1882
*Oct. 24.
1883
*April 30.

DAME ANN BAIN.....APPELLANT;

AND

THE CITY OF MONTREAL.....RESPONDENT.

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

35 *Vic.* (*P.Q.*), *ch.* 51, *sec.* 192—*Assessment for foot-paths—Validity of—Proof of error—Onus probandi—Voluntary payment.—Notice, want of.*

On the 31st May, 1875, under the authority of 37 *Vic.*, ch. 51, sec. 192, (P.Q.) (1), the City Council of the city of *Montreal* by a resolution, adopted a report from their road committee prepared on the 30th April previous, as amended by a report of their finance committee of May 27, 1879, recommending the construction of permanent sidewalks in the following streets (*inter alia*) *Dorchester* and *St. Catherine*. On the adoption of these reports, with which an estimate indicating the quantity of flag stone required for each street, and the approximate cost of the work to be made in each street, had been submitted, the city surveyor caused the sidewalks in said streets to be made, and assessed the cost of these sidewalks according to the front of the real estate owned by the proprietors on each side of the same, and prepared a statement of the same, which he deposited with

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*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

"(1) Sec. 192. It shall be "lawful for the council of the "said city to order, by resolution, "the construction of flagstone "or asphalt sidewalks, or street "grading in the said city, and "to defray the cost of the said "works or improvements out "of the city funds, or to assess "the cost thereof in whole "or in part, as the said council "may, in their discretion, deem "proper, upon the proprie- "tors or usufructuaries of the real "estate situate on each side of "such streets, public places or "squares, in proportion to the "frontage of the said real estate "respectively; and in the latter "case it shall be the duty of the "city surveyor to apportion and "assess, in a book to be kept by "him for that purpose, the cost "of the said works or improve-

the treasurer for collection. *D. A. B.* possessed real estate on *Dorchester* and *St. Catherine* streets, and did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving a notice from the city treasurer to pay within fifteen days certain sums, in default whereof execution would issue, *D. A. B.* paid, without protest, $946.25; and on the 29th Oct., 1878, paid a further sum of $438.90, and on the 14th November, 1878, without having received any notice, paid $700 on account of 1877 assessments.

In an action instituted by *D. A. B.* against the city of *Montreal*, to recover the said sums of money which she alleged to have paid in error that the assessment was invalid.

Held,—affirming the judgment of the Court below—(*Henry* and *Gwynne*, JJ., dissenting), that *D. A. B.* had failed, both in allegation and proof, to make out a case for the recovery of the assessment paid by her, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of a void assessment illegally extorted.

2. That the City Council in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 *Vic.*, ch. 51, sec. 192.

3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal.

"ments, or such part thereof as "the said council may have deter- "mined should be borne by the "said proprietors or usufructu- "aries, upon the said real estate, "according to the frontage there- "of, as aforesaid; and the said "assessment, when so made and "apportioned, shall be due and "recoverable, the same as all "other taxes and assessments, "before the Recorder's Court."

The 39 *Vic.*, ch. 52, sec. 7 amended the above sec. 192, of the 37 *Vic.* ch. 51, by striking out the words "flagstone or asphalt sidewalks" in the second and third lines thereof, and substituting the following in their stead, "sidewalks made of stone "or asphalt, or both together, or "of any other durable and per- "manent material, to the exclu- "sion of wood."

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APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) (1) confirming a judgment of the Superior Court for *Lower Canada*, sitting in the district of *Montreal*, which dismissed an action of the appellant *en répétition de l'indû* brought on the 8th January, 1879, whereby she claimed the recovery of an amount of $2,085.16, paid the respondent on account of a larger amount of $3,258, for which she has been assessed by certain assessment rolls made by the city surveyor, dated the 27th January, 1877, as being her proportion of the cost of flagstone footpaths laid by the city of *Montreal*, respondent, in front of her property in *St. Catherine* and *Dorchester* streets, in the city of *Montreal*, by and in virtue of a resolution of the city council of the 31st May, 1875.

The pleadings and facts sufficiently appear in the head note and the judgments hereinafter given.

Mr. *Barnard*, Q.C., and Mr. *Creighton* for the appellant:

There is no voluntary payment or acquiescence. The jurisprudence in *Lower Canada* on this point, which is of special application to the city of *Montreal*, is in the appellant's favor. *Leprohon* v. *The Mayor, &c of Montreal* and authorities cited (2); *Wilson* v. *The City of Montreal* (3); *Sutherland* v. *The Mayor of Montreal*, referred to by *Dorion*, C.J., in *Wilson* v. *The City of Montreal* (4); *The Corporation of Quebec* v. *Caron* (5); *Corporation de Rimouski* v. *Ringuet*, and *La Corporation de la Ville de St. Jean* v. *Bertrand*, cited in *De Bellefeuille's* edition C. C. L. C. (6). Civil Code of *Lower Canada* (7).

Moreover, this jurisprudence is based on undoubted

(1) 2 Dorion's Q. B. R. 221.
(2) 2 L. C. R. 180.
(3) 1 Legal News, 242; 3 Legal News, 282.
(4) 3 Legal News, 282.
(5) 10 L. C. Jur. 317.
(6) Under art. 1048, No. 819.
(7) Arts. 1047 et seq. Art. 1140.

authorities in the old French law. *Merlin*—Repertoire (1); *Merlin*—Questions de Droit (2); *Sirey*—Receuil Général (3); *Durieu*—"Poursuites en matière de Contributions directes (4)." See also,—The Budget Law of 1822 (5) which section has ever since been inserted in the annual budget.

This jurisprudence is also in accordance with the principle that the payment of a *jugement exécutoire par provision*, does not imply *acquiescement*. *Carré & Chauveau* (6); *Dalloz*—Jurisprudence Générale (7); *Rolland* de *Villargues* (8); *Sirey*—1867 (9).

The authorities cited by *Dorion*, C.J., in his notes, do not apply to the repetition of taxes, and are moreover contradicted by the following: *Laurent* (10); *Toullier* (11); *Delvincourt* (12); *Dalloz*—Jurisprudence Générale (13); *Rolland de Villargues* (14); Civil Code of *Lower Canada* (15).

The tendency of the jurisprudence both in *England* and *America*, is more favorable than formerly to the doctrine of coercion in law. *Union Bank* and the *Mayor* (16); *Peyser* and the *Mayor* (17); *Boston* and *Sandwich Glass Co.* v. *Boston* (18).

(1) Vs. "Restitution de droits indûment perçus." "Prescription," sec. 940. "Paiement des droits d'hypothèque, de Greffe, et de Contributions Indirectes."

(2) "Vente publique de meubles," sec. 2.

(3) 1867. *Douanes de la Réunion* contre *Lacaussade*. Cassation, 19 Août, 1867.

(4) Vol. I., pp. 399 and 400.

(5) Sec. 22.

(6) Edition Belge, Vol. III, p. 377, and notes.

(7) Vo. "Acquiescement," Nos. 35, 612, 866. "Obligations," No. 4549.

(8) Vo. "Contrainte."

(9) P. 61, 405 (Cour de Cassation, 28th May, 1867). Particularly authorities cited in note, and 1875, pt. 1, p. 84 (Cour de Cassation, 9th Dec., 1874); 1871, pt. 1, p. 233 (Cour de Cassation, 13th Nov, 1871); 1862, pt. 1, p. 1054 (Cour de Cassation, 26th Nov., 1861).

(10) Vol. 20, p. 391.

(11) Vol. 11, Nos. 70 and 71.

(12) Vol. 3, pp. 448 and 449 and notes.

(13) Vo "Obligation," Nos. 5546, 5550.

(14) Vo. Répétition de l'indû sec. 8, Nos. 58 & 59, p. 177.

(15) Art. 1214.

(16) 51 Barbour (N.Y.) 159. Reversed on Appeal 51 N.Y.R., 638.

(17) 70 N. Y. R. 497.

(18) 4 Metcalf (Mass.) 189.

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This is a "popular action," not one for the appellant's sole benefit. If the tax is null for one ratepayer, it is null for all, and the court will consider the inconvenience of multiplying suits. *Molson's Bank* and the *City of Montreal* and *Hubert* intervening (1); *Scholfield* v. *Lansing* (2); *Thomas* v. *Gain* (3).

Municipal Code of the Province of *Quebec*, as to proceedings to quash by-laws, art. 698, 42-43 *Vic.*, *Quebec*, ch. 53, sec. 12, first provision for contesting by-laws, &c., in the city of *Montreal*, by petition to quash.

The proceedings of the corporation respondent are without jurisdiction, because the statutory power does not apply to new streets. There was no power to repave or to appropriate materials already laid down. *Wistar* v. *Philadelphia* (4); *Hammett* v. *Philadelphia* (5); *The Washington Avenue* case (6); *Seely* v. *Pittsburgh* (7); *Town of Macon* v. *Patty* (8); *Board of Works Fulham District* v. *Goodwin* (9); *Lowell* v. *French* (10).

Notice to "repave" held not sufficient, where the assessment was for "paving." *State* v. *Jersey City* (11), cited by *Harrison*, Municipal Manual (12).

36 *Vic.*, ch. 48, sec. 467, cited *ibidem*, p. 561, "a sidewalk once made to be kept in good repair at the expense of the city."

If the power to substitute a new sidewalk existed, it should have been exercised after a principle of contribution applicable to the whole city had been laid down. *Town of Macon* v. *Patty* (13).

The council did not execute the authority, but delegated it. *Thompson* v. *Schermerhorn* (14); *Hyde* and

(1) 1 Revue Légale, 542.
(2) 2 Am. Corp. Cas. 538.
(3) 24 Am. Rep. 541.
(4) 21 Am. Rep. 112.
(5) 3 Am. Rep. 615.
(6) 8 Am. Rep. 255.
(7) 22 Am. Rep. 761.
(8) 34 Am. Rep. 451.
(9) 1 L. R. Ex. D. 400.
(10) 6 Cushing, 223.
(11) 3 Dutch (N.J.) 536.
(12) 4th ed. 565, note N.
(13) 34 Am. Rep. 451.
(14) 6 N. Y. Rep. 92.

Goose v. *Joyes* (1); *Powell* v. *Tuttle* (2); *Scholfield* v. *Lansing* (3); *Meuser* v. *Risdon et al* (4); *Bayley* v. *Wilkinson* (5); *Abrahams* v. *The Queen* (6); *Sedgwick* on Statutory Law (7); *Dillon* on Municipal Corporations (8).

The pretended subsequent ratification by the council, even if it existed, would be of no avail in law.

The state of *Maryland ex rel. The City of Baltimore* v. *Kirkley et al* (9); *Brady* v. *The Mayor* (10).

The resolution was uncertain. *Tufts* v. *The City of Charleston* (11); *Ex parte Jenkins* (12).

If the council has the statutory power to make resolutions applying to particular streets, the resolution in question is, under the circumstances unreasonable and unjust.

See *Lowell* v. *French* (13) wherein a wooden sidewalk was held to be a permanent one.

The following authorities show that if the resolution be unreasonable or unjust it will be set aside by the court as if utterly null and void: *Sedgwick*, Statutory Law (14); *Maxwell* on Statutes (15); *Hardcastle* on Statutes (16); *Kyd* on Corporations (17); *Angell* and *Ames* on Corporations (18); *Dillon* on Municipal Corporations (19); *Boone* on Corporations (20); *Arnold*, Law of Municipal Corporations (21); *Harrison's* Municipal Manual (22);

(1) 2 Am. Corp. Cas. 538.
(2) 3 Comstock, 296.
(3) 2 Am. Corp. Cas 538.
(4) 2 Am. Corp. Cas. 101.
(5) 16 C. B. N.S. 163.
(6) 6 Can. S. C. Rep. 10.
(7) 1874 ed., 397, 398.
(8) 2nd ed.,vol. 1, sec. 60, p.180, and note 2. *Ibid* vol. 2, sec 567, p. 667; and sec. 618, p.721 note.
(9) 2 Am. Corp. Cas. p. 425.
(10) 20 N. Y. Rep. 319.
(11) 2 Am. Corp. Cas. 469.
(12) 12 L. C. Jur. 273.
(13) 6 Cushing 233.
(14) 1874 ed. p. 397.
(15) Pp. 100 et seq.
(16) Pp. 151, 152.
(17) Vol. II, 107 and 155.
(18) 11th ed. sec. 347 et seq. 387.
(19) 2nd ed. vol. I, secs. 253, 256.
(20) Sec. 58.
(21) Eng. ed. 1875, p. 19.
(22) 4th ed. 242, note K.

