Inc.
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C833ap
no 33
-1815-

RR

Factum 33

Province of Lower-Canada
Court of Appeals

In a cause between

Joseph-Rémy Vallieres, Esq, sieur de St Real &c.
and
Dame Louise Pezard de Champlain
and
Charles Chaussegros de Lery, &c
tutor to
Adelaïde Pezard de Champlain, minor
daughter of
Pierre Melchior Pezard de Champlain
and Dame Louise Drouet de Richerville
his wife

Appellants

and Jean Rivard

(Defendant in the Court below)
Respondent

Respondent's Case

33

A. Stuart
for respondent

Rés
AC
23
N°33

(après 1815)

2.

LROVINCE OF
POWER-CANADA

Court of Appeals.

IN A CAUSE BETWEEN

Joseph Rémy Vallieres, *Esquire, Sieur de St. Real, Seigneur of Hertel in part, Advocate in and for the Province of Lower-Canada and Member of the Provincial Parliament of the same Province, residing in the City of Quebec in the said Province, and Dame* Louise Pezard de Champlain *his wife, and* Charles Chaussegros de Lery, *Esquire, Lieutenant Colonel in the Militia Forces of the said Province of Lower-Canada and Deputy Quarter Master General of the said Militia Forces, residing also in the City of Quebec, Tutor duly elected in Law to* Adelaide Pezard de Champlain *Minor Daughter of the late* Pierre Melchoir Pezard de Champlain *and Dame* Louise Drouet de Richerville *his wife, (Plaintiffs in the Court below).* *APPELLANTS.*

&

Jean Rivard *of the Parish of the Visitation, commonly called the Parish of Champlain, Yeoman, (Defendant in the Court below).* *RESPONDENT.*

RESPONDENT's CASE.

THE Appeal in this cause is brought from a Judgment rendered in the Court of King's Bench for the District of Three Rivers, dismissing the Appellant's action.

The action in the Court below was for a *restitutio in integrum*, and *en petition d'hérédité.*

The declaration states that Louise Pezard de Champlain and Adelaide Pezard de Champlain in the title of the cause named were heiresses by equal moieties of their late Father Louis Melchoir Pezard de Champlain.

That a certain lot of ground and premises therein described belonged to their said Father at the time of his decease.

That by deed of sale passed before Badeaux, and confrere notaries, bearing date the 14th April 1806, Dame Louise Drouet de Richerville widow of the said late Louis Melchoir Pezard de Champlain, having no knowledge of business and relying with the utmost good faith upon the advice of persons either ignorant or evil disposed, sold in her quality of Tutrix of her above named daughter the above mentioned lot of ground and premises to the said Jean Rivard, which sale, (it is alleged) was so made without any lawful authority, and was neither preceded nor accompanied by any advertizements, publications or other formalities required by the laws, customs and usages of this Province.

That the said Respondent bound himself to pay as the price of the said lot and premises the sum of three thousand, eight hundred livres, which sum the Plantiffs have not received nor have they profited thereby.

That by the same deed of Sale the said Widow granted to the Respondent, permission to cut a number of poles upon the land adjoining the said premises in the rear.

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That

That the said Respondent knewn that the said sale and grant were null, but that he cut large number of poles &c.

The Declaration prays :

1. That the said deed of Sale and also the said grant may be declared null and void.

2. That the Respondent be condemned to render and restore lot of Land and premises &c. the appellants indemnifying him for his improvements.

3. That he be condemned to restore the issues and profits &c.

4. That he be condemned to pay the value of the poles.

5. Costs.

To this declaration the Respondent pleaded :

That he was the just and lawful proprietor of the said lot of ground and premises, having purchased them from Dame Louise Drouet de Richerville, Widow, &c. and Tutrix &c. by deed of the 14 of April 1806, she the said Widow having been specially authorized to that effect by the Honorable C. Foucher one of his Majesty's Justices, after an advice of friends and due examination and deliberation and followed by the formalities used in this Province for the alienation of the property of Minors.

