LA BANQUE VILLE MARIE (PLAINTIFF) ..... } APPELLANT;

AND

MARY JANE ELIZABETH MORRISON (DEFENDANT)..... } RESPONDENT.

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*May 10.

*June 26.

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

Special tax—Ex post facto legislation—Warranty.

Assesment rolls were made by the city of Montreal under 27 & 28 V. c. 60 and 29 & 30 V. c. 56 apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the legislature by two special acts to make new rolls, but in the meantime the property in question had been sold and conveyed by a deed with warranty containing a declaration that all taxes both special and general had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid.

Held, affirming the judgments in the courts below, Gwynne J. dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale.

APPEAL from the decision of the Court of Queen's Bench, affirming the judgment of the Superior Court, district of Montreal, dismissing the plaintiff's action by which she claimed to be reimbursed moneys paid the corporation of the city of Montreal for assessments imposed on the lands in question for their proportion of the cost of widening Saint James street and St. Lambert street.

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

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In 1866 the owners of land fronting on St. James and St. Lambert streets in Montreal, petitioned the city council for the widening of the streets mentioned, the costs of the improvements to be assessed against the lands benefited thereby as provided by 27 & 28 Vic. ch. 60 and 29 & 30 Vic. ch. 56. The council granted the petitions, by resolution, and the improvements were made during the year 1868. A special assessment was made apportioning upon the lands benefited the cost of the works in the same year and the property of the defendant was taxed thereby for $1,755 as the proportion of the cost of widening St. James street and for $650.63 as the proportion of widening St. Lambert street.

In 1873 defendant sold the lands to plaintiff and conveyed them by deed with the usual warranty containing a clause declaring that all taxes, both general and special, had been paid, and three days after the execution of the deed defendant paid the $1,755 assessed for the St. James street improvements to the corporation.

The roll imposing the rate for the St. James street improvements was contested and by decision of the Privy Council on 1st January, 1878, in the case of *The City of Montreal* v. *Stevens* (1), it was set aside as null on account of irregularities in the award of the commissioners, and the $1,755 paid by the defendant was returned to her by the corporation. On the application of the city council the act 42 & 43 Vic. ch. 53 was then passed, secs. 4 and 7 of which authorized the corporation to make a new roll which was afterwards done and the property in question therein assessed for $3,331 for the cost of the same works. The assessment affecting properties benefited by the widening of St. Lambert street was also contested, but no decision arrived at as during the pendency of the suit the roll

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was lost. The corporation again had recourse to the legislature and obtained the act 44 & 45 Vic. ch. 73 authorizing another new roll which was made in 1881 and the lands in question assessed therein for the St. Lambert street improvements at $650.63.

The plaintiff paid the taxes thus imposed and claimed reimbursement under the warranty and declaration contained in the deed, but defendant refused payment on the ground that the lands had never been legally taxed until after her ownership had ceased, and that the warranty and declaration had reference only to the taxes legally due at the date of the sale.

Geoffrion Q.C. and *Charbonneau* for appellant. As to the St. James street item the trouble is not the new assessment, but goes back to the resolution when the city of Montreal, on the petition of the defendants *auteurs*, ordered the street to be widened. The charge exists from that time, *en germe* and absolutely for the whole cost. The assessment roll does not create the charge but only distributes it.

We are not dealing now with a tax. In this case the proprietors join together and agree that the whole cost will be assessed between themselves under a competent authority. The corporation is acting the part of an arbitrator between the proprietors.

The amount assessed between the properties by both rolls was never the debt of the corporation but the joint debt of the different proprietors interested. It is only because the commissioners had separated two proceedings that the assessment roll was annulled in *City of Montreal* v. *Stevens* (1).

As to the St. Lambert street item the roll was not null but simply lost, and the new roll was only a continuation or copy of it. Moreover the proportion

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of the two rolls being the same the respondent has no interest in the matter of warranty to contest said proportion. *Levy* v. *Renauld* (1).

