

grounds, and the *certiorari* would be quashed, and the conviction affirmed.

*Doutre & Co.* for petitioner.

*R. Roy, Q. C.*, for prosecutors.

In re HOGUE, Insolvent, DUPUY, Assignee, DE PHILOMENE COUSINEAU, collocated, and LA SOCIÉTÉ DE CONSTRUCTION MONTARVILLE, contesting.

*Husband and Wife—Hypothec given by husband to wife in good faith and for lawful consideration—Renunciation by wife to priority of hypothec securing her reprises matrimoniales.*

JETTE, J. The question in this case was as to the distribution of the price of an immovable belonging to the insolvent, sold by the assignee. Dame Philomene Cousineau, wife of J. B. Mastha, was collocated by the dividend sheet for \$833.33, which she brought to the marriage, in becoming the wife of Mastha, but which she reserved as a *propre*. The Building Society, creditor, next in order of privilege, contested this collocation. His Honor referred to the deeds produced by the parties, and entered into an examination of the legal questions raised. The Society contended that the wife, Madame Mastha, had no hypothec or privilege on the immovable sold, because the husband had no right to grant a hypothec thereon in favor of his wife. In the next place, the Society contended that even if Madame Mastha had any such right, she had renounced it by the deed of obligation of 20th October, 1873, by which she renounced her dower and all matrimonial, hypothecary or real rights in favor of the Society. Articles 2037, 1483, and 1265, of the Civil Code were relied on by the Society, but these did not prohibit a hypothec by the husband to his wife during the marriage, to take the place of another hypothec legally made to secure a *créance légitime*. The Roman law did not forbid consorts to make such contracts with one another as they thought proper, provided equality was exactly preserved, and one was not benefited at the expense of the other. The French law was more stringent, with a view to prevent indirect advantages, and the maxim was laid down by Dumoulin, "que des conjoints ne peuvent pendant leur mariage, faire aucun contrat entre eux, sans

*nécessité*." It did not follow, however, that all deeds between husband and wife were nullities. The late Mr. Justice Caron, in the case of *Deslauriers & Bourque*, 15 Jurist p. 77, admitted that there are cases in which deeds between husband and wife are valid, and the Court of Appeal held, in the same case, "qu'un acte authentique passé entre les époux, et fait de bonne foi et pour valable considération, en paiement des reprises matrimoniales dues à la femme, en vertu d'un jugement en séparation, est un acte valide et légal." That decision was perfectly applicable, for here all the conditions of good faith were to be found. Therefore, the hypothec granted to Madame Mastha, to take the place of the hypothec which she had under her contract of marriage, to secure to her the payment of the *deniers dotaux* received by the husband, was perfectly valid.

The Society raised a second question, that even if Madame Mastha had rights, she had renounced them by the deed of 1873, from husband and wife to the Society. The clause was as follows:—"Et par ces mêmes présentes la dite Dame Philomène Cousineau, en considération des présentes, déclare qu'elle a renoncé et renonce en faveur de la dite Société de Construction, tant pour elle même que pour les enfans nés et à naître de son mariage avec son dit époux, à tout douaire soit préfix ou coutumier, à tous droits matrimoniaux, ou autres droits hypothécaires ou réels généralement quelconques qu'elle pourrait avoir ou prétendre sur l'immeuble sus désigné." The wife cannot confer advantage on her husband. She may renounce her dower, C. C. 1444, but here she has renounced all hypothecary claims on the property of her husband, i. e., the hypothec given to secure the *deniers dotaux*. Was this renunciation valid? If so, would she not in reality be conferring an advantage on her husband? There was an established jurisprudence on this point. In *Boudria & McLean*, 6 Jurist p. 65, the Court of Appeal decided that the wife may validly renounce not only her dower in favor of her husband, but the hypothec securing her matrimonial *reprises*. The principle settled by that judgment was that the law of Lower Canada, as modified by the registry ordinance of 1841, forbids the wife, it is true, to become surety for the debts and engagements of her husband; it forbids her to oblige herself