Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Les Sœurs Dames Hospitalières de St. Joseph de l'Hôtel Dieu de Montreal v. *Middlemiss, from the Court of Queen's Bench for Lower Canada (Appeal Side); delivered Friday, 12th July* 1878.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Robert P. Collier.

THIS case has been argued with great learning and ability on both sides. The question, however, between the parties is reducible within narrow limits; and that question having been very fully argued, and their Lordships having had an opportunity of considering the authorities cited, they do not think it necessary to reserve their judgment.

The Appellants are a religious community known as Les Religieuses Sœurs Hospitalières de St. Joseph de l'Hôtel Dieu de Montréal, and are the seigniors of a fief in Montreal known as the Fief St. Augustin. The Respondent is the present proprietor of a piece of land within the ambit of that fief, and, at one time, unquestionably held of it subject to the feudal rights then incident to such a tenure. The proceedings out of which this Appeal has arisen were taken by the Appellants in order to recover from the Respondent, as owner of this land, the commutation fine to which, as they allege, they were upon the transfer thereof entitled under the 74th and following sections of chapter XLI. of the

H 456. 100.—7/78. Wt. B 30.

Consolidated Statutes of Lower Canada, intituled "An Act respecting the general abolition of "feudal rights and duties." The 74th section is as follows: "In the Fief St. Augustin * * "*lods et ventes*, and other casual dues, including "*droit de banalité* and all seignorial dues what-"ever, were abolished on the 19th day of May "1860, and instead thereof the *cens et rentes* have "since that day been and shall be represented "by a *rente constituée* of the same amount (in "money or kind, as the case may be), secured "by the same privileges, and payable at the "same periods, until the capital thereof becomes "payable as herein-after provided; and a "commutation fine equal to that which the "seminary of St. Sulpice, of Montreal, is "entitled, in the city and parish of Montreal, "and to be calculated and ascertained in the "manner prescribed by chapter 42 of these "Consolidated Statutes respecting the said "seminary, and by the 69th section of this Act, "subject to the provisions herein-after made "in section 84 of this Act, as to the rate of "commutation according to the situation of the "property, shall be payable to the seigniors "of the said fief, or any portion of it, on the "first mutation which would have created *lods et* "*ventes* of the ownership of any property happening "in the * * * Fief St. Augustin * * * "during the 20 years next after the said day." Upon the transfer to the Respondent of this piece of land in 1874, the Appellants conceived that the period prescribed by the Statute as that at which they would be entitled to the commutation fine had arrived, and accordingly, in conformity with the procedure prescribed by the Statutes for ascertaining the amount thereof, they called upon the Respondent to appoint an arbitrator. He refused to do so. They then took the next

step prescribed by the Statutes, and petitioned the Court to appoint an arbitrator on his behalf. A defence was raised to that claim, which will be afterwards considered. The result was that the Superior Court upheld the claim and appointed an arbitrator. The amount of the commutation fine was afterwards ascertained in due course, and a decree made accordingly. Against those two decrees of the Superior Court there was an appeal to the Court of Queen's Bench, the Judges of which were divided in opinion, but the majority held that the proceedings had been irregular from the beginning; that no arbitrator ought to have been appointed, and that the application of the Appellants ought to have been dismissed. This Appeal is against their decree.

Before considering the merits of the case, it may be well shortly to recapitulate the history of the devolution of this property. In 1805 it seems to have been vested in one William Hallowell. In his hands it was subject, not only to the seignorial dues, but to certain reserved rents and other charges, conventions, and servitudes which were expreseed in a deed of accord of the 9th October 1805. On Hallowell's death his interest in the property became divisible amongst his wife and children, and, by two notarial deeds of the 8th October 1839 respectively, one tenth of that interest was duly conveyed to and became vested in one William Robertson, the remaining nine tenths being in like manner conveyed to and vested in one Charles Montizambert, each of whom accepted as purchaser in trust for the Commissioners appointed for the purpose of erecting a lunatic asylum in the said district of Montreal, and their successors, and with an obligation on his behalf to reconvey in a due manner unto the said Commissioners and their successors, so soon as they should be duly

