1898

*Oct. 13.
*Dec. 14

ALFRED DESCHAMPS (PLAINTIFF).....APPELLANT;

AND

GEORGE BURY (DEFENDANT).....RESPONDENT.

AND

HON. R. J. THIBADEAU *et al*.....MIS-EN-CAUSES.

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

Title to land—Sheriff's sale—Vacating sale—Arts. 706, 710, 714, 715, *C. C. P.—Refund of price paid—Exposure to eviction—Arts.* 1511, 1535, 1586, 1591, 2060 *C. C.—Actio condictio indebiti—Substitution —Entail—Substitution non ouverte—Prior incumbrance—Discharge by sheriff's sale—Procedure—Petition to vacate sheriff's sale.*

The provisions of article 714 of the Code of Civil Procedure of Lower Canada, do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of a deed, nor does that article give a right to have such a sale vacated and the amount so paid refunded.

The *action condictio indebiti* for the recovery of the price paid by the purchaser of lands lies only in cases where there has been actual eviction.

The procedure by petition provided by the Code of Civil Procedure for the vacating of sheriff's sales can only be invoked in cases where an action would lie. *The Trust and Loan Co. of Canada* v. *Quintal* (2 Dor. Q. B. 190), followed.

Mere exposure to eviction is not a sufficient ground for vacating a sheriff's sale.

A sheriff's sale in execution of a judgment against the owner of lands, *grevé de substitution*, based upon an obligation in a mortgage having priority over the deed creating a substitution, discharges the lands from the unopened substitution without the necessity of making the curator to the substitution a party to the proceedings. *Chef dit Vadeboncœur* v. *The City of Montreal* (29 Can. S. C. R. 9) followed.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

1898

DESCHAMPS v. BURY.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (appeal side), affirming the decision of the Superior Court, sitting in Review at Montreal (1), which reversed the judgment of the Superior Court, District of Montreal (2), dismissing the plaintiff's action with costs.

A statement of the facts and questions at issue on the appeal will be found in the judgment of His Lordship Mr. Justice Taschereau.

Belcourt for the appellant. The purchaser at a judicial sale, who has paid the purchase price, need not await disturbance before asking the sale to be annulled. That principle does not apply to bidders at judicial sales. *Moat* v. *Moisan* (3); arts. 953, 959, 961, 2060 C. C.; arts. 710, 714 C. C. P. The case of *The Trust and Loan Co. of Canada* v. *Quintal* (4), did not rest upon a contrary doctrine. Numerous judgments have annulled judicial sales under article 714 C. C. P. even after the payment of the purchase price. *Thomas* v. *Murphy* (5); *Compagnie de pret et Crédit Foncier* v. *Baker* (6); *Desjardins* v. *La Banque du Peuple* (7). In the cases of *Desjardins* v. *La Banque du Peuple* (7), and *Moat* v. *Moisan* (3), the purchase price had not only been paid, but even distributed, and the collocated creditors were ordered to return to the purchaser the moneys so received. See also *Bigras* v. *O'Brien* (8), and *Perron* v. *Bouchard* (9) in which the payment of the purchase money did not prevent the setting aside of the sale. In *The Trust and Loan Co. of Canada* v. *Quintal* (4), the true decision of the Court of Queen's Bench was that the respondent

(1) Q. R. 12 S. C. 155.
(2) Q. R. 11 S. C. 397.
(3) 25 L. C. Jur. 218.
(4) 2 Dor. Q. B. 190.
(5) 8 R. L. 231.
(6) 24 L. C. Jur. 45.
(7) 8 L. C. Jur. 106; 10 L. C. R. 325.
(8) 11 R. L. 376.
(9) 13 Q. L. R. 220.

1898

DESCHAMPS v. BURY.

had failed in his proof to establish that he was exposed to disturbance, and moreover that the sale had been ratified. Judicial sales cannot be considered as subject to rules affecting private sales and consequently the judgment appealed from is wrongly based upon articles 1586 and 1587 of the Civil Code.

At the time of the codification of our laws, in 1866, the French doctrine and decisions required the calling in of the substitutes, even though the property be sold by law to satisfy a creditor of the grantor; 2 Pigeau—Procedure Civile (ed. 1779), no. 616: Denisart, J. P. Acte de notoriété (3 ed.) pp. 407, 408; Thevenot d'Essaules, nos. 821-824, note *a*, also nos. 689, 690; 2 Mourlon, no. 936; Demolombe, t. 22, no. 558, p. 500; Duranton, t. 9, no. 591; Aubry & Rau—t. 7, no. 696, p. 349: tome, 6 p. 51-52. Laurent, t. 14, no. 570; 9 Rolland de Villargues, p. 98, no. 254 & 255; De Héricourt, "Vente des immeubles par décret;" pp. 47, 48, 49. Other authors who lay down the contrary opinion base themselves on the ordinance of 1747 which was not enregistered in Canada, and on the presence at the trial of the Ministère Publique, an institution that does not exist in Quebec. See *Caty* v. *Perrault* (1); *Trust and Loan Co. of Upper Canada* v. *Vadeboncœur* (2). Arts. 2059 and 2060 C. C. make special reservation of the substitute's rights, even where an action against the institute is based on a hypothec anterior to the institute's possession, consequently on the grantor's debt. Duranton, t. 9, p. 573, no. 591, mentions the recourses of the substitute.

