CHARLES ROUSSEAU AND OTHERS (PLAINTIFFS)..... } APPELLANTS;

1902
*Oct. 9.

AND

GEORGE B. BURLAND (DEFENDANT) ..... } RESPONDENT.

AND

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY } MISE EN CAUSE.

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

Title to land—Interdiction—Marriage laws—Authorisation by interdicted husband — Dower — Registry laws—Sheriff's sale—Warranty—Succession—Renunciation—Donation by interdict—Arts. 1467, 2116 *C. C.* —44 *&* 45 *V. c.* 16—46 *V. c.* 25—47 *V. c.* 15, *(Que.).*

The registration of a notice to charge lands with customary dower must, on pain of nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed and must also contain a description sufficient to indentify the lands sought to be affected.

A sale by the sheriff under execution against a debtor in possession of an immoveable under apparent title discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of article 2116 of the Civil Code.

Per Taschereau J.—Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can on any ground whatever, attack a title for which such vendor has given warranty.

Semble, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity and that the authorisation to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorisation.

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*PRESENT :—Sir Henry Strong C.J. and Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

1902

ROUSSEAU v. BURLAND.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming a judgment of the Superior Court, District of Montreal, by which the plaintiffs' action was dismissed with costs.

The plaintiffs claimed title to lands under a conveyance to them, in 1883, by one Moïse Turcot, the younger, alleged to be owner of a moiety thereof in virtue of a deed of donation by the father to him made in 1883 and owner of the other moiety thereof in virtue of his right of dower as the only child issue of the marriage of his parents, both deceased, who were married in 1840 without ante-nuptial contract, the lands having accrued to the father in 1862, during the marriage, by succession *en ligne directe*.

It appeared that the father, Moïse Turcot, the elder, had been voluntarily interdicted in March, 1864, on application made by him personally, and his wife appointed his judicial adviser with full powers to act as such in all matters affecting his estate. Subsequently, in 1865, Moïse Turcot, Sr. and his wife, assisting as his judicial adviser, conveyed the lands to one Hubert, the deed of conveyance containing a renunciation of her right of dower in the property so conveyed by the wife authorised and assisted for the purposes of such renunciation by her said husband. The interdiction was never removed and was still in force at the time of the donation (after the wife's death) in 1883. Moïse Turcot, Jr. did not renounce to his father's succession and accepted the donation.

In 1899 the property thus purchased by Hubert was purchased by the respondent at a sale by the sheriff under an execution against one of the Huberts' heirs who had acquired the lands by succession and was then in possession thereof as proprietor.

The plaintiffs contended that the renunciation of the right of dower by the deed of 1865 was ineffectual,

1902

ROUSSEAU v. BURLAND.

on the ground that the husband, being then interdicted, could not validly authorize his wife for that purpose, and that Moïse Turcot, the younger, became, on the opening of the dower, entitled to the right of dower in the lands. It was also contended by plaintiffs that the right of dower had been effectually preserved by the registration in the registry office of the County of Jacques-Cartier, in 1882, of a notice claiming that right given in conformity with the Quebec Statute, 44 & 45 Vict. ch. 16, which was not accompanied by the certificate of the marriage of the parents of Moïse Turcot, Jr. This notice described the lands sought to be affected as "une part indivise comprenant environ dix arpents de terre en superficie dans une terre connue et désignée sous le numéro trois mille six cent six (3606) d'après le plan et livre de renvoi officiels pour la Côte St-Paul, en la Municipalité de la Paroisse de Montréal."

The learned judges in the court below gave reasons for the judgment appealed from as follows:

"Considérant que le droit au douaire coutumier légal n'est conservé que par l'enregistrement de l'acte de celébration du mariage avec une description des immeubles alors assujettis au douaire; vu que dans la présente cause, le droit au douaire est réclamé par les demandeurs en raison du mariage, sans contrat de mariage de Dame Flavie Dudevoir avec Moïse Turcot, père, le 11 février 1840; vu que l'acte de célébration du mariage n'a pas été enregistré; vu que l'enregistrement effectué désigne l'immeuble en question comme 'une part indivise, environ dix arpents de terrain en superficie dans le numéro trois mille six cent six du cadastre de la Côte St. Paul;'"

"Considérant que cette mention de l'immeuble n'est pas la description requise par l'article 2116 du Code Civil;

1902

ROUSSEAU v. BURLAND.