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Stevens' Commentaries (1); *Cooley*, Constitutional Limitations (2); *Church* v. *The City of Montreal*, per *W. Dorion*, J. (3); *Co. of Framework Knitters* v. *Greene* (4); *Bosworth* v. *Hearne* (5); *Marshall* v. *Smith* (6); *Hall* v. *Nixon* (7); *Fielding* v. *Rhyl Improvement Commissioners* (8); *City of Bloomington* v. *Wahl* (9); *City of Boston* v. *Shaw* (10); *Clapp et al.* v. *The City of Hartford* (11); *Dunham* v. *The Trustees of Rochester* (12).

We also contend that the assessment is null: Because not in conformity with the resolution of the council and rely on—*The King* v. *Cunningham* (13); *Richter* v. *Hughes* (14); *Davison* v. *Gill* (15); *Whitchurch* v. *Fulham Board of Works* (16); *Pound* and Lord *Northbrook* v. *Board of Works for Plumstead* (17); *Swinford* v. *Keble* (18); *Sedgwick*, Statutory Law (19). Because there was no notice enabling parties to be heard against it: *Dillon* on Municipal Corporations (20); *Harrison*, Municipal Manual (21); *Nicholls* v. *Cumming* (22); *Maxwell* on Statutes (23); *State* v. *New Jersey* (24); *Stuart* v. *Palmer* (25); *Thomas* v. *Gain* (26); *The State* v. *The Mayor of Newark* (27); *Flatbush* Avenue case (28). And that a resolution or by-law may be attacked in incidental proceedings. See *Kyd* on Corporations (29); *Dillon* on

(1) 7th ed., vol. 3, p. 13.
(2) 3rd ed., 200.
(3) Reported in *Montreal Gazette*, 1st March, 1878.
(4) 1 Lord Raymond, 113.
(5) 2 Strange, 1,085.
(6) L. R. 8 C. P. 416.
(7) L. R. 10 Q. B. 152.
(8) L. R. 3 C. P. 272.
(9) 2 Am. Corp. Cas. 152.
(10) 1 Metcalfe 130.
(11) 2 Am. Corp. Cas. 117.
(12) 5 Cowen, 465.
(13) 5 East 478.
(14) 2 B. & C. 499.
(15) 1 East 64.
(16) I. L. R. Q. B. 240.
(17) 25 L. T. 463.
(18) 14 L. T. N. S. 771.
(19) P. 299 et seq.
(20) 2nd ed. 741, note 2.
(21) 1878 ed. 565, note C.
(22) 1 Can. S. C. Rep. 395.
(23) P. 325 et seq. and cases there cited.
(24) 4 Zabriskie 662.
(25) 74 N. Y. Rep. 183.
(26) 24 Am. Rep. at 540.
(27) 18 Am. Rep. 729.
(28) 1 Barbour 287.
(29) Vol. 2, p. 170.

Municipal Corporations (1); *Harrison* Municipal Manual (2); *Reg.* v. *T. B. Rose* (3); *Reg.* v. *Wood* (4); *Dunham* v. *The Trustees of Rochester* (5).

Then it is for the municipal corporation to show its authority. Appellant, having alleged that the by-law is illegal, null and void, is not obliged to specify the nature of the legal objections. Moreover respondent has recognized the principle that he is bound to justify.

Redfield on Railways (6); *Kyd* on Corporations (7); *Dillon* on Municipal Corporations (8); *Sedgwick*, Statutory Law (9); *Angell* and *Ames* on Corporations (10); *Cooley* on Constitutional Limitations (11); *Stephens* and the *Mayor, etc.*, of *Montreal* (12); *Patton* and the *Corporation of St. André d'Acton* (13); *Queen* v. *Bristol* and *Exeter Railway* (14); *The Sheffield* and *Manchester Railway* (15); *Hall* and *Nixon* (16); *Hoyt* v. *Saginaw* (17), *per Cooley*, J.

As to inconvenience to the corporation, it is no ground against so holding. *Swinford* and *Keble* (18); *Hall* and *Nixon* (19); *Hoyt* v. *Saginaw* (20).

Mr. *Rouer Roy*, Q.C., for respondent.

Mere apprehension of an impending distress warrant, threats to use legal remedies, do not make payment com-

(1) 2nd ed., vol. 1, sec. 353, p. 441.
(2) 4th ed. 242, note k.
(3) The Jurist 1855, p. 802.
(4) 5 E. & B. 58.
(5) 5 Cowan 465.
(6) 4th ed., Vol. II, 307.
(7) Vol. II., 164 to 167.
(8) 2nd ed., Vol. II, sec. 55, p. 173 *et seq* particularly note 1 *in finem* 176, and sec. 605, 706, and note 2 p. 707.
(9) 1874 ed., 303, 304, 306.
(10) 11th ed., sec. 366 p. 408.
(11) 1878 ed., 236 note 1.
(12) *Vide* p. 135 of printed Transcript in Privy Council Record.
(13) 13 L. C. Jur. 21.
(14) Hodges on Railways, 306.
(15) 2 Q. B. 978.
(16) 10 Q. B. L. R. 152.
(17) 2 Am. Rep. 79 & 80.
(18) L. T. N.S. 771.
(19) 10 Q. B. L. R. 152.
(20) 2 Am. Rep. 79 and 80.

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pulsory. Writ of execution must have issued. See *Dillon* on Mun. Corp. (1).

On the question of what is a voluntary payment, I rely on the following authorities:

The Collector v. *Hubbard* (2); *Supervisors* v. *Manny* (3); *Sumner* v. *First Parish* (4); *Stetson* v. *Kempton* (5); *Wright* v. *Boston* (6); *Preston* v. *Boston* (7); *Richmond* v. *Judah* (8); *Smith* v. *Readfield* (9); *Baltimore* v. *Lefferman* (10); *Gordon* v. *Baltimore* (11); *Taylor* v. *Board of Health* (12); *Town Council* v. *Burnett* (13); *Lee* v. *Templeton* (14); *Abbott* on Law of Corporations (15).

In the case of *Leprohon* v. *The Mayor, &c. of Montreal*, relied on by appellant, the city had no power to tax inspectors of potash, as was recognized by the defendants themselves. Payment was without consideration. Here, on the contrary, the power of the city council is admitted, and there is a consideration, viz., the benefit accruing from the improvement.

In the case of *Quebec* v. *Caron* payment was made in consequence of threatened violence, stoppage of water, action in damages, &c.

Re Wilson v. *City*, payment under protest, the appeal was solely on question of interest.

Re Sutherland v. *Mayor et al of Montreal.* Point not in issue; decided on different grounds.

Burroughs on Taxation (16) roll of assessment is to a certain extent judicial; when closed, equivalent to a judgment. Hence payment constitutes an acquiescence.

Rolland de Villargues (17).

(1) 2 Vol., 857, No. 751 and note 3.
(2) 12 Wall. 1, 12, 1870.
(3) 55 Ill. 160, 1870.
(4) 4 Pick. 361.
(5) 13 Mass. 272.
(6) 9 Cush. 233.
(7) 12 Pick. 7.
(8) 5 Leigh (Va.), 305, 1834.
(9) 27 Maine 145.
(10) 4 Gill. (Md.) 425, 1846.
(11) 5 Gill. (Md.) 231.
(12) 31 Pa. 73.
(13) 34 Ala. 400, 1859.
(14) 13 Gray 476.
(15) P. 876, No. 18.
(16) P. 666.
(17) Vo. Acquiescement and Répétition de l'indû, Nos. 7, 37, 53.

There is no vagueness or uncertainty about the resolution of council.

In adopting the reports of the committees, the city council has virtually determined: 1. That sidewalks should be laid; 2. In what streets; 3. To what extent in each street; 4. Of what material; 5. The maximum of the expense.

There has been no delegation in the sense of the authorities quoted by appellant.

The power given the council was to order (not to construct) the laying of footpaths. The term order implies the carrying out of the improvement by its committees and officers, the council having determined all that was required by the charter, where no direction was given as to dimensions of the work.

Dillon (1); *Cooley* on Const. Lim. (2).

By-law No 47, referred to in respondent's factum, vests city surveyor with control over sidewalks under the direction of the road committee; Legislature must be presumed to have had this by-law under its notice when it gave council power to order sidewalks, since our by-laws are public laws (3); *Hopkins* v. *The Mayor of Swansea* (4); *Dictum* of Lord *Abinger*. *Milne* v. *Davidson* (5).

The grounds of an action must be alleged with precision and clearness, so as to enable defendant to know how to answer. General allegations are of no avail (6).

(1) 1 Vol., 178, No. 58, note 1; p. 181, No. 60, and 2 Vol., No. 618,

(2) P. 205, note 1.

(3) 37 *Vic*, ch 51, sec. 127 (City Charter); 1 *Dillon*, No. 246, n. 1.

(4) 4 M. & W. 621, 640.

(5) 5 *Martin* (La.) 586, 1827.

(6) 1 *Jousse*, Ord. 1667, Tit. 1er; 1 *Thomine-Desmazures*, 159; 1 *Rodière*, Proc. Civ., 174, 285; 1 *Bioche*, Dict. proc. vo. Ajournement, Nos. 75, 76, 81. *Chauveau*, Dict. proc. vo. Exploit, *passim*. *Jouraal du Pal.* Rép. Gén. vo: Exploit, p. 134, Nos. 476, 481. 2 *Dalloz*, Dict. Jur. Gén. vo. Exploit, p. 528, No. 42, No. 507. 1 *Dalloz & Vergé*, C. Proc, p. 128, No. 2 Formalités intrinsiques, libellé, exposé des moyens. *Dalloz & Vergé*, C. Proc., p. 137, No. 355, libellé.

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Code Proc. (*Wotherspoon*), arts. 20, 50, 51, 144, 270, 320 and diss. on pleading by *Ch. J. Sewell* at p. 15 of same work, ed. 1880.

Rodier, Quest., p. 17: "Il faut que le défendeur con-"naisse ce qu'on lui demande, que le juge sache sur quoi "il a à prononcer, et que la sentence soit relative à la "demande."

The allegation in appellant's declaration that the assessment was null and void, did not authorize her to prove all sorts of pretended informalities, since she limited her grounds of action to the four points specified; otherwise, she would have been entitled to prove want of quality of the city surveyor, the irregularity of the council meeting, want of notice of that meeting, &c., and the alleging of the four specific different grounds could only be considered as a trap laid to surprise the good faith of the defendant.

The evidence must be confined to the issues: *Grant* on Corporations (1). The rule has invariably been adhered to in the Province of *Quebec*.

The *onus probandi* was on appellant: the respondent not bound to adduce evidence. "*Ei incumbit probatio qui dicit, non qui negat.*"

It would have been otherwise, if city had sued for the assessment: "*Omnia præsumuntur rite acta esse*" *Reniére* v. *Milette* (2); the trustees were plaintiffs, still *Ch. J. Lafontaine* adopted the maxim, "*Omnia præsumuntur, &c.*" *Hilliard* on Tax. (3); *Dillon* (4).

Nor can appellant invoke injustice to third parties, her action not having the character of an *action populaire*.

It was so decided *re The Mayor* v. *Stephens* (5):

(1) Ed. 1850, p. 312 and seq; 1 Taylor, ev., 7th Eng. ed. 283.
(2) 5 L.C. R., 87, 91.
(3) P. 295, sec. 14, 15.
(4) Vol. 2, p. 747, No. 650.
(5) Printed Transcript (Priv. C.) *in fine*.

The action was a mere personal action, in which he sought to be relieved from the distress upon his property, and to have damages for the illegal act of seizure. The judgment cannot have the effect of a judgment *in rem*, and must be construed to mean that the assessment was null and of no effect against the plaintiff.

Statute of *Quebec*, 42 and 43 *Vic.*, ch. 53, having been passed long after institution of the present case,—sec. 12 does not apply. *Cooley* on Tax. (1); *Cooley* on Tax. (2).

The discrepancy in the width of the sidewalks was not even alluded to, in appellant's action. The point is irrelevant and foreign to the issues.

Besides, the Charter did not require council to fix width, and they did not fix it; the city surveyor had control on this point, and, as observed by a witness, width varied according to sinuosities and irregularities of streets; moreover, the evidence on that point is, to say the least, ambiguous and uncertain.

Lastly, the appellant has seen the work done under her own eyes and never complained. *Hilliard*, Tax. (3); *Michie* v. *Corporation of Toronto* (4), *dictum* of *Draper*, C. J.; *Harrison*, Mun. Man (5); *People* v. *Utica* (6); *New Haven* v. *Fair Haven* (7); *Angell*, Highways (8).

On the question of notice. It is not a ground of the present action; therefore irrelevant.

Hence the maxim: "*Omnia præsumuntur*, &c." applies.