The purchaser is "exposed to be disturbed" in many ways and for many reasons, and asks to be freed from his purchase in virtue of article 714 C. C. P. There is an established precedent in *Jobin* v. *Shuter* (3),

(1) 29 L.C. Jur. 21; 16 R. L. 148. (2) 4 L. C. Jur. 358.
(3) 21 L. C. Jur. 67.

that a purchaser is not obliged to remain exposed to such hazards.

Barnard Q.C. and *Rielle* for the respondent. The Superior Court purported to follow *Moat* v. *Moisan* (1), which the learned judge considered in conflict with the *Trust and Loan Co. of Canada* v. *Quintal* (2). No such conflict exists. The first question is, whether the position of a buyer at sheriff's sale is similar to that of the buyer at an ordinary sale, or whether, under the circumstances indicated, his rights are different from those of the latter. Contractual sales are regulated by arts. 1506-1531 and 1535 of the Civil Code. The fact of the payment of the price regulates the rights of the buyer. Before payment the buyer can object or ask for security on the grounds either of actual disturbance, or of just cause to fear disturbance, but once the price has been paid the buyer can only reclaim it on the ground of actual disturbance or eviction, not even alleged here. Pothier, Vente, no. 282 ; Aubry & Rau, no. 356, p. 497 ; 1 Duvergier, pp. 430 *et seq.* Troplong, Vente, no. 614. Art. 4511 C.C. The position of the *adjudicataire* at sheriff's sale is similar. Arts. 1586-1591 C. C. ; Arts. 714 C. C. P. ; *Trust and Loan Co. of Canada* v. *Quintal* (2). This last case confirmed the jurisprudence on the subject and cites prior decisions. See also *Blondin* v. *Lizotte* (3) ; *Jobin* v. *Shuter* (4).

On the question whether the substitution was discharged by the sheriff's sale, the authorities on the old French law, the *arrêts* rendered under that law, and the settled jurisprudence of the province are all in favour of the respondent. De Héricourt, Vente d'immeubles pp. 47, 48, 49 ; Ancien Dénisart, vo. "Substitution," nos. 95, 99, 102 ; Nouveau Dénisart, vo.

(1) 25 L. C. Jur. 218.
(2) 2 Dor. Q. B. 190.
(3) M. L. R. 3 Q. B. 496.
(4) 21 L. C. Jur. 67.

1898

DESCHAMPS v. BURY.

"Douaire," no. 10, p. 223; Guyot, vo. "Substitution,' p. 526, 527, 528; Ordonnance des substitutions (1747), tit. 1, art. 55; 2 Pigeau, Procedure Civ. p. 407; Thevenot d'Essaulles, nn. 803, 1262; Ricard, Substitutions, 1re partie, no. 258, 2me partie no. 91; Aymar, commentaires de l'art. 55 du titre 2 de l'ordonnance de 1747, p. 224; D'Aguesseau, Subs. quest. 12, 13, 14, 37 rep. d'Aix, p. 386, 387; Opinion du parlement de Paris, pp. 390-391; Pothier (Bugnet) Substitutions n. 177. Merlin—Rép. vo. "Substit. Fid." (*Ed. Belge*) p. 228, art. 2; Bourjon (Ed. 1770) p. 179; Rousseau de la Combe "Substitution," p. 655; Laurent, no. 565; 22 Demolombe, no 553. See also *Mandeville* v. *Nicholl* (1).

In principle the *grévé* is the representative of the substitution, all actions passive and active residing in his person, and all judgments against him binding the *appelé*, except in very exceptional circumstances, such as fraud, just as the judgments against the heir bind the legatee. Judging by the earliest *arrêts* to be found in the books, the power of the *grévé* as the administrator and representative of the substitution, to sell voluntarily and without restraint the property of the substitution in matters of necessity, was unlimited. A usage, however, gradually grew up, so far as appears after the establishment of the Conseil Supérieur at Quebec, to obtain the authorization of the judge after calling in the *appelés*. It is not necessary to decide how far the usage prevailed in Canada; it is sufficient, if it be admitted that it is a question whether art. 959 C. C. does not go further than the law, as it stood before the Code, and to what extent, as to the voluntary sale by the *grévé* of substituted property in cases of necessity. But at no time, in France, either before or since the ordinance of 1747, and at no time in Lower Canada since 1663, has

(1) 16 U. C. Q. B, 609.

it been doubted that the sale by *décret* on the *grévé* alone, for the debt of the *substituant*, bound the *appelé* although he has not been impleaded. The principle established by these authorities has been definitively adopted by arts. 953, 2058 and 2060 C. C. and art. 710 C. C. P.

