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CURRENT TOPICS AND CASES.

In *Cobb* v. *The Great Western Railway Co.*, a case which went to the House of Lords and was decided by that tribunal on the 4th of June, 1894, an attempt was made to hold a railway company liable for money stolen from the person of a passenger. The grounds alleged in support of the action were two in number: first, negligence of the company in not detaining the train to enable the plaintiff (appellant) to have the suspected persons arrested and searched; secondly, negligence in permitting overcrowding, sixteen persons being crowded into a compartment constructed to carry ten passengers. The House of Lords (Earl of Selborne, Lords Watson, Macnaghten, Morris, and Shand), affirming the decision of the Court of Appeal (62 Law J. Rep., Q. B. 335), held that the starting of the train was not opposing an obstacle to the recovery of the plaintiff's property of such a kind as to make the company liable to damages; and as to the overcrowding, no connection had been shown between it and the loss.

In *Harper* v. *Marcks*, the Queen's Bench Division in England (May 23) decided a point somewhat similar to that which came up recently in the lizard or chameleon

case in Montreal (*ante*, p. 66). The court held that a lion kept in a cage at the Aquarium was not a domestic animal. *Apropos* of the chameleon case Mr. Irving Browne writes in the *Green Bag*:—"The Maine Supreme Court would fall in with this, having decided that the dog is not a domestic animal. *State* v. *Harriman*, 75 Me. 562; 46 Am. Rep. 423. And the Queen's Bench of England once held the same of parrots, and the same has been held in England of a performing bear. But the contrary has there been held of a linnet used as a decoy, and a Manchester police magistrate once held it cruelty to domestic animals to feed tame rats to an Indian ferret."

The cable brings intelligence of the death of the Lord Chief Justice of England. Lord Coleridge has been in uncertain health for some time, and even before his lordship was forced to relinquish judicial work he was subject to attacks of drowsiness on the bench, which the bar found at times rather inconvenient. The Chief Justice became famous as a barrister all over the world by his connection with the Tichborne case, in which his speech occupied nearly a month. He was a pleasing and graceful speaker on public occasions and at social gatherings. His article in the *New Review* (see 12 Legal News, p. 297) upon the late Mathew Arnold attracted considerable attention. Lord Coleridge visited the United States about ten years ago as the guest of the New York bar association, and was entertained in the principal cities. (See 6 L.N. 121, 154, 233, 249, 313, 360.) As a judge his reputation was not equal to that of Lord Bowen whose death was recently noticed, but he nevertheless possessed ability of a high order.

Some of our judges are showing in a practical way their dislike of funeral pomp and display. The funeral of the late Mr. Justice Mackay was conducted privately

at his special request, and the late Chief Justice Johnson was disposed to carry simplicity still further, for he expressed a wish that there be no formality, and that "a plain deal coffin" be used for the interment of his body.

Mr. R. P. Fitzgerald, Q. C., of Charlottetown, P. E. I., has been appointed Vice-Chancellor and an assistant judge of the Supreme Court of Prince Edward Island, in the place of Joseph Hensley, deceased.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, April 26, 1894.

Present: LORD HOBHOUSE, LORD ASHBOURNE, LORD MACNAGHTEN, SIR RICHARD COUCH.

DAME GEORGIANA MUSSEN et al., appellants, & CANADA ATLANTIC RAILWAY CO., respondent.

Expropriation—Just indemnity—Country residence—Interference with award of arbitrators.

Judgment of Court of Queen's Bench, Montreal, December 23, 1892, (*R. J. Q*, 2 *B. R.* 222) *affirmed.*

SIR RICHARD COUCH:—

The respondents in this appeal, the Canada Atlantic Railway Company, were enabled by certain statutory powers to make a line of railway running through the district of Montreal. Amongst other lands required by them for the purposes of their railway was certain land in the said district, the property of one William Norris. The company made an offer to Norris of the sum of $1,600 as damages and compensation for the land intended to be taken, and in the event of the offer not being accepted, they named their arbitrator. Norris declined the offer and named his arbitrator. The arbitrators were unable to agree upon a third arbitrator, and the company applied to the Superior Court, according to the provisions of the Railway Act (51 Vict., c. 29), to name one. This the Court did. Hibbard was the

company's arbitrator, Ross was Norris's arbitrator, and Rielle was the arbitrator named by the court. The arbitrators met and took a large body of evidence on both sides. The evidence was of a most contradictory character both as to the value of the land taken and the injury which was caused to the remainder of the property.

