MARY JANE McCORKILL..... .....APPELLANT;

AND

EDMOND C. KNIGHT .....RESPONDENT.

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*Jan. 31.
*Feb'y. 1.
*May 7.

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

Opposition to seizure of real estate—Prescription—Renunciation, effect of, under Art. 1379 *C. C. L. C.; Art.* 2191 *C. C. L. C.; Art.* 632 *C. P. L. C.*

In January, 1856, *R. McC.* sold certain real estate to *J. McC.*, his sister, by notarial deed, in which she assumed the qualities of a wife duly separated as to property of her husband, *J. C. A.* After the latter's death in 1866, *J. McC.*, before a notary, renounced to the *communauté de biens* which subsisted between her and her late husband. *E. C. K.*, a judgment creditor of *R. McC.*, seized the said real estate as belonging to the vacant estate of the said *R. McC.*, deceased. *J. McC.* opposed the sale, on the ground that the seizure was made *super non domino et possidente*, and setting up title and possession. She proved some acts of possession, and that the property had stood for some time in the books of the municipality in her name. *E. C. K.* contested this opposition, on the ground that *J. McC.'s* title was bad in law, and simulated and fraudulent, and that there was no possession.

Held: That by her renunciation to the *communauté de biens*, which subsisted between her and her late husband at the date of the deed of January, 1856, *J. McC.* divested herself of any title or interest in said lands, and could not now claim the legal possession of the lands under that deed or by prescription, or maintain an opposition because the seizure was *super non domino et non possidente.*

APPEAL from a judgment rendered in the Court of Queen's Bench for *Lower Canada* (appeal side), at *Montreal*, confirming a judgment of the Superior Court

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there, dismissing an opposition fyled by the appellant to the sale of certain lots in the village of *West Farnham*, seized as belonging to the defendant *esqualité*, that is, as curator to the vacant estate of the late *Robert McCorkill*.

The respondent, in the capacity of curator to the vacant estate of the late *Seneca Paige*, having obtained judgment against *Edward Donahue*, as curator to the vacant estate of the late *Robert McCorkill*, caused twelve lots of land to be seized, as belonging to the estate of the said *Robert McCorkill*, in the village of *Farnham*, in execution of the said judgment.

The action in which judgment was sought to be executed was instituted in the year 1857 by *Edward Finlay*, and continued by respondent as curator to the vacant estate of the late *Seneca Paige*, against *Robert McCorkill*, then of *West Farnham*, upon two promissory notes, amounting to $730, one for $400, due in November, 1855, and the other for $370, due in November, 1856.

The appellant, widow of the late *John C. Allsopp*, and sister of *Rorbert McCorkill*, claimed, by *opposition a fin d'annuler*, the lots seized, on the following grounds:

1. The seizure was null as made *super non domino et non possidente*; that neither *McCorkill*, nor *Donahue*, as curator, had ever been in possession of any of the lots since the date of the plaintiff's alleged title of debt.

2. That for more than twenty years she (the opposant) had been openly, peaceably, and uninterruptedly in possession, use and occupation of all the said lots as proprietor, and setting up a notarial deed from *Robert McCorkill* to the opposant, duly authorized by her husband, and a party to the deed of date the 2nd January, 1856, before notaries, to her, then the wife of *John C Allsopp*, of *West Farnham*, and by him duly authorized, of certain immovable property, including the lots seized,

which are now village lots, and part of the north quarter of No. 42 in the fourth range of *Farnham*, and of No. 44 in the fourth range of *Farnham*, included in the deed of sale.

3. That she was entitled to claim the emplacements as her property by prescription, and had, since the date of her deed, paid all assessments and taxes on the lots, and leased and occupied them.

The contestation of the opposition alleged, *inter alia:*

That, at the time of the institution of said action, *Robert McCorkill* was in possession, *animo domini*, of all the property seized, and that he died in possession of the same, *animo domini;* that as soon as *Robert McCorkill* was sued by the executors of *Seneca Paige*, he organized, with the opposant, a general system of fraudulent transactions, with the object of divesting himself of all he possessed and vesting his sister, the opposant, with fraudulent, fictitious and simulated titles to his own property, acquiring, moreover, property in her name, but with his own resources, and passing in her name titles to debts due to him, the whole with the fraudulent intent of preventing his creditors from collecting any debt from him—amongst others that of the plaintiff; that the deed of 22nd January, 1856, was one and the principal of the fraudulent transactions above mentioned; that even if the said deed should have the character mentioned in the opposition, it would be null and void, inasmuch as the said *Robert McCorkill* would have thereby divested himself of all his property, in fraud of the late *Seneca Paige*, and would have rendered the recovery of the debt mentioned in the writ of execution impossible; that all the enunciations contained in the said deed were false, and so falsely made, in order to give to said deed some apparent legality, which otherwise it would not possess even *primâ facie;* that the opposant falsely styled herself as separated as to