In this case, the claim, on the face of the proceedings, was a prior one, being for a debt of the grantor, and the question has long been regarded as settled in our jurisprudence. *Macintosh* v. *Bell* (1); *Vadeboncœur* v. *City of Montreal* (2). See also *Gray* v. *Dubuc* (3).

THE CHIEF JUSTICE.—I concur in the judgment prepared by my brother Taschereau, and for the reasons he gives, which are the same as those given by the Court of Review, I am of opinion that the appeal should be dismissed.

I also concur with my brother Girouard and the Chief Justice of the Queen's Bench, in holding that the appeal was rightly dismissed for the reason given by the latter in his elaborate judgment, holding that the appellant had not brought himself within article 714 of the Code of Civil Procedure by showing that he was "liable to eviction" in the terms of that article.

TASCHEREAU J.—On the tenth of September, 1895, the appellant purchased a certain property at sheriff's sale in Montreal. On the sixteenth of October, following, he paid the price of adjudication, which was subsequently duly distributed among the creditors of the judgment debtor. On the third of February, 1896, he presented a petition under article 714

(1) 12 L. C. Jur. 121.
(2) 29 Can. S. C. R. 9.
(3) 2 Q. L. R. 234.

1898

DESCHAMPS v. BURY.

Taschereau J.

of the Code of Civil Procedure to have the sale set aside, *and the amount paid refunded to him* on the ground that he was liable to eviction by reason of a substitution on the property, not discharged by the sheriff's sale. The respondent demurred to this petition on the ground that such a sale cannot be so set aside when the purchase money has been paid, and the price refunded, merely because the purchaser is exposed to eviction ; that in such a case, it is only when actually evicted, not upon the ground of a mere contingent liability to eviction, as alleged in the petition, that the purchaser is entitled to such relief.

I am of opinion that the demurrer is well founded. Article 714 of the Code of Civil Procedure does not give the right claimed by the petition to recover the money paid. And why ? Because it is intended to apply only to a sale not yet paid for, to a sale not perfected by payment, a sale of which the sheriff has not yet given the deed. Art. 706, C. C. P.; Pothier, "Procedure Civile," page 254 ; "Guillouard, Vente, no. 315, *et seq.*

But, argues the appellant, if I cannot get my money back under such a petition, I am at least entitled to have the sale vacated. To my mind, he could not more clearly show how untenable is the position he takes. Could it be possible that a sale duly paid for might be vacated for mere liability to eviction under the Code of Civil Procedure, and yet, that the purchaser should, under the Civil Code (art. 1586), have to wait till he is actually evicted (which may never happen), to recover his money back ? For by that article of the Civil Code, it is only when actually evicted that a purchaser at a judicial sale has the action *condictio indebiti* to recover his money back. Then article 1591 of the Civil Code enacts that such sales, as a general rule, are governed by the principles applicable to

1898

DESCHAMPS v. BURY.

Taschereau J.

ordinary contracts of sale, and ordinary contracts of sale, it is conceded, cannot after payment be set aside for mere liability to eviction. Articles 1511, 1535, Civil Code; Pothier, "Vente," no. 282; 4 Aubry et Rau, (4 ed.) page 397.

And the appellant does not allege that he was unaware of this substitution when he paid on the 16th of October; he simply alleges that he was unaware of it on the 10th of September, at the time of the adjudication.

This exceptional remedy by petition should not be extended by construction. It is not a new right that this article 714 purports to create, but simply an exceptional remedy. It gives the right, if the purchaser chooses to do so, to proceed by petition in the same case, instead of by action, but only in cases where the action lies. And the action does not lie, until actual eviction, to set aside any sale that has been duly paid, and recover the money paid. Art. 1586, C. C. An enactment of this nature in a Code of Procedure must be construed, when possible, as an enactment on procedure, and nothing more. Such is the decision given in 1882, by the Court of Appeal in the province in the case of *The Trust and Loan Co. of Canada* v. *Quintal* (1).

The Court of Review in the present case, in accordance with that decision, allowed the demurrer. The Court of Appeal, though dismissing the petition on another ground, overruled the case of *The Trust and Loan Co. of Canada* v. *Quintal* (1), and dismissed the demurrer. In my opinion the judgment of the Court of Review is the right one.

I would allow the demurrer and dismiss the petition as unfounded in law. The appeal therefore fails.

(1) 2 Dor. Q. B. 190.

1898

DESCHAMPS v. BURY.

Girouard J.

SEDGEWICK and KING JJ.—Concurred.

GIROUARD J.—Nous venons de juger dans la cause de *Chef dit Vadeboncœur et La Cité de Montréal* (1), qu'aux termes de l'article 710 du Code de Procédure Civile, le décret purgeait les substitutions non ouvertes lorsqu'il avait lieu pour une créance préférable, apparente dans la cause, et cela sans mettre en cause le tuteur de la substitution. A plus forte raison, doit il en être ainsi lorsque, comme dans l'espèce qui nous occupe, la créance est antérieure à la substitution. Le Code Civil, article 2060, en a une disposition formelle. Nous sommes donc d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *E. A. B. Ladouceur.*

Solicitor for the respondent: *N. T. Rielle.*