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*Feby.20,21.
*April 30.

JOSEPH M. DUFRESNE *at al*, (PLAINTIFFS)..... } APPELLANTS;

AND

DAME MARIA DIXON, (PETITIONER)...RESPONDENT.

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

Petition en nullité de décret—Seizure super non possidente—Art. 632 *C. C. P.—Registration of real rights—Art.* 2091 *C. C.*

D. (respondent) proprietor of a lot in Montreal sold it to C. *et al.* In 1879, C., who had acquired the interests of his co-owners retroceded the lot in question to D. In July, 1884, the sheriff of the district at the instance of J. M. D. *et al.*, (appellants) judgment creditors of C. seized, sold and adjudicated the lot in question to G. *et al*, who paid the adjudication and obtained a sheriff's title to the lot in question. D. did not register her deed of retrocession until 3rd October, 1884, being a date subsequent to the seizure and sale by the sheriff, but prior to the registration of the deed from the sheriff.

Thereupon D. by a petition *en nullité en décret* prayed that the seizure, sale, adjudication and sheriff's title be set aside and declared null as having been made *super non domino*. At the trial it was proven that from the date of the deed of retrocession D. had been assessed for the lot in question and paid taxes thereon, and that it was in the possession of one McA. as her tenant at the time of the seizure.

Held,—Affirming the judgment of the court below, that the seizure and sale in the present instance having been made *super non domino et non possidente*, the sheriff's title was null. Art. 632 C. C. P.

Per Taschereau J.—The provisions of Arts. 2090 and 2091 C. C. refer to a valid seizure and sale, and cannot be invoked against the registration of the deed of retrocession by the respondent.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) affirming the judgment of the Superior Court by which the appellants' contestation of respondent's petition *en nullité de décret* was dismissed.

*PRESENT,—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

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This case originated out of a judicial sale of a lot of land, situate in the city of Montreal, belonging to respondent, under a judgment in favor of the appellants against the vacant estate of one Campbell for the sum of $8,388.60.

The lot of land in question was sold by the Sheriff of Montreal at the instance of appellants who represented the same, as belonging to the vacant estate of said Campbell, to which one Benjamin Clement had been appointed curator.

The resp dent by petition to the Superior Court sitting at Montreal, prayed for and obtained the setting aside of the sheriff's decree.

The circumstances under which the petition to annul the decree was granted are as follows:

Respondent acquired in February, 1859, by good and valid title a lot of land fronting on Papineau road, subsequently entered upon the cadastre (official plan and book of reference) of St. Mary's Ward of the City of Montreal, under the No. 857.

On the 19th of November 1874, respondent sold this lot of land to William A. Campbell, Joseph Moïse Dufresne and Siméon Pagnuelo, who acquired the same, jointly and severally, for the sum of $7,000.00, on which she received $3,000.00, in cash, said purchasers binding themselves to pay the balance of $4,000 00, with interest, within ten years from the date of the deed.

On the 22nd December, 1875, with the consent of Siméon Pagnuelo, Joseph Moïse Dufresne in first instance, and later, on the 1st August, 1877, of the said Siméon Pagnuelo, sold their respective shares in the said lot of land to their co-purchaser William A. Campbell, who undertook to satisfy all the conditions and undertakings of their deed of the 19th November, 1874, and more particularly to pay for them to the

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respondent their share of the balance of the purchase money ($4,000 00).

On the same day (1st August, 1877) that the said Siméon Pagnuelo thus sold his rights in the said lot of land respondent, by another deed executed between her and the said William A. Campbell, agreed to reduce in his favor the said balance of $4,000.00 to the sum of $3,000.00 of which last amount the lot of land was to remain mortgaged in favor of respondent.

Subsequently, on the 22nd April, 1879, William A. Campbell being unable to pay the balance of $3,000.00, and wishing to relieve himself, as well as Dufresne and Pagnuelo, from their liability for said amount, executed another deed in favor of respondent, whereby he retroceded the lot of land in question to respondent, who immediately took possession thereof and continued to occupy and enjoy the same. This deed was duly registered on the 28th of November, 1884.

On the 27th of June, 1884, the appellants (who are the identical Joseph Moïse Dufresne and Siméon Pagnuelo, above referred to) obtained against one Benjamin Clément, in his quality of curator to the vacant estate of the said William A Campbell, who had recently died, a judgment for the sum of $8,388.00, and proceeded to issue execution under said judgment by order of their attorneys, of whom Mr. Pagnuelo, above mentioned, was one. They instructed the Sheriff of Montreal to accept from B. Clément, ès-qualité, a return of *nulla bona* and ordered him to proceed to the seizure of several immovables, and amongst others the lot of land now in question, which had been retroceded, by W. A. Campbell to respondent, on the 22nd April, 1879, as well for his benefit as in the interest of the appellants.