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property from her husband, and as *marchande publique*, while in reality she was *commune en biens* with her husband, and did no kind of trade or business in her own name; that, as *commune en biens*, she had no legal status to acquire property; that the said deed purports that the price or consideration money had been by her paid in full, while, in fact, she had not paid anything, and has never paid anything, as she has herself admitted in the inventory by her made after the death of her husband on the 11th January, 1866; that, notwithstanding the said deed (22nd January, 1856), *Robert McCorkill* continued to possess all the property described therein up to the time of his death, which took place in 1874, and to draw all the benefits thereof, acting as proprietor, as in fact he was, making sales of portions of the same; that several years after the said deed, to wit, on the 27th September, 1859, the said *Robert McCorkill* borrowed a large sum of money from the Trust and Loan Company, and mortgaged, as his own property, most, if not all, of the real estate described in the said deed of 22nd January, 1856; and in 1860, when it served his purpose, he applied for and obtained a ratification of title to the said real estate, without any opposition on the part of the opposant; that the opposant well knowing the nullity of the said deed (22nd January, 1856), and that she could not hold thereunder, contrived another fraudulent state of things, by which she supposed that the said deed might have the effect of passing the property to the community between her husband and herself,—and in the inventory by her made, as aforesaid, she declared the said property, or parts thereof, as being owned by said community—and, for the same fraudulent objects, she afterwards renounced the said community, and contrived, with the said *Robert McCorkill*, other fraudulent means of vesting herself with some apparent title to the same; that her

husband, the said *John C. Allsopp*, at the time of his death, had no near relative in the vicinity of his residence, having left one sister, *Anna Maria Allsopp*, living at *Cap Santé*, in the district of *Quebec*, and a brother living in *California;* that the said *Robert McCorkill*, representing the estate of the said *J. C. Allsopp* as vacant, obtained his appointment as curator to such pretended vacant estate, and afterwards, to wit, by deed of assignment passed before *M. Clément*, N. P., on the 14th December, 1867, the said *Robert McCorkill ès-qualité*, acting in conjunction with *Cyrille Tessier*, a pretended attorney, by substitution of power of attorney given, in the first instance, by *James Carleton Allsopp*, in *California*, to Rev. *N. Godbault*, to sell his rights as heir to *Henry Quetton de St. George*, of *Cap Santé*, did pretend to sell to said opposant all the rights of the said curator and of the said *James Carleton Allsopp* in the estate of the said *John Charles Allsopp;* that the said deed bears on its face the evidence of its fraudulent character and of its nullity; that the fact of one heir being a party to such deed destroyed the theory of the estate being vacant; that *Robert McCorkill* and the opposant concealed the condition of the estate, in order to obtain the said assignment for a trifle, mentioning only two pieces of ground and pretending to acquire the whole under general expressions; that if, as alleged in the said inventory, the sale of January, 1856, vested in the community, the whole of the property seized would have formed part of the estate of *John Charles Allsopp;* that *James C. Allsopp* never gave power to Rev. *N. Godbault* to sell his rights to any one else than *Henry Quetton de St. George*, and the said Rev. *N. Godbault* never gave power to said *Cyrille Tessier* to sell the same to any person but *Henry Quetton de St. George;* that supposing the said property to have vested in *John Charles Allsopp* (opposant's husband) by the deed of January,

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1856, opposant would have acquired no right by virtue of the assignment of the 14th December, 1867—first, because *Robert McCorkill* was not curator to the vacant estate of *John C. Allsopp*, and if he were curator he never was authorized to sell, and *Cyrille Tessier* had no power whatever to sell to opposant.

Wherefore the said plaintiffs prayed that the said deed of the twenty-second January, 1856, be declared fraudulent and void, and that the said opposition be dismissed with costs *distraits*.

A *défense au fonds en fait* was also fyled.

