Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dorion v. Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal, from the Court of Queen's Bench for Lower Canada, in the Province of Quebec (Appeal side); delivered February 10th 1880.

Present:

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS Appeal arises in two actions which were brought in the Superior Court of the Province of Quebec. The original action was brought by La Corporation de la Paroisse du Sault au Recollet against Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal, to recover the expenses of the repair of part of a road which the seminary was liable by the general law to repair. The seminary, who are the Respondents in the present Appeal, then brought an action *en garantie* against the Appellant, Mr. Dorion, to compel him to indemnify them from the consequences of the action by the parish, on the ground that he held an estate subject to an obligation to repair the portion of the road in respect of which the seminary were sued by the parish.

The circumstances which gave occasion to the action *en garantie* are shortly these: On the 16th November 1804 a seignorial deed was executed between the seminary of the one part and one Oliver Smith of the other, by which the seminary granted land, part of a larger estate, to Smith upon certain conditions. The condition

Q 141. 100.—3/80. Wt. 5034. E. & S.

which creates the obligation in question is the following :—" Plus le dit preneur, ses dits hoirs " et ayant-causes seront chargés de fournir toute " la largeur du chemin sur le front de la dite " terre, et ensuite de le faire et l'entretenir, et " même de faire les fossés et clôtures des deux " côtés du dit chemin tant que les dits sieurs " seigneurs posséderont la partie du dit domaine " opposée." The land so granted to Smith, though it does not appear by what means, became the property of one Dugas and his wife, and was sold by the sheriff on the 7th September 1862, under a decree against Dugas and his wife, to Dorion, the Appellant.

It is contended, on the part of the Appellant, that whatever obligation was created by the grant to Smith to repair the piece of road in question was purged by the sheriff's sale; and he relied on certain Articles of the Code of Procedure for Lower Canada, which are to the effect that a sale by the sheriff discharges the estate from all real claims except those specifically mentioned. One of those specifically mentioned is servitudes. Article 709 is this: " A sheriff's " sale does not discharge immoveables from " servitudes with which they are charged."

The question in this case is, whether the obligation contained in the original deed of grant of this estate to Smith created a servitude. In considering this question the provisions of the Civil Code of Canada which define and enumerate servitudes are to be regarded. Article 499 of that Code defines generally a servitude: " A real servitude is a charge imposed " on one real estate for the benefit of another " belonging to a different proprietor." The obligation to repair a road imposed on one estate for the benefit of the owners of another would, *primâ facie*, seem to be a charge within the terms of this article. No doubt, by the old

French law founded on the Roman law, and by the law of Canada before the Code, a servitude was understood to be, that the owner of the servient tenement was only to suffer, and not to do any act. It is unnecessary to cite the authorities on that subject, because the old law is clear, and may be taken to be correctly stated by Toullier (3rd volume) in Nos. 377 and 378, which are cited by Mr Justice Belanger in his judgment. Toullier's observations are an exposition of the maxim: "*Servitutum non ea natura est ut* " *aliquid faciat quis—sed ut aliquid patiatur aut* " *non faciat.*" It is admitted by writers on the French Code, which contains a definition and enumeration of servitudes similar to those found in the Canada Code, that the principle of the old law has been invaded, and that under the Code some active servitudes may be imposed upon land. But they qualify the admission by affirming that only such active servitudes as are ancillary to servitudes in their strict meaning are contemplated by the Code.

In reference to the particular obligation in question, the following articles of the Canada Code are material to be considered: Article 553, " He to whom a servitude is due has the " right of making all the works necessary " for its exercise and its preservation;" Article 554, " These works are made at his cost, and " not at that of the proprietor of the servient " land, unless the title constituting the servi- " tude establishes the contrary." Therefore, the Code contemplates that, in the creation of a servitude, the parties may by contract impose the active maintenance of it upon the servient tenement. Demolombe's Commentary on the Code Napoléon was cited to establish that a limitation had been placed on the generality of the Article of that Code which corresponds with Article 499 of the Canada Code. No

doubt, Demolombe has put a limited interpretation upon that article, and holds that it must be confined to those active servitudes which are ancillary to passive servitudes. He says in his 12th volume, No. 871, "Régulièrement le "propriétaire du fonds servant n'est tenu que "d'une obligation toute passive." But he goes on to say at No. 873: "L'article 698, "*au contraire*, après avoir déclaré que les "ouvrages nécessaires à l'exercice de la servi-"tude sont aux frais du propriétaire du fonds "dominant, et non à ceux du propriétaire du "fonds assujetti, cet article ajoute cette dis-"position: 'A moins que le titre d'établissement "'de la servitude ne dise le contraire,' et décide, "comme règle générale, qu'il est permis par l'acte "constitutif de la servitude de mettre ces "ouvrages et ses frais à sa charge."

