HERBERT MILLAR ELLARD (DEFENDANT) ..... } APPELLANT;

AND

DAME ELLEN MILLAR (PLAINTIFF) ..... RESPONDENT.

1929
*Oct. 16.
*Dec. 9.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Practice and procedure—Pleadings—Res judicata—Dispositif—Object of the judgment—Necessary consequence of the judgment—Action to account—Promise of sale—Arts. 1241, 1478, 1536, 1537, 1907 C.C.—Arts. 215, 571 C.C.P.

As a rule, under Quebec law, the authority of *res judicata* applies only to the *dispositif* or, in the language of the code (art. 1241 C.C.), "to that which has been the object of the judgment"; but it will also result from the implied decision which is the necessary consequence of the express *dispositif* in the judgment. In this case, upon an action previously brought, a final judgment between the same parties had annulled two deeds for the reason that the annuity thereby provided should have been $2,000, instead of $800. Although the *dispositif* of the judgment stated that the action was maintained "so far as the annulment of the deeds was prayed for," that involved a determination of the true amount of the annuity as being $2,000, which was the same question as that sought to be controverted in the present case; and such question was concluded as between the parties by the judgment in the first case.

Where sums pertaining to the administration by one party of the business and affairs of the other party have, through the course of dealing between the two, become bound up with items of debit or credit derived from other sources, such as annuities, salary, farm produces, etc., so that, during the period of administration, charges offset ad-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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vances or payments of money and so on: it is not open to either of the parties to sue on a single transaction or for a specific sum of money. The recourse is by action to account. The account must be discussed as a whole, a balance must be struck and such balance alone may be awarded to the party entitled to receive it.

Art. 1536 C.C. which provides that "the seller of an immoveable cannot demand the dissolution of the sale by reason of the failure of the buyer to pay the price, unless there is a special stipulation to that effect" applies in the case of a promise of sale accompanied by tradition and actual possession (Art. 1478 C.C.)

APPEAL and cross-appeal from the decision of the Court of King's Bench, appeal side, province of Quebec, varying the judgment of the Superior Court, Martineau J., (who had awarded the respondent the sum of $12,400), and maintaining the respondent's action for $10,000, for annuities.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

J. W. Ste-Marie K.C. for the appellant.

H. Aylen K.C. and *J. A. Aylen* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appeal is from the judgment of the Court of King's Bench (appeal side) of the province of Quebec modifying the judgment of the Superior Court sitting in the district of Hull from which both parties had appealed to the Court of King's Bench. The respondent has also given notice of cross-appeal to this court.

The respondent is the widow of the late Joshua Ellard, in his lifetime merchant of the township of Wright, who died on March 24, 1916. Under the last will and testament of her husband, she was made his universal and residuary legatee. After his death she continued to carry on his business as a general merchant and is still carrying it on.

The appellant is the son of the respondent and of the late Joshua Ellard. Before the death of his father, he was already managing the business and continued so to do until the month of March, 1919, when he requested his mother to accept his resignation.

Matters however got to be unsatisfactory and the appellant was induced to assume once more the management of his mother's interests. The agreement arrived at was reduced to writing at Gracefield on July 4, 1919.

It begins by stating that the respondent

> requires the assistance, advice and services of the said Herbert Millar Ellard in the administration of the said estate * * * and also in the administration of her personal affairs

and Herbert Ellard agrees to give them on the following terms: (1) He is to have "full control, care and management of the property, business and affairs" of Mrs. Ellard during her lifetime; (2) he is to have a power of attorney, irrevocable for five years, but subject to renewal at his own option, with "the most ample powers"; (3) Mrs. Ellard agrees to pay him $100 per month as salary for his services; (4) Mrs. Ellard agrees to convey to Herbert Ellard, on or before the 1st October, 1919, the properties known as the Victoria and Pickanock farms, save and except certain pieces of land therein described and also save and except the homestead with two acres of land adjoining, the store, hotel and mill properties

