LOUIS JOSEPH NAPOLÉON CHEF *dit* VADEBONCŒUR (PLANTIFF)... } APPELLANT;

AND

THE CITY OF MONTREAL (INTERVENANT) ..... } RESPONDENT.

1898

*Feb. 20.

*Oct. 13.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Title to land—Entail—Life-estate—Substitution—Privileges and hypothecs—Statute, construction of—16 *V. c.* 25 *&* 77—*Mortgage by institute—Preferred claim—Prior incumbrancer—Registry laws—Practice—Sheriff's sale—Chose jugée—Parties—Vis Major—Estoppel—Arts.* 945, 947, 950, 951, 953, 956, 958, 959, 2060, 2172 *C. C.—Arts.* 707-711 *C. C. P.—Art.* 781 *C. P. Q.—Sheriff's deed—Deed-poll—Improvements on substituted property—Grosses réparations.*

Upon being judicially authorized, the institute in possession of a parcel of land in the City of Montreal, *grevé de substitution*, and a curator appointed to the substitution, mortgaged the land, under the provisions of the Act for the relief of sufferers by the Montreal fire of 1852, 16 Vict. ch. 25, to obtain a loan which was expended in reconstructing buildings on the property. Default was made in payment of the mortgage moneys and the mortgagor obtained judgment against the institute and caused the land to be sold in execution by the sheriff in a suit to which the curator had not been made a party.

Held, that as the mortgage had been judicially authorized and was given special preference by the statute superior to any rights or interests that might arise under the substitution, the sale by the sheriff, in execution of the judgment so recovered, discharged the land from the substitution not yet open and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the lands.

An institute, *greve de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been

PRESENT: - Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

destroyed by *vis major* in order to make necessary and extensive repairs, (*grosses réparations*), upon obtaining judicial authorization, and in such a case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata* and the substitute called to the substitution is estopped from contestation of the necessity and extent of the repairs.

The sheriff seized and sold lands under execution against a defendant described in the writ of execution, process of seizure and in the deed to the purchaser as "*grevé de substitution.*"

Held, that the term used was merely descriptive of the defendant and did not limit the estate seized, sold or conveyed under the execution.

Judgment of the Court of Queen's Bench for Lower Canada affirmed, Taschereau and King JJ. dissenting.

Held, further per Taschereau J. that article 2172 of the Civil Code of Lower Canada, as interpreted by the statute 29 Vict. ch. 26, applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court, sitting in review at Montreal, and affirming the judgment of the Superior Court, District of Montreal, which maintained the defence and intervention of the respondent and dismissed the plaintiff's action with costs.

The plaintiff brought his action (*pétitoire*), against the universal legatees of one Michel Laurent, deceased, to recover the property in question with rents, issues and profits. The land formerly belonged to the plaintiff's grandfather who died in 1843, having previously made his last will and testament whereby he bequeathed it to his son, the plaintiff's father, for his lifetime subject to the condition or charge of preserving the *fonds* and that, at his death, it should be returned and delivered over to his children born in lawful wedlock as their property absolutely. The plaintiff, the only surviving child of the institute, renounced his father's succession and claims title to the property

as being called to the substitution created under his grandfather's will upon the death of his father, the institute, which happened in 1883.

The deceased Michel Laurent had acquired the land from the City of Montreal, intervenant in the action, which had become the purchaser of the property at sheriff's sale, and sold it to him at public auction under the following circumstances:—In 1852, while the institute was in possession of the property, an extensive conflagration occurred in the City of Montreal, and amongst the buildings destroyed were those upon the land in question An Act was passed by the Legislature (16 Vict. ch. 25), for the relief of sufferers, and to facilitate the negotiation of loans to enable them to rebuild the property destroyed by the fire, and the City of Montreal was thereby authorized to guarantee loans made for the re-construction of buildings in the place of those so destroyed. The institute took advantage of the privilege, and he, together with the curator to the substitution, obtained judicial authorization to borrow $9,600 from a loan company which was expended in re-constructing buildings on the land in question. As the institute had no personal revenues, and the revenue from the lot in question had been bequeathed by way of maintenance, the loan was indispensable. The third section of the "Relief Act" provided that sums so lent should be secured for the principal, interest and costs, by privilege, "upon the houses or other buildings erected and built upon the lot of ground," and that such privilege should be "superior to and have preference over any other claim, debt, mortgage or privilege whatever, on such houses or buildings," and that to secure such privilege it should not be necessary to observe any of the formalities then "re-" quired by law, or any other formality whatsoever; " provided always, that such privileges shall, as re-

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

"gards the ground itself upon which such houses or "buildings may be erected, rank next after the privi- "leges, debts, mortgages or claims already existing or "which may exist upon such ground (*fonds*) at the "time of making such loan; but nothing herein con- "tained shall prevent the parties making such loan or "loans from taking a hypothec as provided by law, "upon the said ground (*fonds*), which hypothec, if "duly registered, shall rank as aforesaid."