In the present case, their Lordships think that the effect of the deed is, that the estate was conveyed to Smith subject to the obligation that part of it was to be used for a road which the grantee was to make and keep in repair. The land to be so used was not excepted out of the grant to Smith, but on the contrary was granted to him as part of an entire estate, subject to the obligation that it should be used for the purpose of a road. The obligation to repair was not an independent servitude separately created, but was part of the entire servitude imposed upon the land on the grant of it. In its inception there can be no doubt that this was so, and that the obligation was for the benefit of the estate which the seminary retained, and which may be called the dominant tenement. By imposing the obligation upon their grantee to furnish the land for the road out of the estate granted to him, the seminary escaped the liability of furnishing any of the land they retained for that purpose, and they

provided that the liability should fall upon the grantee of making and repairing the road for its whole breadth. An obligation would otherwise have rested upon that part of the estate they retained to make and repair so much of the road as was opposite to their land, *ad medium filum*.

A real servitude having been defined in Article 499, Article 500 is in these terms: "It arises "either from the natural position of the pro- "perty or from the law, or it is established by "the act of man;" the last expression, of course, meaning by the contract of the parties. Then the Code, having dealt with those which arise from the situation of property, proceeds in Article 506 to define servitudes established by law: "Servitudes established by law have for "their object public utility or that of indi- "viduals." Article 507, "Those established for "public utility have for their object the foot- "road or tow-path along the banks of navigable "or floatable rivers, the construction or repair "of roads, or other public works." So that one of the servitudes which may be imposed by law is the construction and the repair of roads. Can a servitude of a like nature be created by contract? Their Lordships think it is unnecessary to determine the question in this naked form, because they are of opinion, for the reasons above given, that the obligation to make and repair the road formed part of an entire servitude, to allow the use of land for the purpose of a front road (a use in which the owner on the opposite side was interested), and to make and repair that road. That was the obligation and servitude which Smith undertook in accepting the grant from the Respondents, and to which the land became subject.

Then it is said that the present Appellant, Dorion, bought at the sheriff's sale only the land

up to the road. Undoubtedly it is so described, but the obligation to repair affected the whole of the estate originally granted to Smith, and could not be got rid of by Smith, or anybody deriving title from or through him, severing the estate, if, indeed, which is not clear, the sale had that operation.

Their Lordships think, therefore, that the majority of the Judges below were right in the conclusion to which they came, that this obligation was a servitude within the meaning of the Civil Code, that it was not purged by the sheriff's sale, and was kept alive by force of Article 709 of the Code of Civil Procedure. The Judges rest their judgment in some degree upon a case of *Murray* v. *MacPherson*, which had been decided before the preparation of the Civil Code, and they say that some provisions of the Code were founded upon the principle acted upon in that decision. However that may be, their Lordships think, though the case is not without its difficulties, that they ought not to disturb the decision of the Court below upon this point.

The next question is, whether the right to insist on this servitude has been taken away by prescription. The question arose below, and has been argued at the bar, whether the case falls within Article 2,251, which gives a prescription of 10 years, or Article 562, which gives a prescription of 30 years. It was admitted that the latter had not run against the right in point of time. Then, supposing that the Appellant is right in considering that Article 2,251 is applicable to the case, their Lordships think that the right is not prescribed by it. That article is as follows: "He who acquires a corporeal "immoveable in good faith under a translatory "title prescribes the ownership thereof, and "liberates himself from the servitudes, charges,

" and hypothecs upon it by an effective posses-
" sion in virtue of such title during 10 years."
If this servitude were to be regarded as a mere obligation to defray certain charges as an independent servitude, it may be that it would have been prescribed under this article, inasmuch as no repairs had been done, and no claim made in respect of them, for a period of 10 years. But the servitude, as their Lordships understand it, and as they have already intimated, was not of this nature; and it appears to them that the obligation to repair cannot, for this purpose, be regarded separately from the obligation to allow the land to be used as a road. Then, if that be so, the land has been constantly used as a road, and, therefore, the Appellant has not had effective possession for 10 years in virtue of his title against the servitude so understood. The Judges below have unanimously decided against the Appellant on this point.

For these reasons, their Lordships will humbly advise Her Majesty to affirm the judgments of the Court below, and with costs.