WILLIAM B. LAMBE, *ès qualité* (PETITIONER FOR FOLLE ENCHÈRE.) ..... } APPELLANT;

AND

CHARLES N. ARMSTRONG (ADJUDICATAIRE). ..... } RESPONDENT.

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*Mar 2.

*May 1.

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

Sale by sheriff—Folle enchère—Resale for false bidding—690 *et seq. C. C. P.—Questions of practice—Appeal—Art.* 688 *C. C. P.—Privileges and hypothecs — Sheriff's deed—Registration of—Absolute nullity—Rectification of slight errors in judgment—Duty of appellate court.*

The Supreme Court of Canada will take into consideration questions of practice when they involve substantial rights or the decision appealed from may cause grave injustice.

Part of lands seized by the sheriff had been withdrawn before sale but on proceedings for *folle enchère* it was ordered that the property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for re-sale, or prior to the proceedings for *folle enchère.*

Held, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error.

Held, further, that the sheriff's deed having been issued improperly and without authority should be treated as an absolute nullity notwithstanding that it had been registered and appeared upon its face to have been regularly issued, and it was not necessary to have it annulled before taking proceedings for *folle enchère.*

APPEAL from the decision of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court, District of Montreal,

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

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which had granted the appellant's motion for a *folle enchère*, and ordered a re-sale of the property seized by the sheriff.

A statement of the facts and questions at issue on this appeal appear in the judgment reported.

Macmaster Q.C. and *Stephens* Q.C. for the appellant. The issue raised upon this appeal seems at first to involve mere questions of local procedure, which may be objected to as proper grounds for consideration by this court. Appellate courts have constantly allowed appeals based upon questions of practice when parties might thereby be deprived of remedy or made to suffer great injustice. This is a case of that nature.

It is clear that the slip in drafting the order for re-sale was excusable and occurred through the absence from the record in the office of the court of the notice to the sheriff withdrawing a very insignificant portion of the road-bed of the railway seized. The order was for a *resale*, which could only include what had actually been sold before by the same sheriff under the same process. The maxim *de minimis non curat lex* applies with striking force, but the Court of Queen's Bench reversed the order on technicalities, where there was no mistake either of law or of practice sufficient to vitiate it. The proper course was simply to have reformed the order by the rectification of a mere *lapsus calami* of an officer of the court. The objection taken could not be of interest to the respondent, but on the contrary might have the effect of giving him an actual benefit by making title to the uninterrupted right of way.

The sheriff's deed was illegally issued without authority, because the judges' order did not dispense with the necessity of taking the security imperatively required by art. 688, C. C. P. as amended by R. S. Q. art. 5941. It was based upon proceedings which had been

all set aside as irregular and was wholly unwarranted and an absolute nullity. The registration could have no effect but to cloud the title until rectified by suit in the usual way.

Precise description of the lands to be resold is not required in any event. *Vincent* v. *Roy* (1); *Délisle* v. *Sauche* (2). A suggestion to the sheriff sufficiently indicating that he was to sell again what he had sold before is all that is necessary; the order was sufficient for all practical purposes.

Morgan for the respondent. The appellant is merely acting in an official capacity and makes the excuse of being an opposant *afin de conserver* to force himself into the record as if he were a creditor and not simply a third party. (Arts. 511, 691 C. C. P.) His course is premature and irregular and he is not qualified to demand the resale. *Fraser* v. *Garant* (3). As a condition precedent to the present proceedings the sheriff's deed should have been annulled and its registration set aside. (Arts 2148, 2154 C. C.) Until such declaration of nullity the deed is a complete answer to the motion for *folle enchère*.

This appeal being only to settle matters of procedure and questions arising in most unique circumstances of practice, ought not to be entertained by this court. The appellant having disregarded the universal practice of describing in particular terms all lands to be sold, must abide the consequences of his departure from well settled rules of practice and procedure.

The order is full of irregularities. Besides ordering the resale of the lot withdrawn and which never had been sold and could not possibly be resold under such an order, it fails to mention that over $1,200 were actually paid in cash to the sheriff, and that the *adju-*

(1) M. L. R. 2 S. C. 34. (2) 26 L. C. Jur. 162.
(3) 4 Q. L. R. 224.

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dicataire deposited first mortgage bonds for the balance of the price. It is invalid for its many omissions and irregularities ; (art. 690 C. C. P.) ; and it is absurd that the respondent should be held *contraignable par corps* under an order so very informal and incomplete.

The judgment of the court was delivered by :

GIROUARD J.—This appeal raises only a question of procedure in the court below, and consequently the respondent contended that we should not interfere with the judgment appealed from. But questions of practice cannot be ignored by this court when their decision involves the substantial rights of the litigants, or sanctions a grave injustice. We believe that this is one of those cases.

On the 2nd of June, 1894, the property of The Great Eastern Railway Company, consisting of the line of railway and all its appurtenances, was sold by the sheriff at the suit of Mr. Raymond Préfontaine for $20,000. The line comprised a large number of lots of land situate in several parishes of the district of Richelieu, and among others part of lot 1217 of the parish of St. Thomas de Pierreville.

