THE CITY OF MONTREAL (PLAINTIFF) ..... } APPELLANT;

AND

JAMES B. CANTIN AND OTHERS (OPPOSANTS) ..... } RESPONDENTS.

1904

*Oct. 12.
*Oct. 31.

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

Municipal corporation—Assessment and taxes—Contestation of roll—Limitation of actions—Interruption of prescription—Suspensive condition—Construction of statute—52 V. c. 79 (Q.)—62 V. c. 58, s. 408 (Q.)—Collection of taxes—Art. 2236 C.C.

The prescription of three years in respect of taxes provided by the Montreal City Charter, 52 Vict. ch. 79 (Q.), runs from the date of the deposit of the assessment roll, as finally revised, in the treasurer's office, when the taxes became due and exigible, and the prescription is not suspended nor interrupted by a contestation of the assessment roll, even although the contestation may have been filed by the proprietor of the lands assessed.

Judgment appealed from affirmed, Girouard and Nesbitt JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

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respondent's opposition to annul the seizure of their lands in the City of Montreal in execution on levy of taxes imposed thereon for ordinary rates and a special assessment.

The material facts of the case are fully stated in the opinions of their Lordships on this appeal.

Atwater K.C. and *Ethier K.C.* for the appellant. The prescription could not run against the city while the validity of the tax was being contested in court. Art. 2236 C.C. The city was prevented taking action during the pendency of the litigation; *contra non valentem agere nulla currit præscriptio.* See *City of Montreal* v. *Montreal Land and Loan Co.* (1) per Blanchet J.; Dalloz, 1858, 1, 414; 1862, 1, 35-36 and note The contestation of the roll was by the respondent's *auteurs*, the owners of the lands assessed, and having, by their own proceeding, caused the delay they cannot now plead the limitation after the failure of their contestation. We also refer to Cass. 13 Avril, 1810, S. V. 10, 1, 175.

Bond and *Lacoste* for the respondents. The taxes, if any were due, became exigible upon the deposit of the revised roll in the treasurer's office, (sec. 231 of city charter); the prescription provided by sec. 120, therefore, commenced to run from that date; no judicial demand, (art. 2224 C. C.) was made, and the full period of three years had elapsed before proceedings for collection were begun. See *O'Connor* v. *Scanlan* (2). The operation of sec. 408 of the amending act, 62 Vict. ch. 58, can have no retroactive effect to revive the prescribed right. We refer to sects. 565 and 558 of the last mentioned Act, and also to Endlich on Statutes secs. 271-273; 18 DeLorimier, Code Civil, art. 2232, p. 536; Dalloz Rép. *vo.* Loi, *nn.* 183, 184, 205, 380;.

(1) Q. R. 23 S. C. 461; 13 K. B. 74. (2) Q. R. 3 S. C. 112.

Supp. *nn.* 118, 124, 235; *Fuchs* v. *Legaré* (1); *Bulmer* v. *Beaudry* (2); *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal* (3).

THE CHIEF JUSTICE.—The appellants, as empowered in such cases, caused the sheriff, in August, 1902, to seize a certain lot of land belonging to the respondents for the recovery of a special assessment imposed upon it by an assessment roll which had been deposited in the office of the city treasurer on the 20th of February, 1895, over seven years before.

The respondents by an opposition asked the annulment of the seizure on the ground that the appellants' claim was prescribed and extinguished.

The judgment of the court of appeal, confirming the judgment of the Superior Court, maintained that opposition and quashed the seizure.

These judgments are in my opinion unassailable.

Section 231 of the appellants' statutory charter of 1889 (52 Vict. c. 79 Que.) which, it is admitted, governs the case, provided that

> the roll of assessment, when finally settled by the commissioners, shall be filed and kept of record in the treasurer's office; *and such special assessment shall thereupon become due and may be recovered by the corporation.*

By section 120 of the same Act, it was enacted that the right to recover any tax or assessment imposed under the Act was to be prescribed and extinguished unless the city within three years * * *to be counted from the time at which such tax or assessment became due*, had commenced an action for the recovery thereof, or had initiated legal proceedings for the same purpose under the provisions of the Act

(1) 3 Q. L. R. 11.
(2) Q.R. 12 K. B. 334.
(3) 16 Can. S. C. R. 399.

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provided that in case *any special assessment* is made payable by annual instalments, the prescription runs only from the expiry of each such instalment.

These enactments were clear and unambiguous, and *primâ facie*, the appellant's rights to the proceedings in question were prescribed and extinguished in 1902 when they were initiated.

They contend, however, that it is not so, for the reason that the respondents, availing themselves of the provisions of section 144 of the Act, had filed within six months from the date of the deposit of the said roll a contestation thereof, by which contestation, not finally determined till the 15th of June, 1901, they, the appellants, as they allege in their plea in answer to the respondents' opposition

were hindered, impeded and delayed by the respondents in the collection of the said assessment.

By that section 144 it was enacted that:

Any municipal elector, in his own name, may, by a petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment; but the right of demanding such annullment is prescribed by six months from the date of the passing or completion of such by-law, resolution, assessment roll or apportionment; and, after that delay, every such by-law, resolution, assessment roll or apportionment shall be considered valid and binding for all purposes whatsoever, provided that the subject matter thereof be within the competence of the corporation.

The appellants contend that they had not the right to take proceedings for the recovery of the assessment in question until the final adjudication, in June, 1901, of the respondents' said contestation of the roll authorized by that section.

But, as held by the two courts below by the judgment now appealed from, and previously by the judgments in *The City of Montreal* v. *The Land & Loan Co.* (1) where the same question was raised, that contention

(1) 34 Can. S. C. R. 270.

cannot prevail. It is contrary to the plain words of the statute. It probably is therein a *casus omissus*, the propriety of supplying which has since been acknowledged by the legislature in the appellants' subsequent charter of 1899 (62 Vic. c. 58, sec. 408, Que.). But the statute of 1889 must be taken as it was. We cannot add to it or mend it, and by construction fill up gaps and make up its deficiencies, however apparent they may be, and nowhere in its various clauses is there the least indication that the law-giver intended to suspend the appellants' right to take proceedings for the recovery of any assessment for six months, or till after the determination of a contestation of the whole roll. Quite the contrary. As it reads, it is unequivocal. The prescription runs from the date that the assesment became due, says sec. 120, in so many words.

