IVON LEFEUNTUN (*Petitioner en nullité de décret*) ..... } APPELLANT;

AND

ADOLPHE VÉRONNEAU (*Defendant en reprise d'instance* IN THE COURT BELOW)..... } RESPONDENT.

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*Mar. 6.
*June 24.

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

Venditioni exponas—Order of court or judge—Vacating of sheriff's sale—Arts. 553, 662, 663, *and* 714 *C. C. P.—Jurisdiction.*

A petition *en nullité de décret* has the same effect as an opposition to a seizure and under arts. 662 and 663 C. C. P. the sheriff cannot proceed to the sale of property under a writ of *venditioni exponas* unless said writ is issued by an order of the court or a judge. *Bissonnette* v. *Laurent* (15 Rev. Leg. 44) approved. Taschereau and Gwynne JJ. dissenting.

On the question of want of jurisdiction raised by respondent it was held that a judgment in an action to vacate the sheriff's sale of an immovable is appealable to the Supreme Court under sec. 29 (*b*). *Dufresne* v. *Dixon* (16 Can. S. C. R. 596) followed.

APPEAL from a judgment rendered on the 18th of January, 1892, by the Court of Queen's Bench for Lower Canada (Appeal side) (1) confirming a judgment of the Superior Court rendered on the 28th June, 1889, dismissing the appellant's petition *en nullité de décret* with costs.

The facts of the case and the grounds for the petition *en nullité de décret* are fully stated in the judgment of Mr. Justice Fournier hereinafter given and in the report of the case in the Court of Queen's Bench (1).

Before proceeding to hear the merits Mr. *Bonin* for respondent relying on *Champoux* v. *Lapierre* (2), contended that the case was not appealable.

* PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) Q. R. 1 Q. B. 277. (2) Cassels's Dig. 2 ed. 426.

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[MR. JUSTICE TASCHEREAU.—The case of *Dufresne* v. *Dixon* (1), a judgment on a petition *en nullité de décret* is a clear authority for our jurisdiction.]

The appeal was then heard on the merits.

Mercier Q.C. and *Gouin* for appellant cited and relied on arts. 479, 551, 653, 662 and 663 C. C. P. and *Bissonnette* v. *Laurent* (2); *Trust & Loan Co.* v. *Monbleau* (3); *La Compagnie de Prêt* v. *Monbleau* (4).

Bonin for respondent cited and relied on *Bouvier* v. *Brush* (5); rules 35, 57 and 88 of Superior Court Rules of Practice, and contended also, that the Supreme Court should not reverse the decision of the two courts on a mere question of procedure sanctioned by judicial decision, viz.: Whether the prothonotary could issue a writ of *venditioni exponas* without the order of the court.

THE CHIEF JUSTICE concurred with Fournier J.

FOURNIER J.—The appeal in this cause is from a judgment rendered by the Court of Queen's Bench at Montreal, on the 18th of January, 1892, dismissing the appellant's petition demanding the nullity of the sheriff's sale (*décret*) made under a writ of *venditioni exponas* against the appellant's property.

Narcisse Bolduc, now represented by the defendant *en réprise d'instance*, Adolphe Véronneau, had obtained judgment against the appellant in the Superior Court at Montreal for the sum of $433.46 and costs.

A writ of execution *de bonis*, issued on the 10th August, 1875, was returned on the 25th October following indorsed a *nulla bona*, and the same day was issued a writ of *fieri facias de terris* which was

(1) 16 Can. S. C. R. 596.
(2) 15 Rev. Leg. 44.
(3) M. L. R. 3 S. C. 135.
(4) 16 Rev. Leg. 14.
(5) 1 Rev. Leg. 641.

returned on the 20th March, 1876, in obedience to an order of the Honourable Mr. Justice Rainville, granted upon a *requête civile* presented by the appellant against the judgment of the Superior Court of the 28th November, 1874.

On the 30th June, 1876, the *requête civile* was dismissed by the Superior Court.

On the 8th July, 1876, the then attorney of the plaintiff taxed *ex parte* his bill of costs upon the contestation of the said *requête civile* and upon the back of the said bill asked for a fiat for a writ of *venditioni exponas* returnable on the 7th September, 1876, addressed to the sheriff of Bedford. This writ was issued by the prothonotary without any order of the court.

After two notices in the *Official Gazette* and one publication at the church door of St. Valérien de Milton, the parish in which the appellant's property is situate, the said property was sold by the sheriff, and adjudicated to the plaintiff, Narcisse Bolduc, on the 17th August, 1876, for $55, which sum was insufficient to cover the sheriff's costs.

On the 23rd February following the appellant presented to the Superior Court a petition *en nullité de décret* to have the sale of his property declared null and illegal for the following reasons:

1. Because no notice of the said sale had been given to him.

2. Because the said writ of *venditioni exponas* was irregular, illegal and null and did not state what notices the sheriff should give before proceeding to the sale.

3. Because the said sale had been made before the expiration of the delay fixed by law, and without the notices and publications mentioned.

4. Because the said sale was tainted with fraud and fraudulent acts on the part of the plaintiff and, to his knowledge, to prevent the making of bids.

