

INC.
P340.9
C833ap
no 36
-1815-

RR
Factum 36

Province of Lower Canada
In the Court of Appeals

James Keer, Esquire
(Plaintiff below)

Appellant

and

Joseph Hubert La Croix, Esquire, Legatee
universal of his mother Marie de la Croix
deceased
(defendant below)

Respondent

Appellant's Case

RES
AC
23
N^o 36

36

[Quebec]
1815

JAMES KERR, Esquire,

(Plaintiff below)

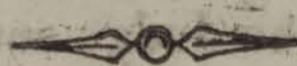
APPELLANT.

&

JOSEPH HUBERT LA CROIX, Esquire, *Legatee Universel* of his Mother Marie De La Croix, deceased,

(Defendant below)

RESPONDENT.



THIS Appeal is instituted from a Judgment of the Court of King's Bench of Montreal, rendered in February, 1815, dismissing the Appellant's action.

The action was brought against the Respondent, representing his late Mother, for damages, in having previous to and on 30th September, 1796, represented herself and the Children of her husband at that time deceased, to be Seigneurs of a Fief called Villeraï, situated under Cape Diamond, and for having sold the Appellant, for a valuable consideration, certain arrears of *Lods et Ventés*, pretended to be due by one John Fraser, when in truth and in fact no such Fief existed, and no *Lods et Ventés* were due by the said John Fraser to the widow and Heirs La Croix.

The Respondent pleaded two exceptions. 1st That as *Legatee Universel* he was not answerable,—and 2dly. That the Appellant being then a Barrister, practising in the Courts of Quebec, could not legally purchase this debt, being then a *Droit Luigieux*: But both pleas were over-ruled by the Court below, so that the only enquiry to be then made was, whether the allegations made by the appellant in his declaration, were true.

The facts in evidence are these. In the year 1796 the appellant was consulted as to the best way of recovering a sum of near £3000, due to a Mr. John Fraser of London as *Baillieur de fonds* of two wharves, situated under Cape Diamond. The purchasers insisted on retaining the money due to Mr. Fraser till the acquittance of all *Lods et Ventés* anterior to their purchase, was produced. As both wharves had been conceded in 1772 and 1773 by the Widow and Heirs La Croix in quality of Seigneurs of Villeraï, and a Judgment had been rendered in the Court of Common Pleas at Quebec, recognizing them as Seigneurs, the appellant advised Mr. Burns, then agent of Mr. Fraser, to obtain an acquittance from the Widow La Croix of *Lods et Ventés* due by him, as the best means to facilitate the recovery of the Money.

Mr. Burns, however, having no authority to purchase these rights, declined to do so, till he should hear from Mr. Fraser. The appellant then intending to visit England, proposed to Mr. Burns to make the purchase for Mr. Fraser in his own name, which that Gentlemen approved of, and this it will be observed, was previous to his obtaining such an assignment. The Appellant flattered himself that on a personal interview with Mr. Fraser, he could find no difficulty in persuading him of the expediency of accepting a transfer of these *Lods et Ventés* over to him, Mr. Fraser. The appellant paid £60 in money, besides five guineas to the Notary and engaged to pay £60 more, as soon as the widow La Croix's children should confirm the assignment.

RES
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Jan 1793

The Appellant was greatly disappointed on seeing Mr. Fraser in London, for that Gentleman insisted that the Widow and Heirs La Croix, had no such Fief as Villeraï, and of course had no right to the *Lods et Ventès*. The appellant was, therefore, referred back to Mr. Burns, and on his return to Canada he found that a private arrangement had been concluded, by which the proprietors of these wharves for a deduction of £600 from the amount of their debts, had undertaken to take the risk on themselves, or in other words to enter into a litigation with all who should claim these *Lods et Ventès*.

Thus the appellant was placed in this predicament, either to submit to the loss of his money, and to pay an additional sum of £60 as soon as the Heirs La Croix might think fit to ratify the assignment, or to bring an action against Mr. Fraser for the pretended *Lods et Ventès* (for as to obliging the Widow and Heirs to refund, it was impossible till their title to the Fief was adjudged upon) and after waiting five years, the appellant brought an action in the Court of King's Bench at Quebec, against Fraser for £500 sterling, the amount of *Lods et Ventès* on one of the wharves.

14 April,
1802.

The Crown by the Attorney General came into the cause and contested the existence of Villeraï; and the Widow and Heirs having intervened to support the appellant's interest, a solemn decree was pronounced, adjudging the Widow and Heirs of La Croix to be *Seigneurs Primitifs* of Fief Villeraï. Tho' the appellant was not ultimately successful in that action in the Court below, from want of form in not having signified the assignment before action brought, yet on an appeal to this Court, the Judgment given below was reversed and Mr. Fraser was condemned to pay the £500 sterling to the appellant. The Appellant brought a second action for £666 13 4, arrears of *Lods et Ventès* due by Mr. Fraser on the other wharf, and he obtained a Judgment for the amount, but this Judgment was reversed in this Court, on matter of form.