In the Province of *Quebec*, the rule is that where all the formalities prescribed by statute have been complied with, the proceedings are valid: and, should the appellant have thought of urging this ground of want of notice before the Superior Court, or in the Court of Appeals, she would have been told, as she was repeatedly on other points, that the question was not in issue,

(1) P. 153, n. 2.
(2) P. 155, n. 1.
(3) P. 384, sec. 70.
(4) 11 U. C. C. P. 385.
(5) Last ed. 565.
(6) 65 Barbour's R. 19.
(7) 9 Am. Rep. 399 & 405.
(8) P. 221, sec. 196.

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and, besides, that the statute did not require such a notice.

The knowledge of the appellant of the improvement being carried on opposite her property (where she resided) was a sufficient notice.

RITCHIE, C.J.:—

This was an action instituted by the appellant to recover $2,085, which she alleges to have paid by error, on account of a larger amount claimed by the city, under a special assessment for a flag-stone sidewalk laid in front of her properties in certain streets of *Montreal*. The appellant opposed the assessment on several grounds. The first of which is on the ground "that at the time the city caused the sidewalks to be constructed in front of her properties, she had good serviceable and permanent sidewalks which were removed by the corporation without accounting or making any allowance for the same; and also that the resolution of the council was too indefinite, as it did not determine the kind of stone, the width of the sidewalk, or the quality of the work.

I agree with Chief Justice *Dorion* in saying that the plaintiff has failed to establish her first ground of objection as well as the second. Had there been any objection taken at the time, the corporation had it in their power then to remedy any irregularities. I think it is too late now for this plaintiff to complain of uncertainty in the resolutions or irregularities in the assessment roll.

The city council had clearly under 37 *Vic.*, ch 51, sec. 192, as amended by sec. 7 of 39 *Vic.*, ch. 52, the right to "order by a resolution the construction of the sidewalks of stone or asphalt in the city, and to assess the costs thereof in whole or in part, as the council may in their discretion deem proper, upon the proprietor or usufructuaries of the real estate situate on each side of

said streets, public places, or squares, in proportion to the frontage of the said real estate respectively." And the city surveyor, under the same statute, had power to apportion and assess the costs of the said works or improvement, &c., upon the said real estate, according to the frontage thereof.

The improvements have been made in front of plaintiff's properties; she saw the work going on, and permitted it to go on, she is in the full enjoyment of such improvements, and after she has voluntarily paid the amount, without objection or protest, how can she, assuming the resolution may be too general, and that there may have been irregularities in the mode of assessment, ask the amount to be refunded to her on such grounds?

I do not think there was such error in the payment she made as would justify her under the laws of the Province of *Quebec* to raise now these objections. I think it is entirely too late, and I do not think she has given any valid reason why the amount expended for her benefit should be refunded.

STRONG, J :—

I am of opinion that this appeal must be dismissed. The payment made by the appellant was a voluntary one, made without any other pressure than that of a demand on the part of the corporation, there having been, so far as the evidence shows, no seizure of goods or other constraint. It certainly appears, according to the later authorities, differing in this respect from *Pothier* (1), that the action *condictio indebiti* can be maintained as well for the recovery of a payment made under error of law as for one made in error of fact (2), but ignorance or error of law is not to be presumed but must be proved.

(1) *Pothier, traité de l'action condictio indebiti*, No. 162.

(2) *Aubry et Rau* 4 *Tome* p. 729, authorities in note.

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In the present case the plaintiff has not in her declaration alleged that at the time of payment she was ignorant of the legal objections to the assessment which she now invokes, nor has she proved such ignorance.

There is, therefore, wanting an essential ingredient, both in allegation and proof, to the establishment of a right to the *répétition de l'indû* upon the ground of payment in error.

That a tax paid without compulsion or remonstrance is to be considered a voluntary payment, which cannot be recovered back upon mere proof of its illegality, is well established by numerous authorities in English law, and these, although they would not be conclusive, if error had been proved, are not the less relevant to show that the payment here must be considered a voluntary one, as distinguished from a payment after a distress or after the inception of legal process to enforce it. *Grantham* v. *City of Toronto* (1); *Dillon* on Municipal Corporations (2).

The plaintiff has therefore failed to make out a case for the recovery of the money, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax.

The reasons just stated are alone sufficient to warrant the dismissal of the appeal. But upon the other grounds stated in the "considerants" of the judgment under appeal and on the notes of the learned Chief Justice, it would seem impossible that the plaintiff could succeed. I can find nothing in the statute which limits the power of the city council to make a special assessment on the property owners for sidewalks of flag stones or asphalts in certain localities and yet to provide for the construction of wooden side-walks out of the general

(1) 3 U. C. Q. B. 212.
(2) Ed. 3, secs. 941, 942, 943. Rolland de Villargues Vo. Acquiescement.

rates. This being so, the only objection would be to the vagueness of the resolution and the correctness of the mode of proceeding,—but these would constitute mere irregularities which, although they might in a proper proceeding have entitled the ratepayers to have the assessment quashed, do not entitle a party who has paid the tax to recover the amount back as a payment of a void assessment illegally extorted (1).

It may be that the assessment was void by reason of the omission to give notice of the making of it to the proprietors, for although the statute requires no such notice, yet in a quasi-judicial proceeding, such as the imposition of a tax, sound rules of statutory construction require that the obligation of giving a notice is to be implied, but a sufficient answer to any objection founded on the invalidity of the assessment for want of notice has been given by the respondent's counsel in his supplementary factum; namely, "that it is not a ground of the present action and is therefore irrelevant."

For these reasons I am of opinion that the judgment of the Superior Court was entirely right, and the appeal therefrom was properly dismissed by the Court of Queen's Bench, whose judgment must be affirmed with costs.

FOURNIER, J.:—

I am in favour of dismissing the appeal for the reasons given by the learned Chief Justice of the Court of Queen's Bench, and by my learned brother *Taschereau*, whose judgment I have read.

HENRY, J.:—

The first question involved in the consideration of this case appears to me to be: whether the payments made by the appellant were in law such voluntary acts

(1) Dillon, Ed. 3, sec. 941, and cases there cited.

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on her part that she cannot now seek to recover them or any of them back in this action. In considering this legal proposition involving also the consideration of the evidence in the cause I have referred to, article 1047 of Civil Code, which provides as follows:

> He who receives what is not due him through error of law or fact, is bound to restore it, or if it cannot be restored in kind, to give the value of it.

The same provision will be found in article 1376 of the code *Napoleon*, and the authorities in *France* hold that the receiving party, in such a case, is bound to make restitution as well in case he became the receiver in good faith, as in bad—the duty to repay is imposed as soon as he learns that the demand for which the payment was made was illegal.

When therefore the repayment was demanded, if not before, the respondent was bound, under the authority just referred to, to repay the amount illegally paid, if such were the fact. If the tax in this case were illegal through irregularities of the respondent or otherwise, he was bound to know it, and ignorance of the law and what it required is no legal excuse or defence. The law is therefore plain as applicable to the circumstances, and the next inquiry is, necessarily, as to the evidence.

The first matter of proof in the proceedings, which formed the basis of the tax on the appellant, was the report of the road committee and of the finance committee of the city of *Montreal* which were approved of by the city council. Next, evidence that the sidewalks referred to in the reports were made, and that a notice was served on the appellant from the city treasurer, as follows:

> Take notice, that having failed to pay the above-mentioned sums within the time prescribed by public notice, you are hereby required, within fifteen days from the date hereof, to pay the same to me, at my office, together with the costs of this notice and service thereof

as below; in default whereof execution will issue against your goods and chattels.

(Signed) *James F. D. Black,*
City Treasurer.

Montreal, 27th Nov., 1877.
Costs 10c.
Notice 20c.

30 cents.

The ultimatum was, therefore, an execution to levy on the goods and chattels of the appellant if the sums demanded were not paid in fifteen days. The appellant may fairly be presumed to have known that the sidewalks had been made, but there is nothing in the evidence to show that she knew that she was to be called upon to contribute in the shape of a tax for the cost of them She, or her agent, had good reason to suppose that the city authorities had proceeded legally, and, under that impression, paid the several sums demanded from time to time, but further, she must also have felt that, rightfully or otherwise, she occupied such a position, that say or do what was in her power, she could not prevent the levy of the execution as threatened in the notice. She had, therefore, to adopt the only mode open to her of preventing it by the payment of the sums demanded. Payment under such circumstances cannot, therefore, be characterized as voluntary. She was as helpless to resist the threatened levy as an unarmed traveller would be when stopped by an armed robber who demanded his money, threatening the consequences of a refusal, and who would be glad to escape the consequences by handing over the money demanded, as she did. The payment might be considered voluntary in the one case as well as in the other. Besides, can we assume the payments in this case to have been made voluntary under the circumstances? What I would call a voluntary payment is one made after a full knowledge of all the facts. It is in no way shown

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that the appellant, when the payments were enforced from her, knew what the proceedings of the city authorities were; it is not shown that she knew of any irregularities having been committed, or that by the payments made she could be considered to waive. Parties who allege a voluntary payment must show that when such was made the maker of it thereby waived the objections which he subsequently relied on. There is nothing in the evidence to establish that position. The defence that the payment was voluntary is founded on the doctrine of estoppel by which a party, who by words or actions admits the existence of certain facts or circumstances, and thereby changes the position of another, is prohibited from saying that what he admitted was untrue. Here no such position can be taken. Besides, the article of the code to which I have referred draws no distinction between voluntary and involuntary payments, but simply enacts that "He who receives what is not due to him, through error of law or of fact, is bound to restore it." Besides the provisions in article 1047, we have that contained in article 1140:

Every payment pre-supposes a debt; what has been paid where there is no debt, may be recovered.

It provides that "there can be no recovery of what has been paid in discharge of a natural obligation." The latter provision does not apply to the circumstances of this case, and therefore leaves the first paragraph of the article to its full operation. Article 1214 is also applicable to our inquiry on another point. It declares that:

The act of ratification or confirmation of the obligation which is voidable, does not make proof, unless it expresses the substance of the obligation, the cause of its being voidable and the intention to cover the nullity.

The case of payments by the appellant of the taxes sought to be recovered may not come exactly within

the provisions of that article, but we are, I think, bound to apply to her acts of payment the equitable provisions of the article. If we do so, then our judgment must on that point be in her favour.

I have looked at and considered several cases in the courts in the Province of *Quebec*, and in none of them do I find that the question of the voluntary payment of taxes alleged to have been illegal was raised as a defence to an action brought to recover money paid as taxes illegally imposed. In the Court of Revision at *Quebec* (1) it was unanimously decided that a seigneur who had paid an illegal tax could recover it, even from the successors of the Commissioners of Schools to whom he had paid it.

See also *Leprohon* v. *Montreal Corporation* (2) where it was held:

That a party who has voluntarily paid a tax imposed by a by-law of a municipal corporation, which by-law is declared by the court to be void, has a right to recover back what he has so paid.

Grant on Corporations (3) says:

Where a corporation has been receiving money wrongfully, they are liable in assumpsit for money had and received.

And he cites the case of *Hull* v. *The Mayor, &c.*, of *Swansea* (4) as the leading case on that point. In that case the question of liability being raised, Lord Chief Justice *Denman* (5) says:

So, here, if the corporation have helped themselves to another man's money, it would be absurd to say that they must bind themselves under seal to return it. The question is what title they have to retain the money, and the only title they show is there having taken it. Their wrongful act binds them to return it without any actual promise.

There have been many others decided in the courts of *Quebec*, and they have been decided in the terms of the

(1) 3 Q. L. R. 323.
(2) 2 L. C. R. 180.
(3) P. 61.
(4) 5 Q. B. 526.
(5) P. 546.

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code—not on the question of the voluntary or involuntary payment of the taxes, but solely on the question as to the validity of the proceedings and the right to impose and collect the taxes. The sole question was whether the taxes were legally imposed, and in every case where they were found illegal the parties paying them were decided to be entitled to recover back the amount of them. It may be contended, however, that in this case the appellant must be presumed to know the law and the proposition may be a sound one, but she cannot be presumed to know that the respondent had not acted according to its provisions.

The respondent is called upon to repay moneys illegally obtained from the appellant by threats of an execution against her goods and chattels. They are then called upon to allege and prove that they were legally entitled to collect from her and retain the moneys in question. If they fail in doing so, she is entitled to recover. The prescription in such a case is thirty years, and we cannot make it less. We may be told that a judgment in favor of the appellant will operate injuriously to the public interests, and open the door for many others to come forward with similar claims. My answer is simply that with such consequences or results we have nothing to do. It is our province and duty to declare the law, and if the public interests thereby suffer, the blame must rest with those who, placed in a position of heavy responsibility, have negligently executed the public trust confided to them, and thereby produced the very results they would ask this court to prevent; when, in the proper discharge of our duty we have it not in our power to do so. Having therefore decided in favour of the appellant on the first objection raised to her right to recover, I will refer the plea to her declaration. The plea sets out in substance—

That in deciding that a sidewalk in stone or flags should be con-

tructed on certain streets, and that the cost thereof should be borne one half by the proprietors or usufructuaries of the properties situated on the said streets, and that a special assessment should be imposed for that purpose according to law and in proportion to the frontage of each such property, the city of *Montreal* acted within the limits of its corporate privileges and exercised a power which is in its nature legislative. That neither the city of *Montreal*, nor the surveyor exceeded their authority in the matters aforesaid, and that in the making of the assessment roll all the formalities required by law were duly complied with. That the plaintiff was justly indebted to the defendants when she paid to the defendants the sum placed to her charge as her part of the contribution to defray the half of the cost of the construction of the said side walks. That long before the institution of the present action the plaintiff has recognized and admitted the validity of the assessment roll by paying to the defendants the sum of $2,085.15, the amount o her contribution, &c.