authorised to accept a deed to that effect, the undivided part conveyed to him of the said property. It appears that, under a colonial statute, public money had been appropriated to certain persons as Commissioners generally for charitable purposes connected with lunatics, and that there was then an intention at least of making those persons a corporation capable of holding land. The purchases were unquestionably made with the public moneys so appropriated to the Commissioners. Nothing however was afterwards done to constitute them a body corporate, or to authorise them to hold lands; and it appears—though it is not very distinctly shown when—that some time between 1841 and 1844 they had ceased to exist, and that the Government of Canada was then in possession of the land. The next transaction in order of date is that of the 20th of April 1860, and, as will afterwards be shown, it is upon the true effect and nature of that transaction that the determination of this appeal now almost admittedly depends. Before and about that time various statutes had been passed with the object of abolishing all feudal rights of the seigniors, and of giving to the tenants a free allodial tenure. The Statute, however, which related to this particular fief was not passed until the 19th May 1860, and was one of several that were embodied in the Consolidated Statute, chapter 41. On the 14th January 1861, after the Statute had come into effect, a notarial act was passed between Montizambert, who held nine tenths of the property under the trusts already mentioned, and Her Majesty the Queen, represented by the Honourable John Rose, described as a Commissioner of Public Works, by which the nine tenths of the property vested in Montizambert were formally conveyed to the Crown. That deed contains a recital in the words: "And "whereas the property herein-after described

" was never conveyed to the Commissioners for " the erection of a lunatic asylum in the district " of Montreal, that such Commissioners have " ceased to exist, and that by the laws in force " in this province the said property, having " been paid for out of the provincial funds, " should be vested in Her Majesty, her heirs, " and successors, and be under the management " and control of the Commissioner of Public " Works for the time being." There is no trace in the record of any transfer of what English lawyers would call the outstanding legal estate of the remaining one tenth from Robertson to the Crown; but there is no doubt that the Crown had long been in possession as well of that, as of the other nine tenths, and, in fact, continued to be in possession of the whole property up to the 1st July 1874. At that date it passed from the Crown to the Respondent by means of an exchange *à titre de soulte et retour*, and it is admitted that if that transaction had taken place between subjects it would have been such a mutation of property as would have created *lods et ventes* within the meaning of the 74th section of chapter 41 of the Consolidated Statutes.

That being so, what was the defence made by the Respondent to the Appellants' claim? His first answer to their petition is at page 21 of the Record. The Appellants put in their reply, whereupon the Defendant obtained leave to file an amended answer, and the reply was ultimately taken to be a reply to that amended answer. Mr. Digby has to-day drawn their Lordships' attention to some supposed distinctions between the two answers, but their Lordships cannot see that there is any difference between them which materially affects the question now to be decided. They will therefore confine their attention to the last answer.

That is to the effect, that the property in question had been acquired by the Crown by the notarial acts of the 8th October 1839; that by those acts it was established that the property in question was acquired in the name of a trustee ("*en fidei-commis*") by the Commissioners for the erection of a lunatic asylum in the district of Montreal, with the money of the Crown appropriated to that object; that the commission of these Commissioners having expired about the year 1844 without their ever having effected the erection of the asylum, and the Commissioners having consequently ceased to exist, the trust was extinguished, and the Crown united the property to its domain, and then began to possess and afterwards continued to possess it as proprietor up to the time of the alienation in favour of the Respondent Middlemiss; and further that the Appellants had since that time treated the Crown as proprietor of the property, and had claimed the indemnity which was due to them as seigneuresses upon the said property, "*ainsi passé en* "*main-morte.*" Their Lordships here pause to consider an argument which has been founded upon the words "*ainsi passé en main-morte.*" They think that the words "thus passed *en* "*main-morte*" cannot fairly be taken to import more than that the property had passed *extra commercium* under the circumstances above stated; and that if those circumstances do not support the conclusion that it had passed into hands which were in the strict sense of the term those of *gens de main-morte*, the Respondent ought not to be held to have made an admission to that effect because his pleader has used in a loose way the term *main-morte* instead of that which Hervé, writing with precision, in his definition of "Indemnité," advisedly substituted for it, viz., *une main qui*