Now, in this case, the assessment became due in 1895, and might then have been recovered according to the plain language of sec. 231. If the appellants then or at any time within three years thereafter had issued a writ against the respondents, the sale would perhaps have been stayed by order of the court or of a judge till the final determination of the contestation of the roll. But they had the right to issue the writ were it merely to interrupt the prescription. Art. 1086 C.C.; 32 Laurent, Nos. 20 *et seq.* And no plea of *lis pendens* could have prevailed against it. Bioche, Procédure *vo.* "Exception," No. 134. An order for consolidation under Art. 291 of the Code of procedure would probably have then been the proper proceeding The appellant vainly relies upon the maxim, "*Contra non valentem agere.*" The city had the right to issue the writ; therefore the maxim has no application.

This section 144 is nothing but an enactment as to the mode by which, the time within which, and by

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whom, a common law right of action can be exercised. (There is no such thing as a rule to quash in such cases in the province). And an action impeaching the validity of such a roll would not suspend the prescription running against the city's right to recover the assessments for the good reason that its right to initiate proceedings for the recovery of the assessments would not be affected by that action. A debtor cannot have it in his power to deprive his creditor of his right of action, as the appellants would contend.

Certainly, as argued by the appellants, prescription does not run against a debt depending upon a condition until such condition happens. But why? Because a conditional debt is not exigible until the fulfilment of the condition. And the appellants beg the question in their argument on this point. They assume that this is a conditional debt. But that is the very point in controversy. And they have failed to establish that the statute imposed any condition whatever upon the maturity of the assessment, or on their right to recover it as soon as the roll was deposited. The forced construction of it that they contend for is based on nothing else than the alleged unreasonableness of enabling them to recover upon a roll which might subsequently be set aside. But with that we have nothing to do. The law-giver has the power to be unreasonable. And the courts are not at liberty to read into a statute clauses or conditions that are not in it simply because they think that they ought to be in it. When a statute is so plain, it has to be given effect to, whatever may be the consequences.

Here the statute decrees not merely that the assessment became due but also that it *may be recovered* immediately after the deposit of the roll creating the debt, and gives the remedy, the right to collect it

immediately. And when it adds that the prescription runs from the date that the assessment *became due*, using the same expression, or when payable by instalments from the date of the expiry of each such instalment, that cannot but be construed as if it said, in so many words, that the prescription runs from the date of the deposit of the roll, or from the expiry of each instalment, if any, and this, whether the roll later on is contested or not, for, if the legislature had intended such a contestation to suspend the appellants' rights, it would have said so, as it has since said in the statute of 1899.

Then, were the non-contestation or the dismissal of a contestation to be considered as a condition, the legislature had the right to say that the assessment would be due and could be recovered before the fulfilment of the condition. And that is what it did, in the public interest, by the enactments in question.

And what shews that there was a debt, a sum unconditionally due upon the deposit of the roll and that could then be recovered, even if the roll were to be subsequently contested and annulled, is the provision of sec. 241 that, in that case, the payments made under it, whether by the contesting party or by anyone else, are not to be invalidated. The city is not then bound to restore what it had received:—and why? Because what it had received was due, though the roll has been annulled. That shows clearly that the debt is not a conditional one, depending upon the validity of the roll. Art. 1088 C. C. What is called a special assessment roll is nothing but the apportionment of the amount due to the city among the different proprietors of the immovables belonging to the parties benefited by the local improvement. Secs. 209, 213; sub-secs. 8, 14, 17, 18, 228, 238, 241.

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The appellant, I observe, claims, under sec. 118 of the Act, interest on the amount of the assessment in question from 1895, or so much of it as is not prescribed. Now, it can only be because the assessment was unconditionally *due and payable* in 1895, according to the words of that section, that they have a right to the interest from that date. And if it was then *due and payable* so as to carry interest *moratoires* because the respondents who were then liable for it, were in default, *en demeure*, the appellants must have had the right to take proceedings to recover it. And, as the prescription against them began to run concurrently with their right to take such proceedings, and as they did not take any until over three years after, they are out of court.

The appellants' further contention that this special assessment is not such a tax or assessment as is, under any circumstances, prescribed by three years, but that it is prescribed by thirty years only, must also be dismissed. The words of sec. 120, "*Any* assessment under this Act" include a special assessment made under the Act. Then when the same section adds:

> Provided that in case any *special assessment* is payable by annual instalments, the prescription of three years runs only from the expiry of such instalments

that makes it still clearer that special assessments like the others are prescribed by three years. The contention that it is only when such special assessments are payable by instalments that the three years prescription applies, but that if they are payable *en bloc*, they are prescribed only by thirty years, would be untenable. Yet that is what the appellants' arguments on this point would lead to.

Further, the words "such special assessment" in section 231 refer to the roll simply called *assessment* in that and the preceding sections 228, 229, 230. Now if

a special assessment is an assessment under the Act in those sections, the word "assessment" in section 120 must likewise include special assessments. And the right to contest an *assessment* roll given by sec. 144 has, by the appellants themselves and by a uniform jurisprudence, always been considered as applying to special assessment rolls.

The appeal is dismissed with costs.

GIROUARD J. (dissenting):—This appeal involves an important question of prescription of a municipal tax and is far from being free from difficulty. It has already divided the judges of the Province of Quebec, and it is not surprising that the judges of this court are not unanimous. Briefly told, the facts, which have been admitted by the parties, are as follows:—

On the 20th February, 1895, a roll of special assessment for the widening of Notre Dame Street, west, section 2, was deposited in the Treasurer's Office of the City of Montreal, by virtue of which a total sum of $205,426.73 was assessed upon all the proprietors interested, and a sum of $24,245.43, with interest amounting to $7,273.63 was claimed from the heirs Cantin, *grèves de substitution*, as their share. On the 8th August, 1895, they, together with a large number of other proprietors, about twenty-five in number, presented to the Superior Court a petition praying for the annulment of the roll, and in a subsidiary manner that all the proprietors, and especially the petitioners, "les propriétaires d'immeubles dans les dites limites et en particulier vos requérants," were not subject to certain charges and payments set forth in the petition, and finally that the said roll be sent back to the commissioners for the preparation of a new roll, allowing a deduction of said charges and payments

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à ce que le dit rôle soit renvoyé devant les dits commissaires pour préparer un nouveau rôle, en y faisant les réductions ci dessus indiquées.