The appellant, in answer to the contestation, denied the allegations of fraud, and set up that the opposant was not responsible for, nor was she aware of, the alleged fraudulent practices of the said late *Robert McCorkill*, &c.; denied the alleged possession of the said *Robert McCorkill* of the lots at the time of his death, &c.

Appellant also alleged that in case the plaintiff were desirous of setting aside, or availing himself of any illegality in said deed of 1856 to said opposant, or the assignment to the said *McCorkill*, in his said quality, or of the alleged want of authority in *Cyrille Tessier* to make the alleged sale, and to plead, as he does, the rights of *Henri Quetton de St. George*, and to allege, or prove, the nullity of the power of attorney by *James Carleton Allsopp* to the Rev. *N. Godbault*, he (the said plaintiff) was bound to have shown interest in himself, or in the said *Paige*, to do so, and should *have brought all parties interested into Court*, and taken a suit to have the same set aside.

That the plaintiff could not obtain any resiliation of the deed, nor could he by general allegations of an organization to defraud on behalf of said *McCorkill*, extending over fifteen years subsequent to the institution of said suit, and previous to the said judgment in favor of plaintiff, bind the opposant, or prove fraud on

her part at the date of the deed set up in her opposition, or obtain the dismissal of her opposition.

That in fact the said *McCorkill* was considered by the opposant a good and correct man of business, and frequently acted on behalf of the opposant, generally without any formal legal authority; that it was not until long after his death that the said opposant was made aware that he had mortgaged any part of the property of the opposant, or treated it as his, or had become bound to the Trust and Loan Company, under the loan in general terms alleged in said contestation.

That any acts of fraud or improper conduct on behalf of said *McCorkill* could not be held as inculpating the opposant without the clearest evidence of complicity on the part of the opposant, which complicity opposant denied, alleging, moreover, that the said now defendant, as curator to said *McCorkill*, failed, or neglected, to urge the defence of the said *Robert McCorkill* in this cause, or to prove the receipts fyled thereon, or to show the said notes sued on by the plaintiff to have been paid and compensated, and declined to authorize the proceeding with the defence, or to sanction the attorney of the deceased defendant proceeding with said defence.

That the contestation of said opposition was contrived between the now plaintiff and defendant, to obtain possession unjustly of the lots seized in this cause, and to injure the said opposant.

Conclusion to dismiss contestation.

General replication to the *défense en fait*.

The case was inscribed for hearing and enquête at the same time, and a large number of witnesses were examined to show who was the *bonâ fide* possessor of the lots, and to prove that at the time of the deed to the opposant, *Robert McCorkill* was insolvent.

The deeds mentioned in the pleadings were fyled as exhibits, besides which several receipts signed by the

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Secretary Treasurer of *West Farnham*, certifying that the property stood in the books of that municipality in opposant's name since 1863. There were also other notarial deeds filed, *inter alia*:

Exhibit P.—"*Renunciation* par *Dame Mary Jane McCorkill* à la *communauté de biens* qui existe entre elle et feu *John C. Allsopp*, son épouse, copie, *P. Beriau*, N. P., 2 avril, 1866."

Exhibit Q.—"Authorization to renounce Estate *John C. Allsopp*, 7th April, 1866; *J. Rainville*, N. P."

The Superior Court for *Lower Canada*, sitting in and for the district of *Montreal*, rendered judgment on the 30th December, 1876, holding that the renunciation by the opposant to the *communauté de biens* that subsisted at the date of the deed of January, 1856, invoked by the opposant, disseized her and destroyed the claim made by her opposition, and destroyed also her claim made by prescription.

The Court of Queen's Bench (appeal side) affirmed the judgment, on the ground that opposant's title was simulated and fraudulent, and that having suffered her vendor to act as proprietor, and to be the reputed possessor *animo domini*, she could not maintain her opposition, though she had done some acts of possession.

Mr. *Robertson*, Q. C., for appellant:—

The possession by the opposant of the lots seized at the time of the seizure and for many years prior to it, is established beyond any reasonable doubt. The following authorities, on which the appellant relies, clearly establish that a seizure of real property in the possession of a third party is a nullity. See Arts. 632 & 634 *C. P. L. C.*; *Pothier* (1); *Lee* v. *Taylor* (2); *Atkinson* v. *Atkinson* (3); *Waring* v. *Zuntz* (4).

(1) Pro. Civ. p. 156.
(2) Robertson's Dig. p. 471.
(3) 15 Louis. R. 491.
(4) 16 Louis. R. 49.