Lajoie for respondent. At the time the defendant sold the plaintiff the property neither tax was due or exigible. The Saint James Street roll was declared null, and the Saint Lambert Street roll was involved in a contestation during which it was lost and deprived of legal effect. It was only after the sale, and in virtue of new and special legislation, that any apportionment creating a charge upon the property was made.

There is no material difference between assessments of this kind and ordinary taxes. The former are expressly assimilated to the latter by 27 & 28 Vic. ch. 60, sec. 24. *Vide* Dalloz (2); *Monestier* v. *Vincent* (3); *Thibault* v. *Robinson* (4).

It is not enough that the charge may exist in a potential state, in germ, it must be full-born (5).

The " new rolls of assessment " provided for by 42 & 43 Vic. ch. 53, sec. 4, and 44 & 45 Vic. ch. 73, sec. 1, prove the non-existence of the old rolls. Before the new could be put into force the old were blotted out, one by annulment the other by loss or destruction.

How can a right be said to survive " in germ " after it has been blotted out ? *Cross* v. *The Windsor Hotel Co. of Montreal* (6).

THE CHIEF JUSTICE.—I am of opinion that the appeal must be dismissed.

As to the St. James street property the taxes paid by the appellant, and which he now seeks to recover

(1) 20 R.L. 449.
(2) Rep. vo. Vente, no. 1046, 1047.
(3) Dal. vo. Commune, no. 2626.
(4) Q. R. 3 Q. B. 280.
(5) C.C. art. 1508 ; C.N. art. 1626.
(6) M.L.R. 2 Q.B. 8 : 12 Can. S.C.R. 624.

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from the respondent, were never legally imposed until after the sale. This was recognized by the city, who repaid the taxes she had paid them and then imposed new and legal taxes, but taxes not coming within the clause of guarantee in the deed of sale.

As to the St. Lambert street property, I am equally of opinion that the respondent is not liable to make good what the appellant has had to pay. The roll upon which this assessment was originally imposed was lost, and without it the taxes could never have been enforced but for the intervention of the legislature. If the legislature had not intervened the respondent never would have been in any way liable for these taxes to the appellant. Then this *ex post facto* legislation was what obliged the appellant to pay. The respondent never agreed by the clause of warranty in the deed of sale to indemnify the appellant against such act of the legislature but only against taxes lawfully imposed at the date of the sale, and these appellant has never paid, though he has paid others of the same amount attributable, however, to another legal source, an altogether different obligation created by paramount authority since the sale. Therefore, for the same reasons as those contained in the *considérants* of Mr. Justice Gill's judgment and in the notes of Mr. Justice Bossé, the appeal must be dismissed.

TASCHEREAU J.—Tant qu'à l'item pour l'élargissement de la rue St. Jacques, je renverrais l'appel sans hésitation. J'écarte le paiement de $1755 fait par l'intimée à la corporation peu de jours après la vente à l'appelante, et le remboursement de cette somme fait par la corporation à l'intimée en 1878. Je ne vois pas que ni l'un ni l'autre puisse affecter la question en litige ici entre les parties. C'était un paiement indû, c'est-à-dire sans cause ou considération, et fait par

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erreur. L'acte qui autorise la corporation à retenir ces paiements, et les imputer sur le nouveau rôle, ne fut passé que quelques mois après le remboursement fait à l'intimée. La corporation était donc légalement tenue de rembourser l'intimée tel qu'elle l'a fait, le 15 août, 1878. Le nouveau rôle d'ailleurs est lui-même subséquent. Il est daté du 30 novembre, 1878.