After four years of unexplained delay, probably caused by a hope that the Quebec legislature would pass a declaratory Act, namely, on the 26th October, 1899, the city pleaded to the petition which was finally dismissed *in toto* by a judgment of the Court, rendered on the 29th of June 1900, and confirmed in Review on the 15th of June 1901. That was the end of the contestation of the roll so far as the petitioners and the respondents in particular were concerned.

There remained, however, another contestation of the roll by the Guy estate, which was likewise dismissed by the Superior Court and finally by the court of appeal, by judgment of the 20th of January, 1903. This case may yet be pending before the Privy Council, for what we know, and possibly the roll may yet be annulled; but it is certain that at that date and when the seizure complained of was made, to wit, on the 1st of October, 1902, it was still pending and undecided.

It was contended at the argument that this court cannot take notice of this Guy contestation, as it is not pleaded by either party. I think it is covered by the plea of the appellants, but it is undoubtedly set up by both parties in written admissions which practically constitute a special or stated case under article 509 of the Code of Civil Procedure, as they were made in order to discuss the questions of law raised by the opposition and the contestation of said opposition and the present cause. These admissions were considered in the courts below, not only without objection, but by consent. Even if I am mistaken in the view I take of the effect of these admissions, I think it would be in the interest of justice and within the intention of the

parties, as above expressed, to order an amendment of the opposition.

On the 10th of September, 1902, the sheriff of Montreal seized certain lands of the respondents to levy the amount of their special assessment with interest. On the 2nd of October they fyled an opposition *afin d'annuler* for two reasons. First, because the lands are not seized and advertised to be sold subject to the substitution or substitutions with which they were charged: Secondly, because the debt of assessment is prescribed and extinguished.

The first ground has been rejected by all the courts, and correctly rejected under article 781 of the Code of Procedure. The substitutions alleged by the appellants, not being opened, cannot possibly be affected by a sheriff's sale. The judges were unanimous upon this point, but not so upon the second ground which affords a very remarkable conflict of opinions. We will be able to appreciate them better after the clauses of the charter of the City of Montreal are quoted.

Clause 231. The roll of assessment, when finally settled by the commissioners, as aforesaid, shall be filed and kept of record in the city treasurer's office; and such special assessment shall thereupon become due and may be recovered by the corporation in the same manner as the ordinary taxes and assessments which it is authorized by this Act to impose and levy.

120. The right to recover any tax, assessment or water rate, under this Act is prescribed and extinguished, unless the city within three years, in addition to the current year, to be counted from the time at which such tax, assessment or water rate became due, has commenced an action for the recovery thereof, or initiated legal proceedings for the same purpose under the provisions of this Act; and the privilege securing such tax, assessment or water rate avails to the city, notwithstanding any lapse of time, for the recovery of any sum which may, by any judgment, be awarded to the city, for such tax, assessment or water rate; provided that in case any special assessment is made payable by annual instalments, the prescription runs only from the expiry of such instalment.

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144. Any municipal elector, in his own name, may, by a petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment; but the right of demanding such annulment is prescribed by six months from the date of the passing or completion of such by law, resolution, assessment roll, or apportionment; and after that delay, every such by-law, resolution, assessment roll, or apportionment shall be considered valid and binding for all purposes whatsoever, provided that the subject matter thereof be within the competence of the corporation.

238. When any roll of assessment or apportionment made by commissioners to defray, in whole or in part, the cost of any improvement under the provisions of this Act, is annulled by competent authority, the city may cause a new roll of assessment or apportionment to be made by commissioners appointed and acting as hereinbefore provided with regard to commissioners for expropriation. And all the provisions of this Act, with respect to the making, revision and completion of any such assessment or apportionment, and to all matters incidental thereto, shall apply to such assessment or apportionment; provided always that proceedings for the making of any new roll of assessment or apportionment shall be commenced within six months from the date of annulment of the previous roll.

241. Whenever a roll of assessment or apportionment for any street improvement shall be annulled and set aside, the payments made under authority of the same shall not be thereby invalidated; but such payments, with interest added, shall go to the discharge of the respective amounts to be fixed by the new assessment roll, subject, on the part of the ratepayers, to making good any deficiency, or to receiving back any surplus according to the difference that may eventually exist between the old and the new roll of assessment; and the present provision shall apply as well to special assessment rolls heretofore made as to those which may be made hereafter.

The contention of the respondents in effect is that, if under these enactments their petition for annulling the roll had been maintained, they would still be liable for their due share of the cost of the expropriation to be settled by a new roll, but as they set up an unfounded opposition to the roll they are liberated *in toto* by lapse of time. This result, if true, reminds me of the old game "*qui perd gagne*", which, I hope, will never hold good in a court of justice.

On two occasions the courts of Quebec have been called upon to pronounce upon this question, and, although divided, they have maintained that prescription commences to run from the day of the deposit of the roll under section 231, and that it is not interrupted nor suspended by its contestation, both as to ratepayers contesting or not.

The point came up first in the case of the *City of Montreal* v. *The Land and Loan Co.* (1), a ratepayer who had not contested the roll. On the 15th January, 1903, Mr. Justice Doherty decided that the prescription of three years was well taken. The learned judge held that article 2232 of the Civil Code did not apply, as the city could proceed to collect, notwithstanding the contestation. He makes no reference to any other article of the code. In appeal, this judgment was confirmed purely and simply, Bossé, Hall and Wurtèle JJ., Blanchet and Ouimet JJ. dissenting (2). Mr. Justice Bossé for the majority said:

Que dans les cas ordinaires, la prescription ait été acquise, ne peut souffrir de doute. Les termes du statut, 52 Vic. ci-haut cités, ne sauraient être plus clairs, ni plus impératifs. Pas d'action, s'il n'a été pris de procédures pour le recouvrement de la dette dans les trois ans.

* * * * * * * * *

Chacun des contribuables a le droit de contester, et, contestant, il le fait pour son compte.