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In addition to this, on the face of the deed of 1856, all the rights of *Robert McCorkill* in the property sold, passed out of him, unless fraud is made out.

This deed is manifestly what our code calls a translatory title, a title competent to convey the land; and such a deed, followed by twenty years open possession, by payment by opposant of all dues and assessments since the date of the deed, by possession at the date of the seizure, and without proof of fraud or bad faith, or proof of any possession whatever on the part of the defendant, is submitted as sufficient base for the prescription pleaded by the opposant.

The plaintiff, by his contestation, takes the ground, first, that the deed of 1856 conveyed nothing to anybody, but was a fraudulent instrument got up to defeat the action of the curator to the estate of *Paige*, and that this fraud was participated in by the appellant. Next, that if anything was conveyed to the appellant, she renounced it by renouncing to the community; and thirdly, that by the renunciation the lands went to the heirs of *John C. Allsopp*, whose residences and names are given in the contestation.

Now, whatever may be the rights of her late husband's estate in the land, the respondent cannot urge these rights, nor set aside the deed attacked, while no person is of record to protect the estate. The question as to the necessity of a substantive action revocatory is not decided upon by the judgment of the Superior Court appealed from; but the whole cause is made to turn upon the renunciation of the appellant, as depriving her of any right to fyle an opposition such as produced in this cause.

The renunication was registered in the Registry Office *subsequent to the seizure* of the lots in question, as appears by contestant's exhibit P. There is nothing to show who caused the registration to be made; the effects

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of the renunciation were not directly raised in the pleadings; nor the rights of the estate or the heirs of the husband, in consequence of the renunciation; nor its effects on the rights of the appellant under her marriage contract.

The learned counsel then reviewed the evidence, arguing that the proof of the alleged fraud on the part of the appellant had failed, and that there was no evidence of record to show *déconfiture* in 1856 or in 1873, and cited the following authorities:

Cummings v. *Smith* (1); *McGinnis* v. *Cartier* (2); *Lacroix* v. *Moreau* (3); *Ferriére, dic. de droit* (4); *Guyot*, rep. (5); *Abat* v. *Penny* (6); *Demolombe* (7); *Mayrand* v. *Salvas* (8); *Bédaride de la Fraude* (9); *Lemoine* v. *Lionnais* (10).

Mr. *Doutre*, Q.C., and Mr. *Haliburton*, Q.C., for respondent:

The opposant bases her right of ownership to the lots seized on the deed of January, 1856. In this deed she falsely assumed the qualities of a wife separated as to property, for by her contract of marriage she is proven to be *commune en biens*. This fact alone is sufficient to prove that the deed was simulated and fraudulent. But we have a further proof, for at the death of her husband, in 1866, she, by a notarial deed, declares that she renounces to the *communauté de biens*, which subsisted between her and her late husband.

The vice which lay at the beginning of this transaction is still existent. *Pothier* de la Possession (11); *Chardon* du Dol (12). Even if she had acquired some interest under the deed of 1856, the moment she re-

(1) 10 L. C. R. 122.
(2) L. C. L. J. (Kirby) 66.
(3) 15 L. C. R. 485.
(4) Vo. déconfiture.
(5) Vo. déconfiture.
(6) 19 Louis. R. 289.
(7) T. 25, No. 175.
(8) 6 Rev. Legale p. 60.
(9) No. 1427.
(10) 2 L. C. L. J. (Kirby) 163.
(11) Nos. 17, 18, 30, 31, 33.
(12) Vol. 2, pp. 362, 368.

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nounced, all rights acquired were abandoned, and she could not, by law, touch a single article belonging to the estate ; and if she had sufficient possession since then, she could not avail herself of that possession. See Art. 2191 *C. C. L. C.* Her possession is coupled with a title which is vicious, and having invoked no other title than that deed, the opposition should have been dismissed without further enquiry when it was ascertained that she was *commune en biens*, and had renounced the community.

The learned counsel further contended that it was manifest, from the evidence, the deeds relied on by appellant were simulated and fraudulent, and that she had never been *bonâ fide* proprietor of the lots, and never legally possessed them ; and cited *Hans dit Chaussé* v. *D'Orsonnens* and *D'Orsonnens*, opposant (1) ; *Chardon* du Dol (2) ; *Domat* (3).