Je pose la cause comme si, en fait, c'était l'intimée qui, sur contestation du rôle de répartition, l'eût fait déclarer nul, d'une nullité de *non esse*, et ce avant la vente par elle à l'appelante. C'est la même question, posée d'une manière différente, sans doute, mais qui, ainsi débarrassée des faits qui ne peuvent l'affecter, rend plus lucide la question légale que, d'accord avec la cour Supérieure et la cour du Banc de la Reine, nous croyons devoir résoudre en faveur de l'intimée. Elle a vendu l'immeuble en question avec garantie de tous troubles et stipulation expresse que les taxes et cotisations générales et spéciales, y compris celles de l'année courante, avaient été payées. Or, elle n'a pu par là vouloir stipuler que pour ce qui était dû et payable. Or, il n'y avait alors rien d'échu, rien de payable à la corporation. C'est là l'effet rétroactif du jugement rendu plus tard annulant la répartition. La doctrine que le vendeur répond de toute éviction dont le germe existait lors de la vente n'est pas applicable aux contributions publiques, ou droits imposés par la loi elle-même (1). Que l'acheteur connaît ou est censé connaître tout aussi bien que le vendeur.

Si, par exemple, une répartition pour la construction d'une église est faite payable pendant dix ans, et que soit, cinq ans après cette répartition, un immeuble qui y est affecté est vendu avec garantie, le vendeur est tenu de tous les arrérages jusqu'à la vente, mais la garantie ne couvrira pas les cinq années à écheoir.

(1) Pothier, Vente, n° 86-87, 194 *et seq.*

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L'appelante voudrait faire remonter la taxe en question jusqu'à la résolution du conseil de ville de 1867. C'est par cette résolution, dit-elle, que cette propriété a été taxée, pour le coût de l'élargissement de la rue St. Jacques.

Mais cette prétention n'a pas été accueillie par le jugement *a quo*, et ne pouvait l'être.

C'est là, de la part de l'appelante, soutenir que si son achat eût eu lieu, au lendemain même de cette résolution, et dès avant toute autre procédure, la garantie de l'intimée se serait étendue à cette taxe. Or cette proposition est erronée. Un immeuble n'est taxé en pareil cas, et la corporation n'y a aucun droit que pour la répartition qui établit le privilège, et non seulement son montant. Ou, en d'autres termes, il n'y a pas de privilège, il n'y a pas de taxes, tant que le rôle n'en a pas fixé le montant. La corporation n'a pas de créance contre qui que ce soit, avant la répartition.

C'est dans ce rôle et son homologation, qu'est le décret, qui, pour la première fois, affecte spécialement chacun des immeubles imposables. Et comment l'intimée aurait-elle pu payer une taxe dont le montant n'étaient pas établie, ou payer avant que la taxe fût due, payer sans cause, sans dette ? Il est bien vrai que la résolution du conseil de ville a, dès 1867, decrété que les travaux requis pour l'élargissement de la rue St. Jacques seraient faits aux frais des propriétaires intéressés, *ut universi*. Mais cette résolution par elle seule n'a pas créé de taxe spéciale sur chacun d'eux, *ut singuli*, ni sur chacune de leurs propriétés.

La jurisprudence de la cour de Cassation nous fournit une cause décidée dans ce sens. Elle est rapportée dans Sirey (1). Le sommaire s'en lit comme suit:

Le propriétaire ou l'habitant d'une commune qui postérieurement à un jugement prononçant au profit d'un tiers des condamnations

(1) *Monestier* v. *Vincens*, S. V., 44, 1, 209.

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pécuniaires contre cette commune, vend les propriétés qui y sont situées, n'est pas tenu de garantir l'acquéreur des charges que fait peser sur lui une ordonnance postérieure, qu'établit une contribution supplémentaire sur toutes les propriétés situées dans la Commune pour parvenir à l'acquittement de ces condamnations.

Cette décision a, dans l'espèce, une application entière.

Ici, le jugement, c'est la résolution de 1867, et le rôle de 1878, est l'ordonnance postérieure à l'acquisition de l'appelante. Je ne parle plus de celui de 1868. Celui-là, je l'ai dit, est frappé, *ab initio* de nullité de *non esse*, *defectus potestatis*, *nullitas nullitatum*.