The institute made default in payment of the loan, and the company recovered judgment against him and caused the land with the buildings thereon to be seized and sold under execution by the sheriff. The curator to the substitution had not been made a party to this suit and, in the writ of execution and process of seizure and sale as well as in the sheriff's deed, the defendant was described as "*grevé de substitution.*" At the sheriff's sale, the City of Montreal, in order to protect its warranty, became purchaser of the property for $7,000, and afterwards sold it by public auction when Laurent became the purchaser as above mentioned, at the price of $6,800. The sheriff advertised the land itself, (*fonds*,) for sale with the buildings thereon and sold and granted his deed, in the usual form and for as much as might be in him, for the land and buildings as advertised.

For the defence it was contended that these sales were a final and unimpeachable alienation, that any rights which may have belonged to the plaintiff were thereby divested, especially as the loan was authorized by the court, and was in fact effected in the interest of the substitute himself. The defence also urged that the plaintiff's real rights, if any, had not been preserved by registration within the time limited after the proclamation of the official cadastre subsequently made of the division in which the land is situated as re-

quired by article 2172 C. C., and that, in any event, the plaintiff could only recover upon condition that he should reimburse all costs of improvements made in good faith with interest.

On the part of the plaintiff it was contended that the curator to the substitution had not been properly made a party to the action by the loan company, but that the institute had been therein sued and condemned alone; that his rights as *grevé de substitution* only had been seized and alienated by the sheriff's sale, leaving the rights of the substitute still subsisting and sufficiently protected by the registration of the will.

The Superior Court dismissed the plaintiff's action with costs maintaining the defence and intervention by the City of Montreal (defendant in warranty), and condemned the plaintiff to pay the costs of the demand in warranty. In the Court of Review the judgment of the Superior Court was reversed, the plaintiff's action maintained with costs and the judgment as to the demand in warranty modified. On appeal to the Court of Queen's Bench, the judgment of the Court of Review was reversed and set aside and the judgment of the Superior Court restored with costs.

Belcourt for the appellant. Under the execution the sheriff only sold the rights of the institute and not those of the substitute; and the will having been once registered it was not necessary to renew the registration at the time of the establishment of the cadastre, since the question at issue is one of proprietorship. Renewal of registration is only necessary for the conservation of hypothecs. See *Banque du Peuple* v. *Laporte* (1); *Wells* v. *Gilmour* (2); *Wheeler et al.* v. *Black et al* (3); *Surprenant* v. *Surprenant* (4); and *Page* v. *McLennan* (5).

(1) 19 L. C. Jur. 66.
(2) Q. R. 3 Q. B. 250.
(3) M. L. R. 2 Q. B. 139.
(4) M. L. R. 1 S. C. 242.
(5) Q. R. 7 S. C. 363.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

The principal question in this case is whether or not the sale by the sheriff caused the rights of the substitute to disappear. The title of the institute is as an owner it is true, but on the opening of the substitution the estate must revert and be delivered up in conformity with the will creating the substitution; [Arts. 944, 950, 955, 961 C. C.]; and sheriff's sales do not purge lands from substitutions not yet open, [Art. 710 C. C. P.,] unless the curator has been called into the suit; [Art. 959 C. C.] See also Art. 2060 C. C. and the judgment on the appellant's opposition to the seizure in 1859, reported as *The Trust and Loan Company of Upper Canada* v. *Vadeboncœur* (1), maintaining the contestation on the ground that his rights could not be effaced by a sheriff's sale.

In the sheriff's deed issued to the respondent the estate conveyed was limited by mentioning that the lots were seized as belonging to the institute through the will and the conveyance was expressed by him to be only "in so far as it on me depends and as I can legally do so." There is full reservation made of the rights of the substitute by the use of these terms in the sheriff's deed.

In reply to the claim for reimbursement of money expended on *grosses réparations*, the appellant claims that the value of the repairs are compensated by rents, issues and profits received and enjoyed by the defendants during their possession of the property.

We refer also to 2 Pigeau, Proc. Civ. (ed. 1779) pp. 506, 616; Denisart, "Acte de Notoriéte" (3 ed.) pp. 407-408; 2 Mourlon, n. 936; 22 Demolombe, 500; Thev. d'Essaules, n. 689, 690; 9 Rolland de Villargues, nn. 254, 255, and the case of *Bérubé* v. *Morneau* (2), and arts. 2130, 2172 and 2172*a* of the Civil Code.

(1) 4 L. C. Jur. 358.