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5. Because the proceedings adopted to arrive at the *décret* and at the sale and adjudication of the said property are irregular, null, illegal and void.

The only grounds relied on by the appellant in this court in support of his demand for nullity, are the following:

1. The premature issue of the writ of *venditioni exponas*, for an amount including costs, which were not yet due and which had not yet been regularly taxed. 2. The said writ was issued by the prothonotary without an order of the court; no notice of the issue of the said writ or of the sale, had been given to the appellant.

Being of the opinion that the issuing of the writ of *venditioni exponas* by the prothonotary without an order of the court or judge is a sufficient ground for the decision of this case I need only deal with that point.

It is evident that the Code of Procedure has not placed the issuing of this writ upon the same footing as ordinary writs of summons, of execution and others. With regard to the latter the prothonotary is specially authorized to issue them. Art. 44 C. P. C. says:— "Writs of summons are issued by the prothonotary, upon the written requisition of the plaintiff." Art. 46. "They are attested and signed by the prothonotary." Art. 222. "Parties are summoned to answer interrogatories upon articulated facts, by means of a process issued in the name of the sovereign by the prothonotary." By art. 545 the writ of execution is attested and signed in the same manner as original writs, and must bear the seal of the court. Art. 633. "The seizure of immoveables can only be made in virtue of a writ, clothed with the same formalities as writs of execution against movables," &c.

In the case of all the above mentioned writs the authority to issue them is given specially to the

prothonotary. With respect to the writ of *venditioni exponas* no such authority is given to him.

In the present case the day fixed for the sale of the immovables of the appellant by the notices given under the writ *de terris*, and the day upon which it was returnable, having passed the said writ had lapsed. The sheriff could not proceed further and the prothonotary, there being no provision in the code to that effect, had no power to decree the sale of the property. To the court alone then belongs the power of ordering the sale under a writ of *venditioni exponas*, in accordance with articles 653, 662 and 663 of the Code of Procedure.

Art. 653 obliges the sheriff, notwithstanding any opposition to the seizure (here *requête civile*) or sale of immovables or rents, to continue the publication above prescribed, but he cannot in such case proceed with the sale without an order from the court. In the present case the *requête civile* had the same effect as an opposition, and the sheriff continued his publications as he had been authorized to do. But the writ having lapsed he could not, as that article says, proceed with the sale without an order from the court. These positive words show clearly that an order for the sale can only be given by the court and not by the prothonotary. The sheriff's duty was then governed by art. 662 which provides that when oppositions have not been decided until after the day fixed for the sale he can only proceed to sell under a writ of *venditioni exponas* and in accordance with the conditions therein contained.

Art. 663 also shows the necessity for the order of the court for the issue of the writ of *venditioni exponas* by declaring that this writ shall "contain, moreover, such other conditions as the court has directed respecting the sale of the immovable or the rent." It is evident then that the order to issue this writ must be asked of

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the court, and that the court alone can grant it, since the writ must contain the conditions upon which the judge may think proper to order the sale.

These several provisions of the code of civil procedure clearly establish that the court alone has power to order a writ of *venditioni exponas* to issue, as has been decided in the Court of Queen's Bench at Montreal in the case of *Bissonnette* v. *Laurent* (1). This decision was followed in the case of the *Trust & Loan Co.* v. *Monbleau* (2).

The respondent has contended that the appellant could not invoke this jurisprudence because it was adopted some time after his petition *nullité de décret.* But this jurisprudence is nothing else than the law itself, and settles nothing but what was already contained in the articles of the Code of Civil Procedure. There has been no change in the law in force at that time, and why should we be now asked to apply to this case an irregular practice, and one which is contrary to the text of the law? To support this contention it is pretended that the appellant should have specially alleged this ground in his petition *en nullité.* This ground was one of law, and the want of an order of the judge to issue the writ, appearing on the face of the record, is sufficiently alleged twice, viz.: in the 2nd and 5th reasons in his petition *en nullité de décret.* In the 2nd he alleges that the writ of *venditioni exponas* is illegal, irregular, null and void; and in the 5th he alleges that all the proceedings adopted to arrive at the sale and adjudication of his property are irregular, illegal, null and void. There are, moreover, a number of other allegations complaining of the nullity of the writ upon which the court below ought to have pronounced judgment. But the court seems to have con-

(1) 15 Rev. Lég. 44.

(2) M. L. R. 3 S. C. 135.

sidered the irregular and erroneous practice relied upon by respondent, as having the force of a law.

We cannot admit that any practice, even long established but which is contrary to law, should be followed even when it has been sanctioned by a judicial decision. The duty of a judge is to disregard such a practice and to be guided solely by the text of the law.

For these reasons I am of opinion that the writ of *venditioni exponas* in virtue of which the appellant's property was sold is null and void, and therefore that the appeal in this case should be allowed with costs.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed for the reasons given by the court below.

GWYNNE J. was also of opinion that the appeal should be dismissed for the reasons given by the court below.

SEDGEWICK J. concurred with Fournier J.

Appeal allowed with costs

Solicitors for appellant: *Mercier, Gouin & Lemieux.*

Solicitors for respondent: *Taillon, Bonin & Pagnuelo.*