> together with such areas of land in connection with each of the said properties as will best serve the requirements of each of the said properties from the point of view of ultimate sale, rental, or other disposal thereof

and Herbert Ellard is to cause a proper survey to be made thereof. (5) Then comes paragraph 6 of the agreement which should be recited verbatim, as it affords the main ground for this litigation:

> 6. In consideration of the agreement by the said Ellen Millar to convey to the said Herbert Millar Ellard the properties hereinabove mentioned, the said Herbert Millar Ellard agrees to pay to the said Ellen Millar, during her lifetime, an annuity of $2,000, whereof $800 per annum shall constitute a first charge upon the aforesaid properties and $1,200 thereof to constitute a first charge upon trading and other operations hereby placed under the control, care and management of the said Herbert Ellard, it being understood that all profits derived from the said trading or other operations, in excess of the $1,200 will belong absolutely to the said Ellen Millar.

(6) Herbert Ellard agrees to render annually, on the first day of August, a statement, duly audited and certified by a chartered accountant, of his management of Mrs. Ellard's affairs.

(7) Finally, it is stated that the agreement cancels a donation made by Mrs. Ellard to Herbert Ellard in 1917.

In order to carry out this agreement, so far as concerned the demarcation of the properties conveyed, the appellant

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caused a deed to be prepared, which the respondent signed on the 23rd June, 1920; but, as the lots in the said deed were not described by their official cadastral numbers, a further deed to cover this insufficiency in the description was signed by the respondent on the 14th March, 1921.

In both of these deeds the consideration provided for in the agreement of 4th July, 1919, was fixed at an annuity of $800.

On the 27th September, 1923, the respondent revoked the power of attorney she had given to the appellant.

On the 22nd January, 1924, the respondent brought an action against the appellant praying that the agreement of 4th July, 1919, and the deeds of 23rd June, 1920, and 14th March, 1921, be set aside on the ground of fraud in securing the same.

The Superior Court maintained the action *in toto*, but the Court of King's Bench found that

ledit acte du 4 juillet 1919 n'est annulable pour aucune des causes ou raisons invoquées par la demanderesse; que cette dernière ne montre pas qu'elle a valable raison de s'en plaindre; et qu'il s'en suit que, quant à cet acte-là, sa demande aurait dû être rejetée.

The agreement made in Gracefield on the 4th July, 1919, was therefore upheld by the appellate court. A further appeal to this court by Mrs. Ellard against the validity of the agreement proved unsuccessful.

With respect to the two deeds however, the judgment of the Superior Court was confirmed by the Court of King's Bench and the decision of that court was not appealed from.

The result was that Herbert Ellard still required a deed from his mother to obtain proper conveyance of the properties mentioned in the Gracefield agreement. On the other hand, he had yet to account for the management of his mother's property, business and affairs. (See judgment of this court in the first case between the same parties) (1).

The parties unfortunately were unable to come to an understanding and Mrs. Ellard brought this second action asking that, unless Herbert Ellard accepted the descriptions set out in a deed, which she tendered and which she declared her readiness to sign, the respective parts of the

(1) [1927] 2 D.L.R. 102 at p. 112.

lots which she was entitled to retain and the parts her son was entitled to receive be defined by the court. The action also claimed $15,500 for annuities then due as the consideration of the conveyance and asked that, in case Herbert Ellard failed to pay this or such other sums as may be awarded, the agreement of 4th July, 1919, be set aside and Mrs. Ellard be relieved from all obligation to convey; and that, in that case, Herbert Ellard be ordered to deliver to Mrs. Ellard the properties of which he had taken possession and to pay $15,500 for the enjoyment thereof as well as for the value of pulpwood by him cut and removed therefrom.