(2) 14 Q. L. R. 90.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Ethier Q.C. for the respondent. We call attention to the absence of any proof of record to show that the testator is dead; and the appellant can have no rights, as consequently it does not appear that the substitution is yet open; all further argument is under reserve of this plea.

The clause in the "Fire Relief Act" which declares those loans to constitute a privilege on the immoveable, in preference to any claim, debt or hypothec whatsoever, without it being necessary to comply with any of the formalities required by law, *or any formality whatever*, dispensed with the necessity of securing authorization from the court to borrow the sums necessary to reconstruct the buildings, and that formality was thus evidently adopted only *ex majore cautelâ*.

Even by Art. 951 C. C. permission is given to alienate the substitution in cases of necessity; see also Art. 953 C. C.. and *Caty* v. *Perrault* (1). Under any circumstances the registration of the will has not been renewed since the filing of the cadastral plans and proclamation thereof as required by Art. 2172 C. C., which is fatal to any rights claimed thereunder; *Poitras* v. *Lalonde* (2), per Mathieu J. *La Banque du Peuple* v. *Laporte* (3), per Baudry J., and *Despins* v. *Daneau* (4), per Ouimet J. Art. 2131 C. C. requires such renewals in case of all real rights whatsoever which are subject to registration. Art. 711 C. C. P. uses the term "real rights" in the same wide sense.

As to the estate sold at the sheriff's sale we simply refer to the terms of the deed to show that the sheriff really conveyed to the city, in the most formal manner, the whole estate in the immoveable in question, without mentioning the usufruct, or any reservations whatever. The descriptive term applied to the defend-

(1) 16 R. L. 148.
(2) 11 R. L. 356.
(3) 19 L. C. Jur. 66.
(4) M. L. R. 4 S. C. 450.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

ant in the process has no effect towards limiting the estate seized and sold.

Lastly the buildings reconstructed on the land with the money specially borrowed for that purpose were necessary and urgent repairs of an extensive character, *grosses réparations*, absolutely required to make the property, bequeathed *à titre alimentaire*, revenue bearing, and they enure to the benefit of the substitution and consequently are a charge upon it. The maxim "*nemo locupletari debet damno alterius*" applies here.

TASCHEREAU J. (dissenting.)—There is no controversy upon this appeal as to the facts of the case.

In 1840, one François Vadeboncœur, appellant's grandfather, made his will in favour of his son, Louis, with substitution in favour of his grandson, the appellant. The testator died in 1843. Louis, the institute, died in 1883, when appellant, Louis Joseph, became entitled to the legacy made in his favour by his grandfather. By his action he claims from the respondents the ownership of a lot of land in Montreal included in that legacy of which they or their *ayants-cause* are in possession The respondents met that action by a plea alleging that they had bought the lot in question at a sheriff's sale, under execution of a judgment recovered by the Trust and Loan Company against both the institute and the curator to the substitution. Appellant replied that it was only against his father, the institute, as institute, that this judgment had been recovered, and not against the curator to the substitution. As a matter of fact, that is so, and it is now conceded by the respondents that this part of their plea is unfounded; the curator was not even a party to the action of the Trust & Loan Company. Notwithstanding this, however, the respondents contend that the appellant's rights were

extinguished by the sheriff's sale under that judgment against the institute alone. *Primâ facie*, such a contention seems untenable. And the three courts below are unanimous in holding that, under ordinary circumstances, a substitute cannot be so deprived of his rights upon proceedings to which neither he, nor the curator, were parties.

But the Superior Court and the Court of Queen's Bench have found, in the following additional facts of the case, a bar to appellant's right of action.

In 1852, while the institute was in possession, a fire having destroyed a large portion of the city, including the buildings on the lot in question, the legislature, by 16 Vict. ch. 25, deemed it expedient to come to the relief of the victims of this disaster by enabling them to borrow the funds necessary to rebuild upon the security of the City Corporation, present respondents. The institute took advantage of that legislation, and jointly with the curator to the substitution borrowed $9,600 from the Trust & Loan Company, upon, among other securities, the guarantee of the City Corporation as authorized by the aforesaid statute. Upon default to pay the overdue instalments, the Trust and Loan Company took a judgment in 1857 against the institute, but not against the curator, and had the lot in question seized and sold in 1860 by the sheriff to the present respondents. The provision in this statute, upon which the respondents mainly rely, is contained in section 3, which reads as follows:

> And be it enacted that any person or persons, company or firm or persons, body politic or corporate so making any loan or advance under any instrument to which the Corporation shall be a party as aforesaid, shall have a privilege for such loan in principal, interest and costs, *upon the houses or other buildings* erected and built upon the lot of ground described in such instrument, which privilege shall be superior to, and have preference over, any other claim, debt, mortgage

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

or privilege whatsoever, *on such houses or buildings*, and that to secure *such* privilege it shall not be necessary to observe any of the formalities now required by law, or any other formality whatsoever; Provided always that such privilege shall, as regards the ground itself upon which such houses or buildings may be erected, rank *next after* the privileges, debts, mortgages or claims already existing or which may exist upon such ground (*fonds*) at the time of making such loan; but nothing herein contained shall prevent the parties making such loan or loans from taking a hypothec as provided by law, upon the said ground (*fonds*) which hypothec, if duly registered, shall rank as aforesaid.

