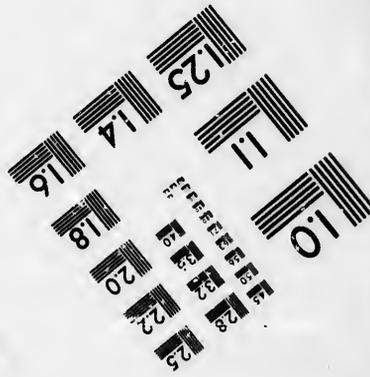
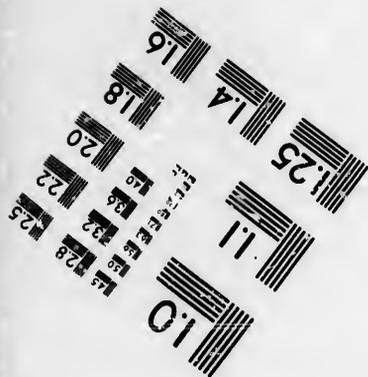
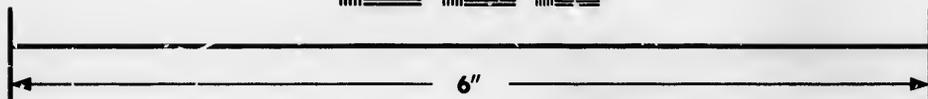
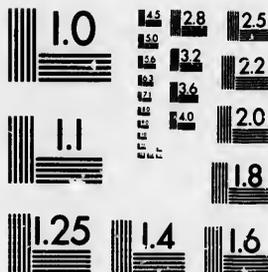


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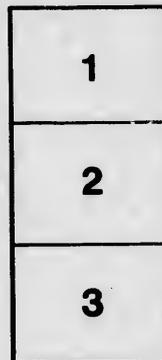
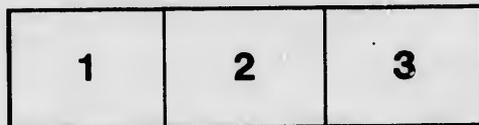
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PROVINCE OF LOWER-CANADA,

Court of Appeals,

JULY SESSION, 1819.



The Revd. JAMES TUNSTALL
and Wife,

Appellants,

and

NAPIER CHRISTIE BURTON,

Respondent.

◆ ◆ ◆
CASE OF THE APPELLANTS.

◆ ◆ ◆
A. STUART, of Counsel
for Appellants.

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PROVINCE OF LOWER-CANADA.
COURT OF APPEALS.

IN A CAUSE

Between

WILLIAM PLENDERLEATH,

(Plaintiff in the Court below)

and

NAPIER CHRISTIE BURTON,

(Defendant in the Court below)

and

RESPONDENT.

The Revd. **JAMES TUNSTALL** and

SARAH CHRISTIE, his Wife,

(Opposants in the Court below)

APPELLANTS.

THE APPELLANTS' CASE.

THIS is a case involving a large sum of money, but of itself of extreme simplicity. The apparent complexity of the cause arises solely from the extraordinary and anomalous course adopted by the Plaintiff in the Court below, and in the omission of that Court to rectify the irregularities of the Plaintiff's proceedings when brought under its consideration by the present Appellants.

The facts out of which the present litigation has arisen, are not controverted by any of the parties, and are the following :

On the 13th of May, 1789, Major General Christie, being then at London, and about to embark for Canada, made his last Will and Testament.