Mr. *Robertson*, Q. C., in reply :

If the deed cannot be attacked for fraud, it is a valid deed, and the property ceased to be owned by *Robert McCorkill*. If the renunciation had the effect of giving rights to other parties to the deed, they should be brought into the case. It is manifest the seizure was made *super non domino et non possidente*, and consequently is null.

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THE CHIEF JUSTICE :—

The opposant opposes the seizure in this case, and asks to have the same declared irregular, illegal and null, and that the same may be set aside, and she maintained in her possession, and be declared to be, in so

(1) 15 L. C. Jur. 193. (2) Vol. 2, No. 202.
(3) S. 2177—2209.

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far as regards the plaintiff, proprietor of the lands seized in this cause, on the ground that the lands so seized belonged to her by good and valid titles, long before and at the date of the issuing of the writ of execution in this cause, and long before even the existence of the alleged title of debt in the declaration of said plaintiff, and in the judgment rendered in the cause mentioned; and the title in the opposant is alleged as follows: "That by deed of transfer in due form of law, made on the 22nd January, 1856, before *C. Morin* and colleague, public notaries, at *Farnham*, *Robert McCorkill*, Esq., then of *St. Romuald de Farnham*, for divers, good and valid considerations, causes, matters and things in said deed mentioned, bargained, sold, assigned and transferred to the said opposant, thereto present and accepting, and thereto duly and specially authorized by the said *John C. Allsopp*, her husband then living, and party to said deed, the property, lands, tenements and hereditaments in said deed described," which description covers the land in question.

This property, though professing to be conveyed to the opposant as *mrachande publique*, wife of *John Charles Allsopp*, and from him separated as to property, *separée quant aux biens*, was not so, as she was *commune en biens* with her husband, as appears by his contract of marriage, and an inventory made by her after the death of her husband on the 11th Jan., 1866, whereby she declared the said properties, or parts thereof, as being owned by the said community, and on the 2nd April, 1866, the opposant renounced the *communauté de biens*. Having thus destroyed her title and possession, I think she has no *locus standi* to contest this seizure. I carefully refrain from the expression of any opinion on the validity of the deed from *McCorkill* to the opposant, or of the validity of the seizure as against any parties who have a right to contest it on the ground

the property was not the property of the judgment debtor, or that the judgment debtor was not in possession *animo domini*.

FOURNIER J.

La présente contestation, soulevée au moyen d'une opposition *afin d'annuler*, origine des faits suivants :

Le 16 octobre 1875, jugement contre *Donahue*, curateur à la succession vacante de feu *Robert McCorkill*, pour la somme de $700.00, montant de deux billets par lui souscrits, l'un le 8 novembre 1854, et l'autre le 18 décembre 1855, en faveur de *Seneca Paige* dont la succession, aussi vacante, est représentée en cette cause par l'Intimé en sa qualité de curateur.

Le 5 novembre suivant, en exécution de ce jugement, douze immeubles décrits au procès-verbal de saisie sont saisis sur *Donahue*, en sa qualité de curateur, comme appartenant à la succession de feu *Robert McCorkill*.

L'Appelante en cette cause (opposante en Cour inférieure) demande, pour deux raisons principales, la nullité de cette saisie, savoir : 1o. que ni *McCorkill*, ni *Donahue*, curateur à sa succession vacante, n'ont jamais eu possession des immeubles saisis ; 2o. que depuis au-delà de vingt ans, elle a toujours été elle-même en possession ouverte, paisible et publique des dits immeubles, en vertu d'un acte de vente que lui en avait consenti *Robert McCorkill*, son frère, le 22 janvier 1856, et enregistré le 4 mars 1860.

L'Intimé *Knight*, comme curateur à la succession vacante de feu *Seneca Paige*, a contesté cette opposition : 1o. par une défense *au fonds en fait* niant toutes les allégations de l'opposition ; 2o. par une *exception péremptoire*, dans laquelle il allègue que la vente invoquée par l'opposante (acte de vente du 22 janvier 1856) a été faite

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en fraude des droits de *Paige*, comme créanciers antérieurs à la dite vente. Il allègue aussi simulation et fausseté des déclarations contenues dans le dit acte de vente, et de plus, que *McCorkill* a toujours conservé la possession des dits immeubles *animo domini*, qu'il les avait hypothéqués en faveur de la Compagnie "*Upper Canada Trust and Loan Company*", que l'Appelante agissait au dit acte comme femme séparée de biens, tandis que de fait elle était commune en biens et ne pouvait conséquemment acheter que pour le bénéfice de la communauté; il ajoute encore qu'elle n'a point payé le prix de son acquisition.

