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ACTION BY USUFRUCTUARY.

In the case of *Abercromby* v. *Chabot* (*ante*, p. 136; 7 Q.L.R. 371), attention is directed to a change of practice since the Code, in the matter of suits by usufructuaries.

The question was whether a usufructuary, who did not allege that she had made an inventory, or that she was in possession of the estate subject to her usufruct, could maintain an action against a debtor to the estate. Chief Justice Meredith observed: "Whilst at the Montreal bar, I brought numerous actions for usufructuaries, and testamentary executors, without alleging, in any case, the giving of security, or the making of an inventory, and although many of the actions so brought were vigorously contested by eminent counsel, on other grounds, so far as I can recollect, no objection was ever urged as to the want of the allegations to which I have adverted." The Chief Justice added, however, that whatever may have been the law before the Code, Art. 463 now removes all doubt, and that at present "a usufructuary who does not even allege either that she is in possession of her usufruct, or that she has made an inventory, cannot by action collect and so 'enjoy' the debts due to the estate."

So, also, Mr. Justice Casault, who dissented in *Abercromby* v. *Chabot*, remarked, "J'avoue que, pendant les 23 ans que j'ai pratiqué au barreau, quoique j'ai eu l'occasion de prendre un bon nombre d'actions pour des usufruitiers et de défendre à plusieurs, je n'ai jamais vu de déclaration où l'usufruitier alléguait qu'il avait fait inventaire." His Honor differed, however, from the majority of the Court as to the necessity for such allegation at present, and thought the practice was established the other way. He adds; "je n'en ai pas plus vu depuis que je suis juge; et cette cause est la première où à ma connaissance, l'on a soulevé cette question. J'ai pris communication des déclarations dans toutes les actions par des usufruitiers que j'ai pu découvrir au greffe de cette cour, et je n'ai trouvé dans aucune l'allégation de l'inventaire par eux des biens sujets à leur usufruit."

FLOGGING AS A PUNISHMENT FOR CRIMES OF VIOLENCE.

The *Law Times* of London calls attention to a recent parliamentary return showing the total number of cases in which flogging has been administered under the Act 26 & 27 Vict. c. 44. *The Times* says: "As no explanation has been offered of the enactment to which the return relates, it will not be amiss to recall its provisions. It was passed, as will be remembered, at the height of the garroting panic, and it is said to have had considerable influence in putting a stop to that offence. It is termed 'An Act for the further security of the persons of her Majesty's subjects from personal violence.' After reciting two previous enactments—24 & 25 Vict. c. 96, s. 43, and 24 & 25 Vict. c. 100, s. 21—against similar offences, namely, armed assaults with intent to rob, and attempts to strangle, and stating that the punishment awarded by these sections is insufficiently deterrent, the Act provides that, where any person is convicted under those sections, the court may, in addition to the prescribed punishment, order the offender to be whipped. The whipping, however, is to take place in private, and only male offenders are to be so punished. On the other hand, the punishment may be inflicted twice, or even three times, and there is no limitation as to age, except that, if the delinquent be under sixteen, the number of strokes is limited to twenty-five. In the case of older offenders, the strokes at each whipping may not exceed fifty, and no whipping is to take place after six months from the passing of the sentence. The number of persons who have suffered corporal punishment under these provisions is certainly less than might be expected. In more than eighteen years only 302 adult offenders have been flogged even once, and in four cases alone has the punishment been repeated. No case is to be found in the records of the Home Office where it has been administered a third time. It will of course be said that the rarity of the punishment is caused by the rarity of the offence, and that the Act promptly extirpated the offences aimed at. Assuming this, the return would give considerable support to those who regard corporal punishment as the panacea for all crimes of violence."

NOTES OF CASES.

COURT OF REVIEW.

MONTREAL, March 31, 1882.

TORRANCE, RAINVILLE, PAPINEAU, J J.

[From S. C., Montreal.

