Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Octave Chavigny de la Chevrotière v. La Cité de Montréal, from the Court of Queen's Bench for Lower Canada; delivered November 16th, 1886.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

THE action from which this appeal arises was commenced in the Superior Court of the province of Quebec, Lower Canada. The demandant, who is also the Appellant, claimed to be proprietor of about seven-eighths of that part of the city of Montreal which from 1803 to January 1847 had been a public market, and from January 1847 to the present time has been an open public place in the city, known as the Place Jacques Cartier. The demandant claimed against the Respondents, the city of Montreal, a right to resume possession of that piece of land as in the original ownership of the grantors. His money claim against the city amounted to 180,866 dollars. Further, he claimed that the original deed of grant of 29th December 1813 should be brought in and declared null and void. The claim is said to have arisen under that deed so often referred to in the course of the case.

It was said to have been a purely voluntary gift, but their Lordships think, if it were necessary to express an opinion on it, it might be doubtful whether it was voluntary, and

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whether its true character was not a grant to the magistrates of the city of Montreal for valuable consideration.

The place in question was originally the property of the Seminary of Montreal, and the Seminary, being about to dispose of it, entered into a treaty with Périnault and Durocher. The property appears to have been made over to Périnault and Durocher to make the most they could of it, but under a condition that they were to pay to the Seminary a sum of about 3,000 guineas. They proceeded accordingly to divide it for building purposes; but reserved a portion, and they entered into treaty with the concessionaires, who stipulated that there should be not only the Rue de la Fabrique (which did not then exist as a street, but was *projeteé* only,) and also that the open space lying between the Rue de la Fabrique and the Rue St. Charles should be converted into a public market. Périnault and Durocher, being unable to comply with that condition without the aid of some public body, applied to the magistrates at Montreal, as they could create a public market, and it was necessary to seek their aid, and out of this sprang the grant of the 29th December 1803.

The result of that deed seems to be, that it created a public right as well as a private servitude,—that is, when that deed had been carried out by converting the open space, which is now the subject in question, into a public market place, with a right in the public to resort to it as a public market place,—it became subject to that public right, at the same time, possibly, being subject to a private servitude to the parties who had become concessionaires of the building plots. Their Lordships do not find it necessary to express any opinion upon the general construction, or upon the effect of the condition contained in the grant of 1803. They

assume, but for the purposes only of the judgement which is about to be delivered, that the demandant's contention may be right, that when there was a breach of that condition the donors or their representatives would be entitled to re-enter and to resume possession as of their former estate.

Several questions of very considerable importance and difficulty have been raised before this Committee. One was suggested by one of their Lordships—whether the condition was apportionable, and, if not apportionable, whether the demandants could sue, not being the owners of nor interested in the whole of the property which is the subject-matter of the condition. On that question also their Lordships do not find it necessary, in their present judgement, to express any opinion.

There were also questions whether the condition of re-entry was void in its inception, whether it was a condition of re-entry properly, or was merely inserted in the deed of gift *in terrorem*, and merely *comminatoiré*.

There was also a question of prescription and other questions in the case upon which their Lordships do not propose to express any opinion, as the appeal may be disposed of on another and satisfactory ground.

The magistrates of Montreal having got possession of the land under that deed of 1803, and converted it into a public market, we come next to the Ordinance of 4 Vict., by which the magistrates ceased to be the managing body of the city of Montreal, and were replaced by a quasi-corporate body. That leads to the 8 Vict. c. 59. The magistrates in Montreal had accepted this deed of 1803, which, whether it was for valuable consideration or a simple voluntary deed, was a deed of grant for ever. The words are "*maintenant et à toujours*"—but subject to

the condition, whatever the effect of it was. Therefore, at the time of the incorporation of the city, the magistrates were, as trustees for the public, in ownership of this land in perpetuity, subject to the condition, with this market upon it; and over this public market place, not inhabitants of the city alone, but the public at large had acquired considerable rights.