n'aliène point. In the following passage he thus explains the use of those words: "Je dis en " général aussi, une main qui n'aliène point " and non pas simplement une main-morte, par- " ceque le Roi qui n'est pas mis dans la classe " des main-mortes, doit néanmoins une in- " demnité aux seigneurs dans la mouvance des " quels il acquiert," and then he proceeds to deal with the indemnity payable in the one case by *gens de main-morte*, properly so termed, and in the other by the Crown. The answer goes on to say that, on or about the 20th April 1860 the Crown had paid to the petitioners an indemnity agreed between them by reason of the said property having ceased to be subject to seignorial rights; and that by reason of the acquisition by the Crown of the said property, and the payment of the said indemnity, that property was united to the Sovereign's domain and ceased to be subject to any *mouvance particulière*. The reply of the Appellants admits to a certain extent the facts pleaded by the Respondent. It admits that the land had been acquired by virtue of the two notarial deeds in trust for the Commissioners, to which Commissioners the government of the province of Canada had afterwards succeeded; it also admits the payment of the sum alleged to have been paid by way of indemnity, being one fifth of the sum less a tenth, but says that that indemnity was not fixed and agreed upon by the parties, because the petitioners did not acknowledge the propriety of the deduction of the tenth, and further claimed *lods et ventes* on the purchase of 1839, which had been refused by the Crown. It then states what is in fact the real issue between the parties, viz., that the indemnity paid represented only that indemnity which was payable by all *mains-mortes* when they acquired immoveable property; that the

effect of the payment was not *resoudre la mouvance*, *i.e.* to put an end to the tenure, but merely to suspend the rights of the seigniors so long as the property remained in the hands of the Government, and that it had been acquired by Robertson and Montizambert subject to all seignorial rights, and so continued to be, except so far as related to the indemnity *pour amortissement*. The Appellants with their reply filed the account at page 24 of the Record, which is really the only evidence in the cause of the transaction in question. Their Lordships have felt, during the greater part of the argument, that the crucial question in the case was which of the constructions put by the parties respectively upon that transaction was correct; or in other words, *quo animo* did one party pay and the other receive the indemnity mentioned in the account. To that question they will now address themselves.

The case for the Respondent involves two questions, one, a question of law, and the other a question of fact. The question of law is, whether by the law of Lower Canada the acquisition by the Crown of lands held from or under a seignior as part of his fief, did extinguish all feudal rights in those lands, and give to the seignior a mere right to an indemnity. The question of fact is, whether the transaction evidenced by the document at page 24 took place upon that footing. Those questions more or less run into each other, because it must be presumed that the parties dealt with each other with reference to the subsisting law, and the construction of the document, in so far as it is ambiguous, will therefore be facilitated by a consideration of what that law was.

Their Lordships do not think it necessary to go in great detail through the many authorities which have been cited in the facta of the parties, in the reasons of the Judges or at the

bar, as to what the law of France, and, consequently, the law of Canada, was upon that point. They have come to the conclusion that those authorities do establish that (whatever may have been the case in earlier times, when the kings of France seem occasionally to have submitted to do homage by attorney or otherwise, for acquisitions in the fiefs of subject seigniors,) for a considerable time, probably very soon after the Edict of Moulins, passed in the reign of Charles IX., there was an end of that state of things, and that the Crown thenceforward acquired such properties with an extinction of all feudal rights therein, subject only to a right on the part of the seignior to receive an indemnity,—a right more or less strictly enforceable, but certainly recognized by custom. They also think it is established that up to the time of the Ordinance of Louis XIV., in 1667, the amount of that indemnity, when not determinable by legal custom or written law, was in the case of lands held by roturiers one fifth of the price. This is very clearly stated by Hervé in a paragraph which applies, not only to the indemnity payable by *gens de main-morte*, but also to the indemnity payable by the Crown. He says, "Lors qu'il " n'y a aucune règle écrite ou lors qu'il y a du " doute, il faut suivre la jurisprudence qui a fixé " l'indemnité à la valeur du tiers des biens nobles " et du cinquième de ceux qui sont roturiers, " car cette jurisprudence fait le droit commun " dans les provinces où il n'y a ni loi ni usage " contraire." This view of the jurisprudence of France does not depend simply upon text writers, such as Guyot and others. It is confirmed by the various decisions or arrêts that have been cited by the learned Judges, and in particular by the arrêt in the case of *la terre de Bohin;* for although the decision in that case was subsequent in date to the Ordinance of

Louis XIV., it is impossible to impute to the Judges who passed it, that they were not applying the law as it existed at the time when the feudal rights were alleged to have been extinguished.