NORMANDIN v. NORMANDIN et al., and DEMERS et al., *mis en cause*, and LES RELIGIEUSES CARMELITES D'HOCHELAGA et al., *mis en cause par reprise d'instance.*

Simulated sale—Effect of cancellation.

The annulling of a sale for fraud does not invalidate a hypothec given previously by the purchaser to a lender in good faith.

The case was inscribed by Les Religieuses Carmelites et al. on a judgment rendered by the Superior Court, Montreal, Mathieu, J., December 17, 1881.

The question was whether the annulling of a sale for simulation or fraud with respect to the rights of creditors of the vendor, affected the hypothec given by the purchaser to a lender in good faith. The sale by Philomène Normandin to Charlotte Normandin of date 26th May, 1880, was annulled for fraud, and also the donation of date 28th May, 1880, by Charlotte Normandin, to Joseph Charles Arnois. Should the hypothec by Arnois to René Dupré who was in good faith suffer the same fate? It was so held by the Court below, according to the maxim, *resoluto jure dantis, resolvitur jus accipientis.* Dupré was put into the cause to hear the titles of sale and donation set aside, and the effect would be *chose jugée* as to him. He died and was afterwards represented by the Religieuses Carmelites and by the Abbé Messire Avila Valois.

TORRANCE, J. The question of the validity or invalidity of the *hypothèque* in the circumstances is settled by authority. There is a host of authors under the French Code who opine for the validity of the *hypothèque*, and only Duvergier and Laurent *contrà*. M. David for the appellant has referred to the case of Devillard v. Guittet & al. J. Palais, p. 111, 112, A.D. 1879. I would also refer to the case of Sejourné Delisle, J. Palais, p. 1240, A. D. 1876, and to the very full and learned note of the Editor appended to that case. Mr. Justice Rainville and myself are agreed that the conclusions taken by the Carmelites and the Abbé Valois should be granted.

The judgment is recorded as follows:—

"La Cour Supérieure siégeant présentement à Montréal comme Cour de Révision, etc...

"Considérant que l'immeuble sur lequel René Dupré a pris une hypothèque pour garantie et sureté de la somme de $500 qu'il avait prêté à Joseph Charles Arnois, avait été donné à ce dernier par acte authentique duement enregistré; que d'autre part il n'est pas établi que le dit René Dupré ait eu connaissance de la fraude ou simulation de la dite donation; qu'il y a eu dès lors au moment où l'hypothèque a été consentie titre apparent de propriété au nom de l'emprunteur et bonne foi de la part du prêteur; qu'en de telles circonstances les règles du droit ancien protégeaient les intérêts des tiers, et ne permettaient pas que la nullité de la donation leur fût opposée; que notre Code, sans faire textuellement revivre ces règles, ne contient cependant aucune disposition contraire; que si l'article 1032 du Code Civil confère à tout créancier la faculté d'attaquer en son nom personnel les actes faits par son débiteur en fraude de ses droits, il n'est pas dit que ce soit sans égard aux intérêts des tiers étrangers à la fraude; que loin de là il ressort de l'esprit général de nos lois que la fraude ou simulation des actes n'est imputable qu'à ses auteurs ou à leurs complices, et ne saurait réagir contre les tiers qui l'ont ignorée, ni porter atteinte aux contrats qu'elle a pu favoriser ou faire naître à leur profit;

"Pour ces motifs, déclare les Religieuses Carmélites d'Hochelaga et l'abbé Valois, comme représentant feu René Dupré, recevable en leur défense; et statuant à l'égard de toutes les parties en cette cause sur les conclusions tendant à l'annulation de la vente du 26 mai 1880, et de la donation du 28 mai 1880, confirme le jugement dont est appel, et sur les conclusions des dites Religieuses Carmélites et de Messire Avila Valois, mis en cause par reprise d'instance, dit que l'annulation de la vente et de la donation précitées ne porte aucune atteinte à la validité de l'hypothèque consenti par Joseph Charles Arnois au profit de René Dupré; et attendu qu'il y a erreur dans cette partie du dit jugement qui déboute les défenses des dites Carmélites et du dit abbé Valois avec dépens, réforme et annule le dit jugement quant à eux, et procédant à rendre le jugement qu'aurait dû rendre sur ce point la Cour de première instance, maintient les dites défenses, et déboute le deman-

deur de ses conclusions contre le dit Réné Dupré et ses représentants, avec dépens de la Cour Supérieure et de cette Cour de Révision contre le demandeur, distraits à Messieurs Longpré et David, avocats des dits mis en causes par reprise d'instance.