L'obligation créée en 1867 n'a été jusqu'à la répartition de 1878, que l'obligation de la masse des contribuables. Ce n'est que pour la répartition que chacun d'eux ou chacune de leurs propriétés, est devenu débiteur. *Si quid universitati debitur singulis non debitur, nec quod debet universitas, singuli debent.* Domat (1). Et c'est bien la propriété de l'appelante et non celle de l'intimée qui a été taxée par le rôle de 1878. La corporation ne pouvait évidemment pas alors la taxer comme appartenant à l'intimée ; et c'est l'appelante seule qui pouvait contester ce nouveau rôle ; l'intimée n'y avait plus de droits.

Sur l'item de $650.63 *plus* $45.42, pour intérêt, montant payé pour l'élargissement de la rue St. Lambert, je suis d'avis que l'appelante doit avoir jugement. Il y a une grande différence entre cet item et celui de la rue St. Jacques. Ici, le rôle était fait et parfait lorsque l'intimée a vendu à l'appelante ; et aucun jugement n'est intervenu depuis pour l'annuler comme il en a été pour celui de la rue St. Jacques. La somme due sur la propriété en question était établie et exigible, et l'intimée était en faute de ne pas l'avoir payée auparavant. Le fait que ce rôle était perdu ne la relevait pas

(1) Lois Civiles, liv., 2, titre 3, sec. 3, n°· 5, page 164.

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de son obligation à cet égard. Une copie en existait sur les livres de la cité. Le témoin Arnoldi l'a produite à l'enquête.

Si le conseil a eu recours à un autre acte de la Législature, pour obtenir la permission d'y substituer un nouveau rôle, ceci ne peut changer les droits et les obligations des parties et enlever les droits acquis. Ces droits et ces obligations restent ce qu'ils étaient au jour de la vente.

Il n'y a pas ici d'effet rétroactif qui puisse les affecter. La forme que le statut 44 & 45 V. c. 73 a autorisée pour la collection des taxes imposées et dues dès 1867 ne change pas la taxe, ni sa date, vis-à-vis des parties à l'instance. C'est dès 1867 que cette propriété a été taxée spécialement par la répartition alors faite, et rien depuis n'a affecté la validité de cette répartition.

Si l'intimée eût payé cette somme à la corporation elle n'aurait pas pu la répéter comme elle a pu le faire de celle payée pour la rue St. Jacques ; ce n'aurait pas été un paiement indû.

Par la perte du rôle la collection forcée par la corporation pouvait être devenue difficile, soit même impossible ; mais la somme restait tout de même légitimement due sur cette propriété ; et étant due et payable dès avant la vente par l'intimée à l'appelante, elle tombe tant sous la clause de garantie de tout trouble, contenue dans l'acte, que sous la stipulation expresse du paiement de toutes les cotisations, générales et spéciales, due sur la propriété.

Il n'y a pas au dossier un mot de preuve sur la nature de la contestation de ce rôle qui paraît avoir été pendante lorsqu'il a été adiré, et nous ne pouvons assumer que cette contestation était basée sur les mêmes moyens que ceux qui ont prévalu contre le rôle de la rue St. Jacques.

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GWYNNE J.—In the month of June, 1866, the Honourable J. A. Berthelot, then testamentary executor of the will of the late Sir Louis Hypolite Lafontaine, auteur of the defendant in this suit, the owner of a piece of land situate at the corner of little St. James street and St. Lambert street in the city of Montreal, together with other proprietors of land fronting on St. James street, and so interested in procuring that street to be widened, presented a petition to the council of the corporation of the city of Montreal praying that little St. James street aforesaid, should be widened from Place d'Armes to St. Gabriel street, the said petitioners, by their said petition, offering to pay the whole or such part of the cost of such improvement under the provisions of 27 & 28 Vic. ch. 60 as the said council of the corporation should think fit.

Some time afterwards a like petition was presented to the council by the proprietors of land fronting on St. Lambert street, praying in like manner for the widening of that street from Notre-Dame street to little St. James street, at the cost of the petitioners and others, proprietors of land fronting on St. Lambert street and benefited by the improvement thereby petitioned for.