That the said sale, authorization and advice of friends were not made, granted or given in fraud of the said Adelaide and Louise de Champlain, but were founded upon necessity and for the purpose of paying debts of the Community and to enable their said mother to rear and educate them according to their condition in life, for the attainment of which last object she had even sold property belonging exclusively to herself (*ses propres*).

That the grant of the poles was one which the said Widow had by Law a right to make.

The Respondent further pleaded, that the said Joseph Remy Vallieres and the said Louise Pezard de Champlain were estopped from bringing any action &c. inasmuch as the said Louise Pezard de Champlain ratified the sale after her majority, in and by a certain settlement of account rendered by the said Widow to the said Louise Pezard de Champlain and by a release and discharge of the Ballance of the said account by the said Louise Pezard de Champlain to her said Mother.

To this plea the Appellants answered specially :

1. That the Instrument executed by Louise de Champlain was a transaction and therefore null.

2. That no vouchers were delivered to Louise de Champlain.

3. That the said Instrument embraced rights with the extent of which Louise de Champlain was unacquainted.

4. That the original deed of sale being null was not susceptible of confirmation.

5. That the said Jean Rivard was not a party to the said instrument, and therefore could not avail himself of it.

6. That the sale was not made according to the formalities prescribed by the usages of the country.

7. That the said Poles were given, not sold to the said Respondent.

8. That the said authorization was granted without due examination and without evidence.

9. That the said order for a sale ought to have been executed by a judicial sale (*vente en Justice*) with the usual formalities (*affiches et criés*) prescribed for judicial sales.

The Appellants conclude for the setting aside of the above mentioned Instrument and for all which they had prayed by their declaration.

The facts of the cause as disclosed in the evidence appear to be as follows—

On the 29 January 1788, Pierre Melchoir de Champlain and Louise Drouet de Richerville intermarried, of which marriage there was Issue Marie Louise, borne on the 26 December 1789 and Antoinette Adelaide, born on the 22 January 1796.

Pierre Melchoir de Champlain departed this life on the 25th February 1805.

1805. On the 19th March of the same year Louise Drouet his wife caused an inventory to be made of the Community.

It appears by this Inventory that the Furniture, utensils, wearing apparel and other moveables belonging to the Community amounted only to the sum of 813′. 19s.

In the Chapter of "Money" we find one emphatic word "NEANT."

Credits belonging to the Community "sixty Boards." Debts due by the Community 1121′. 11. 0.

The *Propres* of the Husband are said to be consist of a lot of ground of seven acres in front by two leagues in depth.

Those of the widow appear to have been sold by the husband in his lifetime for divers sums, amounting in the whole to 1145′. 0.

It appears that a contract of marriage was executed between Mr. De Champlain and the said Louise Drouet; which contract the Appellants have not thought it proper to produce. In October 1805 the widow made before Badeaux and Confrere Notaries a declaration in addition to the above inventory stating that there had been omitted a sum of 343′. 16 due to the Community and another sum of 1026′. 10 due by the Community.

The accounts of the Community may be thus stated:

Proceeds of moveables,	813′. 19s
Debts due by the Community, (Exclusive of widow's *reprises*),	2113′. 8
Ballance against Community,	2699′. 9
To which add Widows *reprises*.	1145′. 0
	3844′. 9

The *propres* of the husband were entirely unproductive. And it will not excite surprise that a Widow, circumstanced as Madam de Champlain was, without money and owing debts which were large if her means of paying them are taken into consideration, found it necessary to adopt the proper measures for the sale of some portion of the *propres* of her hasband then vested by his decease in her children. It is obvious that without this aid Madame de Champlain would not only have been unable to rear and educate her children in a manner consistent with the rank of young ladies, but that she could not even have supplied them with the ordinary necessaries of life.

She accordingly on the 24th September 1805, presented a Petition to the Honorable Mr. Foucher, stating her necessitous circumstances and praying for permission to sell the farm in question. This Petition was supported by the best evidence, the inventory itself. A meeting of relations was called for the purpose of giving their advice.

The persons composing the meeting were Joseph Leon de Champlain, Uncle and sub-tutor of Louise and Adelaide de Champlain. Gile Pezard de Champlain, paternal Uncle of the above named Louise and Adelaide.