By this Will he devised to Sarah Christie, his wife, William Christie, Alexander Adair and Andrew Dickie, (the three last being resident in Great Britain,) his mill and landed property, situate in the Seigniorie of Chambly, in trust to sell, &c. After bequeathing to his widow a sum of £500, to be paid out of the clear and net proceeds to arise from such sale, General Christie proceeded to bequeath to the above named gentlemen a sum of £5000, in trust to invest the same in good securities, to pay the interest or dividends of the said securities to his widow, during her life, in satisfaction of dower; on the decease of his widow to pay the said interest and dividends equally unto and between his two daughters, Catherine Christie, (now Mrs. Robinson) and Sarah Christie, (now Mrs. Tunstall); and after the decease of either of the said ladies, to share and divide one moiety of the said sum of £5000 between the children of such lady so dying: the remaining moiety to be in like manner shared between the children of the survivor of the said ladies upon the decease of such survivor. The Testator next gave and bequeathed unto the said Catherine Christie, "the sum of two thousand, five hundred pounds of lawful money of Great-Britain, and unto the said Sarah Christie, the like sum of £2500, of like lawful money, over and besides such provision as he had already made for them respectively, by that his will, to be paid unto each of them at their respective ages of twenty-one years, or day or days of Marriage which should first happen." After several other legacies, all of which together with those made in favor of his widow and daughters, the Testator directs to be paid out of his personal estate, and the proceeds of the sale of Chambly, he bequeathed the residue of his personal estate and the whole of his real estate, other than the before-mentioned mill, &c. at Chambly, to Napier Christie Burton, with several remainders over. On

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On the 19th of January, 1799, at Montreal, the Testator departed this life, having, as far as human foresight could do, provided for the well-being of his family.

The widow caused an inventory to be made in the usual form.

Previous to the decease of the Testator, William Christie, one of the Trustees named in the will, had departed this life. The other two Trustees refused to act, and the widow of the Testator declined to act in consequence. Upon the arrival of Napier Christie Burton, in this country, in the year 1800, an instrument, denominated a transaction, was executed before Papi-neau and *Confrère*, Notaries, bearing date at Montréal, the 8th of August, 1800, to which, as well the widow of the Testator as the said Napier Christie Burton and the said two daughters of the Testator, were parties.

By this instrument Napier Christie Burton approved the account rendered by the widow, and released her from all claims arising out of the administration which she had had of the goods and lands of the Testator. She, on her part, assigned and transferred all the goods and lands bequeathed to the Trustees, unto the said Napier Christie Burton, he engaging to accomplish the several trusts contained in the will.

The clause relating to the two several sums of £2,500, bequeathed to Catherine and Sarah Christie, absolutely and unconditionally, having given occasion to the present litigation, the Appellant will here insert it:—

Et à ce faire étaient présentes Dame Catherine Christie, épouse de John Robertson, Ecuyer, d'ancien fondée de sa procuration, reçue par M^{re}. Chaboillez, Notaire, et son confrère, le cinq Avril dernier, et assisté du Sieur William Martin, Procureur y dénommé, et Dame Sarah Christie, épouse du Révérend James Tunstall, à ce présent, qui l'autorise à l'effet qui ensuit, lesquels ont volontairement dit et déclaré avoir les présentes pour agréables, consentent et accordent que le Testament de leur père sus-mentionné soit exécuté selon sa forme et teneur, eu ce qui les concerne, se tiennent pour contentes de l'assignation faite par ces présentes, de la somme de £5,000, sterling, dont l'intérêt doit leur revenir après le décès de la dite Dame, leur mère, ainsi et comme il est expliqué ci-devant; et quant à la somme de £2,500, sterling, à chacune d'elles, afférantes aux désirs du dit Testament; elles consentent et accordent pareillement, que les dites sommes de £2,500, sterling, chacune demeurent pareillement assignées et affectées sur tous les biens immeubles situés en cette Province, qui appartiennent au dit Testateur; excepté seulement ceux qu'il pourra trouver nécessaire de vendre, au meilleur jugement de Son Excellence le Major General Burton, pour acquitter les dettes passives du dit Testateur pour la vente de chacune des dites sommes leur être respectivement payée sur le pied de six par cent, par an, par le Récepteur et Administrateur des dits biens en cette Province, en deux paiements égaux, de six mois en six mois, sur leur simple reçu pour leur usage et maintien particulier, leur vie durant, et après leur décès le capital retournera à leurs enfans respectivement.