Il peut arriver, en pratique, que le jugement maintenant la contestation d'un seul contribuable réagisse sur la ligne de conduite et les procédures à être adoptées par la corporation, mais en ceci il n'y a rien pour indiquer que les tiers intéressés aient confié au contestant leurs intérêts et l'aient chargé de faire décider leurs droits. Il n'y a là mandat ni exprès, ni tacite, et la contestation faite par Joseph n'intéressait au procès que lui seul, sans pouvoir en aucune manière lier les autres contribuables.

L'on objecte des raisons d'inconvénient ; mais il ne peut y avoir inconvénient, car la corporation avait trois ans pour réclamer contre les autres propriétaires, et elle ne doit s'en prendre qu'à elle-même de la position qu'elle s'est faite.

(1) Q. R. 23 S. C. 461. (2) Q. R. 13 K. B. 74.

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Mr. Justice Blanchet dissenting:

En permettant à tout intéressé de contester le rôle, en son nom, et d'en demander la nullite (sec. 144) non pas seulement quant à lui, mais pour le bénéfice de ses co-intéressés ainsi que le contestant l'a fait, la charte, par exception au droit commun, confiait à celui qui conteste un mandat spécial qui constitue en réalité tous les autres intéressés demandeurs conjoints. En effet, le jugement qui mettra le rôle de côté profitera à tous les intéressés et celui qui le maintiendra liera également ceux-ci et aucun d'eux ne pourrait recommencer la même contestation pour les mêmes causes (*Stevenson* v. *City of Montreal* (1)

La théorie de l'intimé que pour échapper à la prescription invoquée, la cité était obligée de procéder contre tous les intéressés, auraint forcé ceux-ci à se porter opposants ou contestants, en faisant valoir les mêmes moyens que ceux déjà invoqués par le premier requéran', et, comme dans le cas actuel il y a 44 contribuables, il y aurait eu 44 procès au lieu d'un seul, et si le rôle avait été annulé, la cité aurait été condamnée à payer les frais de 44 causes, que les intéressés eux-mêmes auraient en définitive été obligés de lui rembourser.

C'est ce résultats absurde que la charte voulait prévenir, et celle-ci doit recevoir de la part des tribunaux une interprétation large, libérale, propre à assurer l'accomplissement de son objet et l'exécution de ses prescriptions suivant leurs véritables esprit et intention. (S.R. Q. ch. 2, sec. 13.)

Mr. Justice Ouimet, also dissenting, was of opinion that a special assessment for street improvements is not a tax or assessment within the meaning of section 120 of the charter. We have decided the contrary in *Les Ecclésiastiques de St. Sulpice* v. *The City of Montreal* (2).

In the case under consideration, which is one between the city and one of the rate prayers contesting, Mr. Justice Robidoux, who rendered the judgment of the Superior Court, likewise maintained the prescription of three years, and that it was not interrupted by the contestation; the question of suspension was not considered:

Considérant qu'il est édicté par l'article 231 de la charte de la Cité de Montréal (1889) que les sommes payables en vertu d'un rôle de

(1) 27 Can. S. C. R. 187, 593. (2) 16 Can. S.C.R. 399.

cotisations spéciales deviennent dues dès le moment que ce rôle a été déposé au bureau du Trésorier de la Cité par les Commissaires qui après avoir d'abord été chargés de procéder à l'expropriation, sont ensuite tenus de préparer le dit rôle de cotisations spéciales.

Considérant que c'est le 20 février 1895 que le dit rôle de cotisation spéciales a été déposé au bureau du dit Trésorier de la Cité par les dits Commissaires.

Considérant que c'est à partir de la dite date du 20 février 1895 qu'a commencé à courir la prescription de la dite somme de $24,245.43.

Considérant qu'aux termes de l'article 120 de la dite Charte de la Cité de Montréal (1889) le droit de recouvrir toute cotisation en vertu des dispositions de la dite charte est prescrit et éteint à moins que la dite Cité dans les trois ans à compter de l'échéance de cette cotisation n'ait intenté une action pour le recouvrement d'icelle.

Considérant que le 18 août 1902, date de la dite saisie du dit immeuble—laquelle sasie paraît être la première et seule procédure instituée aux fins de recouvrer la dite somme de $24.245.43 avec intérêt—il s était écoulé plus de trois ans depuis que la dite somme était devenue due en vertu du dit rôle de cotisations spéciales à savoir depuis le 20 février 1895, date où le dit rôle de cotisations spéciales à été déposé comme susdit par les dits Commissaires au bureau du dit Trésorier de la dite Cité de Montréal ;

Considérant que les actes faits par un débiteur dans le seul but de faire déclarer illégal et nul le titre de son créantier ne son pas interruptifs de prescription et que partant la requête en contestation du dit rôle de cotisations spéciales produite le 8 août et dans laquelle Dame Elizabeth Benning, l'un des auteurs des dits opposants Cantin était en effet partie, n'a pas eu pour résultats d'interrompre la prescription de la dite somme de $24,245.43 (Art. 2224 C.C.).

In appeal this judgment appears to have been unanimously confirmed, Bossé, Blanchet, Hall, Ouimet and Charbonneau, *ad hoc*, JJ., no special reason being given. Mr. Justice Blanchet observes, however, that he only concurs in the result, entertaining the same views he expressed in the former case, but as, at the time of the seizure, there was the Guy contestation still pending, the city could not proceed to levy the assessment from the respondents. Mr. Justice Charbonneau is of the same opinion.

The clauses of the charter are undoubtedly ambiguous, but our duty is to reconcile ambiguous enact-

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ments, by giving them a reasonable and even liberal interpretation, so as to give effect to all. C. C. art. 12; Que. Rev. St., Int. Act. Pres. Title, ch. 2, s. 13. This sound principle, as old as legislatures, was followed recently in a remarkable Privy Council case, where the literal meaning of a clause of a statute was overlooked. *Smith* v. *McArthur* (1). All the cases agree that, in construing a section of an Act, regard must be had first to the language of the clause itself, and second to other clauses in the same Act, and that construction should be adopted which makes the whole Act stand consistently together or reduces the inconsistency to the smallest possible limits. See cases cited in Vol. 26, Am. & Eng. Ency. of Law, *vo.* "Statutes," (2 ed.) at page 616.