What then is the effect of the Ordinance of Louis XIV. of which so much has been said? It assumed the existing law, and modified that law in so far as the amount of the indemnity was concerned. It prescribed a mode of calculating the indemnity less favourable to the subject, and also extremely complicated in form, in so far as it related to property held *en roture*. The second article of it, which relates to seignories or fiefs purchased by the Crown, seems to preserve the old custom of calculating the indemnity at one-fifth of the value or price. Their Lordships here observe that it is by no means necessary to hold that this ordinance, which was passed four years after the establishment of the Superior Council in Canada, and therefore was not introduced *proprio vigore* into Canada, and was never afterwards registered in Canada, ever became part of the law of Canada.

It will subsequently be shown that the parties acted and dealt with each other upon the footing of the law as it existed before the passing of the ordinance.

The next question is, was this law so defining the rights of the Crown ever introduced into Canada? Their Lordships can see no objection in principle to treating it as so introduced. It was merely part of the law of feudal tenure, which was unquestionably introduced into French Canada as the law of real property or part of the law of real property in that colony; and which, after the conquest of Canada, when the province had passed under British dominion, continued to be law by virtue of the Imperial

Statute, known as the Quebec Act. If the law relating to the rights of the Crown, which was part of the general law of tenure, was not introduced or continued in Canada, it should be shown affirmatively to have been excepted. What has been principally relied upon as establishing this, is the fifth sub-section of the 66th section of the Consolidated Statute, chapter 41. That portion of the Consolidated Statute does not however relate to the seigniory in question, or to seigniories of that class, but is confined to seigniories belonging to the seminary of St. Sulpice. The enactment relied upon is moreover extremely general in its terms. It says, "The "said payments by the province shall include "the commutation of the tenure of all pro- "perty now held by the province or the Crown, "or by the War Department, as representing the "late Ordnance Department in any seignory "belonging to the said seminary, and such com- "mutation shall be held to have been perfected "on the 4th day of May 1859." It speaks of the tenure of all property held by the province or the Crown, or by the War Department. It does not positively assert that the Crown was treated as an ordinary *censitaire* in all seignories in Canada in which it might hold lands, or in the particular seignory which is in question here.

Reliance was also placed upon two statutes which relate to the officers of Her Majesty's Ordnance, and to lands purchased by them for the protection of the province with Imperial funds. It is possible that lands so purchased and held may have been subject to feudal rights, but their Lordships cannot infer from these particular statutes that the French law was altered upon its introduction into Canada so as to affect the general rights of the Crown in Canada in the manner supposed, or that it has since been so altered.

It may be convenient to mention here that there is no doubt as to the law which is invoked on the side of the Appellant, namely, that upon an alienation by virtue of which property subject to feudal rights passed into the hands of *gens de main-morte*, in the proper sense of the word, an indemnity estimated also at one fifth of the price became payable by the *gens de main-morte* as a compensation for the probable loss of *lods et ventes*. There was however, this distinction between the indemnity payable by *gens de main-morte* and the indemnity payable by the Crown, viz., that upon the passing of the property out of the hands of the *gens de main-morte* the right to *lods et ventes* again revived, the feudal rights, so far as they were covered by the indemnity, being merely suspended; whereas in the case of the Crown, according to the authorities to which their Lordships have already referred, they were absolutely and for ever extinguished. The real question, then, between the parties in this case is, whether the feudal rights in question were so extinguished, or only so suspended by the transaction of the 20th of April 1860.

Their Lordships will now examine the document set out at page 24, and consider which of the contentions of the opposite parties it favours. It is in the form of a bill, presented by the seigniors and followed by a statement of what has been paid by the Government. It may here be remarked that the Provincial Government, as such, was not capable of holding lands, and that all lands acquired by Government for public purposes were required by law to be taken in the name of the Crown. The Bill is headed "Le Gouvernement Provincial." Those words clearly import that the bill was presented to the Provincial Government as representing the Crown. It proceeds thus "Pour