Après avoir opposé ces divers moyens de défense, l'Intimé cite ensuite un autre titre en vertu duquel l'opposante aurait pu, si elle l'eût jugé à propos fonder aussi sa réclamation aux propriétés dont il s'agit, c'est l'acte de vente du 14 décembre 1867, consenti à l'opposante par *R. McCorkill*, en qualité de curateur à la succession vacante de *John Charles Allsopp*, conjointement avec *Cyrille Tessier*, agissant au dit acte comme procureur substitué de *James C. Allsopp*, frère et l'un des héritiers de *John C. Allsopp*. Divers moyens de nullité sont invoqués contre cet acte.

L'*exception* se termine par une conclusion demandant seulement la nullité de l'acte de vente du 22 janvier 1856.

L'opposante a répondu à ce plaidoyer, par une dénégation spéciale des faits allégués, en ajoutant que tous ceux qui sont survenus après l'institution de l'action de *Edward Finley et al vs. McCorkill* et le règlement de la succession de *John Charles Allsopp*, son mari, en supposant qu'ils fussent prouvés, n'établissent aucune participation de sa part à la fraude de *McCorkill*, et ne constituent pas un motif suffisant pour mettre de côté son titre et sa prescription *Grounds for setting aside the said deed and title of the opposant, or title given by prescription as alleged in the said opposition.*

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Elle allègue aussi que pour attaquer son acte de vente du 22 janvier 1856, et l'acte du 14 décembre 1867, il était nécessaire de mettre en cause toutes les parties intéressées, ou bien prendre une action directe pour les faire annuler.

On a vu plus haut que l'appelante n'a fondé son opposition que sur l'acte de vente du 22 janvier 1856, et sur la prescription qu'elle prétend lui être acquise. Cependant l'Intimé, dans son *exception*, cite de plus la cession du 14 décembre 1867, qu'il déclare entachée de nullité et de fraude, mais sans prendre aucune conclusion à cet égard, se bornant seulement à demander la nullité de l'acte du 22 janvier 1856.

La contestation telle que soulevée par les plaidoiries ne repose donc que sur la validité de ce dernier acte, la prescription invoquée par l'opposante et la nécessité de mettre en cause les autres parties intéressées avant de pouvoir faire prononcer la nullité de l'acte du 22 janvier 1856.

Après une assez longue enquête sur les allégations respectives des parties, la cour inférieure a, par son jugement du 30 décembre 1876, renvoyé l'opposition, se fondant uniquement sur le défaut d'intérêt ou de qualité chez l'opposante pour attaquer la saisie faite en cette cause.

Ce jugement a été confirmé par la majorité de la Cour du Banc de la Reine, en appel, mais principalement pour le motif que la vente faite à l'opposante était simulée et faite en fraude des droits de *Seneca Paige*, créancier de *McCorkill.*

Etait-il nécessaire d'aller plus loin que ne l'a fait la Cour de première instance ? Je ne le pense pas ; car s'il est vrai que l'opposante a perdu l'intérêt qu'elle pouvait avoir acquis en vertu de l'acte de vente de 1856, et qu'elle n'a aucune qualité pour représenter ceux qui peuvent y avoir un intérêt, elle manquerait évidem-

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ment, dans ce cas, d'un élément indispensable pour lui donner droit de s'immiscer dans la présente contestation.

Quelle est, en effet, sous ce rapport, la position actuelle de l'opposante? En supposant qu'elle ait acquis des droits en vertu de l'acte de vente du 22 janvier 1856, les a-t-elle conservés? On a vu plus haut qu'elle avait fait l'acquisition des propriétés en question en sa qualité de femme *séparée de biens*, agissant avec l'autorisation de son mari. Mais il est clair qu'elle n'avait point cette qualité, puisque son contrat de mariage, produit en cette cause, établit qu'au contraire, elle était commune en biens. Elle n'a en conséquence pu acquérir pour elle-même personnellement, et si son acte d'acquisition a quelque valeur légale, c'est à la communauté qu'il doit profiter, puisque par le parag. 3 de l'art. 1272, la communauté se compose entre autres choses "de tous "les immeubles acquis pendant le mariage."