The last part of the section relating to conventional hypothecs upon the ground (*fonds*) itself has no bearing on the case, as it is not alleged, nor evidenced on the record that the deeds in favour of the Trust and Loan Company have ever been registered. So that the company's privilege was clearly restricted to the buildings. But even if these deeds had been registered, appellant's rights or claim to the lot itself which had been previously registered, are clearly protected by that legislation. The company, however, had undoubtedly the right to take a judgment against the institute on his personal obligation, and execute it on the lot itself. The institute was owner of it. Appellant could not, and does not attack that judgment. He simply argues that as the curator was not a party to it, it does not concern him. It is the effect of the judgment that he puts in issue, not its legality or validity.

The same as to the sheriff's sale to respondents. Appellant does not, and could not, ask to have it set aside. It was a perfectly valid one as far as it went. The controversy is merely as to what passed under it, or as to what it is that the city bought. Did they or did they not buy it subject to appellant's rights under the substitution? It seems to me evident that nothing but a substituted property was seized, and nothing but a substituted property was sold. Of

course, it was the land that was sold, and that sale might have become free from all claims if the appellant had died before the opening of the substitution. But upon a judgment against the institute alone for his debt, the substitute's right to the ownership cannot be wiped out if he survive the institute. It is from the grantor that he takes the property. He is not the *ayant-cause* of the institute. The appellant has renounced his father's succession. Then the city knowingly purchased a substituted property; it was sold as such; and they had notice of the substitution by its registration and publication *en justice*. That is why an *opposition afin de charge* was not necessary to preserve appellant's rights. The sheriff's deed, moreover, expressly says that the sale is only of what he legally can sell; Pothier, substit. 551. And the purchaser under it cannot have another or a better title than the judgment debtor had. Appellant could not have intervened to stop the sale. He, in fact, attempted it, but his opposition was dismissed on the ground that he could not be prejudiced by proceedings against the institute alone. That judgment is reported as *Trust & Loan Co. of Upper Canada* v. *Vadeboncœur*. (1).

The Trust and Loan Company had the personal obligation of both the institute and the curator, and had they taken their judgment against both could have executed it against both. But having chosen to take judgment against one of them only all that they could seize and sell on that judgment was the property of that one, and not the property of the other. And if their judgment debtor had only a life-estate in the lot in question, it is only a life-estate that can have been seized and sold. And it is only a life-estate that respondents purchased under the sale in execution of that judgment. It is not his liability for the re im-

(1) 4 L. C. Jur. 358.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

bursement of this loan that the substitute now questions; he simply contends that, as he has not been sued for it and condemned, no execution against his co-debtor can have extended to his own property.

The judgments against the appellant in the Superior Court and in the Court of Queen's Bench seem to be based on the consideration that this loan was made in appellant's interest and for his benefit. But this is a disputed fact and not at all clear upon the evidence. Appellant contends that it was made exclusively in the institute's interest. However, assuming that he did benefit thereby, it does not follow that his property was, or could be, sold under a judgment against a third party.

It was said in the Court of Queen's Bench that under art. 710 C. C. P. the appellant's rights were extinguished by the sheriff's sale because the Trust and Loan Company's claim was preferable to the substitution. But this article of the Code of Procedure is not given as new law and cannot be construed as an addition to or an alteration of section 953 of the Civil Code.

Extensive repairs (*grosses réparations*) and necessary disbursements of an extraordinary nature do not, it is true, fall exclusively upon the institute, but that is as between the institute and the substitute. Art. 947 C. C. And it does not follow therefrom that the party who has made these repairs at the request of the institute has a right of action against the substitute, still less that, under a judgment against the institute alone, he can sell the substitute's rights. And when the substitute invokes the protection of the sacred rule that no one can be condemned before being heard or summoned, it is no lawful answer that if he had been heard he would have been condemned.

Moreover, by the statute, the Trust and Loan Company had no lien on the lot itself, as I have already remarked. And even if they had, that could not have had the effect of rendering a judgment against the institute executory on any but the institute's rights and property. The substituted property was his property no doubt, but *pro tem.*, and subject to the substitution, if the substitute were to survive the institute. Such was the judgment of the Court of Review, and such would be my determination of the controversy.