Herbert Ellard pleaded in substance that on the 18th October, 1919, in accordance with the Gracefield agreement, he had caused a survey to be made of the parcels or tracts of land Mrs. Ellard had agreed to convey to him. A description of the lots in conformity with the survey was inserted in the deeds of 23rd June, 1920, and 14th March, 1921, but these had been set aside by the courts, for reasons having nothing to do with the survey itself. He thought this survey correctly defined the lots and was always willing to sign a deed accordingly, but Mrs. Ellard refused to accept it. He was still ready to do so, but would not sign the deed tendered by Mrs. Ellard, because the description of the lots widely departed from the agreement. Herbert Ellard further pleaded that until he secured a proper deed from Mrs. Ellard, he could not be called upon to pay her the annuities which, at all events, since she had revoked his power of attorney in September, 1923, amounted only to $800 and not to $2,000 per year; that immediately after the revocation of the power of attorney he had paid Mrs. Ellard $1,733.35, in full of all that was then due to her and she had accepted the amount; that from then on, he had regularly tendered to her payments on the basis of $800 a year, which she had refused. He denied Mrs. Ellard's right in any event to the cancellation of the agreement of the 4th July, 1919, because of the absence in it of any resolutory clause.

The trial judge found that Mrs. Ellard was not entitled to the parcels of land claimed by her, and he proceeded to

> fix and determine * * * the parts of said lots that (she) was entitled to receive and the parts thereof that (Herbert Ellard) was entitled to retain

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under the agreement. He also found that the true amount of the annuity was $2,000, to be paid to Mrs. Ellard during her lifetime, and not $800 as was contended by Herbert Ellard. He accordingly gave judgment on that basis for seven annual payments, less however a sum of $1,600 which he held to have been paid by the son in the interval. He dismissed all the subsidiary conclusions of the action. A deed embodying these findings was drafted by the judge himself and annexed to his judgment as representing the conveyance which Mrs. Ellard ought to sign.

The litigation in appeal centres around the correctness of the deed so drafted by the Superior Court.

The boundaries of the parcels of land to which each party is entitled are no longer in dispute. They were confirmed by the Court of King's Bench and they are now accepted by both the appellant and the respondent. But the parties still persist in every one of the other contentions they put forward at the trial.

The Court of King's Bench was divided on what has now become the main question in the case: the total amount which the appellant must pay to the respondent. Three of the judges of appeal, forming the majority, were of opinion that the annuity was correctly fixed by the trial judge at $2,000, but they thought the respondent was barred from recovering the whole of the arrears of her rent because of the prescription of five years which, they held, applied in this case under arts. 2188, 2250 and 2267 of the Civil Code. For that reason, they reduced the amount of the recovery to $10,000, although they disallowed the credit of $1,600 accepted by the trial judge.

Of the two remaining judges, one (Hall J.) would have declared that the stipulated annuity was only $800 and that the yearly balance of $1,200 was to be paid Mrs. Ellard out of the profits of the store, which Herbert Ellard guaranteed to the extent of that sum. He discussed at length the accounts between the parties, including the item of $1,600 allowed by the trial judge, and came to the conclusion that the real balance due by the appellant up to the day of the institution of the action was $4,400.20. Yet another calculation was made by the fifth judge (Cannon J.), who thought that the payment of $1,733.35 made by Herbert Ellard to his mother, after the revocation of the

power of attorney, should be regarded as final up to that date and who would therefore have computed the arrears of annuity as of that date (September, 1923), with the result that, according to him, the total amount due was $9,066.87, including that sum of $1,733.35.

All the judges of appeal agreed that Mrs. Ellard's grievances against the deed drafted by the trial judge were not to be entertained and they concurred with him in dismissing all the subsidiary conclusions of the action. In fact, the practical result of the appeal, on both sides, to the Court of King's Bench was a reduction of $2,400 from the amount awarded to Mrs. Ellard.

The same questions, except that concerning the demarcation of the lots, were again raised before this court.

On the first question, i.e., the annuity payable by Herbert Ellard, we think, like the respondent, that there exists *res judicata* and that the whole discussion is concluded by the judgment of the Court of King's Bench in the first case between the same parties.