The above clause divested not Mrs. Tunstall of her right of property in the £2500 and in the interest thereon to accrue. It possessed none of the characters of an Act translatif of property for a valuable consideration—it was as clearly not a donation—it will not be contended that it was a last will or a contractual institution—it was merely a mental destination *in futuro* of this property, which produced no effect. Property once vested can only be divested by some of the forms prescribed by law; even the willing to cease to be proprietor is not sufficient to extinguish the right of property. Ulpian, adverting to a difference between the right of property and of possession, elegantly expresses it thus—*Differentia inter dominium et possessionem hæc est, quod dominium nihilo minus ejus manet, qui dominus esse non vult; possessio autem recedit ut quisque constituit nolle possidere*—L. 17, §. 1, ff. de acquir. et amitt. poss.

On the 30th Sept. 1816, the above named Plenderleath, one of the legatees named in the Testator's will, brought his action in the Court of King's Bench for the District of Montreal, for the recovery of the balance of his legacy.

To this action Napier Christie Burton filed a plea of very peculiar character. He does not deny the debt, but pleads very specially an agreement between the Plaintiff and Defendants, that the property specified in the plea should be exempted from the operation of the Writ of Execution to issue in the cause, and that certain other property also specified in the plea should be seized. Christie Napier Burton concludes for the dismissal of the Plaintiff's action, "unless he the said Plaintiff shall take and obtain the same, subject to the aforesaid limitation and condition."

The Plaintiff replies that he is ready and willing to take and obtain judgment under the said restrictions, &c. and accordingly prays for judgment, "subject to the limitations and conditions mentioned and contained in the aforesaid plea of the said Napier Christie Burton."

Judgment was rendered on the 19th day of October, 1816.

On the 10th December, 1816, a Writ of *feri facias*, unprecedented in form, was issued at the instance of the Plaintiff. The Sheriff is thereby commanded to seize a particular real estate (the

(the mill, &c. of Chambly,) "charged with certain rents and also charged with the payment of £11,111 2 2 currency, one half of which said last mentioned sum (bearing interest to be discharged half-yearly) is to be paid to the heirs of Sarah Christie, wife of the Reverend James Tunstall, at her decease and the other half of the said sum (bearing interest to be discharged in like manner,) is to be paid to the heirs of Catherine Christie, widow of the late Col. John Robertson, at her decease, in conformity to an Act of transaction passed before Papineau and Banon, bearing date the 8th day of August, 1800."

When these proceedings came to the knowledge of Mrs. Turnstall, and her sister Mrs. Robertson, they were advised that their remedy was by an opposition *afin d'annuler*—Oppositions of this nature were accordingly filed.

The opposition of Mrs. Tunstall was on the _____ day of _____ dismissed with costs.

It is difficult to conjecture on what grounds the court below proceeded. Nothing can be more clear than that the debt of Mrs. Tunstall could not in law be considered as a *charge*, nor that her rights could not be affected by a judgment rendered in a cause to which she was not a party, nor by any proceedings had on such judgment without notice to her.

In August, 1813, the Appellants had filed with the Sheriff, in a suit in which one Dumas was the Plaintiff, and the said Napier Christie Burton, Detendant, an opposition *afin de charge* for one moiety of the £5000 bequeathed to the widow of the Testator. It was objected that this was a mortgage and not the legitimate subject of an opposition *afin de charge*. The Court below maintained this objection and dismissed the opposition with costs, assigning as the reason of their judgment "*Que les droits qu'ils reclamant ne pouvoient donner lieu qu'à une opposition afin de conserver les renvoys et déboute de leurs oppositions afin de charge.*"

On the 19th of July, 1817, the Appellants filed an opposition *afin de conserver*, for the before-mentioned sum of £2500, bequeathed to Mrs. Tunstall, absolutely.

The Respondent pleaded the Deed of Transaction, and urged that it was a charge upon all the real Estate of the Respondent.

The Court below maintained the Respondent's plea and dismissed the Appellants' opposition with costs.

Thus, the Appellant found herself deprived of the provision which her father had had the foresight to make for herself and family, and though entitled to a moderate competence finds herself in pecuniary embarrassments.

It is from this judgment that the present appeal is brought.

Quebec, 23d July, 1819.

