1924
Feb. 20.

IN THE MATTER OF THE TREATY OF PEACE (GERMANY) ORDER 1920

BETWEEN

THE SECRETARY OF STATE OF CANADA, AS CUSTODIAN UNDER THE SAID TREATY ..... PLAINTIFF;

AND

ERNEST LAFONTAINE ..... DEFENDANT;

AND

G. A. LAFONTAINE ..... OPPOSANT;

AND

SAID PLAINTIFF CONTESTING.

Opposition—Affidavit in support—Function thereof—Quebec practice—Burden of proof.

Semble: That the sole function of the affidavit made at the end of and in support of an opposition and *afin d'annuler* pursuant to article 646 of the Code of Civil Procedure (Quebec) amending the old Article 584, is to authorize the sheriff or seizing officer to suspend proceedings without any order for stay of execution (sursis), and that being so,

(1) 8 Ex. C.R. 205, at 236.
(2) [1895] P. 49.
(3) [1893] A. C. 8.
(4) [1893] A.C. 38.

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THE SECRETARY OF STATE OF CANADA v. LAFONTAINE, ET AL.

Audette J.

where no evidence is adduced at trial on behalf of either party, the burden of proof being upon the opposant his opposition will be dismissed for want of proof.

OPPOSITION to set aside seizure of certain goods and chattels seized under execution.

February 16, 1924.

Opposition now heard before the Honourable Mr. Justice Audette at Montreal.

Joseph A. Mercier K.C. for plaintiff.

W. M. Mazur for opposant and defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. this 20th February, 1924, delivered judgment.

This is an opposition *afin d'annuler* filed by G. A. Lafontaine claiming the ownership of the goods and chattels seized at the business place or office of the defendant, Ernest Lafontaine, and advertised for sale. This place of business appears, under the bailiff's notice, to have been changed from Number 97 to Number 205 St. James Street, Montreal.

No evidence was adduced at trial on behalf of either party, both parties relying and resting respectively on the opposition and the contestation thereof as filed.

It was stated at bar that the present opposant is the defendant's father, and that the present opposition is in respect of the goods and chattels seized in the defendant's office as distinguished from those seized at his residence or domicile.

The defendant and opposant were duly served with the order fixing the trial and their counsel admitted service had been duly made.

The general rule by which the burden of proof rests on the opposant, as plaintiff, admits of no exception in the present case. Indeed, the burden of proving facts at issue lies on the party holding the substantial affirmative, and the substance of the issues raised by the pleadings must be satisfactorily proved.

Now, the only evidence on record supporting the allegations of the opposition in respect of the ownership of the goods and chattels seized is the affidavit by the defendant —(not the opposant). The well known rule of law that the best evidence must be adduced is more especially enacted in article 1204 of the Civil Code of the province of

Quebec, which states that the proof produced must be the best of which the case in its nature is susceptible. Secondary or inferior proof cannot be received unless it is first shown that the best or primary proof cannot be produced.

In the present case the affidavit at the end of the opposition, asserting ownership, is not even made by the opposant himself, but is made by the defendant, who on a previous occasion in the same case had stopped a sale under the same seizure by an opposition in his own name in which he contended that the very same goods and chattels should be released from the seizure *in his* favour, and the present opposition is only supported by the affidavit of the same defendant to the effect that the goods belong to the opposant. This affidavit on the defendant's opposition (which has already been dismissed) and that upon the present opposition, made by the same party, are therefore in direct conflict.

Moreover, the affidavit at the end of the present opposition is made pursuant to article 647 of the Code of Civil Procedure, which, according to the Report of the Commissioners in charge of the revision of the Code, enacts that an affidavit or sworn deposition be now always required to accompany oppositions, thereby abrogating article 584, C.P.C., which formerly allowed to replace this deposition by an order for stay (sursis).

Therefore it would seem that the sole function of the affidavit at the end of the opposition is to authorize the sheriff or seizing officer to suspend proceedings without any order for stay of execution (sursis). If that be the function of that affidavit the opposition remains unsupported by any evidence whatsoever on the merit.

Counsel at bar on behalf of the Crown even suggested that the opposant was not aware of this opposition, and that is one of the allegations of his contestation, but however possible or probable that may be, there is no evidence on the record in support of that view.

The opposition is frivolous, vexatious, embarrassing and, notwithstanding the affidavit to the contrary, I must find that it was made solely to delay the sale, and is therefore dismissed with costs for want of being supported by evidence.

Opposition dismissed.