As I understand the above clauses of the charter, they mean this:—A special assessment becomes due from the day of the deposit of the roll in the city treasurer's office (s. 231), and immediately prescription commences to run and continues to run, if the roll is not contested within six months. If it is contested the prescription is suspended pending the final judgment. This conclusion results from sections 144 and 238. It is not disputed if the contestation is maintained and the roll annulled. A new roll may be then made where the liability of the contesting ratepayer is continued, subjected to a new prescription (sect. 238). But the statute is silent as to the effect upon prescription of a judgment dismissing the contestation. Therefore, it is contended by the respondents, it continued to run as if no contestation had been made. This would certainly be a remarkable case of *summum jus summa injuria.*

The court of appeal holds that, *pendente lite*, the city was bound to proceed by action or seizure in order

(1) [1904] A. C. 389.

to interrupt prescription. If so bound as against the contesting parties, *a fortiori* will it be against the ratepayers not contesting. Hence the necessity of any number of actions or seizures, 100 or 200, or more—at least as many as there are ratepayers assessed—which would be perfectly useless if the roll be annulled. The Court of Appeals calls this state of affairs a mere inconvenience. It leads not only to great inconvenience, but to most absurd consequences which cannot be supposed to have been contemplated by the promoters of the charter or the legislature (26 Am. & Eng. Encyl. of Law, p. 648).

Of course, as Lord O'Hagan said in a well known House of Lords case :

> We must take care that a hard case shall not make bad law ; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity. *River Wear Commissioners* v. *Adamson* (1) (H. L. 1877).

In *The Queen* v. *The Judge of the City of London Court* (2) Lord Esher M. R. said :

> In my opinion, the rule has always been this—if the words of an Act admit of two interpretations, then they are not clear ; and if one interpretation leads to an absurdity, and the other does not, the court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.

Is it not absurd to suppose that in order to accomplish one object, namely, the determination of the liability of the proprietors, two or more actions—in this instance at least twenty-five—would be necessary ; one by the dissatisfied debtors to the effect that the instrument of indebtedness be annulled, and the others by the creditor against all the debtors, contesting or not, praying for the payment of the debt ? Especially, is it not preposterous to hold that prescription will be interrupted or suspended if the debtor's

(1) 2 App. Cas 743 at pp. 758 ; (2) [1892] 1 Q B. 273 at p. 290. cf. at pp. 762, 764.

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action be maintained, but that it will not, if it be dismissed. With due deference, such a state of affairs is contrary to reason, and cannot be attributed to men in their right senses, as members of a legislature are presumed to be. (26 Am. & Eng. Encyl. of Law, pp. 601, 648).

I therefore consider, independently of the provisions of the Civil Code, and merely by giving a fair meaning to the statute, that prescription was suspended during the pendency of the contestation and that section 408 of the charter of 1899 is merely declaratory, to remove any possible doubt:

> Whenever any valuation and assessment roll, or special assessment roll, is attacked or contested by proceedings, such proceedings shallbe held to interrupt prescription in respect to all such assessment rolls, until the date of the final adjudication upon or determination of such judicial proceeding.

The legislature has used the word "interrupt" instead of the more correct one "suspend"; but it is immaterial in the present case, as both would preserve the right of the city to enforce the collection of the assessment.

It is especially when viewed by the light of the Civil Code that the true meaning of the above statutory enactments appears.

I quite agree with Mr Justice Robidoux, confirmed in appeal, that article 2224 of the Civil Code does not apply, but not for the same reason, namely, that the opposition *afin d'annuler* was made "*dans le seul but de faire déclarer illégal et nul le titre de son créancier.*" Something else was demanded, namely, the confection of a new roll, and in any event, the modification of the first one. It seems to me that the true and, probably, the only reason why Art. 2224 C C. does not apply is to be found in Art. 2226 C. C., which declares that a judicial proceeding does not interrupt

prescription if it be dismissed, as undoubtedly it was here.

But can we not find a cause for interruption of prescription in articles 2184, 2185 and 2227 of the Civil Code? To my mind, the petition to annul the roll of assessment contains not only tacit but express allegations of an acknowledgement of the right to assess and a tacit renunciation of the benefit of the prescription which had commenced to run. The petitioners pray, first, that the roll be annulled; but they knew that this meant not a liberation or discharge from the payment of the cost of the expropriation but the making of a new roll where the legal liability would be continued and adjusted. Finally they pray, in a subsidiary manner, that certain deductions be made from the first roll and, for that purpose, that it be referred back to the commissioners "*pour préparer un nouveau rôle.*" These allegations of the respondents amount to this: We owe our due share of the expropriation; but the roll is null and illegal and we demand that a new one be made; and if this cannot be granted, we pray for certain deductions. The court, by judgment rendered in 1900, dismissed their demand and as a necessary consequence declared that their share of the tax was as stated in the roll.

It may be said that the acknowledgement in the petition to annul was of no avail to the appellants, as the prescription was not acquired. This would be true if the proceedings had ended then; but, in 1899, instead of invoking prescription by an amendment to their petition or otherwise—prescription being available at any stage of the proceedings even in appeal—they joined issue with the city, persisted in the prayer of their petition as framed and, on the 7th of July, 1900, asked the Court of Review to reverse the judgment of the Superior Court and grant the prayer of

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their demand to annul the roll. All this appears in written admissions and establishes that the last act of interruption happened in 1901. The seizure by the sheriff was made in 1902, when the interrupted prescription was yet running. If these facts do not constitute tacit renunciation of prescription, then I do not know what that word means. Arts. 2227, 2184, 2185, 2264, C. C.

Pothier, Oblig. n. 693 says:

Par quelque acte que le débiteur reconnaisse la dette, cet acte interrompt la prescription.

Dunod, p. 58, adds that

toutes les fois qu'il se fait quelque-chose entre le créancier et le débiteur, le possesseur et le propriétaire, qui emporte un aveu exprés ou tacite de la dette, *du droit* ou de la propriété, ce sera une interpretation civile.