Then, assuming that the appellant were liable for the amount of this loan, that would not be, in my opinion, a reason for dismissing his action. All that could be contended for would be that before he could get back his property, he should repay what the respondents have disbursed upon the loan. If the substitution had opened immediately after this loan to the *grevé*, the company's action upon it would have been against the appellant. He would then have had the option of retaining his property upon re-payment of the loan. Why should he be deprived of this option now? I do not see any reason for it, and I think that, in any case, the judgment dismissing his action is wrong. The judgment of the Court of Review should be restored with reserve of any recourse the respondents may have to recover from the appellant the amount disbursed by them to pay the Trust and Loan Company, in so far, at least, as he has benefited thereby. They may have that personal recourse, but, in my opinion, the appellant has a right to his property.

The respondent raised a point as to the necessity under art. 2172 C. C. of renewing the registration of the will creating the substitution in question. The three courts below are against them on this point, which is settled in that sense by the jurisprudence of

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

the Court of Appeal in the province since 1874. *La Banque du Peuple* v. *Laporte* (1); *Wells* v. *Gilmour* (2); *Wheeler* v. *Black* (3), in this court, but point abandoned.

I agree that such a renewal was not necessary. The subsequent Act of 1875, 29 Vict. c. 26, interprets the article as applying only to hypothecs. It would be with great reluctance that we could be induced to upset a well established jurisprudence of the Provincial Court of Appeal upon a point of this nature affecting vested rights and titles to realty.

Another objection raised by the respondents is that it has not been proved that François Vadeboncœur, the grantor, is dead. This is a futility. Their very deed from the sheriff upon which they base their defence would not exist if the institute had not been in possession as institute, and he could not have been in possession as institute if the grantor had not been dead. Moreover, this objection was taken in the Court of Appeal for the first time, and that could not be done on such a point. *Lyall* v. *Jardine* (4); *Bank of Bengal* v. *Macleod* (5); *Bank of Bengal* v. *Fagan* (6); *Owners of the "Tasmania"* v. *Owners of the "City of Corinth"* (7); *Connecticut Fire Insurance Co.* v. *Kavanagh* (8).

The appeal, in my opinion, should be allowed with costs, and the judgment of the Court of Review restored, with reserve of respondent's rights, as I have mentioned.

GWYNNE J.—While concurring in the judgment of my brother Girouard who has dealt with the case very

(1) 19 L. C. Jur. 66.
(2) Q. R. 3 Q. B. 250.
(3) M. L. R. 2. Q. B. 139; 14 Can. S. C. R. 242.
(4) L. R. 3 P. C. 318.
(5) 7 Moo. P. C. 35.
(6) 7 Moo. P. C. 61.
(7) 15 App. Cas. 223.
(8) [1892] A. C. 473.

fully the case appears to me to be concluded by the statute 16 Vict. ch. 25 That statute, after reciting that a then recent disastrous conflagration in the city of Montreal had destroyed upwards of one thousand houses, and that the greater number of the persons who had suffered by that conflagration had lost all they had and were unable to rebuild the property so destroyed without assistance, and that the Corporation of the City of Montreal had expressed a willingness to become surety to the extent of one hundred thousand pounds for such of the said persons as might borrow for the purpose of enabling them to rebuild on the property so destroyed, enacted that it should be lawful for the said corporation to become surety for monies borrowed by any such sufferers for the purpose of rebuilding upon their land made vacant by the fire, such suretyship being by the statute declared to constitute an obligation for the repayment of the moneys borrowed and of the interest thereon in the event of the lenders being unable to enforce payment thereof from the parties borrowing the same after due diligence, and the discussion of the personal and real estate of the said parties for that purpose; and by the Act it was enacted that no such loan should exceed the sum of £500 on each lot of ground to be built upon, and further, that any person or persons, etc., making any loan under an instrument to which the corporation should be a party as surety

should have a privilege for such loan in principal, interest and costs upon the houses or other buildings erected and built upon the lot of ground described in such instrument, which privilege should be superior to and have preference over any other claim, debt, mortgage or privilege whatsoever on such houses or buildings, and that to secure such privilege it shall not be necessary to observe any of the formalities now required by law, or any other formality whatsoever; Provided always that such privilege shall, as regards the ground itself upon which such houses or buildings may be erected, rank next after

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Gwynne J.

the privileges, debts, mortgages or claims already existing or which may exist upon such ground at the time of making such loan.

Among the sufferers by the said fire were Louis Vadeboncœur and his infant son, the now plaintiff, the former of whom at the time of the said fire was by the last will of his father, François Vadeboncœur then deceased, seized as *grevé de substitution* of a piece of land having a frontage of eighty feet on St. Mary Street in the City of Montreal, and a depth of eighty feet, with houses thereon which were destroyed by the said fire, and the ownership of the said piece of land in reversion was by the said will of the said François devised to the children of the said Louis begotten in lawful marriage as *substitués*.