The authority for the proceedings of the respondent is contained in section 192 of the act of the Legislature of *Quebec* (37 *Vic.*, ch. 51) entitled "An Act to revise and consolidate the charter of the city of *Montreal* and the several acts amending the same."

It shall be lawful for the council of the said city to order by resolution the construction of stone or asphalt sidewalks or street grading in the said city, and to defray the cost of the said works or improvements out of the city funds, or to assess the cost thereof, in whole or in part, as the said council may, in their discretion, deem proper, upon the proprietors or usufructuaries of the real estate situate on each side of such streets, public places or squares in proportion to the frontage of the said real estate respectively; and in the latter case, it shall be the duty of the city surveyor to apportion and assess in a book to be kept by him for that purpose the cost of the said works or improvements or such part thereof as the said council may have determined should be borne by the said proprietors or usufructuaries upon the said real estate, according to the frontage thereof as aforesaid, and the said assessment when so made and apportioned shall be due and recoverable the same as all other taxes and assessments before the Recorder's Court.

Under the Act the Recorder's Court had no further jurisdiction in the matter than to issue the execution or warrant to levy for the taxes imposed in case they

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remained unpaid for fifteen days after demand and notice from the city treasurer.

The section just quoted gives power to the council, by resolution to order the construction of stone or asphalt sidewalks, but the plea does not allege that any such order to construct such was passed, and there is no proof that any such was passed. It is true the two committees, before referred to, made certain suggestions and recommendations to the council. The council considered those reports, and the following extract from the minutes show what the action of the council was. On the 31st of May, 1875—

> The order of the day being read to consider the reports from the road and finance comittees to construct side walks in certain streets, the following reports were brought up and read, and on motion of Alderman *Nelson*, seconded by Alderman *Davis*, it was resolved that the said reports be adopted.

The reports referred to are set out in the declaration and affect differently, as I read them, the interests of the appellant. The claim against her is for the sidewalks on *Dorchester* and another street. The road committee, in their report, recommend that the sidewalks on *Dorchester* street be made "from *Union Avenue* to city limits on both sides," while the finance committee, in their report, recommend an amendment to the report of the road committee, and suggest that the sidewalks on *Dorchester* street be made "from corner of *Beaver Hall* terrace westward to the city limits". The minutes of the council show that it was resolved to adopt both the reports. As respects *Dorchester* street then, which of the two reports is really confirmed or adopted? The termini are different, and is it from *Union Avenue* or *Beaver Hall* terrace that the adoption of the report decides upon as one of such termini? The resolution of the council I consider as void for uncertainty, not only as affecting *Dorchester* street, but others, as a comparison of the two reports will show.

I take, however, a higher ground of objection to the legality of the proceedings. By the statute under which they were taken (37 *Vic.* ch. 51, sec. 192) the city council was authorized "to order by a resolution the construction of sidewalks," &c. The order for the construction must therefore be made by the council. No such order was made for the construction of the sidewalks in question by the only body authorized to make such an order. As far as the case shows, the road committee volunteered to make a report to the council containing certain suggestions and recommendations. That report was referred to the finance committee, who, with certain amendments and changes recommended the adoption of the report. As I have before stated, both reports, although inconsistent with each other, were adopted. Here the action of the City Council ended, and what did such adoption amount to? Certainly nothing more than a present approval of what the reports recommended. I cannot give effect to that mere signification of approval of the reports as an "order for the construction" of the sidewalks. The respondent claims in his plea that the statute conferred on the council a *quasi* legislative power in the premises. To test the value of the resolution adopting the reports, it is only necessary to refer to well known practice of parliaments and legislatures, by which the opinion of members is ascertained in a general way as to any particular measure or matter by a resolution affirming some proposition. If after consideration the resolution be sustained, a bill providing for the mode and manner by which the general terms of the resolution shall be carried out is the next and necessary proceeding, and it matters not how specific the resolution may have been in its details, the only means of giving effect to it is by an act. The resolution is but an expression of opinion favourable to the legislation proposed, and if no act be

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passed, it remains on the journals merely as such an expression, and without giving the slightest authority to any one to act in the matter. In this case no one was authorized to build the sidewalks in question, nor did the council authorize any one, as far as I can see, to enter into contracts to bind the council or the city. To establish this proposition it is only necessary to put a very plain case. Suppose an action were brought against the city by a contractor for the materials supplied by a party who entered into an agreement with the city surveyor, or by a party who sustained damages by his negligence whilst engaged in the work, would it not be a good defence for the council to answer that, although approving the reports of the two committees, no order or authority was given to carry out the recommendations contained in them.

It is a legal proposition universally recognized that where power of taxation is given as the result of certain proceedings by a statute to one body, there can be no delegation of it to another. Here then the power to order by resolution is given only to the city council. That body was to decide on the material or materials to be used, and, as a necessary consequence, on the width of the sidewalks. They were to be made of stone or asphalt, or both together, or any other durable and permanent material to the exclusion of wood. To order a stone sidewalk would necessarily require some provision as to the mode and manner of making it. It might be called a stone sidewalk, if made of McAdam stone—or of any other size. It might be made of free stone, granite, slate, or any other kind of stone laid in blocks or thin slabs, with or without cement;—the city was to bear the whole of the cost or of such part as the council should decide—the proprietors or usufructuaries to be assessed for the balance. Up to this point the city council were alone authorized to act. After

all had been done by the council, and a decision had been come to by the council, and the necessary resolution passed to assess the proprietors or usufructuaries, then, and then only does the section in question call for the action of the city surveyor, and his duty or authority is confined to the apportionment and assessment by him of "the cost of the said works or improve-"ments or such part thereof as the council may have "determined, should be borne by the said proprietors or "usufructuaries." How different has been the proceedings. The council decided to adopt the reports of the two committees. The road committee merely recommend that a flag stone foot path, or side walk, be laid on the streets named, without specifying the width of such sidewalks, or describing in any way how they were to be made The city surveyor, however, seems to have taken upon himself the whole responsibility, and made such sidewalks, and of such widths and of such materials as he pleased. If the council afterwards ratified his acts, that might bind the city, but would not affect other parties or interests. In acting as he did, I consider he undertook to do what the Legislature gave him no power to do, and which his position as city surveyor did not authorize. The act gave the council, and the council alone, the power which he exercised, and which the records show the council did not even authorize him to do, were such in its power. He might in the exercise of an arbitrary and irresponsible power have made the sidewalks double, or only half the proper width, and if he had the right to decide, the public and the proprietors would necessarily be injured. If the Legislature intended the exercise by him of such a power, it would have so provided. I consider, then, that as the council in this relation failed to do what the Legislature intended and provided for, I consider there is no foundation for an assessment,

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The same objection I have taken to the absence of any order of the council for the construction of the sidewalks is available also as to the assessment. The council was required "to order by resolution" the construction of the sidewalks and to assess the costs thereof in whole or in part on the proprietors, &c. Now, there is no resolution in the terms of that provision. The assessment is specially required to be made by the council, and I hold that such was not in any manner done by the mere adoption of the reports of the committees, before, too, any work was done, and when no body could tell the amount for which the assessment should be made. The apportionment and assessment made by the city surveyor, is, in my opinion, *ultra vires* in the absence of a previous resolution, in the terms of the section, of the city council. I consider there was not, at the time of the several payments which were made by the appellant as set out in her declaration, any debt due by her to the city as alleged by the respondents, and that she is entitled to recover back the same, and as the city council should, under the circumstances be deemed to have enforced such payments in bad faith, I think she is also entitled to interest from the date of the several payments. I think the appeal should be allowed and judgment entered accordingly for the appellant.

TASCHEREAU, J.:—

I am of opinion to dismiss this appeal. No other judgment could have been given in the case than the one dismissing the appellant's action given unanimously by the two courts and five judges appealed from.

The appellant's first contention is, that though her demand has been met by a general denial of all her allegations, yet she is not obliged to prove her case. *Onus probandi*, for her, is no vain word. It is a real

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onus, and so she would like to get rid of it and to throw it upon her adversary. Some English and American authorities have been cited in support of her proposition, that where a corporation relies upon its proceedings as a matter of defence the burden of proving the regularity of these proceedings falls upon this corporation. These authorities are not applicable to actions *en répétition de l'indû* and to the present case, which is ruled exclusively by our own civil law, under which there is no room for doubt or argumentation on this point, and this whether the defendant be a corporation or a private individual. It is laid down in precise words in the Digest (1) *De probat. et præsumpt.*, that if, on an action *de condictione indebiti*, the defendant admits to have received the sum claimed by the plaintiff, but contends that it was justly due to him, it is for the plaintiff who sues to recover back this sum on the ground that it was not due, to prove that it was not due; and a note in *Toullier* (2) says that this is still the law; *Laurent* (3) is also clear on this. An exception to this rule existed in the Roman law in favour of ignorant or negligent persons, or women, minors, and certain other privileged classes, but such exceptions are not now recognized.

Apart from the general rule, that the plaintiff has to prove his case, and that the defendant has not to adduce any evidence till the plaintiff's case is made out, there is a special one, in actions *en répétition de l'indû*, why it should particularly be so; it is that there is a legal presumption against the plaintiff, that as he paid there was a debt, according to Art. 1140 C. C. This presumption, says Art. 1239 C. C., exempts the defendant from making any proof. "You have paid me," can he say; "you are therefore presumed to have owed me

(1) Lib. XXII. Tit. III. (2) 4 Vol. Belg. edit., p. 230.
(3) Vol. 20, Nos. 366, 467, 368.

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what you paid. You must prove that you did not owe me to get back your money. I have not got to prove that you owed me."

In other words, as stated in *Lahaye* Code Civil (1):

Puisque tout paiement suppose une dette, on doit conclure de là que c'est à celui qui a payé mal à propos et qui veut répêter à prouver qu'il ne devait pas. *Præsumptionem pro eo esse qui accepit nemo dubitat*, dit Paul.

It is true that in the present case the corporation defendant fyled with the general issue an exception in which it is pleaded that the sum paid by the plaintiff was legally due in virtue of certain resolutions and proceedings of the council; it is also true that *reus excipiendo fit actor*, but this does not relieve the plaintiff from the *onus probandi*, from the obligation to prove her case.

Le demandeur doit prouver le fait, qui sert de base à sa prétention; et comme le défendeur est toujours assimilé au demandeur lorsqu'il avance quelque chose dans ses exceptions, c'est à lui à prouver le fait sur lequel il appuie sa défense. Mais celui-ci n'est tenu à cette preuve que lorsque celui-là a vérifié le fondement de sa demande. *Merlin*, Rep. vo. preuve, p. 705.

Demolombe, (2) says:

C'est à celui qui prétend avoir payé indûment et qui veut exercer la répétition qu'encombe la charge de prouver que la dette n'existait pas.

And error in the payment must also be proved by the plaintiff. The law of theDigest on the subject says:

C'est pourquoi celui qui prétend avoir payé ce qu'il ne devait pas, est obligé de justifier par de bonnes preuves que c'est par la mauvaise foi de celui à qui il a payé, ou par de justes raisons d'ignorance, *vel aliquam justam ignorantiæ causam*, qu'il a ainsi payé ce qu'il ne devait pas: autrement il n'aura aucune action pour ce faire rendre ce qu'il aura payé. (Traduction *Hulot.*)

Et le digeste dit: *Si sciens se non debere solvit, cessat repetitio.* (De condict. indeb.)

(1) P. 537.

(2) Vol. 28, page 23.

See also same author Vol. 27, No. 30, and Vol. 31, No. 284.

This same law says :

Lorsque quelqu'un paye une chose qu'il sait ne pas devoir dans l'intention de la redemander après, il est privé du droit de la repéter. (Traduction *Hulot.*)

And in Pandectes françaises (1) it is said :

Pour qu'il y ait lieu à la répétition, il faut que celui qui a payé ignore qu'il ne doit pas, car celui qui paie sciémment ce qu'il ne doit pas, ne peut pas repéter, quand même, en payant, il aurait eu l'intention de reclamer ensuite.