On the 25th of July, 1884, the sheriff seized the lot of land in question but failed to furnish the registrar

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of the Registration Division of Montreal-East, wherein said lot of land is situate, with the legal notification required by the Statute 43-44 Vict. ch. 25, sects. 3, 5 and 14.

On the 3rd of October, 1884, date of the sheriff's sale, said lot of land was adjudicated to Siméon Pagnuelo, already referred to, for the sum of $1,400.00; but he having declared, as appears by the procès-verbal of the sale, that there was an error in his bid, the property was adjudged to one George W. Parent, for the sum of $1,350.00.

Seven months after this adjudication, on the 4th of May, 1885, George W. Parent transferred his right of adjudication to the *mis-en-cause* Alphonse Racine, Thomas Gauthier and Cléophas Beausoleil, who paid the sheriff the adjudication price and obtained their title; and then for the first time respondent was informed that her property had been seized, sold and adjudicated at the instance of Joseph Moïse Dufresne and Siméon Pagnuelo.

The respondent by her petition to the Superior Court prayed that she be declared to be the true and lawful proprietor of the lot of land in question, and that the seizure, sale, adjudication and sheriff's title granted under the circumstances above mentioned, be set aside as declared null; that the decree be quashed as having been made *super non domino*, and respondent maintained in her possession and proprietorship of the lot of land in question notwithstanding said decree.

Pagnuelo Q.C. for appellant contended,—that an unregistered sale of real estate, such as the deed of retrocession by Campbell to respondent in this case, is incomplete, without effect, and confers no right of ownership to the buyer against a seizing creditor of the vendor, and that the registration of the deed of sale of such real estate after seizure has no effect when the seizure

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is followed by judicial expropriation, and cited and commented on Art. 2090, 2091, 2082 C.C.; Arts. 644, 646, 597, 652 C. C. P.; Pothier, Vente (1); Mourlon, Transcription (2); Laurent (3); Troplong, Transcription (4); *Lefebvre* v. *Branchaud* (5); Pothier, Substitutions (6); *Charlebois* v. *Sauvé* (7); *Farmer* v. *Devlin* (8); *Les Ecclésiastiques du Séminaire de Montréal* v. *La Société de Construction* (9): *Adam* v. *Flanders* (10); *Charland* v. *Faucher* (11); see also Aubry et Rau (12); Bravard Veyrières, Droit Commercial (13); Nancy, 27th December, 1879 (14); *Rhéaume* v. *Bourdon* (15); *La Société de Construction Métropolitaine* v. *Beauchamp et David opposant* (16).

Geoffrion Q. C. followed on behalf of the appellants and contended: that the respondent had been guilty of laches, and that under art. 2083 C.C. she could not claim any right to the property against Campbell's creditors until she registered her title, and submitted that under art. 632 C. C. P. the seizure was good, as Campbell's estate had remained in possession, towards third parties, and was in possession *animo domino* at the time of the seizure.

The learned counsel also contended that the judgment of the Court of Queen's Bench should be reversed because, supposing respondent to have been proprietor and in possession of the said lot of land, she should have opposed the sale within the time fixed by law; and in default of so doing, her rights of ownership resolve themselves into a privileged claim upon the

(1) No. 318.
(2) Vol. 2 No. 445.
(3) 29 Vol. No. 159.
(4) No. 22.
(5) 22 L. C. J. 73.
(6) Bugnet's Ed., vol. 8 No. 35.
(7) 15 Rev. Lég. 653.
(8) 15 Rev. Lég. 621.
(9) 28 L. C. J. 23.
(10) 3 Legal News 5.
(11) 9 Legal News 61.
(12) 2 Vol. s. 209 and note 80.
(13) 5, p. 29 note 1.
(14) S. V. 82, 17.
(15) 31 L. C. J. 17.
(16) 3 Legal News 135.

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proceeds of the sale ; 1st, because W. A. Campbell's vacant succession was bankrupt, and registration of a deed of sale after bankruptcy was illegal and has no effect ; 2nd, because appellants, by registering a demand of *separation de patrimoine*, secured a privilege on the real estate in question, which rendered ineffective the subsequent registration of the respondent's deed of sale, and which could not be affected by such subsequent registration ; 3rd, because, supposing that respondent secured against the appellants a right of ownership by registering her deed of sale after the sheriff's sale she should at least pay the costs of the seizure and sale by the sheriff, and all damages caused to appellants by such tardy and late registration.