It appears that the property had at one time belonged to William Benjamin Simpson, who spent a very considerable sum of money upon it. It was well situated, with a view of the river St. Lawrence. Simpson died in 1883, in embarrassed circumstances, and the property was sold at a sheriff's sale in 1884 for $5,300. Norris was the nominal purchaser, but he really represented a small syndicate of some of Simpson's creditors, who hoped to re-sell the property at a profit and thus get back part of their losses.

Hibbard and Rielle made their award on the 22nd July, 1889, by which they awarded a sum of $3,000 to Norris. Ross, Norris's arbitrator, made a separate award in the same month, giving $9,750. Both sides appealed to the Superior Court, as they were empowered to do by the Railway Act. The appeal was heard by Mr. Justice Taschereau, and it is stated that he went to view the property. He gave judgment on the 8th September, 1890, increasing the amount awarded by the majority of the arbitrators from $3,000 to $6,000. The company appealed to the Court of Queen's Bench. The appeal was heard before the Chief Justice and four other Judges, and on the 23rd December, 1892, judgment was given by one of the judges for the Court, reversing the decision of Mr. Justice Taschereau, who had simply awarded the sum of $6,000, without giving any reasons for his decision. The Court of Queen's Bench, however, went fully into the matter, and laying down what they considered to be the proper test of the value of the property, arrived at the conclusion that the award of the two arbitrators ought to stand.

Their lordships entirely agree in the judgment of the Court of Queen's Bench. They think—looking to the fact that this was the decision originally of a majority of arbitrators, who were said in the judgment of the Court of Queen's Bench to have been "experts," and to have been "men of more than ordinary business experience," and looking further to the fact that the arbitrators had the advantage of seeing and hearing the witnesses who were examined before them—that an appeal from a decision

given in such circumstances, upon a question which was merely one of value, is one which should be discouraged. Their lordships will therefore humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss this appeal, and the appellants will pay the costs of it.

Bosanquet, Q. C., and *H. E. Gurner*, for appellants.

J. Duhamel, Q.C., and *Gore* for respondents.

QUEEN'S BENCH DIVISION.

LONDON, May 23, 1894.

[MAGISTRATE'S CASE.]

HARPER, appellant, v. MARCKS, respondent (29 L. J., 342).

Cruelty to animals—'Domestic animals'—Lion—Wild animal in confinement—12 & 13 *Vict.*, *c.* 92, *ss.* 2, 29—17 & 18 *Vict.*, *c.* 60, *s.* 3.

Case stated by a metropolitan police magistrate.

An information had been laid against the respondent for alleged cruelty to certain lions. The lions were kept in a large cage at the Aquarium, into which a lady "skirt dancer" was introduced accompanied by the respondent, a lion-tamer, who was armed with a whip and a strong steel-headed pole. According to the appellant a violent use was made of the whip, but cruelty was not to be assumed against the respondent, as his witnesses were not called owing to the dismissal of the case by the magistrate, who held that these lions were not "domestic animals," to which section 2 of 12 & 13 Vict., c. 92, and section 3 of 17 & 18 Vict., c. 60, alone applied. The learned magistrate stated the case on this point alone, and cited the cases of *Bridge* v. *Parsons*, 32 Law J. Rep. M. C. 95; 3 B. & S. 382; and *Filburn* v. *The People's Palace Company*, 59 Law J. Rep. M. C. 471; L. R. 25 Q B. Div. 258.