"L'honorable juge Papineau ne concourt pas dans ce jugement."

Judgment reformed.

Beïque & Co. for the plaintiff.
Longpré & David for the Carmélites et al.

COURT OF REVIEW.

MONTREAL, June 30, 1882.

MACKAY, PAPINEAU, JETTE, J J.

[From S.C., Montreal.

LESAGE v. PRUDHOMME.

Petitory Action—Pleading—Wrongful possession by defendant.

The case was inscribed by the defendant, in revision of a judgment of the Superior Court, Montreal, Rainville, J., Jan. 31, 1882.

MACKAY, J. The plaintiff has succeeded in the Court below in an action petitory, and the defendant complains. Two pieces of land are claimed by the plaintiff; the first is of one arpent in front by like depth, at St. Antoine, with buildings; the second is a quarter of an arpent front, by twenty-five arpents in depth, also with buildings. The plaintiff claims as representing all the three children who were surviving when J. Bte. Lesage died in 1877. He was plaintiff's father, and left by will these lands to his children who would be alive at his death. The declaration charges defendant with having usurped possession of the lands from the time of the death of J. B. Lesage.

The defendant pleads a *défense au fond en fait*, accompanying it with four pages of new matter. By this he pleads that the plaintiff's title is not perfect, for J. B. Lesage left a son Joseph surviving him; that J. B. Lesage and his wife gave Joseph, by donation, those lands on the 16th October, 1850, that it is false that the defendant has seized the *propriété* of the lands referred to; on the contrary, that he has since the death of Jean Bte. Lesage only continued to occupy *à titre précaire*, administering the lands as during the lifetime of Jean Baptiste; that during his administration he has received and paid out monies, but that his expenditures have exceeded his receipts, of all which he is ready to render an account *à qui de droit*, and particularly to the *vrais héritiers* of Jean Baptiste and his wife, for whom defendant is continuing to administer, he says. He does not ask for a judgment declaring him entitled to retain the lands; he does not ask to be put *hors de cause*. He does not name those for whom he is administering precariously. He asks for the dismissal of the action, with costs.

Ordinarily in actions petitory the defendant pleads general issue; sometimes he contests and claims the property adversely to plaintiff; sometimes does not affect any ownership but asks to be put out of the cause, alleging his possession to be merely precarious, and naming the person for or under whom he is holding. Not so has the defendant pleaded.

The plaintiff made a motion to have all the special matter in the *défense en fait* struck out as irregular, a *défense en fait* being a negative plea, not affirmative as here. The motion was held to be improper procedure. When, later, the plaintiff answered the *défense en fait* as she did, by a long special answer, perhaps she did wrong again. (See vol. 6 Quebec L. R., page 13.) The Court below has been compelled, upon the pleadings as formulated, to find that one Joseph Lesage, brother of the plaintiff, once lived and has not been proved dead; that, therefore, it may be said that J. Bte. Lesage left four children surviving him, and not merely three, as plaintiff by her declaration alleged. It also finds that the donation was made to Joseph as alleged, but that it was never really followed by tradition or any taking of possession, by Joseph; but that, on the contrary, the donors have always since been in possession and Joseph absent from the country, and that defendant is retaining the property without any right. Treating Joseph as *co-légataire* for one-fourth, it pronounces for plaintiff for less than she asks—that is, it adjudges plaintiff to be owner for three-quarters of the lands in question, and the defendant is ordered to quit.

