ADÈLE PREVOST AND OTHERS.....APPELLANTS; 1904

*Oct. 4, 5.
*Oct. 6.

AND

BERTHE RHÉA PREVOST AND OTHERS .... } RESPONDENTS.

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

Right of appeal—Interest of appellant—Parties to action—Art. 77 C. P. Q. —Sale of substituted lands—Will—Prohibition against alienation—Arts. 252, 953a, 968 et seq. C. C.—Res judicata.

Where a person who might have an eventual interest in substituted lands has not been called to the family council nor made a party in the Superior Court on proceedings for authority to sell the lands, the order authorizing the sale is, as to him, *res inter alios acta* does not prejudice his rights and, therefore, he cannot maintain an appeal therefrom.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming an order made by Mr. Justice Doherty, in the Superior Court, District of Montreal, authorizing the sale of substituted lands under the provisions of Article 953*a* of the Civil Code of Lower Canada.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard Davies and Nesbitt JJ.

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In December, 1844, the late Amable Prevost (who died in 1872), made his last will and a codicil thereto whereby he bequeathed the usufruct of all his estate, real and personal, to his wife and children, and then the ownership to his grandchildren whom he instituted his universal legatees, and he directed that in case all his children should die without issue before their mother, then his estate should go to other beneficiaries named. He also declared, as express and absolute conditions of the legacy of the usufruct, that the revenues should be an alimentary pension, exempt from seizure, and that the real estate should pass to his grandchildren in its natural state and, consequently, that it should not be alienable by any authority or under any pretext whatever, even for their greater advantage. He also provided that his grandchildren could not sell, alienate or hypothecate their shares or rights in his estate before the expiration of the term of the usufruct, nor of the shares in such usufruct belonging to their fathers or mothers. Finally, in case all his children should die without issue before the death of his wife, then that his wife, during widowhood, should have the usufruct of all his said estate with remainder as provided in the will.

Eleven years after the death of the testator his children, interpreting the will as creating seven distinct substitutions, *i. e.*, seven separate transmissions, executed a deed of partition of the property, and since then (April, 1883), have each had separate enjoyment of the shares that fell to them respectively. Subsequently, this partition was declared valid by an Act of the Quebec legislature, 60 Vict. ch. 95, which declared it final and definitive and that the legatees, *grevés de substitution*, were and had always been sole proprietors of the shares of the estate that had fallen to them respectively, subject to a reversionary charge, on their

decease, to their children conformably to the dispositions of the will and codicil. On submission of the question to the court a judgment, in December, 1897, declared the deed of partition final and definitive.

Under the deed of partition the lands now in question fell to the lot of the respondent, Berthe Rhéa Prévost (Mrs. Berthelot), an institute under the substitution, and to her children as substitutes. An offer for the purchase of said property having been received, she joined with the curator and George Berthelot, the only substitute then of the age of majority, in an application by petition to the Superior Court, at Montreal, to have a family council assembled to advise on the subject matter of the petition and to have the sale of the land authorized in the usual manner, under the provisions of Act 953*a* C. C. The family council, with the exception of Dr. A. Brodeur an uncle by marriage (the husband of the appellant, Adèle Prévost), agreed that in the interest of both institute and substitutes the proposed sale should be authorized, and the sale was authorized accordingly.

Adèle Prévost, a sister of the petitioner, was not a party to the application and was not called to the family council, nor did she intervene, oppose or otherwise contest the proceedings except by filing a memorandum of the objections made by her husband at the family council. These objections were in effect that the price offered was too low, that it was not advisable to make the sale at the price offered and that there was express prohibition against alienation declared by the will. However, as one of the *grevés de substitution* under the will, and claiming to have an interest in a possible reversion, she appealed from the judge's order to the Court of King's Bench. The respondents moved for the dismissal of the appeal on the grounds that the appellant was not

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a party in the Superior Court nor could she have the necessary interest in the property (Art. 77 C. P. Q.) to entitle her to bring the appeal, and also contested the appeal on the merits.

By the judgment now appealed from the Court of King's Bench, holding that the appellant had the necessary capacity and an interest sufficient to entitle her to bring the appeal, dismissed the motion with costs, but, on the merits, affirmed the order of the Superior Court and dismissed the appeal with costs.

Brosseau K.C. for the appellants. As a daughter of the testator, Adèle Prevost (Mrs. Brodeur) has a contingent interest in the whole estate, *grevè de substitution*, in the event of none of the substitutes surviving. Under the new rule as to right of action, art. 77 C.P.Q., this eventual interest is sufficient to give her the right of appeal from the order for sale. The petition was *ex parte* and Mrs. Brodeur, being merely an aunt of the substitutes, could not be summoned on the family council, art. 252 C. C. However, her interests in the estate and the provisions of her father's will against alienation were protected by law (arts. 968 *et seq.* C.C.) and by the objections to the advice of the family council filed by her husband.

Lafleur K.C. appeared for the respondents but was not called upon by the court.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—We are of opinion that this appeal should be dismissed simply upon the ground that as the appellant was not a party to the case in which the judgment ordering the sale of the property in question was rendered, she cannot be prejudiced thereby, and should therefore not have been admitted by the Court of King's Bench to appeal from it. Even

assuming that she has an eventual right in this property, without deciding anything on the point, the judgment of the Superior Court *inter alios* cannot affect that right. For this reason we hold that the *dispositif* of the judgment of the Court of Appeal dismissing her appeal is right, without adjudicating upon the judgment of the Superior Court.

Appeal dismissed with costs.

Solicitors for the appellants: *Brosseau, Lajoie, Lacoste & Quigley.*

Solicitor for the respondents: *Lafleur, McDougali & Macfarlane.*