

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Les Curé et Marguilliers de la Paroisse de Verchères v. La Corporation de la Paroisse de Verchères, from the Court of Queen's Bench for the Province of Quebec (Appeal Side) ; delivered 6th March, 1875.

Present :

LORD HATHERLEY.
SIR JAMES W. COLVILLE.
SIR ROBERT PHILLIMORE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS is an appeal from a Judgment given by the Court of Queen's Bench for the Province of Quebec, on March 22nd, 1872, which affirmed a Judgment given by the Superior Court on the 30th of December, 1869.

The village of Verchères, situate within the limits of the parish of Verchères, was, in the year 1857, erected into an unincorporated village, in the manner prescribed by the Consolidated Statutes of Lower Canada.

The Municipal Council of this Parish having entertained a proposal for forming a new street, which would pass across a portion of land of the "fabrique" of the parish, occupied by the Curé, between the same and another part occupied by the convent, also belonging to the "fabrique," public notice was, on the 30th July, 1868, given, that on the following 10th of August a special meeting of the Municipal Council would be holden for the purpose of considering or reviewing the

report (*procès-verbal*) of the Superintendent, who had recommended the formation of the new street.

On the 9th of August, 1868, a meeting was holden of the Curé and marguilliers of the "fabrique," and certain former marguilliers of the "fabrique," but no parishioner who was not or had not been a marguillier was summoned to it. This meeting, thus composed, resolved to oppose the formation of the street and the homologation or confirmation of the report, and they appointed the Curé as the Special Attorney of the "Œuvre et Fabrique," to take the necessary steps to execute their resolution, the Curé binding himself to defray all charges thereby incurred.

On the 10th of August, the next day, the Curé, acting on this authority, appeared before the Municipal Council of the parish of Verchères, and opposed the confirmation of the report, but the Council affirmed it, with some variations not material to the present case. The Curé appealed from this decision to the Municipal Council of the county, and that Board, on the 7th of September, dismissed the appeal with costs, and confirmed the report, except so far as it provided that no compensation should be paid to the "fabrique" for the land required for the new street.

In the month of October the Curé brought an action in the names of the Appellants in this cause, that is, "Les Curé et Marguilliers de l'Œuvre et Fabrique," &c., against the Respondents, that is, "La Corporation de la Paroisse de Verchères," in the Superior Court, and filed a declaration, in which he prayed that the proceedings of the Respondents as to the making of the street, might be declared null and illegal, and that the Respondents might be restrained from disturbing the enjoyment and possession by the Appellants of their land, and he prayed also for damages.

To this action the Respondents put in a plea known to French jurisprudence as "la fin de non recevoir," to the effect that the Appellants were not competent to bring the action, inasmuch as they were not authorized to do so by the parishioners regularly convened. They also put in further pleas which it is unnecessary to specify. The Appellants replied that the authority of the parishioners was not required by law to enable them to bring the action,

but that the authority given by the present and past marguilliers was sufficient; they further replied that it was not competent to the Respondents to raise this question of the "autorisation" which could only be raised by the parishioners and "fabriciens" disavowing the Attorney or the Appellants in the action, and that the plea of "fin de non recevoir" was bad in law; and they also specially replied that the authority of the parishioners to bring the action was not necessary according to the law and custom of the country, and particularly according to the usage established in the parish, but that an authority given by the past and present marguilliers was sufficient. There were also other replications not affecting the present case.

Witnesses were examined on both sides before Mr. Justice Berthelot, who, on the 30th of December, 1869, decided that the evidence did establish an usage in the Parish of Verchères to summon all the parishioners to a meeting convened for such a purpose as the one for which this meeting had been holden by the Curé and marguilliers alone, that such usage was not contrary to the general law, and that the Respondents were entitled to raise the question as to the want of due "autorisation."

From this judgment there was an appeal to the Court of Queen's Bench, before which tribunal it was twice argued, and the judgment of the Superior Court was affirmed by the opinions of four judges against one.

From these judgments the appeal has been presented to Her Majesty in Council. Their Lordships are unfortunately deprived of the written reasons of the majority of the judges in the Court below, which have been destroyed by fire; but they have before them the judgment of Mr. Justice Berthelot, the notes of Mr. Justice Caron, and the judgment of the dissentient judge, Mr. Justice Monk.