All the equities, and the law too, are on the side of the plaintiff. The defendant writes himself down in his own deposition as a bad kind of usurper. On the death of Jean Baptiste, who survived his wife, the defendant came to Montreal and consulted a lawyer, who advised him to take possession of these lands, and therefore

he did take possession, he says. When pleading he does not claim to be holding for himself, or as owner, nor does he say for whom he holds. He admits by his deposition his possession to have been such that it is seen tortious.

It may be added further in connection with this deed of donation, unburied by the defendant, that it was of lands, household furniture, cattle, under charges quite onerous and calling for duties and outlays by Joseph, year by year, month by month, in favour of his father and mother; he was to house and feed them, *à son ordinaire*, warm, nurse and clothe them, and, on their deaths, bury them; but he almost immediately abandoned them, leaving all in their possession luckily as before; he left for the States, and in the eighteen years before this suit he had not spent more than a few days in Canada, on a visit; previous to which time he had been absent for long term of years. The defendant says that Joseph left this country for the first time thirty-four years ago, and, according to his belief, has been dead twelve years. Is such a defendant favourable? The Court below evidently thought not, and we see no cause to disturb its judgment.

Judgment confirmed.

De Bellefeuille & Bonin for plaintiff.
Piché & Moffatt for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, November 22, 1881.

DORION, C. J., RAMSAY, TESSIER, CROSS & BABY, JJ.

THE MOLSONS BANK (plff. below), Appellant, & LIONAIS es qual. (deft. below), Respondent.

Saisie-arrêt—Debt which becomes due to defendant between service of saisie-arrêt and declaration of garnishee.

The attachment in the hands of a garnishee of a debt afterwards due to the defendant by the garnishee, is valid, if such debt becomes due before the garnishee makes his declaration.

The appeal was from a judgment of the Court of Review at Montreal, March 31st, 1880;—See 3 Legal News, p. 116, for report of the case in the Court below.

RAMSAY, J. The appellant took out a seizure in the hands of "La Societé de Construction des Artisans," to attach the goods, moneys, credits and effects the said Society may have in its hands belonging, or due, or to become due to the said defendant, H. Lionais es qual. The writ then goes on to summon the said H. Lionais es qual. to be and appear to hear the said attachment declared good and valid. There was no summons to the *Tiers Saisie*. The writ was served on the *Tiers Saisie* on the 11th March, 1879, and on the defendant on the 12th March. It was returnable on the 24th. By the return it seems as though the writ was only returned on the 26th.

It seems, although not summoned, that the *Tiers Saisie* appeared and made a declaration to the effect that nothing was due by the *Tiers Saisie* at the time of summons; but on the day following (12th March) one Galarneau sold to the *Tiers Saisie* a certain property, to be paid for on the 7th Dec., 1880, "*ou avant, si la chose etait exigée pour et à l'acquit du vendeur*," to the heirs and representatives of the late Mrs. Lionais, a sum of $200 and interest. That there was no acceptance of this *indication de paiement*, but that the respondent es qual. had by notarial deed of the 18th, transferred the debt to Mr. Joseph, and that this transfer had been signified to Galarneau on the 22nd.

The defendant did not appear nor plead to the sufficiency of the proceedings, nor in any way contest them; default was entered, and judgment taken condemning the *Tiers Saisie* to pay the $200 to the appellant. This judgment was of the 17th October, 1879.

On the 25th the appellant appeared and inscribed the case in Review, and raised three questions of form, and one substantial reason for setting aside the judgment.

The formal grounds are:—

(1) That he had no notice of inscription for hearing in the Court of first instance.

(2) That there was no summons to the *Tiers Saisie*.

(3) That the writ was returnable on the 24th, and it was not returned until the 26th.