Lacoste Q. C. and *Grenier* for respondent contended ; 1st, that the evidence in the case already established the fact that the seizure had been made *super non domino et non possidente*, and consequently was a nullity. Arts. 632 C. C. P., Pothier, Civil Procedure (1); Pigeau (2) ; Guyot (3) ; *Tessier* v. *Bienjonetti* (4) ; *Wilson* v. *Caldwell* (5) ; *Consolidated Bank of Canada* v. *Town of St. Henri* (6) ; Guyot (7) ; *Re Tempest* v. *Baby* (8); arts. 637, 638 C. C. P.

And 2nd, that the registration by the respondent of her title (the deed of retrocession by Campbell) subsequent to the seizure and sale by the sheriff, but prior to the emission of the sheriff's title, and consequently to its registration, is valid as against the claims of the purchasers at sheriff's sale. Citing arts. 2089, 2098 C. C.; Verdier, Transcription Hypothécaire (9) ; Troplong, Transcription Hypothécaire (10) ; Mourlon de la Trans-

(1) Nos. 525, 526.
(2) 1 Vol. 779.
(3) Vol 5, Vo. Décret p. 307.
(4) 16 L. C. R. 152.
(5) 3 Rev. de Lég. 476.
(6) 5 Legal News, p. 231.
(7) Vo. Décret 307.
(8) 2 Dor. Q. B. 371.
(9) Vol. 2, No. 927, Nos. 298, 299, 301, 302.
(10) Nos. 143, 144, 153.

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cription (1); Troplong, Vente (2); Aubry et Rau (3); *Re Caya* v. *Pellerin* (4); *Re Dallaible* v. *Gravel* (5); *Re Adam* v. *Flanders* (6); *Re Begin* (7); and that moreover the question of registration could not arise in this case if the sale was *super non domino*.

FOURNIER J.—Les faits au sujet desquels s'élèvent les questions de droit soumises à la considération de cette cour sont comme suit:—

En 1859, la Requérante, Mme Dixon, acquit l'immeuble en question, situé dans le quartier Ste-Marie de Montréal.

En 1874, elle vendit cet immeuble à Messieurs Campbell, Dufresne et Pagnuelo. Par des actes de 1875 et de 1877, Messieurs Dufresne et Pagnuelo vendirent leur part à leur co-propriétaire Campbell, à la charge par ce dernier de payer à Madame Dixon, l'Intimée, la balance du prix de vente originaire, $4,000.

Le 1er août 1877, par une transaction entre Campbell et Mme Dixon, cette dernière consentit à réduire cette balance de $4,000 à $3,000, en conservant son hypothèque pour cette somme sur l'immeuble en question.

En 1879, Campbell, se trouvant incapable de payer à Madame Dixon la balance de $3,000, a fait acte de rétrocession de l'immeuble à la condition de libérer Messieurs Campbell, Pagnuelo et Dufresne, les appelants en cette cause, de la dette en question.

Campbell est décédé plus tard et Benjamin Clément a été nommé curateur à sa succession vacante.

En 1884, les appelants, Dufresne et Pagnuelo, ayant obtenu jugement contre le curateur Clément, firent saisir l'immeuble en question qui fut adjugé, le 3 octobre 1884, à M. Pagnuelo, et par déclaration d'erreur

(1) Nos. 78, 79, 455, 559, 486.
(2) P. 231.
(3) 2 Vol. pp. 312, 313, 315.
(4) 2 Rev. Lég. 44.
(5) 22 L. C. J. 286.
(6) 3 Legal News, p. 5.
(7) 6 Q. L. R. 52.

dans l'enchère, Geo. W. Parent, le précédent enchérisseur, fut déclaré adjudicataire.

Parent n'ayant pas payé l'adjudication, sept mois après, savoir, le 4 mai 1885, transporta son droit d'adjudication aux adjudicataires actuels, MM. Racine, Gauthier et Beausoleil, qui ont payé alors le prix d'adjudication, et auxquels le shérif accorda un titre.

La preuve a établi de la manière la plus positive que pendant les cinq années qui ont précédé la saisie, l'intimée (Maria Dixon) a été seule ouvertement et publiquement en possession de l'immeuble en question en cette cause. C'est elle dont le nom est porté sur le rôle de cotisation de la cité de Montréal comme propriétaire, et c'est aussi elle qui en a acquitté toutes les taxes pendant cette période.

Pendant ces cinq années, le témoin McAvoy a prouvé qu'il avait occupé cette propriété comme locataire de l'intimée.

Le curateur, interrogé comme témoin, a déclaré qu'il n'avait jamais fait aucun acte de possession de cette propriété ni d'aucune autre appartenant à Campbell.

Cette preuve, qui n'a été nullement contredite, établit comme une certitude le fait que le curateur à la succession n'a jamais été en possession de cet immeuble, qui n'est pas sorti de celle de l'intimée depuis qu'elle en est redevenue propriétaire par l'acte de rétrocession que Campbell lui en avait consenti en 1879.