Willes, Q.C., and *Colam* appeared for the appellant. They relied on *Colam* v. *Pagett*, 53 Law J. Rep. M. C. 64; L. R. 12 Q. B. Div. 66; *Swan* v. *Sanders*, 50 Law J. Rep. M. C. 617; and *Aplin* v. *Poritt*, 62 Law J. Rep. M. C. 144.

Poland, Q. C., and *Bonsey*, for the magistrate, were not called upon.

The COURT (CAVE, J., and WRIGHT, J.) dismissed the appeal, on the ground that these lions were wild animals merely kept in confinement, and, as such, could not be deemed domestic animals, and (*per* Wright, J.) that such animals could only be regarded as domestic which were of a kind ordinarily domesticated, and which, in fact, were themselves domesticated.

Appeal dismissed.

THE BANKRUPTCY LAW IN ENGLAND.

The Incorporated Law Society in England have issued a pamphlet, in which many reasons are stated against the present bankruptcy and liquidation system. These reasons are interesting at a time when a new bankruptcy law is before the Parliament of Canada. The principal points are summarized as follows :—

1. After a trial of the Bankruptcy Act for ten years the public show a decided preference for private trustees selected and controlled by the creditors themselves.

2. A very large proportion of insolvent estates is withheld or withdrawn from official administration.

3 Official administration was condemned by Parliament in 1869, after an experience of upwards of thirty years, and after an exhaustive inquiry under the commission appointed in 1864.

4. The interregnum of official administration, with delays, routine, and hesitation, and frequently forced realizations of assets between the date of the receiving order and the appointment of a trustee, is often productive of serious loss to creditors, and in some circumstances—such, for instance, as the stoppage of a private country bank or an extensive foreign mercantile business—may have disastrous effects.

5. Public disclosure of fraud and dishonesty might be secured even more effectually without introducing officialism into the management and administration of the property.

6. Government interference in the management and administration of private affairs—*i.e.* not of general public concern—is undesirable, and the conduct of such business is better left to the control of the persons directly interested.

7. Government monopolies carrying on administrative business are against public policy.

8. Official departments undertaking private business, and not self-supporting, become a burden to the public exchequer with no corresponding public benefit.

9. There is no public demand for increased officialism, and proposed extensions emanate from the official departments. Public opinion is adverse to official interference, and the public prefer to manage their own affairs in their own way.

10. The increase of patronage in the appointment to numerous highly-paid offices is to be deprecated.

11. Periodical reports of official departments naturally tend to present statistics in a light favourable to a continuance of officialism.

12. An official system which is not required and not self-supporting is a source of danger, as likely to press for extensions of its operations, either compulsorily or otherwise.

13. Official departments carrying on administrative business must in all heavy and difficult cases call in extraneous assistance, which practically means that the work is twice paid for—viz., once to the individual who does the work, and over again in the heavy fees of the official department.

14. Such extraneous aid is moreover often called in on speculative terms as to remuneration, because the Treasury or the Board of Trade does not permit the department to incur expense beyond the fund being administered; and this, where there may be no sufficient estate, results in unsatisfactory selection and exercise of official patronage.

15. Official administrative systems tend to become less efficient and more encumbered with routine, having no personal inducements to maintain a high standard of efficiency.

16. Unsatisfactory administrative official systems, when once established, cannot be displaced without compensation or injustice.

DEMERS v. *HARVEY.*

M. le Rédacteur,

En jugeant la cause de *Demers* v. *Harvey*, page 2, vol. 5, des Rapports Judiciaires, M. le juge Routhier dit :— "M. Girouard, "dans son ouvrage, "On Bills and Notes," page 123, no. 38, dit "que la décision de *Beaulieu* v. *Demers*, a été renversée par la

" cour d'appel dans la cause de *La Banque Nationale & Ross et al.*, " 11 Q. L. R. 109. Mais rien n'est moins exact. C'est même le " contraire qui est la vérité ; car dans cette cause, l'exception di- " latoire pour appeler garants sur billets promissoires avait été " maintenue en appel.