The first ground is readily answered. The case being by default he was not entitled to any notice. The second is scarcely more difficult. Defendant was summoned, and he should have objected at once to the error in the writ if he had really any interest in raising the question; but now the writ having answered its purpose, he is too late in raising a question which does not affect him directly. The third ground is more difficult. If the writ was only returned on the 26th, he has not had an opportunity to be heard,

and he was entitled to that. No one can be deprived of his legal right to be heard, without introducing a most dangerous laxity. A fair opportunity to be heard is a fundamental principle of justice, and Courts cannot assume the responsibility of saying when it is important or not. In practice the right to be heard does not depend on whether one has anything to say that is worth hearing. If there is no opportunity to a defendant to be heard, and no unmistakable waiver, there is no *chose jugée* (C.C.P. 16.) The question, then, we have here to decide is whether as a fact the writ was not returned till the 26th. The articles of the C. C. P. referred to by appellant have no application to this case. The non-return of the writ till the 26th renders the whole proceeding absolutely null, and there is no more need of a preliminary plea than if there had been no service. But the appellant adds that the certificate shows that it was returned on that day, but that this was a clerical error, and that in fact it was duly returned on the 24th. I think this error may be shown, at all events, when there is evidence from the record itself that there is error, and so we held in a recent case where the judge's entry of the *jurat* showed that the date was a clerical error, and that the affidavit was sworn to on the Saturday and not on the Sunday. Besides, it is not properly matter of record contradictorily entered, but mere matter of docket. At most it is but the act of the Court and not of the party. In England such matters could be corrected *during the same term.* This admits the possibility of amending errors even in their rigid system. Under our law, I think error may always be shown, and particularly when the error is of a third party. How does the proof stand here? On this last question I think we must suppose that the Court knew of its own entry, and the Superior Court not having determined that the return day was the 26th and not the 24th, it would be hazardous for us to decide that it was.

The question on the merits on which the decision turned in the Court below is as to whether a seizure in the hands of a *Tiers Saisi* could be validly made so as to attach what is not due at the time of the seizure, but which became due owing to a liability which took its rise since the attachment was signified. The judges in the Court of Review, held, on the authority of a writer on the modern French law, that the attachment could only affect what was due on a debt already contracted when the attachment was signified. I think we must look to the terms of our Code, read by the light of the old law, rather than to the somewhat speculative views of writers on texts of law differing materially from our own. In the French Code of Civil Procedure there is no article similar to our Art. 856. In that article the form of the writ implies that the attachment strikes all moneys, things or effects the *Tiers Saisi* has or may have belonging or due to the defendant. Now the respondent wishes this to be restrained to the time of the service or issue (it matters not which) of the writ. In other words, the *Tiers Saisi* is not to say what is true at the time he answers, but what might have been true at the time the question was asked him. The object of this limited interpretation is to defeat the recourse of the creditor. I cannot concur in this mode of dealing with the law, more particularly when it is clear that under the old law the *Tiers Saisi* had to speak in the present tense. Again, if we turn to our Art. 619, the thing becomes still more clear, for the *Tiers Saisi* has to declare: "in what he was indebted at the time of the service of the writ upon him, in what he has become indebted since that time," &c. There is no distinction here as to the period of the origin of the debt, and I cannot see on general principles why there should be any such distinction. It is a very striking form of expression to say "*il a frappé dans le vide,*" but I don't think it is a very convincing one. It is an exclamation rather than an argument. I am of opinion that the judgment of the Court of Review must be reversed, and the judgment of the first Court must be sustained.

The judgment of the Court is recorded as follows:

"La Cour, etc...

"Considérant que le bref de saisie-arrêt en cette cause, qui était rapportable le 24 mars 1879 a été signifié à la Société de Construction des Artisans, tiers-saisie, le 11 mars 1879, et au défendeur le 12 du même mois;

"Et considérant qu'avant le rapport du dit bref de saisie-arrêt, et, avant que la tiers-saisie eût fait sa déclaration de ce qu'elle avait entre ses mains, appartenant au défendeur, elle s'est obligée par acte de vente que lui a consenti le nommé Joseph Galarneau, le dit jour, 12 mars 1879, de payer au défendeur, à l'acquit du dit

Galarneau, une somme de $200, avec intérêt;