L'article 632, C. P. C., est évidemment fait pour rencontrer ce cas :

On ne peut, dit cet article, saisir les immeubles que sur la personne condamnée qui les possède ou est réputée les posséder *animo domini*.

La cour a été unanime à déclarer la saisie en cette cause nulle, comme faite contrairement à la disposition de cet article.

A l'appui de cette décision, l'autorité suivante de Verdier (1) a été citée :

(1) Vol. 2, Transcription hypothécaire, nº 299.

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Par conséquent, si l'on suppose que la vente a précédé la saisie, il est certain que celle-ci est radicalement nulle, puisqu'elle porte sur un bien qui n'était plus dans le patrimoine du débiteur. La transcription qui surviendrait ne saurait donner la vie à un acte qui est mort-né, selon l'expression de M. Dalloz. Elle ne saurait avoir aucune efficacité. La saisie, nulle dans l'origine, est comme non avenue. Si la saisie a précédé la vente la position est la même, et les résultats sont identiques. Tant que la saisie n'a pas été transcrite, elle n'enlève pas au saisi le droit de vendre. Dès lors, s'il a usé de cette faculté, la vente a pour effet immédiat de le désinvestir, ainsi que ses ayant-cause. Or, le saisissant, n'ayant aucun droit réel qui lui soit propre et indépendant de celui du saisi, n'est qu'un ayant-cause ; il est bien obligé de subir la vente. La saisie, dit M. Dalloz, a été frappée de mort par cette vente ; son objet lui a échappé ; dès lors, la transcription n'a pu lui rendre ultérieurement la vie qu'elle a perdue.

Je suis d'avis de confirmer le jugement de la cour du Banc de la Reine avec dépens.

TASCHEREAU J.—The Superior Court in Montreal granted this petition and annulled the sale thereof on the ground *inter alia* that the seizure and sale had been made *super non domino*. The Court of Queen's Bench confirmed that judgment.

I am of opinion that these judgments were right. There can be no question as to the law. "The seizure of immovables" says Art. 632 C.C.P. "can only be made against the judgment debtor" and "he must be or be reputed to be in possession of the same *animo domini*.

Pothier, Civil Procedure, says (1).

On ne peut saisir réellement que sur la personne qui s'est obligée par l'acte ou qui a été condamnée par le jugement en vertu duquel on saisit, car toute exécution cesse par la mort de l'obligé ou condamné.

La saisie réelle doit se faire sur le propriétaire de l'héritage, une saisie faite *super non domino* est nulle. Observez néanmoins qu'on entend par propriétaire, non pas seulement celui qui l'est dans la vérité, mais encore celui qui possède l'héritage *animo domini*, soit qu'il en soit véritablement propriétaire, soit qu'il ne le soit pas, car il est réputé l'être, lorsque le véritable propriétaire ne réclame point.

(1) Nos. 525, 526.

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Bugnet in a note on above, says (1):

Contre le propriétaire apparent. sauf le droit de revendication de la part du propriétaire véritable, qui pourra même, en règle générale, demander la nullité de l'adjudication. L'adjudicataire (sur saisie immobilière) ne transmet à l'adjudicataire d'autres droits à la propriété que ceux appartenant au saisi.

Pigeau (2) and D'Héricourt (3) are also in support of respondent's contention; and Guyot (4) says:

Lorsqu'un immeuble a été saisi réellement sur celui qui n'en était pas propriétaire et que celui à qui il appartenait en est resté paisible possesseur jusqu'à l'adjudication, la saisie réelle, les criées et l'adjudication ne peuvent faire aucun préjudice au véritable propriétaire, car pour qu'un bien puisse être valablement adjugé par décret, il faut qu'il soit devenu le gage de la justice et des créanciers de la partie saisie.

Now as to the evidence in this case the two courts below have found as a matter of fact that the curator to the estate, Campbell, upon whom the sale was made, was not then in possession of the immovable in question; and the evidence fully supports that finding of fact. The curator himself, examined as a witness, admits that he never made any act of possession of that property.

I would dismiss this appeal with costs.

I do not allude to the question of registration raised by the appellant as, in my opinion, it cannot affect this case. Even if Mrs. Dixon had never registered the deed of retrocession, she would be entitled to get this seizure and sale set aside. Art. 2091 C C. refers to a valid seizure—a lawful sale. Here we hold that there has been no sale, that the so-called sale is a nullity.

Appeal dismissed with costs.

Solicitors for appellants: *Pagnuelo, Taillon, Bonin & Duffault.*

Solicitors for respondent: *Curran & Grenier.*

(1) 10 Vol. 243.
(2) Vol. 1, p. 779.
(3) P. 49,
(4) Vol. 5; Vo Décret, p. 307.