For the purpose of availing themselves of the benefit of the said Act, (16 Vict. c. 25) the said *grevé* and one Trefflé Goyette, as and being the duly appointed curator to the substitution established by the said will of the said François, jointly petitioned the judge of the Circuit Court at Montreal that they should be judicially authorised to borrow under the conditions in the said Act contained, the sum of two thousand pounds (currency) for the purpose of building four houses upon the said piece of ground; and such proceedings were thereupon had that the said petitioners were in due form of law by the judgment of the said court judicially authorised to borrow the said sum and for the purpose of securing payment of the said principal sum and the interest thereon to hypothecate the said piece of land.

In pursuance of the authority so judicially obtained the said *grevé* and the curator of the said substitution borrowed from the Trust and Loan Company the said sum of two thousand pounds in four several sums of five hundred pounds each which were expended in erecting four houses as authorised by the judgment of

the Circuit Court and for the purpose of securing repayment of the moneys so borrowed they, upon the 22nd day of June, 1853, executed four several mortgages each securing $2,000 and interest thereon upon several portions of the said piece of land each having a frontage of twenty feet on said St. Mary Street, and a depth of eighty feet. And the said Corporation of the City of Montreal became parties to the said several mortgages and thereby respectively became *cautions* of the said borrowers for the repayment of the said sums by the said mortgages respectively secured under and in pursuance of terms of the said Act of Parliament.

Afterwards, the said sum of eight thousand dollars having been found to be insufficient for the completion of the said four houses, the said *grevé* and the curator to the said substitution upon the 8th day of September, 1853, in due form of law petitioned the said court for leave to borrow a further sum of £500 for completion of the said four houses under the provisions of the said Act (16 Vict. c. 25), and a certain other Act (16 Vict. c. 77), passed for the purpose of amending the said Act (16 Vict. c. 25), and such proceedings were thereupon had that the said petitioners were by the judgment of the said court judicially authorized to borrow, and did accordingly borrow, the further sum of £400 upon the security of the said piece of land from the said Trust and Loan Company, and for the purpose of securing repayment thereof with interest they executed another mortgage bearing date the 10th of September, 1853, upon the whole of the said piece of land having a frontage of eighty feet by a depth of eighty feet to which mortgage also the corporation of the city of Montreal became parties as surety of the said borrowers under the conditions and in accordance with the provisions of the said Acts of Parliament.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Gwynne J.

At the times of the said respective loans having been effected and of the execution of the said respective mortgages in security therefor there were not any other debts, mortgages or claims existing and affecting the lands upon which the said four houses were erected with the money so borrowed, having privilege or precedence over the said mortgages, and consequently the said Trust and Loan Company, in virtue of the said respective mortgages and of the provisions of the said Acts of Parliament, had for the said loans in principal, interest and costs, privilege as well over the land upon which the said houses were so as aforesaid erected as over the houses themselves superior to and having preference over every other claim, debt or privilege whatsoever. The mortgages covered the whole estate in the land and the houses thereon erected, not only of the *grevé*, but also of those in substitution. Default having been made in payment of the moneys secured by the said several mortgages, the Trust and Loan Company recovered judgment in consideration of such default against the *grevé*, and issued execution thereon in due form of law and by process of a writ of *venditiori exponas* issued upon the said judgment caused to be sold at sheriff's sale upon the 6th of February, 1860, the whole estate in the said land which had been so mortgaged to them under the provisions of the said statutes, and at such sale the corporation of the city of Montreal being the highest bidders therefor became the purchasers of the said land and premises at and for the sum of $7,000, paid to the sheriff by whom the said sale was made. The mortgaged estate thus realized less than the amount secured by the said mortgages, and thereby the corporation of the said city in their character of surety for the said borrowers became liable under the said

statutes to the said Trust and Loan Company for the balance.

The said *grevé* died upon the 25th of October, 1883, and the sole question now is as to the estate acquired by the said corporation by their purchase at the said sheriff's sale.

It is not questioned that the said estate in substitution was subject to the mortgages so as aforesaid executed equally as was the estate of the *grevé*, and was liable to be sold for satisfaction of the claim of the Trust and Loan Company, but it is contended that the proper form of procedure to enable the mortgagees to sell the land in which the plaintiff had the estate in substitution, was not pursued inasmuch as the curator to the substitution had not been made party to the action in which the judgment upon which the sale took place was rendered.

It is not suggested that if the curator to the substitution had been made a party to that action it would have derived any benefit or could have prevented the land and premises mortgaged from being sold for the purpose of satisfying the judgment recovered for default in payment of the moneys secured by the mortgages. It appears obvious upon the evidence that the joint and several covenants of the *grevé* and the curator to the substitution were, in view of the impecunious condition of the institute and the substitute, of value only as providing a mode of reaching by judicial process the land and premises mortgaged, all remedies against which the statute, 16 Vict. c. 25, sec. 1, seems to have required to be exhausted before the guarantee of the Corporation of the City of Montreal should become exigible.