In that case, as already stated, Mrs. Ellard sought the annulment of the agreement of 4th July, 1919, and of the two deeds respectively dated the 23rd June, 1920, and the 14th March, 1921, executed for the purpose of carrying out the agreement. The *dispositif* of the judgment annulling the two deeds merely stated that the action was maintained

pour ce qui concerne les dits actes de vente du 23 juin 1920 et du 14 mars 1921

but one of the points discussed was that Herbert Ellard,

depuis qu'il a obtenu de (Mrs. Ellard) ledite acte de vente du 14 mars 1921, ne se prétend plus tenu envers elle qu'à une rente viagère de $800 par année.

The consideration stipulated in the deeds was $800 instead of $2,000 per year and they were annulled for that reason as appears by the following *motif* of the judgment:

Considérant que la cause ou considération de la vente telle qu'exprimée dans ces deux actes de vente, n'est pas celle dont les parties étaient convenues; que par l'acte du 4 juillet 1919, la demanderesse avait stipulé du défendeur, comme considération de la vente qu'elle s'engageait à lui faire, une rente viagère de $2,000 par année; qu'au lieu de cette rente, ce n'est plus qu'une rente de $800 par année qui figure, comme considération de la vente, dans lesdits actes de vente; que ce changement a été fait sans le consentement de la demanderesse et hors sa connaissance; que la demanderesse n'a pas lu ces actes et n'en a pas eu lecture avant de les signer; * * * qu'elle aurait sûrement refusé de signer, si elle eût su que lesdits actes de vente ne faisaient mention que d'une rente de $800 au lieu de celle de $2,000 qu'elle avait stipulée; * * * et que, pour

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cette raison, la demanderesse a le droit d'être relevée du consentement et de la signature qu'elle a donnée.

As a rule, under Quebec law, the authority of *res judicata* applies only to the *dispositif* (3 Garsonnet, Procédure, p. 239, no. 465 and note 13; 7 Larombière, ed. 1885, no. 18; 20 Laurent, no. 29; 8 Aubry & Rau, p. 369) or, in the language of the code (art. 1241 C.C.), "to that which has been the object of the judgment." In this case, the object of the judgment was no doubt the annulment of the two deeds. But the judgment "involved a determination of the same question as that sought to be controverted" in the present litigation (Spencer Bower on Res Judicata, p. 9), viz.: the amount of the annuity. The reason for the annulment of the deeds was that the consideration of $800 per year there expressed was not in conformity with that of $2,000 per year stipulated in the agreement. Clearly that implied a decision that the true amount of the annuity was $2,000.

Res judicata will result from the implied decision which is the necessary consequence of the express *dispositif* in the judgment (Cass. 22 March, 1882; S. 83, 1, 175: Cass. S. 1907, 1, 397; S. 1910, 1, 135).

Lacoste, a foremost authority on the subject, lays down the following rules:

La règle d'après laquelle l'autorité de la chose jugée ne s'attache pas aux motifs doit être écartée lorsque les motifs font corps avec le dispositif, lorsque, selon l'expression de la Cour de cassation, ils sont nécessaires pour soutenir le dispositif.

Souvent, en effet, le dispositif ne contient qu'une partie de ce que le juge a décidé, et l'autre partie se trouve dans les motifs. C'est ce qui se produit à chaque instant lorsque le juge doit statuer successivement sur deux points et que la solution donnée pour le second est la conséquence nécessaire de celle qui est donnée pour le premier; le juge met la première solution dans les motifs sous forme de considérant, et le dispositif ne renferme que la seconde. Ainsi le demandeur se prétend le fils de telle personne décédée et réclame à ce titre la succession; plus d'une fois le tribunal ne constatera la filiation contestée que dans les motifs, et le dispositif contiendra simplement l'attribution de l'hérédité. Il est manifeste que, dans les cas de ce genre, l'autorité de la chose jugée ne doit pas s'attacher uniquement au dispositif; le jugement contient, en réalité, deux décisions, l'une renfermée dans le dispositif, l'autre insérée dans les motifs.