" M. Girouard cite aussi Bédarride, Pardessus et Dalloz ; mais " je n'ai rien trouvé dans ces auteurs aux endroits cités sur la " question débattue.

" D'autre part, M. Girouard reconnaît que d'après la jurispru- " dence canadienne, (a well settled jurisprudence), l'appel en ga- " rantie est accordé dans des cas analogues à celui qui m'est sou- " mis."

Voici ce que je dis à l'endroit cité par le savant juge :—

" In Quebec, the dishonour of a bill not only gives the holder a right of action against all parties, but the endorser and all parties who stand as sureties or quasi sureties, may, even before paying, proceed against the principal debtor to be indemnified. This action is generally called an action *en garantie*, and is expressly given by article 1953 of the Quebec Civil Code. It is recognized by what may be considered a well settled jurisprudence. Desbarats v. Hamilton, 2 L. N., 279; Macdonald v. Whitfield, P. C., 8 App. Cases, 733; Mackinnon v. Keroack, 15 Can. Sup. Ct. 111. But the exercise of this right of action *en garantie* must cause no delay to the holder in his own recourse. Durocher v. Lapalme, M. L. R., 1 S. C. 494; Block v. Lawrence, M. L. R., 2 S. C. 279; Banque Nationale v. Ross, 11 Q. L. R. 109, *overruling* Beaulieu v. Demers, 5 R. L. 244. Such is also the law of France, Rej. 24 Floréal, an. 13, D. 5, 1, 371; 2 Pard. 333; Bédarride, 299; Dalloz, Table de dix ans, vo. Lettre de Change, no. 140 and following; Code de Commerce, arts. 118, 165 and 167."

Vous observerez que je ne dis pas que la cause de *Beaulieu & Demers* a été renversée par la cour d'appel. Tout ce qu'il y a d'inexact dans le passage de mon livre c'est le mot "overruling" que je viens de souligner, qui aurait dû être placé avant " Banque Nationale v. Ross," pour indiquer que les deux dernières décisions étaient opposées aux deux premières, plus anciennes. Cette erreur est d'autant plus manifeste que les deux causes de *La Banque Nationale* v. *Ross* et *Beaulieu & Demers* ont été jugées dans le même sens.

Quant aux autorités françaises, le savant juge n'a évidemment pas les éditions que je possède et que j'indique en tête de mon ouvrage. Bédarride, 2e édit., 1877, vol. 1er, p. 299, parlant du recours en garantie de l'accepteur qui accepte sans provision, dit : " La Cour de Cassation décidait le 1er décembre 1832, que l'accepteur ne pouvait même exiger un délai pour appeler le tireur en garantie."

Pardessus, éd. 1841, Droit Commercial, vol. 2, p. 333 : " Il n'est pas même nécessaire que celui qui veut exercer cette garantie, ait payé ; dès qu'il se trouve assigné par le porteur, il a droit d'appeler ceux qui lui doivent garantie devant le tribunal où il est traduit, *sans toutefois que cette mise en cause apporte aucun retard dans l'exercice des droits du porteur.*"

Je réfère à Dalloz afin que le lecteur puisse facilement connaître la jurisprudence française au sujet de l' " action du porteur " contre les endosseurs et de ces derniers contre les endosseurs " antérieurs, l'accepteur et le porteur."

Montréal, 15 juin 1894.

D. GIROUARD, C. R.

RETRAIT SUCCESSORAL—PHILLIPS v. *BAXTER.*

The Supreme Court of Canada has unanimously confirmed the judgment of the Court of Review in *Phillips* v. *Baxter* (R. J. Q., 4 C. S. 151). The opinion of the Supreme Court was pronounced by Mr. Justice Taschereau as follows :

TASCHEREAU, J. Appeal by defendant directly from a judgment of the Court of Review.