Before the sale the plaintiff ordered the sheriff in writing to withdraw said lot from the sale. The balance of the property seized was duly adjudicated to the respondent. He did not, however, pay the amount of his adjudication, but deposited an amount sufficient to satisfy the school taxes and the expenses of the sheriff. The latter, therefore, returned to the court that the sum of $19,168.85 was still unpaid and in the hands of the respondent. Under the pretence that he was the sole hypothecary or privileged creditor of the company he adopted, with the consent of the plaintiff and defendant and other then apparent interested parties, various proceedings for the purpose

of obtaining a judgment of distribution in his favour, and in fact did obtain that judgment. It is not necessary to take any further notice of those proceedings, as they were subsequently set aside at the suit of the appellant by a judgment of the Superior Court, which was confirmed in review, and the sheriff was ordered

> to return the moneys arising from the said sale in to court, and that the same be distributed according to law,

and so far that judgment is *chose jugée* between the parties, as no appeal was taken from it. Thereupon, the sheriff made a supplementary report that the money was still in the hands of the respondent, as hypothecary creditor of the railway company, and that he held no security from him for the amount. Neither the certificate of the registry office, nor any other paper, shows that the respondent was even an ordinary creditor. His counsel alleges in several papers that he is

> opposant afin de conserver * * *et* le seul créancier privilegié de la compagnie défenderesse, tel qu'il appert aux documents produits,

but these documents were never produced, at least they are not to be found in the printed case; the opposition *afin de conserver*, if ever filed, is not before us.

No mention was made by the sheriff that he had previously delivered a deed of sale to the respondent, which acknowledges that the respondent had paid the full amount of his adjudication, first by paying him $1,102.37 in cash, and $18,897.63, as representing so much of the mortgage debentures of the company.

The appellant, being *opposant afin de conserver*, in his quality of collector of provincial revenue for the province of Quebec, alleged that he was a creditor for $2,250 and claimed a privilege for $900 of that sum, and finally moved for *folle enchère* against the respondent under art. 690, and following of the Code of Procedure. The respondent did not contest the claim of the appellant, but allowed the motion for *folle enchère* to go by

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default, although duly served upon him, and contented himself with filing of record a copy of the sheriff's deed of sale, accompanied by a list or *inventaire des productions de l'adjudicataire*, which mentions only the said deed. It may be stated here that the said deed does not comprise lot no. 1217.

The Superior Court (Doherty J.), after having heard the appellant only, no mention being made of the respondent, granted the motion for *folle enchère*,

and doth order the issue of a writ of *venditioni exponas* in order that the property described in the *procès verbal* of seizure herein may be resold at the *folle enchère* of said Armstrong, *adjudicataire*, and that the said *adjudicataire* may be held by *contrainte par corps* to the payment of any loss resulting from the resale and the costs of these presents.

The Court of Appeal reversed the judgment for the following reasons:

Attendu que le jugement rendu en cette cause par la Cour Supérieure, le 26 septembre 1895, ordonne la vente à la folle enchère de l'appelant de la propriété décrite au procès verbal de la saisie qui en a été faite et qu'il appert que l'un des immeubles désigné au dit procès verbal, savoir: le numéro 1217 du cadastre de la paroisse de St. Thomas de Pierreville, a été distrait de la dite saisie et n'a jamais été vendu ni acheté par l'appelant:

Considérant de plus que l'appelant oppose à la demande de l'intimé le titre en apparence régulier que le shérif lui a donné comme adjudicataire de la propriété par lui acquise, lequel, paraît avoir été dûment enregistré et que l'intimé qui a fait annuler les procédures adoptées pour l'obtenir n'a pas demandé ni obtenu l'annulation préalable du dit acte:

Considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure, etc.

We have no hesitation in holding that the judgment of the Superior Court was right and should be restored: but it should be corrected so as to exclude lot 1217. It was clearly a mistake easily explained, as the paper withdrawing that lot from the seizure and sale was only left with the sheriff, and was not filed of record in the court, at least at the time it was signed; in fact it is hard to know when it was filed, as even the sheriff's return makes no mention of the same.

The respondent has no interest to raise this point, for if this lot be sold it will benefit himself and diminish his liability as *adjudicataire*, without being in any manner responsible for the validity of the proceeding.

As to the sheriff's deed of sale, which has been registered, I look upon it as a mere waste paper, which should be entirely ignored as it was not filed in support of any pleading or proceeding, and as having been issued improperly, illegally or without authority. It was an easy matter for the respondent to obtain, or at least to move for, leave to contest in writing the application for a resale under art. 692 of the Code. This leave seems to have been granted as he was allowed five days to answer, but failed to do so, and even to appear at the hearing before the court.

The respondent has admitted before us the nullity of the sheriff's sale, but he contended that, at least by his motion for *folle enchère*, the appellant should also have prayed that it be annulled. It is too late for him to urge this ground in appeal. We believe, moreover, that in view of the fact that the sheriff's deed was merely thrown into the case and that the appellant had no notice of it, the court should ignore the same. To permit litigants in default, as this respondent certainly is, thus to take advantage of the irregularities and misdoings of the officers of the court, would be simply to hinder the administration of justice and destroy the usefulness of courts of law. We have, therefore, no hesitation in reversing the judgment of the Court of Appeals and restoring the judgment of the Superior Court, with the rectification of the mistake above mentioned, with costs against the respondent before all the courts.

Appeal allowed with costs.

Solicitor for the appellant: *C. H. Stephens.*

Solicitor for the respondent: *E. A. D. Morgan.*