Après avoir fait, le 11 janvier 1866, un inventaire des biens composant la communauté qui avait existé entre elle et son mari, dans lequel elle prend sa véritable qualité de commune en biens, ne croyant pas qu'il lui serait avantageux d'accepter cette communauté, l'appelant y a, plus tard, savoir, le 2 avril 1866, renoncé par acte authentique, devant Bériau, N.P.

Depuis cette renonciation, l'appelant a-t-elle pu, d'après la loi, conserver un droit quelconque sur les biens de la communauté? Il est certain que non. D'après l'art. 1379, Code Civil,

La femme qui renonce ne peut prétendre aucune part dans les biens de la communauté, pas même dans le mobilier qui y est entré de son chef.

La femme par sa renonciation (à la communauté) perd toute espèce de droits sur les biens qui la composent: les biens restent en totalité au mari ou à ses héritiers (1).

Depuis sa renonciation, l'appelante n'ayant absolu-

(1) Duranton, vol. 14, No. 507.

ment aucun droit aux immeubles de la communauté, dont ceux saisis en cette cause font partie, il me semble parfaitement inutile de discuter la validité de l'acte du 22 janvier 1856, ni le caractère de la possession de l'opposante pendant l'existence de la communauté. Lors même que sa possession, (ce que je suis loin d'admettre), aurait été une possession légale pour le bénéfice de la communauté, cette possession, comme son titre à ces mêmes propriétés en qualité de commune en biens, a complètement disparu par l'effet de sa renonciation. Elle n'a eu depuis cette époque qu'une simple détention qui ne pouvait servir de base à la prescription qui exige une possession *animo domini*, ni lui faire acquérir aucun autre droit quelconque. Il n'est resté chez elle ni possession, ni droits de propriété, et par conséquent aucun intérêt à s'opposer à la saisie des dits immeubles.

Pour ces motifs seulement, et d'accord avec l'honorable juge qui a rendu le jugement en cour de première instance, je suis d'avis que le jugement doit être confirmé avec dépens.

Henry, J., concurred.

Taschereau, J.:—

This seems to me a clear case. In 1856, during her marriage with *John Allsopp*, *Jane McCorkill*, the appellant, bought the lands seized in this case. She was in community with her husband. Consequently, these lands fell into the community (1). *Allsopp*, her husband, died in 1865. In 1866 she renounced the community. "The wife who renounces cannot claim any share in the property of the community," says art. 1379 of the *Civil Code*. Yet, it is upon that deed of purchase of 1856, and upon that deed alone, that she now claims these lands by her opposition. She alleges and contends that

(1) Arts. 1272, 1275, C. C. L. C.

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she is in possession of them *animo domini*, and that the seizure of these lands made upon the defendant is null. But the only title that she invokes, to sustain this allegation and to qualify her possession, is a title which, at the most, would give her only one half of these lands, and to which half she has renounced. This disposes of her opposition, and that is all we have to adjudicate upon in this case. It may be that the seizure is null; it may be that the heirs *Allsopp* can have it set aside; but we have in this case nothing to do with all this. All we have to determine is, whether *Jane McCorkill*, the appellant, has proved that these lands are in her possession as proprietor in virtue of the deed of 1856. I have shown that she is not. By the renunciation to the community which existed between her and her husband, she has divested herself of any rights to these lands. *Allsopp's* heirs, at his death, and by this renunciation, in the very terms of art. 607 of the *Civil Code*, were then seized of these lands by law alone. In them vested the legal possession. The appellant detains the lands, it may be, but she has not the legal possession of them.

I do not wish it to be understood that I consider the sale of 1856 as valid; far from it; but I deem it unnecessary to go into this point, and merely say that, supposing it to be valid, the appellant has now no right to these lands under it. She may have established that the defendant is not proprietor of the lands seized, but, at the same time, it is clearly proved that she is not proprietor of them, and that she possesses for others.

I am of opinion this appeal should be dismissed with costs.

GWYNNE, J.:—

I agree that the opposant, having renounced all her estate and interest in the *communauté*, cannot support

her opposition upon the deed of January, 1856, in virtue of which alone she claims to have had possession of the land in question. I must say, however, that there appears to me abundant evidence to support the judgment of the Court of Queen's Bench in appeal, upon the grounds of fraud and simulation, upon which the majority of that Court rested their judgment.

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Appeal dismissed with costs.

Solicitors for appellant: *Robertson & Robertson.*

Solicitors for respondent: *Doutre, Doutre, Robidoux & Hutchinson.*