Upon the undisputed fact in the case, that the "autorisation" for the prosecution of this suit was given by an assembly composed exclusively of the old and new marguilliers at which the Curé presided (Record 38, p. 201), the several questions of law, which have been maintained, were raised before the Courts below, and have been again insisted upon before their Lordships. They may be concisely stated as follows:—

First, was the "autorisation" sufficient or, the position on which the Respondents rely, a nullity?

Secondly, if insufficient, and a nullity, was it competent to the Respondents to plead this nullity, or, in the language of the French jurisprudence, "opposer la fin de non recevoir" to this action?

No question on the merits of the case has been decided in the Courts below, or is now mooted before their Lordships.

The first question, namely, was the "autorisation" sufficient? is the really important and substantial question in the case.

Their Lordships have carefully examined the various authorities which have been cited to them, as well as others upon which it appeared to them that reliance might be placed.

It seems to their Lordships proper to make at the outset a general observation upon the weight which is due to French jurisprudence and law upon the present question.

It has been urged that the Édít of 1663, which created the "Conseil Supérieur" in Canada, required that all subsequent édits should be registered before they became law in this French Colony, and that, therefore, the authorities derived from French law where this condition was wanting were of little or no weight.

But their Lordships are of opinion that this proposition is too broadly stated:—

It is one thing to say that an Édít required registration before it could become positive law in Canada, and another thing to say that French jurisprudence relating to such Édits can be of no avail in the construction of Canadian law or interpretation of Canadian usage.

It appears to their Lordships that, for these purposes, and so limited, the French jurisprudence has been rightly relied upon by the Courts below, and must be considered by their Lordships.

It is manifest that the early French Colonists must have imported such portions of French law relating to Fabriques as were applicable to their new position. Such portions must have constituted the foundation of the unwritten law of custom which sprung up in Canada before positive law was enacted in these matters for the Colony. Judge Baudry seems to state the matter

fairly in his recent work, "Code des Curés et Marguilliers et Paroissiens," p. 2: "Un grand nombre de ces règles dérivent d'ordonnances rendues depuis 1663, et qui n'ont pas eu force de loi ici, n'ayant pas été enregistrés au Conseil Supérieur de Québec; cependant, ces ordonnances sont souvent invoquées dans nos Tribunaux, du moins comme raison écrite." In the absence of any established usage or custom it is right to consult the authorities of great French Jurists like Denisart and Merlin; and sometimes of French édits, which, though directed to a particular Mission, or Paroisse, not unfrequently, as in the case of the "Arrêt de St. Jean en Grève," contained—as Durande de Maillanne, in his recital of it at length expressly points out—a summary of principles applicable to the general subject.

In the recent case of *Dame Henriette Brown v. Les Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montreal*, their Lordships had occasion to consider the character and nature of what is called "la fabrique." But it may be as well to cite upon this subject the definite language of Guyot, Rep., tit. "Fabrique," Art. 24:—

"C'est qui appartient à une église, tant pour les fonds et les revenus affectés à l'entretien ou à la réparation de l'église que pour les argenteries et les ornements." . . . "désigne aussi par ce terme de fabrique, le corps ou l'assemblée de ceux qui ont l'administration des fonds et revenus dont on vient de parler."

It seems that, except in Quebec, parishes were scarcely established in Canada before the year 1679, and that Verchères was constituted a parish as late as 1722; the first appointment of Marguilliers in that parish appears to have been in the next year; and the extracts from registers of this parish show that the parishioners almost immediately exercised the right of choosing the Marguilliers.

The general question, however, as to the nature of the subjects which could legally be dealt with by the Curé and the Marguillier in charge, or by the Curé and the old and new Marguilliers, without the consent of the general body of parishioners, appears to have not been very strictly inquired into in this parish of Verchères before the year 1830.

About that period local circumstances caused the question to be agitated. At first the ecclesiastical authorities appear to have considered that the intervention of the body of the parishioners upon almost any subject relating to the "fabrique" was a gratuitous concession on the part of the Bishop to the parishioners,—a proposition which has, indeed, in substance, been maintained by the Counsel for the Appellants before their Lordships; but it is now admitted that on two occasions, at least, the convention of the whole body of the parishioners is required by law, namely, the occasions of electing new Marguilliers, and the rendering of the accounts by the old Marguilliers. This is said to be a concession to the parishioners since the year 1843.