Pothier (2) says :

Il n'y a lieu à l'action *condictio indebiti* pour ce qu'on a payé sans le devoir, que lorsque c'est par erreur qu'on a payé.—Si, lors du paiement que j'ai fait d'une chose, je savais ne la pas devoir, je n'en ai aucune répétition.

Demolombe (3) says as clearly :

Nous disons, au contraire, que l'erreur est toujours requise de la part de celui qui a payé, de sorte que le paiement de l'indû fait en connaissaince de cause ne donne lieu à aucune action en répétition.

As late as 1878, the Cour de Cassation in a case of *Chemin de fer du midi* v. *Schmid* (4) held that :

C'est à celui qui répète la chose payée de prouver qu'elle a été payée indûment et par erreur.

On the same principle, the *Louisiana* Court of Appeal, in *Hills* v. *Kerrion* (5) held, that to reclaim money paid on the ground that it was not due, the plaintiff must show not only that it was not due, but also that it was paid through error. See also *Urquhart* v. *Gore* (6).

The authorities and decisions referred to in *Merlin*, *Rép.* vo. *Restitutions de droits indûment percus*, *vente de meubles*, and *prescription*, relied upon by the appellant, have no application to the present cause. They are based on special laws concerning the public revenues in *France*.

According to the principles which must govern this

(1) 10 Vol., p. 377.
(2) No. 160
(3) Tome 29, No. 276.
(4) Dalloz, Jurisp. gén., 1879.
(5) 7 La. R. 522.
(6) 4 La. R. 207.

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action, the plaintiff had consequently to prove: 1st. The payment; 2nd. That the sums paid were not due; and 3rd. That she paid through error or involuntarily; that is to say, under *contrainte*. The payment is admitted. The other allegations are denied.

In this case, however, the plaintiff does not allege error. She rests her claim on the exclusive ground that she paid under *contrainte*—under compulsion. She therefore could not be admitted to prove error, and she did not attempt it. There is not a word of evidence as to this. Her agent, who made this payment for her, and who was examined as her witness, was not even questioned on this point. Had she alleged such error, to rebut the presumption of implied ratification arising out of her payments, the proof of it would have been on her. On this, there can be no doubt. The authorities I have just quoted are clear. *Marcadé*, it is true, (1) contends that the burthen of proving the absence of error or of ignorance of the party making the payment falls on the party to whom the payment was made. But *Merlin*, though at first of that opinion, and *Toullier*, *Bédarride* and *Rolland de Villargues* are of a contrary opinion. *Toullier* says (2):

> Finissons par observer qu'il nous parait que *Merlin* ne s'est point exprimé avec son exactitude ordinaire quand il a fait entendre que pour qu'un contrat fut ratifié par l'exécution volontaire, il fallait prouver que la partie obligée avait, en l'exécutant, connaissance du vice qui pouvait le faire annuler. Autrement, dit-il, et à défaut de cette preuve, elle est censée ne l'exécuter que parcequ'elle en ignore le vice. Cette proposition nous parait contraire à l'article 1338, qui porte expressément qu'à défaut d'acte de confirmation ou ratification, il suffit que l'obligation soit exécutée volontairement. Si l'exécution volontaire suffit, celui au profit de qui le contrat est ratifié par l'exécution n'a donc rien autre chose à prouver. Il n'est pas tenu de prouver que le ratifiant connaissait le vice du contrat quand il l'a volontairement exécuté; c'est, au contraire, à ce dernier de prouver qu'il ne le connaissait pas, s'il croit pouvoir le faire.

(1) Vol. 5, p. 93. (2) Vol. 4, No. 519.

Our law, as to ratification by voluntary execution, is the same as here mentioned by *Toullier*, though not included in our Code, art. 1214, as it is in art. 1338 of the Code *Napoléon*. See also *Solon*, *Nullités* (1).

Merlin (2) admits that the opinion he had given on the point in the previous editions of his works was wrong, and he concludes, with *Toullier*, that the proof of the error in the payment lies on the plaintiff who alleges it.

Laurent (3), also says :

Le motif que l'on donne pour dispenser le demandeur de faire cette preuve se retourne contre lui. Sans doute, personne n'est présumé jeter son argent, mais qu'en faut-il conclure? Il faut dire avec *Toullier* que c'est une raison de plus pour imposer la preuve de l'erreur à celui qui, contre toute probabilité, soutient qu'il a payé par erreur ce qu'il ne devait pas.

See also *Fradet* v. *Guay* (4).

Bédarride, de la fraude (5), adopts as follows *Merlin's* last opinion :

Cette démonstration nous parait sans réplique ; nous admettons donc que l'éxécution fait présumer par elle-même la connaissance du vice de l'obligation que cette présomption doit céder devant la preuve du contraire ; que cette preuve est à la charge exclusive du débiteur pretendant se faire relever des effets de l'obligation.

And he cites a decision of the Cour de Cassation, dated July 23, 1825, in that sense. *Solon* (6) thinks that this is going too far, and that as to implied ratification a distinction should be made between *nullités apparentes* et *nullités cachées*. But his opinion, however, does not help the plaintiff, for he says :

Si le vice était apparent il y a présomption légale que la partie qui a exécuté l'acte connaissait les moyens qu'elle avait de le faire annuler, car comme chacun est censé connaître le droit, personne ne peut prétendre avoir ignoré l'imperfection apparente et en quelque

(1) 2 Vol. P. 369.
(2) Quest. Vo Ratification (4th edit.).
(3) Vol. 20, No. 368.
(4) XI Rev. lég. 531.
(5) 2 Vol. No. 608.
(6) Nullités, Vol. 2, 373.

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sorte matérielle, d'un acte qu'il avait dans les mains, ou qu'il était sensé y avoir, par la facilité qu'il avait de se le procurer. En pareil cas, il est à présumer que l'exécution a été volontaire, c'est a dire qu'elle a été faite dans l'intention de couvrir la nullité.

Here, the causes of nullity alleged by the plaintiff against the proceedings of the counsel were all of them apparent on the face of the documents, and the plaintiff had free access to these documents and could see them when she pleased. If she did not see them, it is her own fault, and *vigilantibus non dormientibus subvenit lex.* Error of law and error of fact, I may remark, are here on the same basis under article 1047 of our code, which is not given as new law, though it settled a mooted point. Though the *Napoleon* code is not so clear, error of law and error of fact are also in *France* both good grounds of revision. See *Marcadé* (1); *Demolombe* (2); *Laurent* (3).

I say, then, that the plaintiff in this case has made the payments in question with the full knowledge, at the time she made them, that she was not bound to make them, and this, 1st., because she does not herself allege that she made them through error; 2nd., because she did not prove or attempt to prove that she made them through error; 3rd., because the legal presumption is that she was aware, when she made them, of the grounds of nullity she now complains of in the defendants' proceedings. Now, if she has not paid through error, she is presumed to have paid voluntarily, unless she proves that she paid under *contrainte* and under violence as it were. In fact, though it seems to have been lost sight of at the argument before us, her action is, as I have already remarked, simply based on this last ground, and is not the action *condictio indebiti, stricto sensu.* She says virtually to the defendant: "I "paid you, though I knew I did not owe you; but I

(1) 5 Vol. No. 255. (2) Vol. 29 No. 280.
(3) Vol. 20 No. 354.

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" was constrained to do so to avoid the seizure and sale " of my goods, or, in other words, I paid through fear and " under threats of violence." In law, these certainly are good grounds of action. Art. 998 C. C., relating to contracts made under legal constraint or fear, enacts that:

If the violence be only a legal constraint or the fear only of a party doing that which he has a right to do, it is not a ground of nullity, but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort a consent.

Replace this last word consent by payment, and we have the law applicable to the plaintiff's demand in the present case.

I am thus brought to the consideration of the question whether the plaintiff has established, 1st, That the payment in question was extorted from her through the fear of forms of law used or threatened against her; and 2nd, if these forms of law were used or threatened against her for an unjust and illegal cause.

The Superior Court and the Court of Queen's Bench have both unanimously found as a matter of fact, that the plaintiff made her payments voluntarily, and not under compulsion. I concur fully in this finding. The evidence shows that the plaintiff did not at all act under the influence of the fear of forms of law, when she made these payments; but on the contrary, acted throughout as voluntarily as possible, and with the most perfect freedom.

In the first place, she paid without protest, and so, presumably, voluntarily. The case of *Leprohon* v. *City of Montreal* (1), relied upon by the plaintiff, was very different from this one. There the plaintiff alleged a payment made through error. Of course, one who pays through error, cannot protest: he is under the impression that he owes, and has nothing to protest against, or no reason to protest at all. But here the plaintiff knew,

(1) 2 L. C. R. 180.

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or is in law held to have known, that she did not owe the sum she paid; she merely contends that she paid under *contrainte* or fear. She should then have paid under protest. The case of *The Corporation of Quebec* v. *Caron* is precisely like the present one; that is to say, there also the defendant had paid under *contrainte*, knowing that he did not owe; but the defendant had alleged in his declaration, and specially proved, that he had paid under protest, and this protest was a special ground of the judgment of the court. In *Wilson v. The City of Montreal* (1) the payment had also been made under protest.

In *Dubois* v *La Corporation d'Acton Vale* (2) there had also been a protest.

In *Sutherland* v. *The Mayor of Montreal*, cited by the Chief Justice in *Baylis* v. *The Mayor* hereafter cited, it also appears that the payment had been made under protest.

In *Baylis* v. *The City of Montreal* (3) there had been no protest, and the majority of the court seemed to have been of opinion that such was not necessary. I, however, remark that, in that case, a warrant of distress had actually been issued against the defendant when he paid. The Chief Justice seems to insist specially upon that fact, and it is one of the *considérants* of the judgment.

The case of *Buckley* v. *Brunelle* (4) was also a payment alleged by the plaintiff to have been made through error, and which the Court of Appeal held to have been made contrary to a law *d'ordre public.*

I cannot help but thinking that, that when a party pays a debt which he believes he does not owe, but has to pay it under *contrainte* or fear, he ought to accom

(1) 1 Leg. News 292, and 3 Leg. News 282.
(2) 2 Rev. leg. 565.
(3) 23 L. C. Jur. 301.
(4) 21 L. C. Jur. 133.

pany this payment with a protest, if not under the impossibility to make one, and so put the party whom he pays under his guard, and notify him that he does not pay voluntarily, if this party is in good faith. If he is in bad faith and receives what he knows is not due to him, he is, perhaps, not entitled to this protection. A distinction might also perhaps be made between the case of a payment under actual *contrainte*, and one made under a threat only of *contrainte*, or through fear.

If there is an actual *contrainte*, a protest may not be necessary, and in some cases, it is obvious, may be impossible, but if there is a notice of threat only of *contrainte*, then, if the party pays before there is an actual *contrainte*, he should pay under protest. *Demolombe* (1), seems, at first sight, to say that a protest is not absolutely necessary, but he speaks, it must be remarked, of the case of an actual *contrainte*.

Of course, each case has to be decided on its own facts. It is not as a rule of law that a protest may be said to be required. For a protest is of no avail when the payment or execution of the obligation is otherwise voluntary. *Favard de Langlade*, Rép. Vo. *Acquiescement* (2); *Solon* (3); *Bédarride* De la Fraude (4).

The contention of the appellant, that as the payment of a judgment *exécutoire par provision* is not an *acquiescement* to it, so the payments she made to the corporation should be held not to be an *acquiescement* to its proceedings. But the case of a judgment *exécutoire par provision* stands on totally special grounds. *Bioche*, Procédure (5). The rule is, that he who executes a judgment of that nature is not estopped from appealing it. Why? The very terms given to these judgments explain it. They are pro-

(1) Vol. 29 No. 77.
(2) Par. XIII.
(3) 2 Des Nullites, No. 436.
(4) Vol. 2, No. 609.
(5) Vo. Jugement No. 222. See Boncenne 560 et seq.

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visional. He who pays such a judgment pays only what is a provisional order, his very payment is therefore only provisional; therefore, it is impossible to attach to such a payment consequences to which the very nature of the judgment is forcibly opposed. Yet, *Pothier* requires that the payment of such a judgment should be made under protest, if the party desires not to acquiesce in it. However, some modern cases seem to say that a protest is not necessary. But here there is no provisional order; the corporation's judgment against the appellant for the rate was equivalent to a judgment—was a final judgment; and the voluntary payment of a final judgment, unaccompanied by protest or reservation, has always been held to import a complete *acquiescement* to it, in fact the clearest and most unequivocal possible. *Charbonneau* v. *Davis* (1); *Poncet*, Des jugements (2); *Bioche*, Procéd. Vo. *Acquiescement* (3); *Merlin*, Quest. dr. Vo. *Acquiescement* (4).