That being the position of affairs, there came the Canadian statute of 8 Vict. c. 59; that statute is not a general Act dealing with all corporations, but with Montreal alone. It is to give greater potency and effect to the incorporation of the city of Montreal and to enlarge the powers of the corporate body. It gives them very extensive powers over the city, and amongst other things it says, in the 50th section, that they shall have power of "changing the site of any "market or market place within the said city, "or to establish any new market or market "place, or to abolish any market or market "place now in existence, or hereafter to be in "existence in the said city, or to appropriate "the site thereof, or any part of such site for "any other public purpose whatever, any law, "statute, or usage to the contrary notwith-"standing; saving to any party aggrieved by "any act of the said council respecting any "such market or market place any remedy "such party may by law have against the cor-"poration of the said city for any damage by "such party, sustained by reason of such act" of the corporation.

Now it was contended that, acting under that statute and converting this market place to another public purpose, was no breach of the condition, and that the effect of the statute was to discharge the condition and leave it open to the corporation, acting for the public interests, to appropriate the site of that market place to

any other public purpose, but subject to a claim for compensation by the demandant here and the parties he represents, if they had title, and had been injured by the act of the corporation. Now upon this very important question as to the effect of this statute, their Lordships do not think that it is necessary at present to express any opinion.

Proceeding under the powers that they had so obtained in December 1847, the first byelaw was made. In that, the corporation indicate their intention to abolish this market and apply the site to another public purpose, and their Lordships can have no doubt, that in taking that step the corporation were moved only by considerations of public good. They found it necessary probably to supply the growing city with a larger market place, for Montreal in 1847 was a very different place from the Montreal of 1803, growing and extending every day, and still growing and becoming one of the most beautiful cities in the world. They very likely thought that a larger market place was necessary, but that they ought to retain the space occupied by the market as an open space for the public good and the public health, and hence they converted it into the Place Jacques Cartier.

In January 1847 the Act of Conversion was made complete, and there was also a subsequent byelaw by which they directed that the new place should be henceforward called the Place Jacques Cartier.

Their Lordships assume also, for the purposes of the case, that, upon the happening of these events, whatever rights if any the demandant or those he represents had under the condition in the grant of 1803 came into existence in January 1847, that is, that they were then entitled, if at all entitled, to put their claims in force and to institute a proceeding against

the corporation to take advantage of the condition annexed to the gift of 1803, and to resume possession of this plot of ground or to get compensation for the act of the corporation. But they did not do so, and things went on as before from 1847 to 1852. The effect of the transaction of January 1847 was, to convert, by the act of the corporation, the old market place into a public square which the citizens of Montreal and the public had a right to use.

Things continued in that condition down to 1852, when Perrin instituted his action. That action may be described with substantial accuracy as similar to the present. It made the same case. The present demandant is the assignee of Perrin's interest. Perrin's action the corporation defended. They put in exceptions similar, save in one respect, to those now before their Lordships. It was allowed to sleep for some six years. The case was then set down for hearing before the proper court in Canada, and was dismissed, either for want of prosecution, or on the merits. Perrin never instituted any other proceeding. He appears to have lain dormant for 19 years, and in 1876, for a nominal sum, to have assigned this large claim over to the present demandant. In all that interval the public had been using this public place and it was not using it privately, it was not *clam*, but it was openly and as of right, without any interruption by the parties or any of them who are now represented to have had the property in the place. Mr Fullarton relied very much on this action of Perrin's and a petition that came in from some outside parties. Who they were we do not know; but it was a petition which was not acted upon, and it is open to the suggestion that it was the existence of that petition that suggested the action of François Perrin. However, Perrin never took a step further, and

it appears to their Lordships that the absence of any contestation of the right of the public to use this place as a public highway is clear evidence of acquiescence in the public right, or rather of abandonment of the claim, if any, that François Perrin had.