The fact is, that about this period an important law-suit was commenced, which was decided by the Queen's Bench in 1844—45.

The name of the case was "*Ex-parte Renouf.*" The marginal note of the reporter is correct, and is as follows:—

"Les notables ont droit de participer à l'élection des marguilliers.

"Les notables sont tous les paroissiens contribuables.

"Les Curé et marguilliers peuvent être contraints d'appeler les notables aux assemblées pour l'élection de marguilliers, au moyen d'un writ de mandamus.

"Le retour fait par le Curé et les marguilliers qu'ils ont offert d'admettre aux assemblées certaines personnes notables par leur état et leur rang, à l'exclusion de la généralité des paroissiens, est déclaré insuffisant et illégal."—(*Rev. de Juris.*, 1845-46. *Banc du Roi, Québec. Philippe Renouf. Requérant pour Mandamus.*)

After this decision it became impossible to deny that for certain purposes the consent of the parishioners was necessary, at all events in parishes in which there was not a custom to the contrary.

But the principle upon which the decision is founded is important. It is clearly to the effect that in all questions of grave consequence affecting their parish, the parishioners have a right to be consulted. This appears to their Lordships to be the true doctrine derived from the reason of the thing and to be supported by the general analogies of the law relating to communes,

The argument that the concessions originally flowed from the Bishop, and that, therefore, the parishioners have no right in the matter, is really untenable. While the revenues of the parish were derived exclusively from a portion of the dîmes; while the civil authority was not resorted to for the purpose of enforcing rates for the maintenance of the services and ornaments and property of the church; while what is now known as the office of Marguillier was unknown to the civil or municipal law; the argument might have been plausible; but since the corporation called the parish has been legally founded, and supported by civil and secular authority, every parishioner has an interest in the management of its property, and the argument is without foundation on principle.

Accordingly the books of authority, and the sentences of French Courts, greatly preponderate in favour of such rights of the parishioners as are claimed in this suit.

It is quite consistent with the existence of these rights that the Marguilliers chosen by the parishioners should be invested with a limited power sufficient for the transaction of the ordinary business of the parish, and for the supply of the ordinary necessities of divine worship.

The law can scarcely be stated with more perspicuity than it is in the *Nouveau Denisart* (358-9), under the title, "Fabriques des Paroisses."

"Les fabriques sont réglées dans deux espèces d'assemblées, savoir, dans les assemblées générales et dans les assemblées particulières que l'on appelle assemblée du bureau ordinaire. Dans d'autres paroisses, surtout à la campagne, il n'y a pas de bureau ordinaire. Tout ce qui est d'administration courante et journalière est dirigé par les marguilliers seuls, les affaires importantes se traitent dans les assemblées générales de la paroisse."

Some reference has already been made to the Arrêt in the case of St. Jean en Grève delivered in 1737, which the learned canonist Durande de Mailanne refers to as a collection of the rules of law applicable to the rights of parishioners and the duty of marguilliers.

It is only necessary to refer to three of the Articles of this Arrêt :—

“ Article 20. Sera fait en outre un état de tous les revenus, tant fixes que casuels de la fabrique, ensemble de toutes les charges et dépenses d'icelle, tant ordinaires qu'extraordinaires, &c.

“ Article 21. Ne sera faite aucune autre dépense par le marguillier comptable en exercice, que celle mentionnée au dit état, si ce n'est qu'il en eût été délibéré dans une assemblée du Bureau ou dans une assemblée générale, ainsi qu'il sera dit ci-après.

“ Article 24. Ne pourront les marguilliers entreprendre aucuns procès, ni y défendre, faire aucun emploi ni remploi des deniers appartenants à la Fabrique, ni accepter aucunes fondations, sans délibération précédente de l'assemblée générale; sans préjudice néanmoins des poursuites nécessaires pour le recouvrement des revenus ordinaires de la fabrique, pour l'exécution des baux, et pour faire passer des titres nouveaux, pour raison de quoi il en sera délibéré au bureau ordinaire; et dans tous les cas du procès à intenter ou à soutenir, seront délivrées aux procureurs chargés d'occuper, des copies en **forme de délibérations**, soit du bureau ordinaire, soit de l'assemblée générale.”—(*Dict. de Droit Can.: Durande de Maillanne, tit. “ Fabrique.”*)

The authority of the Ancien Denisart (V. Marguilliers, p. 248, No. 42) is also very pertinent. He says:—

“ Des Marguilliers ne peuvent intenter aucun procès ni y défendre, faire aucun emploi, ni remploi des deniers appartenant à la fabrique, ni accepter aucune fondation, sans y être autorisés par une délibération de l'assemblée générale; mais il peuvent, sans autorisation particulière, faire les poursuites nécessaires pour le recouvrement des revenus ordinaires de la fabrique.”