"Et considérant qu'aux termes des articles 613 et 619 du Code de Procédure Civile, la dite tiers-saisie ne pouvait se déposséder de la dite somme de $200 sans un ordre de la Cour, et qu'il n'était pas loisible au défendeur de céder la dite somme de $200, sans égard à la saisie-arrêt dont elle était frappée;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure, siégeant en révision à Montréal le 31e jour de mars 1880;

"Cette Cour casse et annule le dit jugement du 31e jour de mars 1880;

"Et rendant le jugement que la dite Cour de révision aurait dû rendre, confirme le jugement rendu par la Cour Supérieure, siégeant en première instance, en cette cause, le 17 octobre 1879, et condamne le dit défendeur intimé à payer à l'appelante les frais encourus, tant en Cour de première instance, et en révision, que sur le présent appel."

Judgment reversed.

Barnard & Beauchamp for appellant.

Doutre & Joseph for respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, Nov. 22, 1880.

DORION, C. J., RAMSAY, TESSIER, CROSS & BABY, JJ.

COSSITT et al. (plffs. below), Appellants, and LEMIEUX (deft. below), Respondent.

Capias—Bail under C. C. P. 824—*Obligation of defendant.*

A defendant arrested under a capias ad respondendum, who has given special bail under C.C.P. 824, *not to leave the heretofore Province of Canada, is not liable to contrainte par corps if he neglects to file the statement and make the declaration of abandonment mentioned in Art.* 764 *C.C.P., within* 30 *days from date of judgment maintaining the capias.*

The appeal was from a judgment of the Superior Court, Montreal, Mackay, J., June 27, 1881:—See 4 Legal News, p. 263.

The majority of the Court (Dorion, C. J., Tessier, and Cross, J J.) were for confirming the judgment of the Court below.

RAMSAY, J., who dissented, made the following observations:—

The appellants sued the respondent for $2134.44. While the case was pending they also took out a *capias* for fraudulent disposal of his estate, under which respondent was arrested. He gave bail under article 824 C.C.P., that is to say, he gave bail that he would not leave the Province, and that in case he did so his sureties should pay the debt. He then, according to the wording of the code, obtained his "*discharge.*" In due time judgment was rendered against the respondent, and appellants waited in the vain hope that within 30 days he would make an abandonment of his property under article 766. Finding that the respondent did not intend to do anything of the sort the appellants moved to commit him. Respondent answered, "I have given bail and been discharged, and I have fulfilled the conditions of my bond. You have no further recourse against me." This answer was considered sufficient by the Court below, and appellants' petition was rejected. Appellants very properly remark, that if the fraudulent debtor can escape from making the statement under oath, and the declaration of abandonment of all his property, for the benefit of his creditors, by giving bail under article 824 C.C.P., then there is practically an end to all coercion of fraudulent debtors. All they will have to do is to secrete their effects and give bail that they will not leave the Province; and by holding to the promise of not abandoning a country which deals with them so charitably, their secreted property, themselves and their sureties will be left untroubled.

The only difficulty that seems to me can arise to prevent the Court disposing of these pretentions comes from the unfortunate mode we have adopted in dealing with legislation. The Act of the 12 Vic. (c. 42) was passed to abolish imprisonment for debt, and for the punishment of fraudulent debtors. I do not think that the object of this Act was only to soften the rigour of the laws affecting the relation between debtor and creditor. It was intended to soften their rigour as against honest debtors, and to intensify their rigour as against fraudulent debtors. The former were not thereafter to be liable to any imprisonment in satisfaction of their debt, but the latter were to be held in gaol or under bail until the Court was satisfied that they had delivered up all their property. I think sections 3, 4 and 5 of the Act make sufficient provision for putting this system in force. Section 3 provides for bail before judgment, by which the debtor obtains his release

"from such arrest and confinement," not "his discharge." Section 4 provides for what the debtor who has given bail before judgment must do after judgment to avoid going to gaol, and section 5 provides what the person absolutely incarcerated may do either before or after judgment to obtain "his discharge."