Action (by respondent) *en retrait successoral* for two shares, of one fifth each, of the undivided succession of the late W. E. Phillips, sold by two of her brothers, co-heirs, Charles and Henry, to the appellant (defendant). Of all the numerous questions and points of law that may arise out of any action of this kind, the present suit presents but few ; and, as we are unanimously of the opinion that the appellant has no reasonto complain of the judgment ordering the *retrait* asked for by respondent, and as we adopt in their entirety, the views of the learned judges who have expressed opinions on the case, as well in the Court of Review as in the Superior Court, I will essay to tell, as succinctly as possible,

the result of our deliberations and the reasons upon which, more particularly, the same has been based. Brief as my remarks will be (although longer than I anticipated at first), the number of authorities we have had to consult before arriving at a definite solution of the various points submitted by the parties at the hearing has been considerable; the novelty, in our jurisprudence, of the questions raised, the importance of the interests at stake, the ability with which the case has been argued upon both sides, required it. At the same time the arduous work of the counsel on both sides and their profound researches have, I am happy to state, much facilitated our task.

Article 710 of the Civil Code of Quebec, a textual reproduction of Art. 841, of the Code Napoléon, has continued as law in the Province what is commonly called *retrait successoral* which (with exclusive limitations to the family and co-heirs) is no more than what was called in the old French law *retrait de bienséance*. This *retrait*, in effect, consisted of the faculty given by the law in a general manner, to all those possessing *par indivis*, to take back, *retrayer*, the part sold by a joint proprietor upon reimbursing the purchaser the price given. Loisel, Inst. Cout., Vol. 2 p. 45. The principal reason (*motif*) of this legislation is to be found in our days, as well in France as in the Province of Quebec, in the desire to protect families from the intrusion of strangers seeking indiscreetly to meddle in their family private affairs, and to guarantee them against the litigious cupidity of purchasers of hereditary rights. An amicable division (partage), besides, is generally possible, even probable, between relatives; while, when a stranger has a right to participate therein, almost always it becomes necessary to proceed *en justice* and suffer the consequences of an intermeddling which is vexatious, disagreeable, and may ulteriorly be ruinous to all the family—Hué, No. 319. And in a case where there are only two co-heirs, in the event of a sale by one of them, the *retrait successoral* obviates the necessity of a partition, an operation always bristling with difficulties.

It is established, both by doctrine and jurisprudence, and has not been denied by appellant, that the *retrait* can be exercised as well by direct action as by exception, and that the action is imprescriptible and admissible as long as the division (*partage*) has not been consummated between the co-heirs. D 83-1-268. It is an annex of the action of partition, and like it is perpetual. 3 Hureaux No. 321. An heir who sees his co-heir selling his share

is not obliged to intervene at the time in order to retain this right of *retrait*; and the purchaser can himself resell, (and this resale with the knowledge of the co-heirs,) followed by one or more other sales, without such abstention from acting being a ground of forfeiting, either individually or collectively, their right to exercise the *retrait* of the share so sold and by the first sale be put outside the family ranks. All the sub-assignees, like their immediate *auteur*, are presumed and considered as knowing the right or faculty of the co-heirs of their *auteur* and the risks of eviction. It is a blemish on the title of each one of them to the property which the partition alone will wipe off.

"It follows, from what we consider the right of *retrait réel en partie*, (says Dunod, treatise on *retraits*), that the co-heir has the right, when the *heritage* has been alienated by the purchaser within the year of the *retrait*, to exercise it against the purchaser or against the actual holder, at his option. This has been decided by our *Coutume*, even when the property may have passed through several hands and the actual possessor holds it under an onerous title." What the author here limits to one year for the *retrait lignager* applies to *retrait successoral* until a partition has taken place.