Resolutions of the council of the corporation were duly passed, in the year 1867, granting the prayers of the respective petitioners, upon the express condition, however, that the whole of the cost of making the said enlargements of the said streets respectively should be borne by the said petitioners and others, the owners of land fronting on the said streets respectively and benefited by such improvements, such amounts to be levied by a special tax, rate or assessment to be apportioned and imposed by law upon the lands so fronting on the said street and benefited by the improvements as aforesaid petitioned for.

Upon the faith of these resolutions or acts of the council of the corporation the said respective improvements were made and completed by the corporation in 1868.

Now, by force of the above resolutions or acts of council it cannot, I think, be doubted that the piece of land at the corner of St. James and St. Lambert streets sold by the defendant to the plaintiff in 1873, as hereinafter mentioned, was legally and effectually charged with its fair proportion, as yet unascertained it is true, but still with its fair proportion, of the cost of the said respective improvements. The respective works having been performed upon the faith of the said resolutions of council, the lands fronting on the said respective streets became legally charged by the resolutions and the statute in virtue of which they were passed with their fair proportion of the costs of the works, although such proportion remained to be determined in the manner provided in the statute in that behalf. Upon the 9th day of January, 1868, commissioners were appointed by the council under the provisions of the statute 27 & 28 Vic. ch. 60 to fix and determine the price and compensation to be allowed for each piece of ground required for the widening of said little St. James street, and were ordered to begin their operation on the 15th January, 1868, and to make their report upon the 15th April following. The amount so to be paid and allowed was duly fixed by the said commissioners at the sum of $127,788.43, which sum thereby and by force of the said resolution of council upon the petition of the said owners of property fronting on said little St. James street and benefited by the said property became a charge upon the whole of the said lands so fronting upon said St. James street, although the proportion in which the same should be borne by the several pieces of land so fronting and benefited and the owners thereof remained to be determined.

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By a roll of apportionment of the said sum among the several lots of lands fronting on St. James street and the proprietors thereof, made and signed by the same commissioners who had fixed the price to be paid for land required for the widening of said little St. James street upon and bearing date the 22nd day of July, 1868, the said commissioners apportioned the sum of $1,755 as the amount by which according to their valuation the said piece of land at the corner of little St. James and St. Lambert streets was benefited by the widening of little St. James street as aforesaid.

Commissioners appointed to fix and determine the price and compensation to be paid for each piece of land required for the purpose of widening St. Lambert street aforesaid, under the resolution or act of council in that behalf, duly fixed and determined the sum to be paid for such land at the sum of $26,318.48, and they by a roll of apportionment, the date of which is not given to us, apportioned the sum of $650.63, as the amount by which according to their valuation the said piece of land at the corner of little St. James and St. Lambert streets was benefited by the widening of St. Lambert street aforesaid. The particular date of this apportionment does not appear, but it also was made sometime in 1868.

Now what by notarial deed bearing date the 26th day of November, 1873, the above defendant agreed to sell, and sold to the plaintiff for the sum of $12,200, was the said piece of land at its full value as so benefited. There cannot I think be a doubt that the purchase money agreed upon between the parties was so agreed upon as the price of the piece of land with the increased value attached to it by the widening of the streets, the benefit of which the *venderesse* had enjoyed for five years, and upon the faith that a proportionate part of the cost of the said improvements

had been borne and paid by her. She does not appear to have had the slightest objection to the said respective apportionments of $1,755, and $650.63 as her share of the cost of the said improvements; whatever objection there might have been to either of them she, in so far as appears, was at the time of the sale of the said piece of land to the plaintiffs quite content therewith and there does not appear to be any reason for entertaining a doubt that the price agreed upon for the land was its full increased value as benefited by the said improvements so made at a cost, the defendant's proportion of which was treated by both the seller and the purchasers as between themselves to be conclusively fixed at the said sums of $1,755 and $650.63, so *de facto* apportioned against the defendant and as having been paid by her.