(Lacoste, De la chose Jugée 3e éd., pp. 92 & 93, & 226-227, et nombreuses autorités en notes.)

Posons donc en principe, que si un droit a été affirmé ou nié dans un procès, il y aura identité d'objet si dans un nouveau procès on remet en question le même droit, alors même que ce serait pour en tirer une autre conséquence qui n'a pas été déduite dans le procès originaire." (Lacoste, p. 103, no. 252.)

La règle à suivre est celle-ci: (says Baudry-Lacantinerie (3e éd. vol. 15, no. 2677, p. 357), la seconde demande devra être rejetée toutes les fois qu'elle tend par son objet à mettre le juge dans l'alternative, ou de se contredire, ou de confirmer purement et simplement la sentence qu'il a déjà rendue.

A similar view of the law is expressed in Juris-Classeur Civil (vo. Contrats—Obligations en général—Div. 155, art. 1351, nos. 57 et 107):

57.—A. Identité d'objet.—L'objet de la demande est le bénéfice juridique immédiat que l'on se propose d'obtenir en la formant.—Pour qu'il y ait identité d'objet, il faut donc que les deux instances portent sur le même droit, ou que l'une d'elles porte sur un droit qui fait essentiellement partie intégrante de celui au sujet duquel le tribunal s'est déjà prononcé de manière définitive. Dans ces cas, en effet (et c'est le critérium de l'identité d'objet), le juge serait mis, par le nouvelle demande, dans l'objection ou de confirmer ou de contredire la première.

107.—Mais il ne faut pas confondre l'omission avec la décision implicite (V. supra, n. 47). La première laisse non résolu le point omis qui peut donc faire l'objet d'une nouvelle demande; la seconde, qui découle nécessairement de la solution exprimée, participe logiquement de son autorité, puisqu'elle ne pourrait être remise en question sans remettre également en question la décision qui l'impliquait.

Reference might also be made to the judgment of Lamothe C.J., then Chief Justice of the province of Quebec, in *Ville de St. Jean* v. *Quinlan & Robertson* (1), and to the decision of the Quebec Court of Queen's Bench in *Stevenson & The City of Montreal & White* (2), confirmed by this court (3).

We must therefore hold that the judgment delivered on the 23rd February, 1926, by the Court of King's Bench of Quebec constitutes *res judicata* as to the amount of the annuity payable by the appellant to the respondent.

Of course the appellant argues that the revocation of his power of attorney had the effect of reducing the annuity. This was a new contention not apparently raised in the first trial and, at all events, not decided in the judgment just referred to. The power of attorney was revoked in September, 1923. The first action was brought only after that date, but the fact of the revocation could not be urged in support of the two deeds executed long before the revocation. The appellant is right in saying that there is not *res judicata* as to this point, but he cannot derive any benefit from that fact. He acquiesced in his dismissal as

(1) (1920) Q.R. 30 K.B. 189, at p. 191.

(2) (1896) Q.R. 6 Q.B. 107.

(3) (1897) 27 Can. S.C.R. 593.

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manager of the business and affairs of Mrs. Ellard. Whether he could have made the dismissal a ground for repudiating the whole agreement is not in issue. He elected to proceed with the balance of the agreement as it now stands and to remain in possession of the farms and other properties acquired under the agreement. He must pay the price stipulated therefor. That he should remain manager of the business was no part of the consideration of the conveyance, nor was it made by him a condition for his agreeing to pay the annuity of $2,000.

This disposes of the appellant's objections against the deed drafted by the trial judge. Those put forward by the respondent will be discussed when we come to consider the cross-appeal.

There remains to establish the amount due by the appellant when the action was brought and which gave rise to such a diversity of opinion in the courts below.

For this, it is necessary to refer to the course of dealing between the parties.