Under the circumstances above appearing there cannot, I think, be entertained a doubt that the claim of the Trust and Loan Company under the mortgages

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Gwynne J.

so as aforesaid judicially authorised, constituted by force of the special statute (16 Vict. c. 25), a privileged claim superior to and in preference over the substitution, and consequently that by force of articles 950-951 and 953 C. C. and art. 710 C. C. P., the sheriff's sale on the execution issued upon the judgment recovered in the action instituted by the mortgagees, the Trust and Loan Company, effectually passed the whole estate, that of the substitute as well as that of the *grevé*, all which was made subject to the mortgages for realising payment of the moneys secured by which the judicial sale took place, and that therefore, upon the death of the *grevé* such judicial sale was not dissolved in favour of the substitute, the present appellant.

The appeal must, in my opinion, be dismissed with costs.

SEDGEWICK J. concurred in the opinion that the appeal should be dismissed with costs.

KING J. dissented being of opinion that the appeal should be allowed.

GIROUARD J.—Lors de la plaidoirie orale devant nous, j'étais sous l'impression que le défaut d'avoir mis en cause le tuteur à la substitution était un juste motif de nullité du décret, à l'encontre de l'appelé à la substitution; mais après une plus sérieuse étude de la question, je suis arrivé à une toute autre conclusion. D'après les dispositions de nos Codes—qui ont simplement reproduit le droit ancien—il faut le supposer jusqu'à preuve du contraire; *Herse* et *Dufaux* (1); la seule conséquence de ce défaut est que le jugement qui a donné lieu à la saisie n'est pas chose jugée contre

(1) 9 Moo. P. C. 281.

l'appelé, tandis qu'il le serait, si le curateur à la substitution eût été mis en cause. (C. C. art. 945, 959.)

La loi dit formellement que le décret par le shérif n'affecte, en aucune façon, les droits des appelés, sauf dans quelques cas spécialement mentionnés, et ce sans distinguer si le curateur à la substitution est en cause ou non. (C. C. art. 950, 953; C. P. C. art. 710.) Les ventes forcées de biens-fonds substitués sont assujetties à des règles particulières, qui, au moins avant le Code, ne reconnaissaient à l'appelé aucun droit à faire valoir avant l'ouverture. *Trust and Loan Co. of Upper Canada* v. *Vadeboncœur* (1); *Wilson* v. *Leblanc* (2); voir sous le Code l'art. 956.

L'article 710 du Code de Procédure Civile (art. 781 du nouveau Code), postérieur au Code Civil, et beaucoup plus large que l'art. 953 de ce dernier, ajoute :—

Le décret ne purge pas les substitutions non ouvertes sauf le cas où il existe une créance antérieure ou préférable, apparente dans la cause.

Les auteurs et la jurisprudence sont unanimes à regarder comme une charge de la substitution les grosses réparations, et à plus forte raison, la reconstruction des édifices incendiés, particulièrement de ceux dont le revenu était, aux yeux du substituant, et en fait, nécessaire au soutien de tous les bénéficiaires de la substitution, ce qui existe dans l'espèce, puisqu'il le déclare alimentaire et insaisissable, et que ces immeubles formaient tout leur avoir. C. C. art. 947, 951, 958; *In re Desrivières* (3); *Caty* v. *Perrault* (4); Thevenot d'Essaule (Ed. Mathieu) nn. 685, 689, 691, 692 et page 463.

Au numéro 685, Thevenot dit :

Quant aux grosses réparations, le grevé n'est point obligé de les faire; par exemple, s'il s'agit de relever et reconstruire des choses tombées par vétusté, ou par force majeure, sans qu'il y ait faute de sa part.

(1) 4 L. C. Jur. 358.
(2) 13 L. C. Jur. 201.
(3) 12 R. L. 649.
(4) 16 R. L. 148.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Girouard J.

Au No. 686, il ajoute:

Que si le grevé les a faites, il est fondé à en répéter le montant, lors de la restitution des biens. Il y a une loi qui le dit expressément, pour l'héritier grevé qui a reconstruit les maisons incendiées.