After this Act had been in force for twelve years, it was thought necessary to appoint a commission for the consolidation of the Statutes. The statute we have just been considering had to be re-shaped, or re-made, and to be incorporated with other statutes. The dispositions of the 12 Vic. appear in Chap. 87 C.S.L.C., which is styled: "An Act respecting arrest, *and imprisonment for debt*, and the relief of insolvent debtors."

The only disposition of the 12 Vict. respecting imprisonment for debt was to abolish it, and by the consolidation it was to remain abolished. To make such a change of name in a consolidation which was only to perpetuate its abolition, was, to say the least of it, infelicitous. It is, however, only just to say, that the consolidation has fairly enough represented the law as it stood, and that in this respect it is open to no greater reproach than having confused the order of the text, and so given those who are desirous of following up the legislation to its source an infinity of trouble. But it has omitted to do what would really have been useful. In the 12 Vic. there is a section 12 which had no longer any meaning after the abolition of imprisonment for debt. The sort of arrest *ad respondendum*, simply because the debtor was leaving the jurisdiction, could no longer arise. It formed part of the machinery for enabling the creditor to get at the body of his debtor by the writ *ad satisfaciendum*. Nothing more was required than to keep him in the Province or to give security for the payment of the debt. Instead of leaving out this section of the 12 Vic., which is in very general terms and very innocuous, the Commissioners, having restored the terms of the 5 Geo. IV, dragged it into prominence as Sect. 3. The 12 Vict. sec. 12, preserved any right to put in special bail to the action which then existed by any laws in force, in other words it was a very maladroit saving clause, whereas the consolidated acts permit any one arrested under ANY writ of *capias ad resp.* to put in bail, the condition of which is that cognizors are not liable unless the defendant leaves the Province without paying the debt, &c., for which action is brought.

This amplification was not only inconvenient but it paved the way for further blundering. We have next to turn to the C.C.P., where we are to look for models of legal diction, free from redundancy, precise and technical.

By article 824 C. C. P. we are told that the defendant may obtain his *discharge* upon giving security that he will not leave the Province of Canada, and that if he does, his sureties will pay the debt, &c.,—not one word as to surrender. It is evidently the old bond prior to the abolition of imprisonment for debt the Codifiers were unwittingly manipulating, subject to the limitation of eight days added by 12 Vic. sec. 12. But there is no such reserve in the Code.

Then comes article 825, by which the defendant may at any time before judgment, give security that he will surrender.

Notwithstanding the serious character of this criticism, it seems to me that we must put such an interpretation on the Acts as will give effect to the intentions of the legislature. In the first place we have the articles 2274 and 2275 of the C. C., which lay down the rule that the fraudulent debtor who has given bail or gone to gaol, can only escape from coercive imprisonment by the statement under oath without fraud and the abandonment of his property. Then article 2274 refers to the code of civil procedure for the form of proceeding and to the chap. 87, C. S. L. C. for the cases in which the proceeding may take place. Now if we look back to chap. 87, we find sect. 12, s.s. 2, provides for the imprisonment of defendant if he neglects to file such statement, *in punishment of his misconduct*. The C.C.P. seems to have no article precisely corresponding, but it is evidently contemplated by art. 793, 4thly.

I therefore think the judgment should be reversed, and the defendant be compelled on pain of imprisonment to give the statement and make the abandonment required by the civil code, else we must decide that the articles of the civil code to which I have just referred are useless for want of an express mode of procedure being laid down by the code.

BABY, J., who also differed from the majority of the Court, expressed his entire concurrence in the foregoing observations of Mr. Justice Ramsay.

Judgment confirmed.

DeBellefeuille & Bonin, for Appellants.
Pelletier & Jodoin, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, November 22, 1881.

DORION, C. J., RAMSAY, TESSIER, CROSS & BABY, JJ.

SENECAL (opposant below), appellant, and CRAWFORD (plff. below), Respondent.

Moveables sold at judicial sale—Déplacement.

Where moveables have been sold at judicial sale, and the purchaser in good faith has allowed the effects to remain in the defendant's possession, he, or his representatives, may oppose the seizure and sale of such effects at the suit of another creditor.