Now by the notarial deed the defendant sold the said piece of land to the plaintiffs—

avec garantie contre tous troubles, &c., &c., et causes d'éviction et de troubles généralement quelconques,

for the sum of $12,200, and by the said deed—

la dite venderesse déclare que les taux et cotisations générales et spéciales des lieux présentement vendus ont été payées y compris celles de l'année courante.

It appears now that at the time of the execution of the above deed the said sums of $1,755 and $650.63 had not, in fact, been paid to the city by the defendant, but that those sums were, or at least that the said sum of $1,755 was, regarded by the defendant as having been so charged upon the said piece of land and the defendant in respect thereof, that the non-payment thereof by the defendant would constitute *un trouble ou une cause de trouble* guaranteed against by the defendant, or a breach of the above covenant of the defendant in the deed, or at least that, having regard to the fact that the price paid by the plaintiffs for the

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piece of land, was its price as increased in value by the work, the defendant thereby receiving the full benefit of the work. That plaintiffs were entitled to have the amount as aforesaid apportioned against the land as the defendant's share of the cost paid by her for the plaintiffs is apparent from this, that three days after the execution of the deed of sale to the plaintiffs, and when, therefore, the piece of land was the property of the plaintiffs, the defendant paid to the city corporation the said sum of $1,755 so as aforesaid apportioned against the said piece of land and the defendant in respect thereof. That sum so paid was a payment voluntarily made by the defendant, and as so made was, as I think we must hold, a payment made for the use and benefit of the plaintiffs, the then owners of the piece of land purchased by them at a price which we must also, I think, hold to have been agreed upon by the parties as the full price of the land as increased in value by the widening of the streets so as aforesaid made, and that sum having been so paid by the defendant the plaintiffs were entitled to enjoy the benefit thereof, and the defendant had no right whatever at any time afterwards to demand and receive from the city repayment of a sum so paid; but having received repayment thereof as she appears to have done on the 15th August, 1878, she must, clearly as it appears to me, reimburse the plaintiffs to that amount, with interest, and place the plaintiffs, in respect of that amount, in as good a position as they would have been if the defendant had not demanded and received repayment thereof.

The grounds upon which the defendant now insists upon her right to retain this sum are that in 1878 the Privy Council in England affirmed a judgment of the Court of Queen's Bench in the province of Quebec in appeal which affirmed a judgment of the

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Superior Court in a suit instituted by one Stephens against the corporation of the city of Montreal (1) for exacting by execution payment by the said plaintiff of the sum of $2,838.50, for which a lot of land of the plaintiff in that action had been charged for defraying the expense of widening little St. James street, by which judgment the court, upon the purely technical ground that the roll of apportionment of cost had not been made in the precise manner required by the law in that behalf, held that roll to be null and that Stephens therefore was entitled to judgment in his action, and the now defendant claims that by force of that judgment she had a right to demand and receive from the city on the 15th August, 1878, and now to retain, the $1,755 so voluntarily as aforesaid paid by her, and to subject the land now the property of the plaintiffs to the full cost of the widening of the said streets in addition to the purchase money paid by them as the full price thereof as increased in value by the work done and assumed to have been done at the cost of the defendant when that purchase money was agreed upon. But whether the defendant when she sold the property to the plaintiff did or did not know of the action instituted by Stephens, or of the grounds upon which it was based, she might have been well content, as by the sequel it appears she had good reason to be, assuming her not to have sold the property with the apportionment as made against her, and when selling the property it was important to her as well as to the plaintiffs that the amount which her lot of land as abutting on the street should contribute to the cost of work performed five years previously upon the authority of an act of council passed at the request of the owners of such lots and upon the express condition that the whole cost of the work so petitioned for should be