Baudry-Lacantinerie, *Droit Civil*, Vol. 25, n. 529, (2 ed.):

La reconnaissance interruptive de prescription résulte de tout acte ou de tout fait contenant ou impliquant l'aveu de l'existence d'un droit. Elle peut être, en effet, expresse ou tacite.

Fuzier-Herman, Code Annoté, art. 2221, Vol. 4, pp. 1262, 1263, summarizes the jurisprudence upon this point in the following paragraphs:

7. Il faut observer d'ailleurs que les juges du fait peuvent induire la renonciation, tant des circonstances particulières de la cause que du silence gardé par le défendeur en première instance relativement au moyen de prescription. Cass. 21 mai, 1883, Touchet, précité, Paris 1er mars, 1893 (D. p. 93, 2, 296). Sic. Baudry-Lacantinerie et Tissier n. 51.

14. La renunciation tacite à une prescription acquise peut résulter de déclarations consignées dans des actes de procédure, par example dans un exploit introductif d'instance, ou dans une requête d'avoué, aussi bien que de declarations personnelles, Paris, 16 janvr, 1865 (S. 65, 2, 123, P. 65, 583). Sic, Baudry-Lacantinerie et Tissier, n. 79; Aubry et Rau, t, 8, p. 452, par. 776. Contrà, Troplong, t. 1, n. 55.

27. Celui qui, sans contester l'existence de sa dette, *en discute la quotité*, ou l'époque de l' exigibilité, *sollicite des réductions* ou des

délais, renonce, par là même, à opposer la prescription. Troplong, t. 1, n. 67 et 68 ; Aubry et Rau, t. 8, p. 453, par. 776 ; Baudry-Lacantinerie et Tissier, n. 73, V. suprà, art. 2220, n. 11.

Prescription was not only interrupted, but it was also suspended. These two expressions are not synonymous. All the commentators of the French Code, similar in this matter to the Quebec Code, establish that they have a different meaning and effect. See Quebec Civil Code, arts. 2222 to 2231, and 2232 to 2239, also 2264; 32 Laurent, n. 77; 25 Baudry-Lacantinerie, n. 365. Interruption means the entire destruction of the prescription running which recommences to run for the same time as before. Suspension, as the word indicates, merely suspends the running prescription. The expression is used to indicate cases in which the statute, after having begun to run, is suspended in its operation so that the time during which the statute ran prior to the period of suspension and the time elapsing after are alone to be counted against the creditor.

Mr. Justice Doherty and the majority of the court of appeal held in the case of *City of Montreal* v. *The Land and Loan Company* (1), that the contestation of the roll does not constitute the *absolute impossibility* to collect required by art. 2232 C. C. I believe that practically it does. What valid reason can be advanced to force the city to take hundreds of cases ruinous to all? As many suits or seizures of a similar character and for the same object as there were proprietors, contesting or not, would be necessary. Such an absurd result could not have been contemplated by the legislature. It may be that the learned judges were right in the case before them, that of a ratepayer who did not contest the roll; I express no opinion upon that case which is not before us; but it seems to me that

(1) Q. R. 23 S. C. 461 ; 13 K. B. 74.

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the parties who have contested the roll are bound by this contestation and its result. Evidently the city could not force the collection of the assessment against them until the contestion was finally disposed of. If undertaken by an action or a seizure, it would probably have been met by a plea of *lis pendens* setting forth all the grounds of nullity alleged in the petition to annul the roll, and its demand would be not simply stayed, but dismissed with costs under article 173 of the new Code of Procedure, or article 136 of the old Code. At all events, the ratepayer contesting the roll will be entitled by dilatory exception to a stay of proceedings till the rendering of the decision of the court on his contestation, and will thus prevent the city from enforcing the payment of the assessment *pendente lite* (art. 177 C. P. Q.) The same course would be necessary at least against all proprietors contesting, a most absurd state of affairs which, in my opinion, amounts to absolute impossibility to proceed. The present case, therefore, falls strictly within the exception of article 2232, namely, that it was absolutely impossible for the city, *in law*, to act effectively, *utilement*, to use the expression of French decisions quoted later on. It is the application of the old well known Roman law maxim which is to be found in all systems of jurisprudence: "*Contra non valentem agere nulla currit præscriptio.*" The French Code, art. 2251, different from art. 2232 of our Code, did not retain the maxim. It merely declares that prescription runs against all persons, unless they fall within some exception established by law. The jurisprudence has however maintained the old rule with the limitation resulting from the word "absolute" contained in our article.

On the 21st of May, 1900, the *Cour de Cassation* held that:

La prescription ne court pas contre celui qui est dans l'impossibilité absolue d'agir par suite d'un empêchement quelconque résultant soit de la loi, soit de la convention ou de la force majeure. P.F. 1900, 1,431.

See also Troplong, Pres. vol. 2, n. 701; 5 Zacharié, par. 848; Merlin, Rép. S. 1, par. 7, art. 2, quest. 10 and 11; Dalloz. Rép. Supp. vo. Prescription, n. 454, Vol. 13, p. 178 (1893); Pandectes Fr. vo. Prescription, nn. 970 to 975, Vol. 45 (1903) p. 507, 508; Sirey, Rép. 1902, 1, 133, note 1-2.

It would seem that article 2232 C.C. is sufficient to suspend prescription, if the debt depends upon a condition. Here again the reason of the exception is the absolute impossibility for the creditor to move. The code has, however, specially provided for this particular case. Article 2236 C.C. says:

Prescription of personal actions does not run with respect to debts depending on a condition, until such condition happens.

As I read the various statutory enactments relating to the prescription of a special assessment in the City of Montreal, I find that they are subject to the happening of an event which may or may not come, namely, the contestation of the roll. If no contestation be lodged within six months, the prescription continues its course till accomplished. If a contestation be made, prescription will be suspended pending the litigation. This necessarily results from sections 144 and 238.

The provision of article 2236 C.C. was borrowed, word for word, from article 2257 of the Code of France, where its scope and effect have been fully considered by the highest courts and jurists. I will refer to a few of these decisions: Cass. 20th Feby. and 15th July 1839; S.V. '39,1,215,575; 26th May, 1856; S.V. 57, 1,820; Cass. 14th Feby. 1888; S.V. 90, 1,313; Cass. 28th Oct. 1889; S.V. 91, 1,293; Troplong, Pres. Vol. 2, n. 686; Leroux de Bretagne, n. 512,592.