Pothier (5) says:

A plus forte raison doit-elle être censée avoir acquiescée lorsqu'elle est entrée en paiement, soit de la somme portée par la condamnation soit des dépens auxquels elle a été condamnée, à moins que dans les cas auxquels la sentence est exécutoire par provision, elle n'ait payé en vertu de contrainte, en protestant qu'elle ne payait qu'en vertu de contrainte, sans préjudice à l'appel par elle interjeté, ou qu'elle comptait interjeter.

Jousse, under art. 5, tit. XXVII de l'ordonn. de 1667, also requires a protest.

Guyot, Rep. Vo. Chose jugée (6), says:

Il suffit que l'acquiescement puisse se présumer par la conduite de la partie, comme si elle demande du temps pour payer ou pour exécuter la sentence, à moins que la sentence, étant exécutoire par provision, elle n'eût payé ou promis de payer que pour éviter des

(1) 20 L. C. Jur. 167.
(2) Vol. I., No. 285, and Vol. II., No. 249.
(3) Nos. 50, 70, 82, 86, 90 and 96.
(4) Par. 3.
(5) Vol. 1 No. 860.
(6) P. 481.

contraintes ; et encore faudrait-il qu'elle eût fait ses protestations, sans quoi elle serait présumée y avoir acquiescé.

Some of the authorities would tend to say that in a case like the first payment made by the appellant, of which I will speak presently, a protest would not be necessary ; but they are all unanimous in the conclusion that payments made under the circumstances under which the appellant made her second and third payment should have been made under protest, if made with the intention to claim them back. Indeed, as I have already remarked, even had there been a protest, these last payments should be held to have been voluntary. The absence of protest cannot but have always great weight against the contention that an act done under the circumstances disclosed in this case was not voluntary.

Then, what evidence did the appellant bring to prove that she made these payments under *contrainte* or fear at all? Her claim is based on three different payments of three instalments of the taxes in question: one on the third December eighteen hundred and seventy-seven ; one on the twenty-ninth October, eighteen hundred and seventy-eight ; the other one on the fourteenth November, eighteen hundred and seventy-eight. As to the two first payments the plaintiff's sole proof of *contrainte* consists in the notices given to her by the corporation under sec. 86, 37 *Vic*, ch. 51, requiring her to pay the said two instalments of the said taxes and informing her that in default of such payment, execution would issue against her goods and chattels. These notices are dated the 27th November, 1877, and in the absence of proof to the contrary, must be held to have been served on that day. What did the plaintiff do on the receipt of these notices? She paid on the third of December, 1877, a few days after the notice, and nine days before a warrant of distress

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could at all be issued, a first instalment of the said taxes without any protest of any kind; she then waited ten months, and without any other notice or threat of any kind, again without protest, paid a second instalment of these taxes No warrant of distress was ever issued against her. *Bédarride* (1). Then, one month later again, she walks up to the city treasurer's office and pays $700 for a third instalment, without ever having been threatened with seizure for it; nay, without ever even having been asked to pay it, and, it must not be lost sight of, with the full knowledge, or presumed knowledge, all this time, of the illegalities in the defendant's proceedings she now relies upon. Can this plaintiff now contend, under these circumstances, that she made these payments under *contrainte* or fear? For the first one, perhaps, if alone, there might be a reasonable ground for such a contention, but the two last ones, it seems to me clear, and the last one more particularly, were made without *contrainte* or threats of any kind, and as such were ratifications of the first, or rather, they reflect back on the first and indicate that it was equally made as voluntarily as possible. I must say that, in my opinion, the plaintiff should have taken her action after the first payment, instead of paying two other instalments ten and eleven months later. Her conduct, as evidenced in the case, establishes conclusively that she did not at all act under *contrainte* in the matter. I say then that, even if the plaintiff did not owe the sums she so paid to the corporation, she could not now recover them back.

1st. Because she did not pay through error.

2nd. Because she did not pay under *contrainte* or compulsion.

This would dispose of the plaintiff's action, but, with the courts below, I go further, and say that, in this case,

(1) Vo. 2 Nos. 604, 605.

she did not prove that she did not owe the sums she paid, or, in other words, she did not prove that legal forms were threatened against her for an unjust or illegal cause.

Under the doctrine of implied ratification, the plaintiff has, I have already remarked, by paying these taxes, waived her right to impeach their legality upon any ground appearing on the simple inspection of the Corporation's proceedings :

Si la nullité est apparente, l'exécution est toujours volontaire et entraine nécessairement la ratification (1).

There is nothing here to support the contention that the resolution and assessment roll were null *d'une nullité absolue ;* they might have been voidable, and that is all. This also supports the *considérant* of the judgment of the Superior Court that,—

Considérant que la demanderesse n'a pas demandé par ses conclusions la nullité de la résolution et des rôles de côtisation en question, mais qu'elle conclut seulement au remboursement des sommes de deniers qu'elle a payées en plusieurs versements à plusieurs mois d'intervalle en vertu des dits rôles.

What is a nullity of *non esse*, can be treated as such in certain cases, *Dumont* v. *Laforge* (2), but what is simply voidable must be annulled, and is valid till so annulled, as said by Mr. Justice *Tessier*, in *Baylis* v. *The City of Montreal.* The majority of the court there held, it is true, that the proceedings complained of, in that case, were an absolute nullity, but they did not dissent from the law so laid down by Mr. Justice *Tessier* as to voidable acts.

The question of want of notice raised by the appellant before us is not opened to her. She did not allege it in her declaration ; it does not appear before the face of the proceedings, and was not before the courts below. If she had invoked the want of notice as a ground of

(1) Solon, Nullités, Vol. 2, No. 418. (2) 1 Q. L. R. 159.

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the action, the defendant might, perhaps, have proved that such notice was actually given.

In *Garden Gully United Quartz Mining Co.* v. *McLister* (1), in the Privy Council, Sir *Barnes Peacock*, delivering the judgment of the court, said:

> Their lordships are not disposed to hold parties too strictly to their pleadings in the lower courts, but they consider that it would be an act of gre t injustice to allow defences to be set up in appeal which have not been suggested or alluded to in the pleadings, or called to the attention of the courts below. In *Devine* v. *Holloway* (2), it was also held in the Privy Council that an objection not raised in the court below cannot be taken unless it is patent upon the face of the proceedings so that the Appellate Court can take notice of the objection. In *Shay* v. *Marshall* (3) the House of Lords would not permit parties on appeal to raise objections which they did not raise in the court below. In *Livingstone* v. *Rawyards Coal Co.* (4), it was held per Lord *Cairns*, in the House of Lords that "it is not usual to argue points in this house that have not been argued in the court below."

I refer also to *Mackay* v. *Commercial Bank of New Brunswick* (5), and to *L'Union St. Joseph* v. *Lapierre*, in this court (6). The recent case *Firth, ex parte* (7), is also in the same sense.

On the resolution itself and the assessment roll made thereon, I have very little to add to the remarks made by the learned judges of the Court of Queen's Bench or to the *considérants* of the judgment of the Superior Court. I will simply remark that the appellant seems to forget that with us:

> Point d'intérêt, point d'action, pas de nullité sans grief. Les lois ayant principalement pour objet l'ordre public et la conservation des intérêts particuliers, (says *Solon*,) leurs dispositions n'ont et ne peuvent jamais avoir de l'importance qu'autant que de leur inobservation doit résulter un dommage quelconque; l'absence de tout préjudice enlève à une contravention toute sa gravité, et ce serait méconnaître la volonté du législateur et les règles de l'équité que de

(1) 33 L. T. (N. S.) 408.
(2) 14 Moo. P. C. C. 290. C. & F. 245.
(3) 19 Ch. Div. 419.
(4) 5 App. Cases 29.
(5) L. R. 5 P. C. 409.
(6) 4 Sup. Court Rep. 164.

faire résulter de cette contravention la nullité d'un acte ou d'une convention; aussi a-t-on toujours tenu pour certain qu'il n'existe pas de nullité sans grief.....La maxime qu'il n'est point de nullité sans grief a pour objet de repousser une action dont le mobile est la chicane ou la malice. (1)

This disposes of what seemed at the argument the strongest cause of nullity involved by the plaintiff against the corporation's proceedings, that is to say, the ground based on the fact that a sidewalk of four feet only could be made, and not one of six feet as has been done. Far from its being demonstrated in any way that the plaintiff has any interest in complaining of this, it is proved that the six feet sidewalk actually cost less than the estimate made for a four feet one. So that the plaintiff complains of what turned to her benefit. How can she be admitted in a court of justice when she has suffered no grievance, when the corporation gave her more than she was entitled to. Then as said in *Dillon* (2):

A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within the corporate powers, but not otherwise. Ratification may be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.

Here if the corporation did not order the six feet sidewalk, it certainly approved of it and ratified the surveyor's doings in accepting it. See *Municipality* v. *Guillotte* (3). So that the assessment made was perfectly legal.

The appellant invoked that part of the judgment of the Superior Court by which judgment was given against the corporation for the interest over paid by her, as admitting the principle that her action ought to be maintained. This at first sight would appear a contradiction in the judgment, but the defendant explained

(1) Des Nullités, vol. 2 Nos. 407, 413.

(2) 2 Vol., No. 385.

(3) 14 La. An. 297.

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to us at the hearing that this part of it was given by consent.

GWYNNE, J.:—

It cannot but be with the greatest distrust of my own judgment that I find myself unable to concur in the conclusion arrived at by so many learned Judges who have expressed their opinion upon the matter in contestation in this case as well in the courts of the Province of *Quebec* as in this Court. However, as after the best consideration I have been able to give the case according to my understanding of it, and an earnest desire to concur with my learned brothers constituting the majority of this court, I find myself unable to do so, the parties litigant are entitled to an expression of my opinion, whatever it may be worth. I understand the judgment of the court in effect to be that the payments made by the plaintiff, which she now seeks to recover back, must be regarded as having been made voluntarily by her, and that, therefore, they cannot be recovered back, and that it is a matter of no importance whether the demand made upon her by the corporation of the city of *Montreal* was a legal demand or not. That is to say, that it is a matter of indifference, in so far as the present action is concerned, whether or not the corporation exercised the powers conferred upon them by the statute in such a manner as to attach to the amount demanded the character of an assessment duly imposed by authority of law so as to constitute a debt due from the plaintiff to the corporation. It is upon this point *in limine* that my difficulty arises, for whether or not the proceedings of the corporation were so conducted in accordance with the powers conferred upon them by the statute, as to constitute the demand made by the corporation upon the plaintiff to be legally due from her in the character of an assessment lawfully imposed,

appears to me to be an element in the consideration of the case before us which cannot be separated from it, and upon the answer to which, in the affirmative or the negative, the right of the plaintiff or of the defendants to succeed in this contestation wholly depends. If the proceedings of the corporation were not such as to make the sum demanded a legal debt or sum due from the plaintiff to the corporation in the character of an assessment lawfully imposed, I cannot give my assent to the proposition that the payment of a demand which was made upon the plaintiff as a legally imposed assessment which she was in law obliged to pay, and which demand was accompanied with the threat to levy the amount out of her property by summary process of law, which could have been done if the assessment had been legally imposed, can be regarded as a voluntary payment, if it should afterwards appear, as is now insisted, that the demand never had been legally imposed, and in point of fact, that the proceedings authorized by law, as necessary to be taken to constitute a legal valid assessment and to impose a liability upon the plaintiff to pay the amount demanded, never had been taken. Surely, if in point of law the assessment was not imposed in accordance with the powers conferred upon the corporation, it constituted no assessment and created no debt or sum due from the plaintiff to the corporation. In such case the demand upon the plaintiff was an illegal demand of a sum of money which the corporation had no right to receive, and the retention of a sum of money paid under the circumstances above mentioned cannot, as it appears to me, be justified and defended upon any principle having the sanction of equity and good conscience. The case appears to me to come within the article 1047 of the Civil Code, which declares that he who receives what is not due to him through error of law or of fact, is bound to restore it.

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Laurent (1), in his observations upon the corresponding article No. 1376 of the Code *Napoleon*, says that the obligation to make restitution is the same whether the defendant received what he did receive in good or in bad faith—that good faith in him who receives that which is not due to him does not permit him to retain that which he received *indûment*; on the contrary, it imposes upon him a duty to repay it so soon as he learns that that the payment was *indû*. With the greatest deference for the opinions of the learned judges with whom it is my misfortune to be unable to concur, and with the utmost distrust, consequently, in my own judgment, I must, nevertheless, say that the character of voluntary payment cannot, in my opinion, be attributed to the payment made by the plaintiff in this case without a disregard of the above article of the C. C., which the very able, and, I may be permitted to add, to my mind, conclusive argument of the learned counsel for the appellant, has convinced me does apply to, and has a most important bearing upon the decision of, this case.