When Herbert Ellard undertook the management of Mrs. Ellard's "property, business and affairs," he was to receive a salary of $1,200 a year for his services. On the other hand, for the conveyance of the farms, etc., he agreed to pay "an annuity of $2,000." Under the agreement, his salary was payable at the rate of $100 per month. No mention was made of a date when the annuity was to be paid and, therefore, the first instalment became due on the 4th of July, 1920, being one year after the date of the agreement. It may be pointed out that, unless Herbert Ellard received his salary during the year, compensation between it and the annuity took place *pro tanto* at the expiration of each year and the only sum then due by him to his mother would be the balance of $800.

The evidence shews that Mrs. Ellard did not make to Herbert Ellard monthly payments of his salary and that Herbert Ellard did not pay the annuity all at once and in a lump sum at the end of each year, while his management lasted. Instead of so doing, they

> opened up an account in the ledger for (Mrs. Ellard) as she got monies and charged it to her, and (Herbert Ellard) had (his) own personal account in the ledger and he charged (himself) up with the $800 per year and credited (himself) with his salary.

He did not receive his salary. It would only "be credited into the account * * * and the credit was left lying

there." In the same way he credited his farm produce delivered to Mrs. Ellard's store or hotel. He would take money from time to time and have it charged to the account. So would Mrs. Ellard ask and receive odd sums of money and have it charged in the same way. These accounts were kept by different bookkeepers in the employ of the estate, outside of Herbert Ellard, and most of the entries were made by them. This method of dealing went on from the moment that Herbert Ellard took charge of Mrs. Ellard's affairs until the revocation of his power of attorney, or from the 4th July, 1919, until the 27th September, 1923. It was to the knowledge and with the consent of both parties.

The accounts were in the books of the estate and copies thereof were filed in the case. They shew that, in the fall of 1923, when Herbert abandoned the management, there was a balance of $1,733.35 due Mrs. Ellard. The appellant "squared up his account and went down to her and delivered her a cheque" for that amount, for which she gave him a receipt. The appellant accordingly claimed to have paid his mother up to the time of the revocation. The cheque of $1733.35 was only tendered back by Mrs. Ellard with the return of the writ of summons on or about the 2nd May, 1927, or more than four years later.

On this state of facts, it will be apparent that the payment of the salary or of the annuity and the several items pertaining to the administration by Herbert Ellard of the business and affairs of Mrs. Ellard were so bound up together that it would be unfair, not to say impossible, to deal with one without dealing with the other. Charges for farm produce or for salary offset advances of money or payments of annuity and so on. They were made part of one and the same account. As a consequence, it became no longer open to either of the parties to sue on a single transaction or for a specific sum of money, such as for the salary or for the annuity, for the period extending up to the revocation, but the recourse was necessarily by action to account. (*Reid* v. *Brack* (1); *Stephens* v. *Gillespie* (2); *Duhamel* v. *Dunne* and *La Banque Royale* (3).) Chief Justice Lamothe, in the latter case, said (p. 188):

(1) 5 R. de J. 100. (2) M.L.R. 7 Q.B. 289.
(3) Q.R. 31 K.B. 185.

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"Qui doit compte ne doit rien," dit une maxime souvent citée, ce qui veut dire que celui qui a droit de demander un compte n'a pas de créance liquide et exigible à ce moment-là, sa créance dépendant du reliquat qui sera établi sur la reddition de compte, si ce reliquat est en sa faveur, ce qui veut dire, de plus, que le rendant compte n'est, à ce moment, débiteur d'aucune dette connue et exigible.

Les principes que j'énonce ci-dessus sont élémentaires à mes yeux.

The trial judge picked out a single item of the accounts representing a sum of $1,600, and gave credit for it to the appellant. No doubt the evidence, clear and uncontradicted, amply justified the finding so made but, in the matter of accounting, individual items may not thus be singled out; the account must be discussed as a whole, a balance must be struck and such balance alone may be awarded to the party entitled to receive it.