Their Lordships desire to point out that, independently of the statutes, there is evidence of a long-continued user by the public and an abandonment of right by those who could have disputed the user by the public, sufficient to sustain at common law the public right. There seems to be no difference between the law of Lower Canada and the law of England and of Scotland in that respect. The public had enjoyed the right from 1847 down to the commencement of the present action. They had enjoyed it openly, claimed it, not privately, but adversely, and as of right, and in the meantime there had not been a single step on the part of the present claimant, or those from whom he derives title, to dispute that right, but, on the contrary, there was the amplest evidence of acquiescence in the public enjoyment. There has been made out, independently of any statutory provision, an ample case of user on the one side and dedication or abandonment on the other which would constitute the place in question a public place over which, not the citizens of Canada or Montreal alone, but the public at large, had rights, which the law would give effect to independently of the provisions of any statute.

The 18 Vict. c. 100, Lower Canada, does not apply to Montreal, but deserves attention. Montreal is excepted from the operation of that Act, but it applies to every part of Lower Canada save Montreal and some other excepted places, and it contains this provision, that "every road declared a public "highway by any procès verbal byelaw or order "of any grand voyer, warden, commissioner or "municipal council legally made and in force

" when this Act shall commence shall be held " to be a road within the meaning of this Act " until it be otherwise ordered by competent " authority." That was the Act adverted to by Chief Justice Dorion. He intended to refer to the 23 Vict. c 72, which applies to Montreal alone. It deals with the property of Montreal. It deals with the powers of the corporation and extends them beyond the Act of the 8 Vict. In sub-section 6 of section 10 of that Act (23 Vict. c. 72) there is this special provision :—" The said council" (that is the council of Montreal) " shall " also have power to cause such of the streets, " lanes, alleys, highways, and public squares in the " said city, or any part or parts thereof, as shall " not have been heretofore regarded or sufficiently " described, or shall have been opened for public " use during 10 years but not regarded, to be " ascertained, described, and entered of record in " a book to be kept for that purpose by the city " surveyor of the said city, and the same when " so entered of record shall be public highways " or grounds ; and the record thereof shall in all " cases be held and taken as evidence for their " being such public highways and grounds."

Proceeding under this Act, the corporation did in 1865 register the Place Jacques Cartier as a public place of the city. Their Lordships have no doubt that the registration was valid, and has been amply proved. If any objection had been taken at the trial before the Canadian Judge, it would have been the easiest thing possible to produce the original book, but a certified copy of the entry of registration was admitted in its place.

The Place Jacques Cartier had been from 1847 up to 1865 (more than 10 years before registration) enjoyed by the public as a public way, and it was enjoyed as a public way more than 10 years after the registration and before the present action was commenced ; and it seems

to their Lordships that the case comes within the express language of that statute, and their Lordships have no doubt that, when the local Legislature passed this Act they knew the state of things in the city, intended to provide for it, and did provide for it in strong and emphatic language, saying, that when a street or road should have been opened for public use during 10 years and placed upon the register, it should be a public highway.

Their Lordships are of opinion that, even if the common law question did not arise, still, there having been antecedent to this registration, and posterior to the registration, the statutable time during which the place should be used as a public street to give operation to the statute, the statute then applies, and upon that registration the Place "Jacques Cartier" became a public highway. There is a distinction between the Canadian law and the law of this country as to public highways. The Canadian law agrees rather with the law of Scotland, which is founded on the civil law, namely, that when a street or road becomes a public highway the soil of the road is vested in the Crown if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then in that corporate body in trust for that public use. It was admitted in the argument for the Appellant that such was the law of Lower Canada.

Their Lordships being of that opinion, which is in accordance with the principles deduced from *Guy* v. *the Corporation of Montreal*, and with the principles on which the Court of Queen's Bench for Lower Canada appears to have decided this case, will therefore humbly advise Her Majesty that the judgement of the Court of Queen's Bench for Lower Canada, which is also the judgement of the Superior Court, should be affirmed, and that the present appeal should be dismissed with costs.