It would be useless to accumulate further authorities from French writers on this point.

It is plain that modern legislation in Canada has been founded upon the basis of this jurisprudence. By the Consolidated Statutes of Lower Canada (cap. 18, sec. 8) it is enacted that—

“ Whenever it is required to erect any new parish, to dismember or sub-divide any parish, or unite two or more parishes, or to alter or modify the bounds, limits, or division lines of any parish already established and erected, according to law; or when in any parish or mission, it is required to construct a parish church or chapel, or chapel of ease, or a sacristy, or other appurtenance of any such church or chapel, or a parsonage-house, and the appurtenances thereof, or a church-yard, or to alter or repair the same, or any of them, in any of the said cases, on a petition of a majority of the inhabitants (being freeholders) interested in them, the erection, sub-division, dismemberment, or union of any parish or parishes, or in any alteration or modification of the bounds or limits of any parish, or interested in the construction, or in any alteration or repairs of any church,

parsonage-house, or church-yard as aforesaid, such petition being presented to the Roman Catholic Bishop of the diocese," &c.

And section 45 enacts—

"And for avoiding doubts as to the person who ought by law to preside at general, parish, or 'fabrique' meetings for the election of churchwardens and other persons for which parish and 'fabrique' meetings are by law required in the Roman Catholic parishes of Lower Canada—

"1. Every general, 'fabrique,' and parish meeting for the election of churchwardens and other purposes, for which the law requires general meetings of the parishes and members of 'fabriques' in the Roman Catholic parishes of Lower Canada, shall be presided over by the curé of the parish or the priest administering the same; and every proceeding at such meeting shall be entered in the register of proceedings of such parish in the usual manner and form, notwithstanding any usage or custom to the contrary which may have been introduced into any parishes. (23 Vict., cap. 67, sec. 1.)

"2. Every such parish meeting shall be summoned in the manner usual in the parish. (*Ibid.*, sec. 2.)

"3. The only persons who shall be entitled to vote at such parish meetings, when such parish meetings are necessary to the election of churchwardens, shall be the resident parishioners being householders. (*Ibid.*, sec. 3.)

"4. This question shall not affect 'fabrique' and parish meetings which have been held and presided over contrary to the provisions thereof; and any proceedings which have been or shall be instituted in consequence of such meetings shall be decided as though this section had not been enacted." (*Ibid.*, sec. 5.)

The allegation that a contrary custom prevails in the parish of Verchères remains to be considered. At one time, no doubt, a great variety of usage and custom on this subject prevailed in France; and some variety has existed in Canada. Oral and documentary evidence with respect to the alleged custom in Verchères was produced before the Courts below. Their Lordships have examined the Schedules and Summary taken from the Registry on this subject which form a part of the Record before them.

There are certainly some errors and omissions in these documents; but their Lordships see no reason to suppose that such errors and omissions were intentional, or that the Curé is open to any charge of *mala fides* in this matter. But apart from this circumstance, the Courts below held, and, in the opinion of their Lordships, rightly held, not only that no such contrary custom had

been established by the evidence, but that a custom of summoning the parishioners on all but the ordinary occasions of the parish was proved. (Record, p. 169.)

The result of their Lordships' examination of the history of and authorities on the first question is, that the matter of taking legal proceedings with respect to this road, inasmuch as it affected the property of the "fabrique" and incurred the responsibility of a lawsuit, was a matter of that gravity and importance which according to principle and authority required the previous "autorisation" of the parishioners duly convened for deliberation on the subject; and that there is no sufficient evidence of the existence of any custom in this parish which renders the general law inapplicable to it.

The remaining question, namely, whether it was competent to the Respondents to plead this nullity as a "fin de non recevoir" is really a question of pleading; and their Lordships would be very reluctant to interfere with the deliberate Judgments of the two Canadian Courts respecting it. Their Lordships, however, have consulted various authorities on this subject, and find them to be such as fully to warrant the opinion of the Judges of the Courts below.