The material contents of the plaintiff's declaration, so far as it is necessary to set them out here, are as follows: The plaintiff alleges that she has paid to the defendants the sum of $2,085 15, being the amount of a certain tax assessment levied on the plaintiff's property by the defendants in virtue of a certain special assessment roll, as follows, to wit:—$946.25 the 3rd December, 1877, and $438.90 the 29th October, 1878, in virtue of a special assessment roll made by the city surveyor of the said city of *Montreal*, the defendants aforesaid, to defray one-half of the cost of laying sidewalks in front of the plaintiff's property on *Dorchester* street, said assessment roll bearing date the 27th January, 1877, and the sum of $700.00 the 14th

(1) Vol. 20, p. 393.

November, 1878, in virtue of another special assessment roll made by the said city surveyor to defray one-half of the cost of laying sidewalks in front of the Plaintiff's property on *St. Catharine* street. The evidence fails to shew with certainty that this last sum of $700.00 was assessed for the cost of sidewalks, but the defendant's plea admits that the whole sum of $2,035.15, in the plaintiff's declaration mentioned, of which the $700.00 is part, was charged and paid as assessed upon plaintiff for the sidewalks, as most probably it was, although not clearly made so to appear in evidence, in consequence perhaps of the admission in defendants' pleas. The declaration then alleges that the said tax was so paid to avoid the seizure and sale of the property belonging to the plaintiff, the said defendants having threatened the plaintiff with such seizure, and then and there proceeding to collect such tax by means of seizure from the other parties mentioned in said assessment rolls. And the plaintiff alleges that the said assessment rolls are illegal, null and void, and the said City of *Montreal*, thereunder, had no right in law to assess the said plaintiff's property.

The city council of the city of *Montreal* adopted by resolution two reports, the one of the road and the other of the finance committee of the council. The mode of adopting the reports appear to have been as follows: On the 31st May, 1875, the order of the day being read to consider reports from the road and finance committees to construct sidewalks in certain streets, the following reports were brought up and read, and on motion of alderman *Nelson*, seconded by alderman *Davis*, it was resolved that the said reports be adopted.

The reports so adopted are set out in the declaration as follows: The road committee respectfully report:—

That the question of sidewalks has recently engaged their attention, and fully impressed with the necessity of doing away with the old

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and decayed method of planked footpaths, your Committee believe the time has come when an effort should be made to inaugurate a new system of good and substantial sidewalks in the city.

It will take many years, of course, before these can be laid throughout the city generally, and it is only gradually that this much needed improvement, can be obtained.

As the proprietors on the line of the streets where these new footpaths are to be laid will undoubtedly receive a direct benefit from the improvement, your Committee believe they should bear a proportion—say one-half of the cost thereof.

Your Committee therefore recommend that it be resolved to lay, in the course of this summer (eighteen hundred and seventy-five) a flag-stone footpath or sidewalk in the following streets or sections of streets namely: (here follows the enumeration of several streets, including Dorchester street from Union Avenue to the city limits on both sides, and St. Catherine street from Bleury to Guy streets), and that the cost of said footpaths or sidewalks be borne and paid as follows: *i. e.*—one-half by the Corporation, out of the loan, for street paving and permanent sidewalks, and the other half by the proprietors or usufructuaries of the real estate on each side of such streets, public places, or squares, by means of a special assessment to be imposed and levied according to law, and in proportion to the frontage of their properties respectively.

Your Committee further recommend that an appropriation of $79,623, being the amount of the accompanying estimates less the items per chain stone and flag-stone already appropriated, be made to your Committee for the purpose of said footpaths, and of the said loan, for street paving and permanent sidewalks, the whole nevertheless respectfully submitted.

The Finance Committee respectfully report that as directed by the Council, they have considered the accompanying report of the Road Committee recommending the laying of flagstone foot-paths in certain streets and on certain conditions therein mentioned, of date the 30th April, ultimo, and that they concur in the recommendation therein made with the exception of the streets, avenues, squares and places wherein the said foot-paths are to be laid, which shall be as follows: (Here follows an enumeration of the places approved by the Finance Committee, including Dorchester street from corner of Beaver Hall terrace westward to the city limits, and St. Catherine Street from Bleury street to Guy street.) Your Committee recommend that, so amended, the said report of the Road Committee be adopted, the whole nevertheless respectfully submitted.

The declaration then proceeds to allege:

That it is on the sole strength of the resolution of the City Council adopting the above reports of the said Road and Finance Committees of the said City Council, that the City Surveyor has proceeded to introduce in the said streets a new sidewalk, removing the one formerly existing which was in a good state of preservation, and in many parts thereof of durable and permanent materials, and using the materials thereof without accounting for the same, and the said plaintiff alleges that at the time the said city caused the said sidewalks to be constructed in front of her said properties, the said plaintiff had good permanent serviceable sidewalks in front of her said properties, and the said plaintiff further alleges that the said resolution as given above is altogether indefinite, and such as could only lead to the most arbitrary proceedings on the part of the official charged with the duty of carrying out the same. That while it orders the laying of a flag-tone footpath in Dorchester and St. Catherine streets, it does not determine the kind of stone, the width of sidewalk or the quality of the work. That in the absence of a provision of the statute allowing the new system to be introduced gradually, the Council could not force the proprietors in said streets to pay the cost of one-half of the new sidewalks while the proprietors in other streets are wholly provided with sidewalks out of the city funds without any contribution on their part.

That moreover the said assessment has been passed on an illegal principle inasmuch as more has been charged plaintiff than the sidewalk has cost in proportion to frontage of plaintiff's said properties, the plaintiff being charged a proportion of the cost of the sidewalk throughout the whole of said Dorchester and St. Catherine streets instead of the cost of the sidewalk actually laid in front of the plaintiff's properties. That in the aforesaid amount paid to defendants by plantiff was included the sum of $269.59 for interest on the capital unpaid illegally charged to plaintiff by defendants at the rate of 10 per cent. That the plaintiff in virtue of the above allegations has a right to have the said sum of $2,085.15 refunded to her with interest from the day of payment, wherefore the plaintiff prays that the said defendants be condemned to pay and satisfy her the said sum with interest from the date of payment.

To this declaration the defendants plead

That in deciding that a sidewalk in stone or flags should be constructed on the streets named, and that the cost of such sidewalk should be borne one-half by the proprietors or usufructuaries of the properties situated on the said streets, and that a special assessment should be imposed for that purpose according to law, and in proportion to the frontage of each such property, the City of *Montreal*

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acted within the limits of its corporate privileges and exercised a power which is in its nature legislative. That neither the City of *Montreal* nor the City Surveyor exceeded their authority in the matters aforesaid, and that in the making of the assessment roll all the formalities required by law were duly complied with, that the plaintiff was justly indebted to the defendants when she paid to the defendants the sum placed to her charge, as her part of the contribution to defray the half of the cost of the construction of the said sidewalks; that long before the institution of the present action the plaintiff has recognized and admitted the validity of the said assessment roll by paying to the defendants the sum of $2,085.15, the amount of her contribution.

That therefore the plaintiff cannot be heard to demand the recovery of the said sum as having been illegally paid to the defendants, and the allegations contained in her declaration are untrue.

The plaintiff joined issue upon this plea. Now, the plea, upon which issue is so joined, seems to me to rest the defence of the defendants wholly upon the legality of the proceedings of the Corporation of the City of Montreal, so as to give to them the character and effect of an imposition, in its nature legislative, upon the plaintiff as a good and valid assessment of the amount demanded of her, so as to constitute that sum to be a debt due by the plaintiff capable of being levied by the defendants by process of law as a good and valid tax. There seems to me to be no point here made that the payment was made voluntarily, and for that reason not recoverable, whether the sum demanded as a tax was duly imposed or not. The payment is referred to solely as amounting to, as is contended, a recognition and admission of the validity of the assessment, which it cannot be, as it appears to me, if in truth the assessment was invalid, for an admission by implication of an assessment being valid, which in fact and in law was invalid, would, as it appears to me, to be so clearly erroneous as to constitute the payment, from which the admission by implication is claimed to arise, a pay-

ment made in error within the provision of Article 1,047 of the Civil Code.

The 192nd section of the Act of the Legislature of the Province of *Quebec*, 37 *Vic.*, ch. 51, intituled: "An Act to revise and consolidate the charter of the City of *Montreal*, and the several Acts amending the same" enacts that:

It shall be lawful for the Council of the said City, to order by resolution the construction of flagstone or asphalt sidewalks or street grading in the said city, and to defray the cost of the said works or improvements out of the city funds, or to assess the cost thereof, in whole or in part, as the said Council may in their discretion deem proper, upon the proprietors or usufructuaries of the real estate situate on each side of such streets, public places or squares, in proportion to the frontage of the said real estate respectively; and in the latter case it shall be the duty of the City Surveyor to apportion and assess in a book to be kept by him for that purpose, the cost of the said works or improvements or such part thereof as the said Council may have determined, should be borne by the said proprietors or usufructuaries upon the said real estate according to the frontage thereof as aforesaid, and the said assessment when so made and apportioned shall be due and recoverable, the same as all other taxes and assessments before the Recorder's Court.

The interposition of the Recorder's Court is for the sole purpose, as appears by the 88th section, to enable the City Treasurer upon the expiration of fifteen days from demand made upon each proprietor or usufructuary, for the amount so charged to him by the City Surveyor, in case of default being suffered in payment of such demand, to obtain a warrant to issue out of the Recorder's Court, authorizing the levy of the amount by seizure and sale of the goods and chattels of the party charged.

Now, can it be possible that, and must we hold that, when the Legislature authorized the Corporation to impose upon the owners of property in the city, so heavy a tax, as, judging from the amount charged to the plaintiff upon the two streets, upon which the property of which she is usufructuary for life is situate,

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the tax relied upon in this case as having been legally imposed is, it contemplated that the resolution or order authorizing the construction of the flagstone sidewalks, and assessing the owners of the adjoining properties for the whole of the cost of such sidewalks, or for such part thereof as the Council of the city in their discretion should deem proper, should be less certain as to the nature and extent of the work authorized, and as to the amount of the liability, in the nature of a tax to be imposed upon the owners of property in respect thereof, than if the work had been authorized and the tax had been imposed by law? In which case the parties would be apprised of the proceedings being taken in the Council to tax them.

Can it be possible that the Legislature contemplated that the proceedings of the Council to impose a special tax, in the interest of the public, upon a particular portion of the ratepayers of the city, should be so conducted, as to leave it in the power of the City Surveyor, or of any other person or persons other than the Council itself, to determine the width and character of the sidewalks to be constructed, and to leave it in his or their power to determine, and in his or their discretion to vary, the amount of the tax for which the owners of property subjected to the special rate should be liable? Can it be possible that the Legislature contemplated that the discretion which the Council was called upon to exercise, in order to determine the amount of the cost of a contemplated work to be assessed upon the owners of the adjacent properties, should be exercised without any notice whatever being given to the parties to be affected, informing them of the amount contemplated to be assessed upon them for the work contemplated, so as to enable such parties to press their views before the Council before the resolution binding them should be passed, in order to give

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a proper direction to the discretion which the Council was called upon to exercise, and to enable it intelligently to exercise that discretion ?

Can it be possible that the Legislature contemplated that the Council should have the power of imposing a burthen exceeding, as in this case, $3,200 upon the usufructuary for life, of unproductive property, wholly behind the back of the party to be affected, and by a mode of procedure admirably adapted to keep such party in ignorance of what was being done as affecting his interests, until he should be served with a demand, irreversible in its nature, which, unless paid, would in fifteen days mature into an execution, against the levying under which no cause could by possibility be shown ?

Can it be possible that the Legislature contemplated that a proceeding which was given the force and effect of an irreversible judgment should be taken against any one without any notice whatever being given to such person until after the judgment should be obtained, and that the notice then given should be that an irreversible judgment had been obtained against him ?