The judgments of the Superior Court and the majority of the Court of King's Bench fail to follow this principle. For this reason, we think the amount awarded by these judgments is wrong. Having regard to the method adopted by the parties, the whole period covered by the management of Herbert Ellard is one for accounting. Without an account properly rendered and discussed, it is not possible to decide whether there is any sum due and by whom. Provision was made in the agreement for the rendering of an account. The respondent may yet avail herself of the stipulation. She may also make use of the accounts filed in the record by the appellant and bring an *action en réformation de compte.* It is to be hoped that this will not be necessary and that, the parties having now become better informed of their respective rights, will be able to come to terms.

We see no harm however, in adjudicating at once that the appellant must pay the sum of $1,733.35 acknowledged by him to be due to the respondent at the end of his administration. (Art. 571 C.C.P.) Upon payment thereof, he will be entitled to withdraw from the record the cheque he gave for that amount on the 24th September, 1923. Due credit of course would then have to be given to the appellant, in discussing the accounts, for the sum thus paid.

Having now disposed, at least so far as concerns this case, of the period during which the appellant was managing the affairs of the respondent, it becomes an easy matter to fix the amount owed by the appellant, independently of that period, up to the time of the institution of the action.

From September 24, 1923, to 4th July, 1924, the annuity represented an amount of $1,548. Further annuities of $2,000 each came due on the 4th July of the years 1925 and 1926, viz.: $4,000. In 1927, when the action was brought the annuity for that year was not yet due. We cannot in this action make any award in respect of it, nor of any other annuity accruing in the subsequent years, in the absence of an incidental demand on the part of the respondent. (Art. 215 C.C.P.)

The total amount due for annuities when the action was brought was therefore $5,548 to which, for reasons already stated, should be added $1,733.35, making a total sum of $7,281.35. As for interest, the courts below decided that it should run " from the date of service of the action " and no complaint was made by either party in that respect. In the above view of the case, the question of prescription, on which the majority of the Court of King's Bench based its judgment, does not arise and does not require to be discussed.

This disposes of all the points raised in the main appeal, and we may now turn to those submitted by the respondent on the cross-appeal.

The draft deed prepared by the trial judge contains the following stipulation:

> The above conveyed properties to the purchaser together with all buildings and real improvements thereon will be hypothecated in favour of the plaintiff for the payment of her annuity, but to the extent only of $800 per year.

This was approved by the Court of King's Bench.

The respondent contends that she never renounced any part of the privilege which would ordinarily secure the payment of her annuity and that the judgments below are wrong in requiring her to sign a deed whereby her privilege or hypothec over the properties would be limited to $800 a year.

Clause 6 of the agreement of 4th July, 1919 (already cited) provides in part as follows:

> In consideration of the agreement by the said Ellen Millar to convey to the said Herbert Millar Ellard, the properties hereinabove mentioned, the said Herbert Millar Ellard agrees to pay to the said Ellen Millar, during her lifetime, an annuity of $2,000, whereof $800 per annum shall constitute a first charge upon the aforesaid properties and $1,200 thereof, to constitute a first charge upon trading and other operations, etc.

We agree with the Superior Court and with the Court of King's Bench that this was a clear renunciation of part of

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the privilege given by law (Compare *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry Limitée* (1). No other purpose could be ascribed to the stipulation. In fact, unless it means a reduction of the privilege, it would lend colour to the contention of the appellant that the annuity was only $800 and that the balance of $1,200 was to be paid out of the earnings of the "trading and other operations."

The respondent further asked that in case the appellant should fail to pay the annuities that would be awarded, the agreement of 4th July, 1919, be set aside by reason of such default. The courts below have refused to grant such conclusions and the respondent complains of that part of the judgment.

The answer lies in article 1536 C.C. which provides:

> The seller of an immovable cannot demand the dissolution of the sale by reason of the failure of the buyer to pay the price, unless there is a special stipulation to that effect.