Thus Dalloz, in the earlier edition of his work (Dalloz, Juris. Gen. du Royaume. Tit. Fabrique des Églises, Tom. 8, p. 14, s. 58) :—

"Le défaut d'autorisation de la fabrique produit-il une nullité absolue? l'autorisation est-elle nécessaire pour défendre sur l'appel et pour se pourvoir en cassation? Nous nous en référons à ce que nous avons dit sur ces questions au mot 'communes,' section 2."

It is obvious that no distinction in principle upon this question of pleading can be taken between the cases of the "Fabrique" and the Commune, and, accordingly, following this reference, their Lordships find that in his later edition of 1848, the author, under the title "Commune," tit. 5, c. 13, observes, first (November 1764) :—

"*Effet de défaut d'autorisation à l'égard de la commune.*— Le défendeur poursuivi par une commune non autorisée à cet effet peut envoyer devant l'autorité judiciaire une fin de non-recevoir tirée de l'incapacité de son adversaire, et les Tribunaux doivent accueillir cette exception, alors qu'elle est justifiée."

Further on, in paragraph 1,779, he considers :—

“ Effet du défaut d'autorisation à l'égard de l'adversaire de la Commune.—Si le défendeur actionné par une commune non autorisée, soit par suite d'un refus du Conseil de Préfecture, soit parce qu'elle aura négligé de s'adresser à ce Conseil, oppose la fin de non-recevoir, tirée de cette violation des formes, la commune doit être déclarée non-recevable.”

Dalloz examines at length the question whether, if “ la fin de non recevoir ” has not been invoked, the adversary of the “ Commune ” can avail himself of the nullity resulting from the defect of “ autorisation. ” He observes that there have formerly been three schools of opinion upon this subject. According to one school this defect produced an absolute nullity, and could be alleged at any stage of the cause even before the Court of Cassation. According to the second school, the exception must have been taken before the Judges of First Instance.

Between these two schools of opinion came the third, of which Merlin was, in fact, the founder, and which ultimately triumphed. This distinguished French Jurist arrived at the conclusion that the objection must have been taken before the case reached the Court of Cassation, either before the Judges of the First or Second Instance.

This has now become the law of France, and the whole matter is thus summed up by Dalloz :—

“ Ainsi et pour resumer ce que nous venons de dire, le pourvoi en cassation, fondé sur ce défaut d'autorisation, ne peut être ouvert à l'adversaire de la commune qu'autant que ce moyen a été proposé en première instance ou en appel ; mais il peut être invoqué devant les juges du second degré, quoiqu'il ne l'ait pas été en première instance, à moins que la partie n'y ait renoncé expressément ou tacitement.” (Par. 1786.)

Merlin, in his “ Répertoire de Jurisprudence,” titre “ Nullité,” § 2, “ Par qui les nullités peuvent-elles être alléguées,” says :—

“ 1. On distingue, sur cette question, deux sortes de nullités, l'une absolue, l'autre relative.

“ La première peut être alléguée par toutes sortes de personnes ; la seconde ne peut l'être que par ceux en faveur de qui elle a été prononcée.

* * * * *

“ Cette nullité [namely, the first] peut être objectée, non-seulement par la partie publique, mais encore par toutes sortes de personnes, sans qu'on puisse leur opposer qu'elles se prévalent du droit d'un tiers; et le juge peut y prendre d'égard d'office quand personne ne la proposerait.”

And so M. Rolland de Villargues, in his comparatively recent work “Dictionnaire du Droit Civil,” titre “Autorisation pour Plaider,” observes:—

“ Le défaut d'autorisation peut être opposé par toutes les parties, et même d'office, en tout état de cause: et il vicie tous les actes de la procédure d'une nullité radicale. Il s'agit ici d'une formalité qui est d'ordre public et substantielle.”

A category which embraces the present case.

“ *Le point,*” this author adds, “ *est constant,*” and he refers to several Judgments of the Court “Cassation ” in support of his opinion.

Other authorities might be cited to the same effect.

Upon the whole, their Lordships are of opinion that upon both questions the Canadian Courts have come to a right decision, and that this appeal ought to be dismissed with costs. And they will humbly advise Her Majesty to this effect.