" lods et ventes sur son acquisition,"—that is, the acquisition by the Government, the representative of the Crown, from the heirs and representatives of William Hallowell,—" by two " contracts of the 8th October 1839 which " passed to Robertson and Montizambert, pur- " chasers for the advantage of the Commissioners " of the lunatic asylum." It claims first the *lods et ventes*, alleged to have been payable on that particular transaction, and then contains this item: " Pour droit d'indemnité sur le susdit " prix de vente 192*l.* 0*s.* 10*d.*," being one fifth of the price. Then follows a claim from the Government of the *rente foncière*, which was reserved by the original deed to Hallowell in favour of the seigniors over and above their seignorial dues for 15 years, a claim which implies that at least during that period Government representing the Crown had been the proprietors of the land. How then did the Government, as appears by the second part of this document, deal with these claims. It rejected that for the *lods et ventes* upon the transaction of 1839, and it may well be presumed that the claim was so rejected because it had been established by judicial decisions in Canada that *lods et ventes* were not payable on a purchase for a purpose of public utility. It paid to the Appellants the sum of 217*l.* 11*s.* 9*d.*, which was composed of the following items, viz.; 1st, the indemnity claimed 192*l.* 0*s.* 10*d.*, less one tenth which was deducted on the ground that these particular seigniors were not entitled to the profits of *la haute justice*, and therefore that one tenth was retainable to cover the claims of those that were so entitled; and, secondly, the sums claimed for the arrears of the *rent foncière*.

An argument was founded by the learned Counsel for the Respondent upon the words " droit d'indemnité," and upon the fact that the

payment was made of the "indemnité reclamée." It was contended that the words "droit d'indemnité" have received a statutory interpretation, and must be taken to import the indemnity payable to a corporation or other *main-morte*. Their Lordships are of opinion that the words mean only a right of indemnity, and are to be construed *secundum subjectam materiam*. Here it appears on the face of the bill, as already shown, that the claim was against the Government as representing the Crown; that its title was referred to the transactions of 1839; and that it was treated as having been in possession of the property, and liable for the rent reserved for at least 15 years before the date of the transaction. All this appears to their Lordships to afford the strongest inference that the indemnity claimed was that payable by the Crown.

It was suggested, however, in an early part of the argument that the sum was not that which would have been the amount of the indemnity payable to the Crown under the Ordinance of Louis XIV., but, as their Lordships have already observed, that only shows that that ordinance was not treated as regulating in Canada the amount of the indemnity; but that the claim was made according to the law as it existed in France before that ordinance. On the other hand the view which the Appellants take of the transaction is not altogether consistent with the document. There is on the face of the account no allegation that the sum claimed was the indemnity payable by *gens de main-morte* in the proper sense of the term. To treat the Crown as falling within that category would clearly have been an error in law, and the facts stated in the bill which give a partial history of the former transactions, fail to show that at any time the property was held by any corporation or body of persons who were capable of being treated in the proper sense of

the term as *gens de main-morte*. Therefore it appears to their Lordships that upon the true construction of this document it must be held that the indemnity was claimed and paid as an indemnity payable by the Crown, with the legal incidents of a purchase by the Crown, and the payment of an indemnity thereon, namely, that the feudal rights were thereby extinguished and became incapable of being revived.

The chief argument, not already dealt with, which has been used against this construction was founded upon the expression in the deed of 1861, which conveyed the legal estate to the Crown. Their Lordships are not prepared to say that a plausible argument cannot be raised upon that point. That deed, however, cannot be used in the way of admission or estoppel as regards this question, because the Appellants were no parties to it; and it seems to their Lordships that a sufficient explanation of the difficulty is that given by the learned Chief Justice of the Court of Queen's Bench, which is to the effect that the clause was put in for the protection in the ordinary way of the conveying party, and to relieve him from any claim which might possibly be made against him in respect of seignorial rights. Their Lordships cannot set any inference which arises from those clauses against what upon a full view of the law and the facts they think was the effect of the transaction of April 1861. It seems to them that their view of that transaction really disposes of the case, and that it is unnecessary to deal with any other questions that might be raised upon the construction of the Statute and the effect of the conveyance to the Crown of 1861, or any of the other points which have been more or less raised in the course of the argument before them. It will be their duty on the whole case humbly to advise Her Majesty to affirm the judgment of the Court of Queen's Bench for Lower Canada, and to dismiss this Appeal with costs.