The verbal testimony of the purchaser is admissible, as against such other seizing creditor, to prove the transfer of the effects from the first purchaser to the transferee, opposant.

The appeal was from a judgment of the Superior Court, Montreal, March 12, 1880, dismissing an opposition to the sale of moveables under execution.

RAMSAY, J. This is an appeal from a judgment of the Superior Court dismissing an opposition to the sale of certain moveables seized in the possession of L. A. Senecal. The opposant is the mother of L. A. Senecal, and he is the *cessionnaire* of Mr. Gill who is the son-in-law of L. A. Senecal. The judgment is founded on the presumption that Gill never purchased the things for himself, and that the opposant is a mere *prête-nom*. Fraud is not pleaded, and the only evidence establishes clearly that Mr. Gill bought the things and paid for them. We cannot therefore adopt the view of the Court below. It is highly probable that Mr. Gill purchased these effects with the intention of allowing his father-in-law to use them; but that is not illegal. We have nothing to do with his motive. On this point we are all agreed, I believe. But there was another question urged at the argument with some success. It is said on the part of respondent that there is no legal evidence of the cession from Gill to opposant, that there was a bill of sale *sous seing privé* and it was not produced, that respondent was in the rights of his debtor, and that he has possession. It seems to me that this argument shows at every step the untenable character of respondent's position. It is precisely because his only title to claim the effects is that they are seized in his debtor's possession that verbal testimony is admissible. Under no system of evidence was it ever required to repel *simple* possession by written evidence. The legal title was properly proved to be in Gill, and respondent answers this by saying, I possess. Surely Gill can say, you possess by sufferance, and prove it by parol. If not, he could only obtain his property after the sale by writ of possession, and if Gill can establish his right by parol, why not his *cessionnaire*? The proof of the cession by parol, might be raised by Gill, as against opposant, but as a witness Gill proves it. The majority of the Court is therefore of opinion that this judgment must be reversed.

The judgment in appeal is as follows:

"La Cour, etc...

"Considérant qu'il est prouvé que les meubles qui ont été réclamés par l'appelant dans son opposition afin de distraire, à l'exception de deux boîtes, dont une contenant environ 25 cigares, une corbeille à papier en fil de fer, un pot à tabac en grès, un petit calendrier en cuivre, une pendule et ses mouvements en bon ordre, un chiffonier en frêne, à deux portes et à un tiroir, un cadran et ses mouvements, une paire de rideaux en nett, un miroir de toilette au troisième étage; parmi les quinze volumes Canada under the administration of Lord Dufferin, by Stewart, un petit moulin à coudre à manivelle en bon ordre, une petite boîte en noyer noir avec No. 174, deux encriers, ont été achetés par Charles Gill sur vente par autorité de justice, et que le dit Charles Gill est par là devenu propriétaire des dits meubles, sans qu'il fut nécessaire de les déplacer;

"Et considérant qu'il est prouvé que le dit Charles Gill a cédé ces meubles à l'opposant en cette cause pour valeur reçue, et, que sous ces circonstances, l'opposant est, en droit, bien fondé de les réclamer comme en étant le propriétaire;

"Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 12e jour de mars 1880;

"Cette cour casse et annule le dit jugement du 12e jour de mars 1880;

"Et rendant le jugement que la dite Cour de première instance eût dû rendre, déclare l'opposition du dit appelant bien fondée, et le dit appelant légitime propriétaire des biens et effets mobiliers mentionnés au procès-verbal de saisie produit, à l'exception de ceux ci-dessus spécialement désignés; en conséquence maintient la dite opposition de l'appelant, déclare illégale, nulle et de nul effet la dite saisie des dits biens et effets mobiliers, et en accorde main-levée au dit appelant avec dépens, tant en Cour de première instance qu'en appel. (Dissident l'hon. M. le juge Cross.)"

Judgment reversed.

Lacoste, Globensky et Bisaillon, for appellants.
T. Bertrand for respondent.