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charged upon the lots fronting on the streets in proportion to the benefit conferred upon each by the work, should be finally fixed and determined when the plaintiffs and defendant were negotiating as to the price to be paid by the purchaser for the then value of the land so increased in value. Nothing was more natural than that the price should be arrived at upon the basis that the vendor had been chargeable and charged with and had paid or should pay the precise amount as apportioned against her, whether that amount had or had not been arrived at, in the precise form prescribed by the statute. There was no necessity for their being affected by whatever might be the final result of the suit instituted by Stevens against the city. They had peculiar interests which the judgment in that case whatever it might finally be, could not and should not affect, and this I think is what we must conclude to have been done when the price to be paid by the plaintiffs to the defendant was agreed upon, and as the defendant cannot retain the $1,755 so as aforesaid paid and so as aforesaid repaid to her, and so subject the plaintiffs to payment, in addition to their purchase money of that amount, so neither I think can the plaintiffs now claim to be reimbursed by the defendant the sum which in excess of the said sum of $1,755 they have been compelled to pay under the provisions of the statute 42 & 43 Vic. ch. 53. The purchase money was agreed upon upon the faith that as between the parties vendor and vendee the apportionment against the lot was legal and final and conclusive, and as between them it must still, I think, be held to have been so although by the roll substituted by 42 & 43 Vic. ch. 53 the cost for widening Little St. James street imposed upon the lot purchased by the plaintiffs has been increased from $1,755 to $3,331.20 or nearly doubled. By that act it was enacted that payments made upon the

basis of the annulled rolls should not be invalidated but should go in discharge *pro tanto* of the amount to be apportioned by the new roll authorized by the statute to be made. The plaintiffs therefore should and would upon the new roll have received the benefit of the said sum of $1,755 so made as aforesaid by the defendant for the benefit of the plaintiffs if the defendant who, in the purchase money received by her from the plaintiffs had received the full benefit of the improvement, had not, wrongfully in my opinion, received back from the corporation the amount so paid, and having received it back she must reimburse that amount to the plaintiffs.

Then as to the $650.63, the roll by which that sum was in 1868 apportioned against the said piece of land for the cost of widening St. Lambert street never was cancelled but it was lost, and by reason thereof another act 44 & 45 Vic. ch. 73 was passed, which authorized the corporation to make a new roll in its place, whereby to recover from the parties benefited by that improvement the cost thereof. Now the work having been completed in 1868, and the lost roll having apportioned against the said piece of land the said sum of $650.63 as its share of the cost of widening St. Lambert Street, it is obvious that the defendant, when five years afterwards she sold the land to the plaintiffs for its full value as so improved, is the person who, in the language of the Statute 44 & 45 Vic. c. 73, was benefited by the improvement, and who should therefore pay the share of the cost apportioned against the piece of land so sold by her, which sum has been by the new roll fixed at precisely the same amount as had been determined by the lost roll. Upon the whole, I am of opinion that when the defendant sold the land to the plaintiffs it was so effectually charged by the act of the council of the corporation and the statute by force of which the widening of the streets was authorized to be made at

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the cost of the lands fronting thereon, with their fair proportion of such cost when determined as required by law, as to make a claim upon the land against the plaintiffs for such proportion when ascertained *une trouble ou cause de trouble* guaranteed against by the defendant in her deed to the plaintiffs; and further that the defendant by reason of her having in the purchase money received by her from the plaintiffs, received the full benefit of the improvement, she, as the person so benefited, is in justice bound to reimburse the plaintiffs to the extent of the said sum of $1,755 and $650.63 as apportioned by the rolls of 1868, which I think we must take to have been accepted by both parties as conclusive between them when the purchase money was agreed upon.

The appeal should therefore, in my opinion, be allowed with costs, and judgment be ordered to be entered for the plaintiffs in the action for the said sum of $1,755, with interest thereon from the 15th August, 1878, and for the sum of $650.63 with interest thereon from the time of the payment thereof to the corporation by the plaintiffs, together with their costs of the action.

SEDGEWICK J.—I concur in the judgment pronounced by the Chief Justice.

KING J.—I am of opinion that this appeal should be dismissed with costs, for the reasons given for the judgment of the Court of Queen's Bench.

Appeal dismissed with costs.

Solicitor for the appellant: *N. Charbonneau.*

Solicitors for the respondent: *Bisaillon, Brosseau & Lajoie.*