I will, in a moment, cite other authorities in the same sense. That the respondent had a right of action in the present instance does not admit of doubt, and has not, in fact, been questioned. It is not contested that the appellant was *non successible* and that respondent's two brothers, Charles and Henry, who sold him their undivided shares in the succession of their father in which the respondent wishes to be subrogated, were co-heirs (*successibles*). That the sale by Charles (or his curator) to the appellant was an onerous contract and a cession of all his rights also in the succession (*droits à la succession*) is incontestable. That the sale by Henry to the appellant was likewise a sale of all or an aliquot portion of his rights in the said succession which can give rise to *retrait* is a point that has been contested by appellant, but after examining the evidence and the documents produced, (for it is a question of fact rather than of law), we do not think there can be the slightest doubt as to the correctness of the conclusion, on this point, arrived at by the Court *a quo* adversely to the appellant. I will confine myself to referring on that point to the authorities cited in Sirey, Code Annoté, under Art. 891, No. 41, Fuzier Herm., Code Annoté, under Art. 841, Nos. 21,

42, 57, 235; to Vol. 13, Revue de legis. and de juris., p. 532, art. par Derome where I find a learned dissertation on the subject; to *Durocher* v. *Turgeon* (19 L. C. J. 178), and to *Leclere* v. *Beaudry* (10 L. C. J. 20) and Dutruc No. 487.

Another objection to respondent's action in its entirety taken by appellant, appears to us entirely unfounded. It is that by which, invoking the doctrine adopted by the Court of Appeals at Montreal in *re Demers* v. *Lynch* (1 Dor. Q.B.R. 341) that a vendor, with right of redemption, cannot exercise the redemption before having tendered the price agreed upon, he argues from that here the respondent not having made a legal tender before action brought, should have her suit dismissed. The appellant makes here evidently a false application of this doctrine. There is no *redemption* sought by respondent's action; it is simply a subrogation, in the place and stead of the appellant as assignee of the two shares in question, the respondent seeks. As Hureaux (3 Vol. des Suc., No. 307) expresses in very happy terms, all the plaintiff says to the defendant in such an action, is "Get out of that so that I can take your place." Now doctrine and jurisprudence are unanimous in saying that she was not obliged to make any previous legal tender; it was sufficient for her to undertake, by her conclusions to indemnify the defendant before the execution of the *retrait* as she has done.

This disposes of defendant's objections to the action in its entirety.

I now come to points that apply to only one or the other of the two shares in question.

First of all, as to that of Charles, the only objection made by defendant to the *retrait* demanded is based upon the fact that he acquired it from the curator (to whom, it appears, Charles, as *trader*, had made an assignment under Art. 763 et seq. of the Code of Procedure) upon the authorization of a judge as required by art. 772. Such a sale says he, is equivalent to a sale par *decret*, and is not subject to *retrait*. This pretention was rejected by both the Superior Court and the Court of Review, and justly so. We have not here to decide whether *retrait* would lie against a sale made upon an ordinary adjudication *en justice* after publications (*annonces*) and bidding, and tacit refusal by the co-heir to become purchaser. That may be somewhat a doubtful question, although it seems to me that in France, the jurisprudence and the great majority of authors, admit the right of *retrait* even after

such a sale. It was the same with respect to Retrait Feodale, Porquet de Liv., des Fiefs, p. 247. It is true that Dalloz, Repert. vbo. Suc. No. 1917, as also an arrêt of La Cour de Paris, S. 36. 2. 113 ; Hureaux des Suc. 3, No. 319, and Demolombe 4 des Suc. No. 110, are of a contrary opinion. But an arrêt of the Cour de Lyons S. 44, 1, 614, Dutruc, Partage de Suc. No. 496 ; Laurent Vol. 10, No. 370 ; F. Herm. Code Ann. under art. 841 No. 71, admit *retrait* even against an adjudication *en justice*. Art. 150 of the Coutume de Paris expressly decrees it for *retrait lignager*; and although this art. of the Coutume has been abrogated by Stat. 1855, Ch. 53, S.R.B. C., which put an end to retrait lignager in the Province of Quebec, we are justified, as has always been the case in France, as well under the old as under the modern jurisprudence, to have recourse to the principles which governed this kind of retrait, when, as in the matter of the time required for the existence of the right, for instance, or the formalities to be followed to obtain it, there is not complete divergence between the two. Pothier *des retraits* No. 76 ; Bourj Dr. Com. Vol. 1, p. 1021, Bretonnier sur Henrys Vol. 4, p. 587, No. 12, and Duplessis Vol. 1, p. 328 all admit the retrait after a sale *en justice*. " Quoique le decret soit public, says the latter, qu'il purge toutes les charges, et que les lignagers aient la liberté d'y encherir néanmoins le *retrait* lignager y a lieu . . . quoique le retrayant ait été présent à l'adjudication." On the same principle the Seigneur, even after filing an opposition to the decret for the conservation of his rights, was not excluded from the retrait feodale. Pocquet de Liv., des Fiefs, p. 429.