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A decision of the *Cour de Cassation* of the 22nd June, 1853, is quite in point. A doubt having arisen as to the applicability of a canal tax or toll, both parties referred the case to the *Conseil d'Etat*, the competent tribunal, for determination, it being agreed that, in the meantime, no other proceeding would be taken. The court held, 1st: That prescription had been suspended pending the decision in consequence of the said agreement; and 2ndly, that independently of the agreement and by force of law, prescription was suspended by the proceeding or *instance* before the State Council, where the validity of the title of the creditor was at stake. Dalloz 1853, 1,302:

La Cour: Sur le premier moyen: Attendu que l'arrêt attaqué a reconnu et constaté, en fait, qu'il était intervenu entre les parties des conventions dont le but était de suspendre toutes poursuites jusqu'à ce que le conseil d'Etat eût statué sur la portée du titre en vertu duquel le droit était réclamé: qu'en induisant de ces conventions que la prescription n'avait qu'à courir au profit des demandeurs, l'arrêt attaqué n'a violé ni faussement interpreté les articles invoqués; *Que c'est avec la même raison que le dit arrêt a décidé que la prescription avait été suspendue par suite du litige soulevé sur le titre lui-même, puisque, pendant cette instance, la personne du débiteur étant incertaine, le créancier ne pouvait utilement agir.*

The commentators and *arrêtistes* who have noted this decision, refer only to the last *moyen* which they express as follows:

Jugé que la prescription d'un droit qui repose sur un titre dont la validité est contestée demeure suspendue pendant l'instance en validité du titre. Gilbert sur Sirey, Code Annoté, ed. 1870, p. 573, art. 2257; Marcadé, art. 2257. See also Cass. 27th May, 1857, D. 57, 1,290.

The issue and the facts of the case as detailed in the report lead to no other conclusion, and no authority can be quoted which gives another meaning to this decision of the highest court of France. I am not aware that its soundness has been questioned by either courts or commentators. It is cited as law by the

best authorities: Fuzier-Herman, Rép. 1903, Vo. Pres.; vol. 31, p. 265; Pand. Fr. Rép. 1903, Vo. Pres. vol. 45, p. 507; S.V. 1902, 1,133, note 1-2.

With regard to the Guy contestation, Mr. Justice Blanchet and Mr. Justice Charbonneau held that as long as it is not finally disposed of, the city cannot levy the tax even from the respondents who have been unsuccessful in their petition to annul. It is true that, if the Guy estate succeeds, a new roll may become necessary as to all the proprietors, the respondents included; but this does not mean that they are parties to that case, and that the assessment is not payable as to all who did not contest, or at least those who having contested have been put out of court. As to the latter at least, there is *chose jugée* and they have no other course to adopt than to pay. If the roll be annulled at the suit of the Guy estate or any other proprietor, then the respondents will find their relief in section 241 of the charter. This clearly results from our judgment rendered last December on a motion to quash an appeal for want of jurisdiction in the case of *The City of Montreal* v. *The Land and Loan Company* (1).

For these reasons, I am of the opinion that the appeal should be allowed and the opposition *afin d'annuler* of the respondents dismissed with costs before all the courts.

DAVIES J., concurred in the judgment dismissing the appeal with costs.

NESBITT J. (dissenting):—I must say I have felt very great doubt and difficulty as to this case, but I have come to the conclusion that the opinion of my brother Girouard is the correct one. It appears to me that the debt does not become due on the roll when a

(1) 34 Can. S.C.R. 270.

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person assessed properly disputes it until that dispute is solved and that, in any event, the person so disputing cannot be h ead to say at the time the court declares the roll valid and binding on him that no debt is due from him in respect to it.

KILLAM J.—I agree entirely with the reasons given by the learned Chief Justice for the dismissal of this appeal; but on account of the importance of the case and the differences of opinion in this court and the courts below, I desire to add some further considerations.

The prescription given by section 120 of the city charter of 1889 applied to

the right to recover any tax, assessment or water rate under this Act.

Section 81 of the Act authorized the council to make by-laws to impose and levy an assessment on immovable property liable to taxation in the city, not to exceed one and a quarter per cent of the assessed value of such property, and also to impose and levy a business tax on trades, professions, etc., and certain special taxes upon those engaged in particular kinds of business. By section 82 these assessments and taxes were to be payable annually and at the times fixed by such by-laws.

Section 260 authorised the imposition of rates for the use of water.

Sections 228-231 provided for the making of special assessments of the kind now in question.

By section 1 of the Act:—

Whenever the following words occur in this Act, they shall, unless the context otherwise requires, be understood as follows:

* * * * * * * * *

The word "assessment" shall mean the rates annually levied upon immovable property in the city generally;

The words "special assessment" or "apportionment" shall mean the assessment levied, from time to time, upon certain proprietors for local improvements;

The word "tax" shall mean the personal duty or license fee levied upon trades, business professions or occupations generally.

The "special assessment" is certainly within the generic term "assessment". While there was an advance by the city of the whole cost of an improvement, one half of which was eventually to be borne by certain property holders only, their proportion of the cost was to be imposed upon them by the sovereign authority vested for the purpose in the governing body of the city. It was as much an assessment upon them as was the imposition of any contribution for ordinary municipal purposes. The benefit being considered to be greater to them than to the city at large, they were made liable to the imposition of a greater proportion of the burden. That was deemed the fairest mode of apportioning the cost of a particular civic improvement.

When a general term, like "assessment," is assigned in a statute a narrower meaning than it would have in its ordinary sense, excluding some of its species, the draftsmen requires to exercise great care to escape its use in the general sense. In such a case a slight indication may be sufficient to warrant the ascribing to it of its full natural meaning. The definition is qualified. It is "unless the context otherwise requires."