Jean Baptiste Dorval, husband of Françoise de Champlain, Aunt of the above named Louise and Adelaide.

Etienne Leblanc, husband of Josephte Richerville, maternal Aunt of the above named Louise and Adelaide.

Etienne Ranvoyzé, Joseph Comeau and Edward Sills, friends of the parties. These near relations of the Appellants are the persons whom they have in their declaration styled "*either evil disposed or ignorant.*"

It will be observed too that three of them are relations by the Father's side, and were therefore interested in keeping this paternal *propre* in the family. They unanimously concurred in giving it as their opinion that sale of this property should be made. The Judge accordingly ordered it. The land in question was offered for sale by public outcry for three successive Sundays at the Parish church of Batiscan the adjoining Parish, which was in truth also the Parish Church of Champlain. No Bidders appeared. It was again offered for sale on a fourth Sunday, and the present Respondent became the highest bidder for the sum of 3800′. and it was accordingly

accordingly adjudged to him. Madame Champlain afterwards executed a deed of Sale in favor of the Respondent, which is upon the files of this cause.

On the 28th July 1815, Madame de Champlain rendered an account in the ordinary form to her daughter Louise de Champlain, who therein took credit for her share of the price of the lot of ground so sold to the Respondent.

In the year 1812 Madame de Champlain departed this life and escaped the mortification of seeing the legality of her acts as Tutrix questioned by her children.

No renunciation to her succession is produced by the Appellants nor in truth was any made. And the Appellants are by law, as heiresses of their Mother bound to maintain and defend the Respondent in the possession of that lot of land which as heiresses of their Father they require him to quit and restore them.

It will be in the power of the Respondent to shew that all the formalities which have been usually required have been in this instance observed.

The Principles of law applicable to the case appear to be well established and may be reduced to a few general propositions.

Tr. des Min. chap. XIV. p. 34, § 7. p. 80.

1. Where the real property of a minor is sold in virtue of a Judge's order and the Minor complains that the proper formalities have not been observed; his remedy is by a rescisory action, praying a *restitutio in integrum*.

Tr. des Min. p. 141.

2. As on the one hand he is entitled to a *restitutio in integrum* even where all the proper formalities have been observed, if he can shew that he has been damnified by the sale, so on the other hand he is not entitled to this relief, if it appear to the Court exercising a discretion that, altho' the sale may be objectionable in matters of form, yet that in equity and good conscience it ought to be maintained, as *exempli gratiâ* where the Minor has derived benefit from the sale.

Domat. p. 292. Art. IV. and p. 298, Art. XXVI.

Tr. des Min. p. 31, 32. *l* 2, Cod. si Major factus, *l*. 3. § 1. D, de Minor Domat p. 293, 297, 298.

3. A Ratification or any act equivalent thereto after majority excludes the party from the benefit of the *restitutio in integrum*.

4. A Covenant entered into with a Tutor by his pupil who has arrived at the age of majority, whereby the pupil in consideration of a certain sum releases the Tutor from the obligation of rendering an account is not binding in law; but there is no principle of law which prevents these parties from entering into a compromise respecting their claims when the account is rendered.

Tr. des Min. p. 288. p. 290.

Tr. des Min. p. 30. Domat, p. 292.

5. The effect of the *restitutio in integrum* is to put the parties in the same state as if the deed complained of had never been executed, hence where the deed is a sale, the Plaintiff is bound to reimburse the Defendant for his improvements, and also, to repay the purchase money with Interest.

Domat p. 295, Art. X. p. 299, Art. XXVIII.

Acte de Notoriété apud Rep. de Jur. verbo Mineur in Notis.

6. After the notifications injoined by the Judge have been made if no bidders appear, the Tutor may sell by private sale.

It will not be necessary to give an abstract of the Reasons of Appeal as little more is contained in them than a repetition of the declaration and special answer of the Appellants.

The answers to the reasons of Appeal are general.

IN APPEAL.

J. R. Vallieres, esqr. & al.
APPELLANTS.

&

Jean Rivard,
RESPONDENT.

RESPONDENT's CASE.

A. Stuart for RESPONDENT.