But, as I have said, in this instance we have not to pronounce on this question. Here there was no sale *en justice* at which the plaintiff (respondent) could have become adjudicataire. The appellant acquired from the curator, Charles' rights, neither more nor less, with all the incumbrances, (charges) mortgages and conditions with which they were burdened and to which they were subject. Now one of these charges or conditions was that the sale of these undivided hereditary rights was subject to *retrait successoral*, in favor of all or any one of Charles' co-heirs, and this condition which the law attaches to every sale of hereditary rights, can in such case no more be ignored by the purchasers of such rights than if it had been stipulated in the deed of acquisition, or, at least, such ignorance cannot excuse them. In the eye of the law the defendant is in the same position as if he had purchased from Charles directly.

We decide, therefore, that this objection of the defendant relative to the share acquired by him from Charles' curator is ill founded. I pass now to Henry's share; I have already said that we entirely concur with the Court *a quo* in the conclusion arrived at by it on the question of fact and law, that the sale to the defendant was one giving rise to the *retrait*. There only remains to be examined a single objection on defendant's part to the plaintiff's demand of *retrait* of this share. He has pleaded and proved that, before action brought by deed duly enregistered, he sold to Mad. Beique, Henry's share in a certain immovable, situated in Cote St. Antoine, near Montreal; and from this fact he asks us to conclude, as he had in the Court of Review, that *quoad* that part at least, plaintiff could not in the present suit, in the absence of Mad. Beique, obtain judgment of *retrait*. But this objection, which at first sight may seem serious, cannot prevail against the plaintiff's demand. Here the defendant invokes only the rights of Mad. Beique. Now by what right does he defend Mad. Beique? Does he not therein plead the rights of others? Is he not merely invoking *jus tertii*? Useless to tell us, as he has done, that anything that may be decided in this suit will remain *quoad* Mad. Beique *res inter alios acta* and can in no way illegally prejudice her rights. That is another argument against his objection, and nothing else. If the law ordains that the judgment granting *retrait* reacts against her as holder of a portion of his rights, she must submit to it, but this tribunal will not say to her such is the law until she shall have had occasion to defend herself. Doubtless, it perhaps might have been better for the plaintiff to have impleaded Mad. Beique, if not at the institution of the action, at least, as soon as such sale was pleaded by defendant. There are authors who seem to say that, in such a case it is for the defendant to denounce the suit to the possessor (*détenteur*). Pothier des retraits Nos. 189, 190, is of opinion that it is more equitable that the detenteur should be called in by one or the other of the parties to the suit. And the parties certainly would have had no reason to complain, it seems to me, if, under the circumstances the Superior Court had, *ex proprio motu*, ordered it at any stage of the case. But since neither the Superior Court nor the Court of Review have thought proper so to do, should we now do it? The defendant, if I have correctly understood him, saw there a reason for asking us, if not for the dismissal of the entire action, at least for an express declaration

and adjudication, withdrawing the part held by Mad. Beique from the effect and operation thereof. But the law rejects such a prayer. He has no *griefs*. I will cite extracts from some authors to show what considerations more particularly guided us on this part of the suit. But, before doing so, I would point out that it is evident that the plaintiff had necessarily to demand the *retrait* of both the shares acquired by the defendant, as well Charles' as Henry's; to have demanded only one would have been an absurdity. The essential aim of *retrait successoral*, as I have already said, is to exclude the purchaser from the partition "banquet dont chacun des convives a le droit de chasser les intrus qui pourraient troubler la fête." Hean Rev. Prat. Vol. 18, p. 329. Now it is evident that this object would be far from being attained, if the plaintiff had not directed her action against both the shares of Charles and Henry. Demol. 4 de Suc. 119. Hureaux Dr. Suc. 3 Vol. No. 332. S. 40. 2. 318.