"Considérant que pour chacune de ces deux raisons, le droit au douaire réclamé, s'il a jamais existé, n'a pas été conservé sur la partie de l'immeuble que le demandeur réclame comme héritiers de sa mère douairière; vu la vente judiciaire du 21 janvier 1899, vente faite sur le seul héritier de R. A. R. Hubert, acquéreur de la totalité du dit immeuble par acte du 27 janvier 1865; vu que cette vente a été ainsi effectuée sur un défendeur en possession comme propriétaire en vertu de titres apparents;

"Considérant qu'une telle vente a purgé les droits de propriété invoquée par les demandeurs en raison des actes des 7 et 10 mars 1883 et ces droits étaient existants lors de la dite vente judiciaire;"

and dismissed the appeal taken by the plaintiffs from the judgment of the trial court dismissing their action.

Larochelle for the appellants;

Aimé Geoffrion for the respondent was not called upon for any argument.

The judgment of the court was delivered by:

TASCHEREAU J.—By these appellants' deeds of purchase of the litigious rights in question, one of them is styled *agent d'affaires contentieuses*, and the other one is an attorney at law and barrister. I read the words *agent d'affaires contentieuses* as meaning "speculator in litigious rights" in partnership with a member of the bar.

I am not sorry to have to dismiss their appeal. Such speculations are never viewed with favour in any court of justice. Their contentions are utterly unfounded. What surprises me is that after having failed in the two courts of the province, they have had the courage, relying undoubtedly on the axiom *audaces fortuna juvat*, to bring the present appeal.

1902

ROUSSEAU v. BURLAND.

Taschereau J.

The reasons given by the Court of Appeal in dismissing their action, as the Superior Court had done, are unanswerable. The registration required of this right to the dower claimed on the property in question has never effectually been made, and the sheriff's title to the respondent has wiped off any right to the said dower, if any, that existed previously thereupon. Art. 2116 C. C.; 44 & 45 Vict. ch. 16; 46 Vict. ch. 25; 47 Vict. ch. 15, sec. 2.

Then, who is it that attacks the deed of sale to Hubert in 1865, of this property? No one else but the vendors or their heir who has never renounced to their succession, or universal donee who has accepted the donation. That is to say, the claimants, or the party under whom they claim, are in law, and by express stipulation, the very parties who are the warrantors of Hubert's title, and of those who hold under him, the very parties who have to hold Hubert and his representatives harmless from any attack made upon the deed of 1865. How can they be admitted to attack, upon any ground whatever, that which in law and by their express undertaking they are bound to defend? *Quem de evictione tenet actio eum agentem repellit exceptio* is a rule founded on principles that will always govern. Pothier, Vente, nos. 167, 168.

And a very important feature of the case, in the deed of sale to Hubert, is that Turcot's wife was actually a party to the deed as warrantor and was therefore obliged herself to defend Hubert's title and, of course, her son and heir not having renounced to her succession cannot attack that title. Art. 1467 C. C.; *Betournay* v. *Moquin* (1). The argument that Turcot, Jr., did not accept his father's nor his mother's successions cannot help the appellants. The law transmitted those successions to him. *Le mort saisit le vif.* He was seized of all their

(1) 2 Dor. Q. B. 187.

1902

ROUSSEAU v. BURLAND.

Taschereau J.

rights and obligations at the moment of their deaths, and renunciation is never presumed. Arts. 606, 607, 651 C. C.

Then if necessary to determine the point, I would be strongly inclined to hold that the interdiction of Turcot, in 1864, was radically null, that the renunciation by his wife to her dower was legal and entirely put an end to it, and that the sale to Hubert was valid to all intents and purposes.

But if, as contended for by the appellants, the sale to Hubert was null because Moïse Turcot, the vendor, was interdicted, I fail to understand how the donation to his son by this same interdicted person can be valid.

However, it is unnecessary for us to expressly determine other questions than those determined by the judgment appealed from, and the appeal should, in my opinion, be dismissed with costs, for the reasons given by the said court.

Appeal dismissed with costs.

Solicitor for the appellants: *M. G. Larochelle.*

Solicitors for the respondents: *Geoffrion, Geoffrion & Cusson.*