Section 120 refers to

the right to recover *any* tax, assessment or water rate *under this Act.*

And the proviso at the end refers to a "special assessment" as if it had been included under the previous language. It is not merely an enactment that, in case of a special assessment payable by instalments, there shall be a similar period of prescription running from the maturity of each instalment. It seems to assume that

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special assessments are included in the previous part of the section; it is a proviso apparently framed to qualify or explain the prior terms; it speaks of "the" prescription, as if that previously provided was applicable; it states that it is to run "*only* from the expiry," etc., as if otherwise it would be different. In my opinion the context sufficiently indicates that a special assessment of the kind now in question comes within the word "assessment" where first used in the section.

The period of prescription ran from the time at which the "tax, assessment or water rate became due." It did not run from the time that proceedings could be taken to collect the tax, assessment or water rate. Different methods and different times were fixed for recovery from different sources. In order to a sale of immovables, there must, whether under the Act of 1889 or under that of 1899 (which was the one in force when these proceedings were taken), have been some tax, assessment or rate in arrear for a year.

In respect of all these various taxes, rates and assessments express provisions were made either directly fixing or authorizing the council to fix the times when they should respectively become due. And in the case of a special assessment the time was explicitly fixed by the statute. Section 231 required the assessment roll to be filed with the city treasurer, and provided that "such special assessment shall thereupon become due."

If there had been nothing in the Act to qualify these provisions it would be absolutely clear that the period of prescription would run from the times thus respectively fixed for the maturity of the claims.

The argument for the city is, however, that section 144 of the Act of 1889 postponed the commencement of the period of prescription, either by postponing

the due date of the assessment or by interposing an obstacle to its enforcement.

The section was as follows:

144. Any municipal elector, in his own name, may, by a petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment; but the right of demanding such annulment is prescribed by six months from the date of the passing or completion of such by law, resolution, assessment roll, or apportionment; and after that delay, every such by-law, resolution, assessment roll, or apportionment shall be considered valid and binding for all purposes whatsoever, provided that the subject matter thereof be within the competence of the corporation.

This section did not relate exclusively to assessments. It had not for its object to fix the times of their maturity. It was general and dealt with other than financial matters.

The sections numbered from 140 to 148 came within a portion of the Act designated as "Title XV." having the heading "By-laws" and beginning with section 140 which authorized the city council to make by-laws on a great variety of subjects.

It appears to me that nothing in section 144 affected in any way the time of the coming into force of valid by-laws, resolutions, assessment rolls or apportionments. It dealt with the method of attacking such matters for illegality and fixed a limit of time within which this could be done. The portion of the section making them valid and binding after the specified delay was not needed in order to make valid and binding by-laws, resolutions, etc., which were legal and valid when made. And it could not have been intended for that purpose. They would be so without any such provision. To hold the council's by-laws and resolutions suspended in their operation until the expiry of the six months, and then until the disposi-

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tion of proceedings attacking them, would be to paralyze the hands of the civic authorities.

The proceedings to annul for illegality the assessment roll in question failed. This established that the roll was valid and legal from the beginning. The proceedings were begun within the necessary six months, so that the expiration of six months gave the roll no greater force than it had when filed with the treasurer.

The last of the conditions upon which it could be said that the debt depended, under art. 2236 of the Civil Code, happened with the filing of the roll. It was not a debt with a term, but one payable immediately upon its coming into existence.

Articles 2222-2231 C. C. deal with the causes which interrupt presenption articles 2232-9 C. C. with the causes which suspend the course of prescription.

The causes of interruption are divided into "natural" and "civil." By its definition "natural interruption" does not apply to a case like the present. The specified causes of civil interruption are judicial demands, renunciation of the benefit of a period elapsed and acknowledgement by the debtor.

The judicial demand, under article 2224 C. C is one served on the person whose prescription it is sought to hinder, not upon the person whose claim may be prescribed. And as the petition was dismissed, it cannot, by the terms of article 2226 C. C., be treated as having interrupted the prescription. Seizures, set-offs, interventions and oppositions are considered as judicial demands. Even if the contestation of the petition to annul the roll could be treated as an opposition within this article, that contestation was not put in until after the expiration of the period of prescription. The result of the proceeding was only the dismissal of the petition, which merely established the

validity of the assessment roll when made and filed and involved no adjudication upon the continuance of its effect.

The petition did not acknowledge the right. It contested it.

By article 2232 C. C.,

prescription runs against all persons, unless they are included in some exception established by this code, or unless it is absolutely impossible for them in law or fact to act by themselves or to be represented by others.

I am quite unable to discover any reason for believing that the petition to annul the assessment roll interposed any obstacle to proceedings for the enforcement of the assessment either against the petitioners or against other property holders affected. It seems to me that, if they had been taken in time and opposition entered, the only relief would be by an appeal to the discretion of the court, which might have stayed the proceedings if the petition had seemed to raise sufficiently substantial questions.

If the mere filing of a petition to annul an assessment roll would suspend its operation or effect, equally a petition to annul a by-law or resolution would suspend the operation or effect of the by-law or resolution, a result which would leave the city at the mercy of any elector in cases in which a short delay might be of serious importance.

Notwithstanding the authorities to which my brother Girouard has referred, I am unable to agree with him that the pendency of this petition had the effect of either interrupting or suspending the prescription.

The summary in Dalloz, 1853,1, 302, of the case there mentioned, does not appear to me to show the circumstances sufficiently to warrant its being taken as a direct decision that the pendency of any collateral liti-

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gation questioning the title to or existence of a right or debt operates *ipso facto* to prevent the owner or creditor from taking direct proceedings to enforce the right or debt. The reason there given

puisque, pendant cette instance, la personne du débiteur étant incertaine, le créancier ne pouvait utilement agir,

appears to limit the decision to a case of that character, although the summary of the case does not clearly show in what the uncertainty of the person consisted. And further it was thought that *le créancier ne pouvait utilement agir*. It was not that it was absolutely impossible for him to act, as the Quebec code requires.

In the present case the prescription was expressly made to run from the time at which the assessment became due, not from the accrual of the right to enforce it, which would be a year later. Neither the city charter nor the Civil Code expressly interposed any obstacle to proceedings upon the claim or to the running of the prescription; and, in the absence of any clear, well-known principle of law to that effect, I cannot think that the existence of such an obstacle should be implied.

Appeal dismissed with costs.

Solicitors for the appellant: *Coyle & Tétreau.*

Solicitors for the respondents: *Brosseau, Lajoie, Lacoste & Quigley.*