According to the principles of law, the *retrayant* takes the place of the retrayé, *in omnibus et per omnia*, and the plaintiff had the right to her complete subrogation in the place and stead of the defendant as to these two shares.

The retrait has a retroactive effect as if, on the day itself of the acquisitions by defendant, she herself had bought the shares of her co-heirs, "*qui retrahit perinde est ac si emisset ab ipso venditore et primus emptor perinde habetur ac si non emisset.*" And consequently all sales, alienations, incumbrances and mortgages made or created by defendant of or upon such shares, or any portion thereof, disappear. Pothier des *retraits* No. 341, 1, Bourjon 1070–1075; 3 Hureaux No. 337 et seq. 146, Aubry and Rau, Vol. 6, par. 621; Laurent Vol. 10, No. 386, and the note of the reporter. Royneau 92. 1. 113, Hué. Code Civ. Vol. 5, No. 329; Bretonnier sur Henrys Vol. 4, p. 586 et seq.

The acquisitions of those shares by the defendant are resolved and put an end to *ab initio* and reduced *ad non actum, ad non causam.* Prevost de Jannes Ins. fi vol. 2, p. 246; or rather there is no resolution, no annulation of these acquisitions, no more than there is a retrocession, but simply and purely a subrogation, Fuz. Herm. Code Annot. sous art. 841, Nos. 287, 290 et seq., 298. Cass. June 17, 1892, S. 93, 1, 17—the simple substitution of plaintiff to defendant (*neque enim non contractus, sed legalis translatio de persona in personam.*) D'Argentre, Cout. de Bretagne;

and the retrait can be exercised even after the death of the co-heir vendor. D. 79. 2. 201. By the retrait the original purchaser is excluded as if he were a perfect stranger to the operation. It is a necessity he suffers and to which *nolens volens* he must submit. It is as if he had never acquired, says Dunod des *retraits* p 6. He has no grounds of complaint. He is not taken by surprise; for, in buying hereditary rights the law itself has inserted in his deed of purchase an unequivocal reserve of his right in favor of the co-heirs of the vendor collectively and individually. And, as soon as this right is exercised, he is held and considered never to have any rights in the thing sold and consequently could not confer any on other persons. Dal. Rep. Vbo. Suc. No. 1891–2001. 1 Berthetol des evic. His possession was burdened with a vice of hereditary organism and any title he may have given to a third person suffers inevitably from the infirmity of his own.

(*Concluded in next issue.*)

GENERAL NOTES.

THE COLONIES AND THE ESTATE DUTY.—A meeting of the colonial representatives in London was held at the offices of the High Commissioner for Canada, to discuss the propriety of addressing a remonstrance to the Chancellor of the Exchequer relative to the application of the proposed estate duty to the personal property of persons domiciled in the United Kingdom, while the property may be situated in the colonies. There were present the High Commissioner for Canada, and representatives of New South Wales, Victoria, South Australia, Western Australia, Queensland, Tasmania, New Zealand, the Cape Colony, and Natal. Sir Charles Tupper, who presided, characterised the proposal of the Chancellor of the Exchequer as highly inexpedient, and as the initiation of a policy which might produce consequences as grave as they apparently were unexpected. The discussion which followed revealed the absolute unanimity of the colonial representatives so far as the inadvisability of the Government's proposal was concerned, but, as several of the Australasian Agents-General had not received instructions from their Governments, it was considered desirable to delay coming to a final decision until the colonial authorities could be communicated with.