomination, by John Campbell of the City of Quebec, sworn Culler of lumber of and for the Port of Quebec, the quantity, quality and value of such parts and parcels of the said Pine, Birch, and Lath-wood, Spars, Oars, and staves so seized as aforesaid, as the said James Shepherd shall not deliver to the said Jean Baptiste M'Clure, shall be ascertained and estimated, with power to the said *Experts*, and in default of the nomination of the said *Experts* with power to the said John Campbell to examine witnesses after being duly sworn; of all which it is ordered that the said *Experts* and in default of such *Experts* the said John Campbell do make report to this Court on or before the first day of February term next, and that such further proceedings be had thereon as to justice may appertain, Costs reserved.

The present Appeal has been instituted from the above Judgment,

Quebec, 15th July, 1814.