The agreement, it is true, is only a promise of sale, but the appellant took possession at once of all the properties defined in the judgment and has occupied them ever since. "A promise of sale with tradition and actual possession is equivalent to a sale" (Art. 1478 C.C.). Article 1536 C.C. applies to a case of this kind and, in the absence of any stipulation to that effect, the agreement cannot be set aside by reason of the failure of the appellant to pay the price. If it were not so the respondent would yet be precluded from securing the remedy she claims by force of art. 1907 of the Civil Code:

> Non-payment of arrears of a life-rent is not a cause for recovering back the money or other consideration given for its constitution.

On both these questions, therefore, we find ourselves in accord with the courts below.

Moreover, the draft deed for which we are now providing must be that which, according to the agreement, should have been passed on or before the first day of October, 1919. On that day the respondent obliged herself to supplement the agreement by a proper conveyance, but there was no corresponding and simultaneous obligation on the part of the purchaser to pay any part of the price. There was no cash payment to be made, the first payment of annuity would not be due until the 4th July, 1920. Even although, by force of circumstances, the deed will finally

(1) [1926] S.C.R. 655, at pp. 663 and 664.

be executed only after the date agreed upon, there exists no reason why it should, on that account, be different now from what it should have been then. We see no necessity for making in the deed any reference to a cash payment. All requirements will be met by modifying the draft deed so as to state the consideration as follows:

an annuity of two thousand dollars ($2,000) per year from and after the fourth day of July nineteen hundred and nineteen, payable by the purchaser to the vendor during her lifetime.

It follows that, saving the modification just mentioned, and consequential changes hereinafter indicated, the draft deed annexed to the judgment of the Superior Court should be approved.

The cross-appeal must accordingly be dismissed with costs.

On the main appeal, the judgment should be modified as indicated and the amount of the condemnation reduced to $7,281.35 with costs to the appellant here and in the Court of King's Bench.

In the draft deed annexed to the judgment of the Superior Court, we would strike out the clause reading as follows:

The present transfer and conveyance is so made by the vendor to the purchaser for and in consideration of an annuity of two thousand dollars ($2,000) per year from and after the fourth day of July nineteen hundred and nineteen, payable by the purchaser to the vendor during her lifetime, the vendor acknowledging to have received at the passing of the presents the sum of twelve thousand four hundred dollars ($12,400), being in full of said annuity to the 4th July, 1926;

and the following clause should be substituted for it:

The present transfer and conveyance is so made by the vendor to the purchaser for and in consideration of an annuity of two thousand dollars ($2,000) per year from and after the fourth day of July nineteen hundred and nineteen, payable by the purchaser to the vendor during her lifetime.

This however will not remove all difficulties in the path of the parties. The deed drafted by the Superior Court defines the lots which each party is entitled to receive and contains other stipulations in conformity with the agreement of 4th July, 1919; but it can take effect only if and when received before a notary after having been signed by both the appellant and the respondent. We should help the parties to work this out, and provide machinery, so far as we have the right to do it. (*Grondin* v. *Cliche* (1).)

(1) [1929] S.C.R. 390.

1929

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Rinfret J.

The party most interested in securing the deed is the appellant. He needs it for purposes of registration. The respondent did not require it to sue for the annuities. If it were otherwise, she could not recover under the present action. It devolves primarily upon the appellant to ensure the execution of the deed.

Unless this be done by mutual agreement and the deed be properly completed within one month from the present judgment, the appellant is authorized to cause to be prepared by a notary a deed similar to that drafted by the Superior Court, as amended by this court, and to sign it. He may then put the respondent *en demeure* to affix her own signature to the said deed; and, in default of her so doing within fifteen days after the *mise en demeure,* the appellant may again come before this court to apply for an order to the effect that the judgment be registered to all intents and purposes in lieu of and to take the place of a deed between the parties. In the meantime, the case will stand adjourned until the 2nd day of February, 1930, or such other day as may be fixed upon application by either of the parties.

Appeal allowed with costs.
Cross-appeal dismissed with costs.

Solicitors for the appellant: *Ste. Marie & Ste. Marie.*

Solicitors for the respondent: *Aylen & Aylen.*