Thevenot n'exige pas même l'autorisation du conseil de famille: Dénizart, *vo.* "Subs." no. 109, et Lacombe, *vo.* "Subs." p. 183, no. 10, sont du même avis. A plus forte raison, la substitution est-elle responsable du coût de ces reconstructions, lorsque, comme dans l'espèce, elles ont été autorisées en justice? Dans le premier cas, l'appelé pourra contester l'urgence ou la valeur des réparations ou constructions; dans le second, l'autorisation en justice est chose jugée contre lui (C. C. Art. 959) à moins qu'il ne prouve la fraude ou la collusion entre le grevé, le tuteur à la substitution et le créancier. Ici rien de semblable n'est allégué. L'ordre du juge a été régulièrement obtenu suivant la pratique immémoriale suivie dans la province de Québec, et l'appelant admet lui-même que les bâtiments érigés avec les fonds empruntés, valent aujourd'hui même la somme de $9,600, le montant total des emprunts. Je considère donc que les hypothèques en question en cette cause sont valides aux yeux du droit commun et constituent une réclamation préférable aux termes de l'art. 710 du Code de Procédure. A plus forte raison doit il en être ainsi en face du Statut, 16 Vict. ch. 25, qui a autorisé le cautionnement de la cité de Montréal, et à mon avis, c'était plutôt pour l'obtenir que pour valider les emprunts, qu'il fut passé. Même si le doute était permis sur ce point, les termes du statut sont si clairs, si larges, qu'il est impossible de ne pas considérer la réclamation comme préférable, ainsi que M. le juge Gwynne le démontre. Ce point ne me paraît pas sérieusement contesté par l'appelant.

L'intimée a été forcée d'acheter les biens substitués pour protéger son cautionnement, et elle le fit, non pas à vil prix, mais en payant la pleine valeur de l'immeuble, savoir $7,000, puisque cinq ans plus tard elle le vendait, à l'encan public, à Michel Laurent, pour $6,800, sans qu'il n'apparaisse aucune détérioration ou dépréciation extraordinaire. Tous ces faits apparaissent au dossier; l'incendie des lieux au grand feu de 1852, dont le grevé n'était certainement pas responsable; l'autorisation de l'intimée par la Législature de se porter caution des victimes du feu, pour reconstruire les édifices incendiés; l'autorisation du conseil de famille et du juge au grevé et au tuteur de la substitution de faire les emprunts; les hypothèques consenties par les deux tant sur les bâtisses que le fonds; le jugement basé sur toutes ces hypothèques; le décret par le shérif en exécution du dit jugement et paiement des dits emprunts et enfin la valeur actuelle des bâtisses. Tous ces faits, notamment la bonne foi de toutes les parties, sont apparents dans la cause; et d'après la jurisprudence bien établie de la province de Québec, tant avant le Code que depuis, ils constituent une créance préférable apparente dans la cause, aux termes de l'article 710 du Code de Procédure Civile, c'est-à-dire, une créance qui prime la substitution elle-même et pour laquelle l'appelé est responsable, absolument comme il l'est pour une dette du substituant, ou une hypothèque antérieure à la substitution, et pour le paiement de laquelle le créancier n'est pas obligé d'attendre l'ouverture de la substitution ou de provoquer la nomination d'un curateur à la substitution, mais peut procéder à l'échéance contre le grevé absolument comme s'il n'y avait pas de substitution, C. C. 2060; Voir aussi, Laurent, Vol. 14, n. 565; Actes de Notoriété, p. 407; Héricourt, Des Im., p. 150; Dénizart, *vo.* "Subs." nn. 99,102,103; Lacombe, *vo.* "Subs." p.

1898

VADEBONCŒUR v. THE CITY OF MONTRÉAL.

Girouard J.

180, n. 2. C'est ce que fit le créancier dans l'espèce : il fit vendre l'immeuble par le shérif, sur le grevé, qui alors était le seul propriétaire connu *animo domini*, (C. P. C. art. 632), et à mon avis, cela suffisait aux termes de l'art. 710, qui est exorbitant du droit ordinaire en matière de décret. Cet article n'exige pas que le tuteur à la substitution soit en cause, et je ne crois pas que les tribunaux doivent imposer cette formalité.

Il en serait autrement si le shérif n'eût vendu que les droits du grevé, ainsi que la Cour de Revision l'a supposé ; alors il n'y aurait pas lieu de se méprendre sur la portée du décret ; mais, ici le shérif ne fait mention du grevé que pour indiquer qu'il vend sur le grevé, non pas ses droits simplement, mais tout l'immeuble, sans en rien réserver. Il eut été, sans doute, plus prudent de mettre en cause le curateur à la substitution et peut-être plus conforme à la pratique ordinairement suivie, mais il me semble que les tribunaux ne doivent pas exiger l'accomplissement de cette formalité, à peine de nullité du décret, lorsqu'il n'y a aucune loi qui la prononce ou fasse même mention de cette formalité ; et qu'au contraire l'article 710 semble prévoir le cas où il n'est pas en cause et qu'enfin il y a absence totale de griefs de la part de l'appelant.

La majorité de cette cour est donc d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant : *Lamothe, Trudel & Trudel.*

Solicitors for the respondent : *Roy & Ethier.*