19 April 1806

From the first Judgment, Mr. Fraser appealed to the King in Council, as did the appellant from the last. But during the dependence of these appeals one of the wharves was brought to a Judicial sale, and the Appellant claimed out of the proceeds £500, the amount of his Judgment against Mr. Fraser; and the widow and Heirs La Croix, advanced their pretensions for the surplus *Cens* and *Lods et Ventès* as *Seigneurs Primitifs*. The Crown again contested the opposition of La Croix and the Appellant claiming under them, and for a third time the Court of King's Bench at Quebec, decreed the Widow and Heirs La Croix to be *Seigneurs* of Villeraï and they and the appellant were ordered to be collocated on the proceeds. From this latter Judgment the Attorney General appealed to this Court which on hearing the parties, ordered that the proceedings be remitted to the Court below for further proof of property and possession of the Fief and in the progress of that enquiry in the Court below, Paul La Croix, Brother and Attorney of the Respondent, came into Court, produced a procuration and filed a *Retrait* of the Respondent's opposition.

14 June April, 1809.

The appellant then proceeded to produce such evidence in support of his claim as was in his power, but being thus deserted by the Respondent his claim was necessarily dismissed, and Judgment was finally entered for the Crown.

This Judgment given *directly* on the points of property and possession and going to establish the Title to this Fief to be in the Crown and not in the Heirs La Croix, was fatal to the appellant whose rights rested entirely on their title to the Fief. It therefore became no longer an object to prosecute his suits depending in England, and they were both dismissed. Thus the Respondent (for he has identified himself with the Widow La Croix, his Mother) has not only had a large sum of money from the Appellant without having rendered any equivalent but from his deceitful representations overwhelmed him in an expence exceeding £1000.

It is difficult to conceive what reasons actuated the Court below in giving the Judgment now appealed from. For the appellant has adduced proof of every thing he has alledged. 1st. That the widow and Heirs had in 1796 held themselves out to be *Seigneurs* of Villeraï. 2dly. That the appellant gave a sum of money for their pretended rights and obtained a transfer of them. 3dly. That the Respondent and the Heirs declared themselves that they were not the *Seigneurs* of that Fief and were adjudged finally to have no such Fief. And 4thly. That the appellant's

damage exceeds £1000, independent of the gain he would have realized if the La Croix's had been *Seigneurs Primitifs*.

Vide evidence of Mr. Brehaut,

As to the defence set up that this was a *Droit Litigieux*, Pothier and other authors say that to constitute the sale of a debt, a *droit litigieux*, it must have been litigated at the time of the assignment or there must have been reason to apprehend that it would be litigated, and further that the assignment should contain a condition that the purchaser must enforce payment of the debt at his own costs, and without warranty. Now the transfer in question does not come within the spirit or letter of this definition; for the debt was not litigated in 1796, nor inasmuch as the Judgment of the Court of Common Pleas was rendered three years before, could it have been foreseen that it would have been litigated, moreover there is no condition that the debt was to be recovered at the expence of the appellant, and without guarantee of the Widow and Heirs. Of course they are held by the *garantie de Droit*, to indemnify the appellant for the damage he has sustained by their fraud and deceit.

Vide traité du contrat de vente Nos. 583, 584, 586 and 587; vol. 1. p. 682.

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The Appellant humbly submits that in seeking a reversal of the Judgment of the Court of King's Bench at Montreal, and a decree for such *actual* damage as he has sustained, he is supported by reason, justice and law.

Copy of the Declaration & Retrait offered to

Thomas facets
Demandeur
Pierre Bouchard D'écuyer
Maj. Genl. de la Armée
Défendeur
Le Roy Intervenant

Leudi 16 Janvier
1859
Nous: Paul de
Civry scilicet presenté
en Cour et de la
part qui faisant
tant pour lui que
pour les autres
Heritiers de la suc.

cession de la Civry dont il a la Procuration qu'il
fais, qu'il a presenté requête a son Excellence
le Gouverneur en Chef soumettant tous ses droits
opretensions contenue dans son Opposition dans
cette cause a la decision de son Excellence et
que ni lui ni les dits Heritiers ne veulent
plus persister dans leur dite Opposition, mais

damage exceeds \$1000, independent of the gain he would have realized if the ...
Gritz had been assigned a ...

As to the defense set up that this was a ...
authorities that to constitute the sale of a ...
judged at the time of the assignment on ...
ground that it would be ...
condition that the purchase must ...
and to their ...
part of letter of this date ...
and it is the judgment of the court of ...
fore, could I have been ...
is no condition that the ...
and without ...
and with ... the applicant for the damage he has sustained by

The Appellant ...
in seeking a reversal of the judgment of the ...
and a decree for such actual damage as he has ...
justice and law.

W. Appell

Wm. S. S. S.

Appellant

W. S. S.

Appellant

Appellant