In my humble judgment the language of this 192nd section does not warrant us in imputing to the Legislature an intent so contrary to the plainest principles of natural justice. So autocratic an administration of a democratic institution never could have been contemplated. I profess not to prescribe any *particular* course of procedure as necessary to be taken by the Council prior to passing a resolution having the effect of imposing so heavy a burthen upon individuals ; but, in my judgment, some notice should be given to the parties to be affected by the resolution about to be proposed of the contemplated intention of the Council, which would give to such parties the opportunity to have their views

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brought under consideration of the Council to guide them in the exercise of their discretion. The case of the present plaintiff is such as to seem to me to give great force to this opinion, for it does seem to be a great hardship, and one which by reason of the course adopted by the Council was most probably unknown to them, and which, if known, might have affected the conclusion they would have arrived at, that a person being usufructuary only for life of property incapable of being, from the nature of her estate, made productive during her life, should be exposed to so grievous a burthen as that insisted upon as having been imposed upon her by a resolution of the intention to pass which she had no notice, and from the effect of which she can have no relief, if the burthen has for its imposition the sanction of law, and this, although she can derive no possible benefit from the work for which she is so called upon to pay, otherwise than as one of the general public having occasion to use the sidewalks of the City of *Montreal*. But whether a party be or be not peculiarly benefited by such a work, I am of opinion that the passing by the Council of an order or resolution purporting to have the effect of imposing upon proprietors or usufructuaries of real property in the City of *Montreal*, the whole or any portion of the cost of making flagstone sidewalks on the streets upon which such property is situate, without some prior notice of the contemplated intention of the Council to make such order or resolution, is not in terms authorized by the act, and that such a proceeding is so contrary to the principles of natural justice that a resolution passed without such notice and opportunity being given to the parties to be affected, of being heard upon the matter, cannot, in the absence of express legislation, in unequivocal terms depriving them of their right to have such notice and opportunity, be given in a Court of Justice the sanction and authority of law.

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But the objections of the learned counsel for the appellant to the validity of the charge sought to be imposed upon the plaintiff do not rest here; his argument, as I understood it, raises what appear to me to be two other very important questions, namely: First —What is the proper construction to be put upon the report of the Road Committee of the Council, which is set out verbatim in the declaration? And, secondly— What was the effect of the resolution of the Council which simply adopted that report? The short substance of the report of the committee, appears to me, to be that they believe the time has come when an effort should be made to inaugurate a new system of good and substantial sidewalks in the city, and that, as it would of necessity require many years before practical effect can be given to such a system, by having the sidewalks laid under it generally throughout the city, they recommend that a commencement be made in the year 1875 by applying the system in the first instance to certain streets named, and that the cost should be defrayed as follows, namely, one half by the Corporation and the other half by the proprietors or usufructuaries of the real estate on each side of such streets by means of a special assessment to be imposed and levied according to law, and in proportion to the frontages of their properties respectively, and they further recommend that an appropriation of $79,623 be made to the committee for the purpose.

Now, it is an essential element of every good tax that it should be made to bear equally upon all persons similarly situated. When, therefore, the committee recommended that part of the system, which they proposed should be introduced, should consist of a tax imposed upon the owners of property abutting on the sidewalks, it was very natural that they should recommend, as the first thing to be done, the adoption or inauguration or

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introduction by the city council of a new system in conformity with which the making of flagstone sidewalks throughout the city should be regulated. The committee, however, enters into no details of the system—that is left to the city council if it should be of opinion, with the committee, that the time for the inauguration or introduction of a new system had arrived. The report, therefore, makes no suggestion as to what should be the width of the flagstone sidewalks to be laid in some streets and what in others. Naturally some, as for example the most public thoroughfares, would require wide sidewalks; in less frequented streets, narrow ones might be sufficient, and the amount of the tax to be imposed upon the owners of property by the council would necessarily vary in proportion to the width of the flagstone sidewalk ordered in front of his property. The recommendation of flagstone sidewalks being laid, in the particular streets named by the committee, at the charge to the owners of property of one-half of the cost thereof, except as a part of a system to be adopted, which should have the effect of imposing the tax equally upon all persons similarly situated, when from time to time the council should order flagstone sidewalks to be made, would be manifestly unjust. For example, if the council in one year should order that a part of a street should have flagstone sidewalks laid at the whole and sole cost of the owners of property abutting on such sidewalk, and the council in another year should order that the flagstone sidewalks should be continued for a further distance on the same street, for which the owners of property adjoining should pay only one-fourth of the cost, and the council in another year should extend the sidewalks in the same street at the cost to the owners of property along such extended part, of one-half, and the council in another year should extend them still further, and defray the cost of such

extension out of the general funds of the city, that is to say, at the charge of all the ratepayers of the city; or if the Council should order in one year that in a particular street a sidewalk of stone should be constructed at the sole cost of the owners of the adjacent property on the street, and the council in another year should order that in other streets equally public thoroughfares similar sidewalks should be laid at the cost to the owners of property in one street of one-third, in another of one-half, and in another of one-fourth of the total cost, and the balance to the general ratepayers; and if the council in another year should order that a similar sidewalk should be laid in an equally public thoroughfare, for which payment should be made wholly out of the general funds of the city, that is to say, at the cost of the ratepayers at large, such works could not be said to be done in pursuance of any system, and such a mode of procedure being in its result so unequal in the charge imposed upon the several owners of property in the respective streets, would not have in it the essential element of a just tax; but what the report of the Road Committee contemplates plainly, as it appears to me, is the introduction of a system for the regulation of the laying flagstone sidewalks; that is to say, a plan or method, constant and uniform in its operation, and which, when applied, should bear equally upon all persons similarly situated, upon whom a tax for carrying it into operation should be levied.

The recommendation therefore, in the Report of the road committee, as to the streets upon which they suggest that the sidewalks should be made in the year 1875, must, in my opinion, be read as a recommendation that the new system, the inauguration of which they recommend, if, and when, it should be inaugurated by the council, should be applied in the first instance to the streets named, but the inauguration of the system with

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all its details as to the width of flagstones, accordingly as the streets should be great public thoroughfares or otherwise, and all other details are left by the Report of the committee, which is silent upon these points to the council to suggest and adopt.

The true construction of the Report, therefore, in my opinion is that it recommends a new system, plan or method to be adopted by the council for the regulation in the future of all flagstone sidewalks, to be laid in the City of *Montreal*, and as part of such system that when it shall be applied to any street, the owners of property on such street shall be assessed for one-half the cost thereof, but all other details of the system to be adopted are left to the Council to devise. Such a system should, in my opinion, provide for notice being given to the owners of property on the line of the contemplated improvement, of the nature and cost of such contemplated sidewalk, and of the amount to be charged in respect thereof to such owners for their half share respectively in such cost, so as to enable the parties to be affected to be heard, in case they or any of them should have any objection to offer to the passing of a resolution bringing the street upon which their property is situate within the adopted system, which objections when heard by the Council might have the effect of causing it, in the exercise of its discretion, to defer putting the system into operation in the particular street then under consideration.

Then, secondly, what is the effect of the resolution of the Council which simply adopts that report without more? Doubtless as is urged by the defendants in their plea, all acts of the Council of the City of *Montreal* as of all municipal corporations authorizing work to be done at the cost of the Municipality, and especially such acts as are intended to have the effect of imposing a special tax or burthen upon a particular portion of the

community, are in their nature legislative, and for that reason, to be properly conducted, should be conducted in a manner as analogous as circumstances will admit to that in similar cases adopted in Legislative Assemblies, and where a municipal council adopts in practice a proceeding taken from the practice of a Legislative Assembly such proceeding should, in the municipal council, have the the same effect and only the same effect given to it as the like proceeding would have given to it in the Legislative Assemby from whose practice the proceeding is taken. Now, in no Legislative Assembly, as far as I have been able to learn, is the adoption of the report of a committee regarded as a resolution ordering that to be done which the report recommends should be done. It amounts to no more than a concurrence in the recommendation, and an undertaking that the members of the council adopting the report will pass the resolutions and give the orders and take all proceedings necessary to give effect to the recommendation of the committee. The adoption of a report of a committee by the council would not, as would an order and resolution in due form passed ordering to be done that which was recommended in the report, be binding upon the Council of the next year. The adoption, therefore, by the city council of 1875 of the report of the road committee in the present case amounts, in my my opinion, to no more than this: that the council concurred with the opinion of the committee that the time had arrived for the adoption and inauguration of a new system regulating the laying of sidewalks in the City of *Montreal;* but it left for future consideration what that new system in its details should be. The adoption of the report amounted, also, to a declaration of the concurrence of the council in the recommendation of the road committee that it should be part of the new

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system, that an assessment should be imposed upon the owners of the property, in the street where sidewalks should be made, to the amount of the half of the cost of such sidewalks, and that that system should be first put into operation, and in the year 1875, upon the streets named; but by concurring in the recommendation that the owners of property in the streets named should be assessed for the half of the cost of laying flag stone sidewalks on these streets when such should be ordered, it did not in fact assess such property holders for any amount. By concurring in the recommendation that flagstone sidewalks should be laid in the particular streets named, it did not order that the sidewalks should be made of any prescribed width or at all, and width certainly appears to me to be an essential element in a valid order directing a flagstone sidewalk to be laid, a portion of the cost of which was to be charged to the property owners on the street. By concurring in the recommendation of the committee that the sum of $79,623 should be appropriated to the purpose recommended, it did not as it appears to me, make the appropriation so as to require the City Treasurer, upon the mere production of the resolution adopting the report of the road committee, to pay over such sum to anyone. By adopting the report of the road committee, the council did not order the City Surveyor to lay down any sidewalks whatever in the streets named, and the City Surveyor appears to have had no other authority emanating from the council, whatever he may have had from the road committee for laying the sidewalks in question. There is nothing in the resolution adopting the report which can be construed into an order given by the council for the construction of any sidewalks. In so far as any order of the council is concerned, the City Surveyor might have made the flagstone sidewalks, which he did lay down in the streets named, of the width of twelve

feet, or of eight feet, or of four feet at his pleasure; the council prescribed nothing, and what the 192nd section of the act says, is that it shall be lawful for the council to order by resolution the construction of flagstone side-walks, and that it shall be lawful for the council to assess the cost thereof in whole or in part upon the proprietors of real estate. The duty of the City Surveyor does not come into action until the Council has by resolution ordered the work to be done, and has assessed the cost thereof, in whole or in part, upon the proprietors of real estate. The width of the flagstone appears to me to be an essential element to be stated in a valid order, and as to the assessment, the function of the City Surveyor, as it appears to me, is simply to apportion among the proprietors of real estate the proportion of the cost which the council has by resolution assessed them for, and such assessment should not, as I have already said, be attempted to be imposed without some previous notice to the parties to be affected. The section which authorizes a thing to be done by resolution, which could only previously be done by by-law, cannot be construed as authorizing the council to impose a tax upon particular individuals by a resolution of which they have had no notice. Now, if the council had proceeded by By-Law, as they might have done notwithstanding the 192nd section of 37 Vic., c. 51, the adoption of the report of the road committee, followed by a By-Law read for the first time only, would have no validity to impose a tax upon the plaintiff. How then can the mere adoption of the report, without more, have a greater effect because the council may under the 192nd section of the above act proceed by resolution instead of by By-Law. Surely the power of the council to order a thing to be done by resolution instead of by By-Law cannot give any additional force to the mere adoption by the council of, the report of a

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committee. In my opinion, therefore, the resolution of the council of the City of *Montreal*, adopting the report of the road committee as set out in the declaration, cannot, upon any analogy derived from the proceedings of any legislative body, be said to be an order by resolution within the meaning of the 192nd sec. of 37 *Vic.*, c. 51 authorizing the construction of the particular flagstone sidewalks which have been laid on the streets in question, and an assessment imposing a legal tax or burthen upon the plaintiff for any part of the cost thereof.

The only notice of the imposition of the tax, or of any intention to make plaintiff liable for any part of the cost of the sidewalk, which it appears she ever had, was at the foot of the demands served upon her agent after the construction of the sidewalks in the words following, signed by the City Treasurer:

Take notice that having failed to pay the above mentioned sums within the time prescribed by public notice, you are hereby required within fifteen days from the date hereof to pay the same to me at my office, together with the costs of this notice and service thereof as below; in default whereof execution will issue against your goods and chattels.

Montreal, 27th Nov., 1877.

Costs	$0 10
Notice	0 20
	$0 30

(Signed,) JAMES F. D. BLACK,
City Treasurer.

In my opinion upon receipt of this notice the plaintiff's agent was justified in assuming, and in fact did assume, that the council of the corporation had taken all proceedings necessary to impose upon the plaintiff the obligation to pay the amounts demanded, which could and would be enforced, as threatened in the notice, unless payment should be made; and having paid under such an impression, which, in my judgment,

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was for the reasons I have given erroneous, she is entitled to recover back the money which under the influence of such error, both of law and fact, she paid to the defendants, who, if my judgment be correct as to the invalidity of what is relied upon as an assessment, the defendants had no legal right to demand of the plaintiff, and as the defendants ought to have known that they had not taken proper proceedings to make the plaintiff liable for the amount demanded, I think she should recover interest from the respective dates of payment. The appeal therefore in my opinion should be allowed with a direction to enter judgment in the Superior Court for the plaintiff for the full amount with interest as above calculated and the costs in all the courts.

Appeal dismissed with costs.

Solicitors for appellant: *Barnard, Beauchamp & Creighton.*

Solicitors for respondents: *Rouer Roy.*