1893

*Mar. 22.

*June 24.

THE MIDLAND RAILWAY OF CANADA (DEFENDANTS)..... } APPELLANTS;

AND

ROBERT H. YOUNG (PLAINTIFF) AND MARGARET MABEL YOUNG AND JOHN YOUNG (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Tenant for life—Conveyance to railway company by—Railway acts—C.S.C. c. 66 s. 11 ss. 1—24 V. c. 17 s. 1.

By C.S.C. c. 66 s. 11 (Railway Act) all corporations and persons whatever, tenants in tail or for life, *grèves de substitution*, guardians, &c., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent * * * seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, &c., so made shall be valid and effectual in law.

Held, affirming the decision of the Court of Appeal, that a tenant for life is authorized by this act to convey to a railway company in fee but the company must pay to the remainderman or into court the proportion of the purchase money representing the remainderman's interest.

APPEAL from a decision of the Court of Appeal for Ontario, (1) affirming the judgment for the plaintiffs at the trial (2).

The facts of the case may be briefly stated as follows:—

That portion of the defendants' line of railway which passes through the lands above-mentioned was, prior and up to the 10th day of March, A.D. 1882, known as the Toronto and Nipissing Railway Company, being incorporated by the act of the Legislature of Ontario,

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 19 Ont. App. R. 265. (2) 16 O.R. 738.

31 Vict. ch. 41, and under said statute and the acts amending the same, the said Toronto and Nipissing Railway Company acquired the land above described, and built and worked their railway thereon. In October, 1852, Thomas Jefferson Stephens being seized in fee conveyed the ten acres in question, part of the said south half of lot 27, concession 6, to John R. Torrance. John R. Torrance and the plaintiff's mother were the only children of John Torrance. John R. Torrance died first, leaving his widow Margaret Torrance, and leaving a will devising the land in question to his widow, Margaret Torrance, for life. He made no further dispositions and left no children. John Torrance died without a will, and was heir-at-law to John R. Torrance. The mother of the plaintiff, who claimed to be the heir-at-law of John R. Torrance her brother, by her will devised to Robert Hamilton Young 100 acres of land, the south part of lot 27, concession C, in the township of Scarboro', adding the words, "Together with all my right, title and interest therein, present and future." Then, on or about the 23rd day of October, 1871, Margaret Torrance being the tenant in possession of the ten acres in question, executed a conveyance to the defendants' predecessors in title the Toronto and Nipissing Railway. Upon executing the said conveyance the said Margaret Torrance was paid the sum of $1,200, which was the price agreed to be paid for the said land. The said Margaret Torrance departed this life on or about the 9th day of March, A.D. 1886.

Subsequently the said Toronto and Nipissing Railway Company, by the act of the Ontario Legislature, 45 Vict. ch. 67, and the agreement which forms part thereof, became consolidated with other companies under the name of the Midland Railway of Canada, the defendants in this action. The plaintiff then brought

1893

THE MIDLAND RAILWAY OF CANADA v. YOUNG.

this action against the said defendants to recover the sum of $1,200, the purchase money aforesaid, and interest thereon from the death of the said Margaret Torrance. The action came on for trial before the Hon. Mr. Justice Street, at the Toronto Spring Assizes, on the 16th May, 1888.

At the close of the argument the plaintiff applied for leave to add as parties the other heirs of Isabella Hamilton Young the mother of the said plaintiff.

In March, 1889, the learned judge delivered judgment, giving the plaintiff leave to amend as asked, and postponing further disposition of the action until such amendments were made. Subsequently the plaintiff, on the 14th of May, 1890, amended by adding as defendants Margaret Mable Young and John Young, infants under the age of twenty-one years, children of one John Young, a son of the said Isabella Hamilton Young, who predeceased her, and by inserting in the statement of claim other additional paragraphs.

The defendant company on the 21st day of May, 1890, also amended by inserting an additional paragraph in the statement of defence.

The hearing and trial of the case concluded on the 15th day of November, 1890.

Judgment was delivered by the learned judge on the 25th day of November, 1890, His Lordship holding under section 11, subsection 22, of chapter 66, Consolidated Statutes of Canada, which enacts that compensation shall stand in the stead of land, that inasmuch as the said Margaret Torrance would have been entitled to the annual rental of the said lands had the same not been taken by the Railway Company, and at her death those in remainder would have been entitled to the fee in possession, that therefore those rights should be maintained with regard to the compensation which the above section enacts shall stand

in the stead of the land taken, and further that the railway company should not have paid the purchase money for the said land to the said Margaret Torrence, but should have paid the same into court

The learned judge then directed that judgment be entered for the plaintiff against the defendants for the sum of $1,000, with interest at 6 per cent from 9th March, 1886, and the costs of the action, including the costs of the official guardian to be paid by the plaintiff and added to his own; and that the defendants, the railway company, pay into court for the infant defendants the remaining $200 of the compensation with interest at 6 per cent from the 9th March, 1886, and that defendant company should set off against plaintiffs' costs their costs occasioned by the amendment, including the costs of the hearing on 15th November, 1890, and plaintiffs should have no costs of said amendment and hearing.

From this judgment the defendants appealed to the Court of Appeal for Ontario. The argument was heard on the ninth day of February, 1892, and on the 8th day of March, 1892, judgment was delivered affirming the judgment of the learned trial judge (Burton, J.A. dissenting) and dismissing the appeal with costs. From this judgment the defendants appeal to this court.

Osler Q.C. for the appellants referred to *Cameron* v. *Wigle* (1).

Kerr Q.C. for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed for the reasons given by the majority of the Court of Appeal.

It appears to me that the judgment of Chancellor Spragge in *Cameron* v. *Wigle* (1), was in all respects

(1) 24 Gr. 8.

1893

THE MIDLAND RAILWAY OF CANADA v. YOUNG.

Gwynne J.

correct, and was properly adopted by the Court of Appeal as the principle of their decision.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J. The title undoubtedly passed, but in such a case I think it well to hold that the company having power to protect themselves by payment into court should be required to do so.

SEDGEWICK J.—The only question presented to us for consideration upon this appeal is the construction of section 11 of the Railway Act, Con. Stats. of Canada (1859) chapter 66 as amended by chapter 17 of 24 Vict. 1861, sec. 1.

The lands set out in the statement of claim were taken by the Toronto and Nipissing Railway Co. as a portion of the roadbed of their railway. One Margaret Torrance who had a life estate in the lands conveyed them to the company, the instrument of conveyance purporting to pass the fee simple, and the whole of the purchase money was paid to her.

The company held under this title alone.

Margaret Torrance died on the 9th March, 1886. The plaintiffs who are interested in the remainder now bring this action to obtain compensation for that interest. The defendant company having succeeded to the rights and obligations of the company that constructed the road contend that the deed by Margaret Torrance above referred to, a life tenant only though she was, vested an absolute title in the Toronto and Nipissing Company, and that the receipt by her of the purchase money was a discharge of all claim thereon which, prior to such payment, any person interested in remainder might have.

The statutes upon which the question depends are as follows: Con. Stat. Canada (1859) c. 66 :—

11. The conveyance of lands, their valuation and the compensation therefor, shall be made in manner following: 14 & 15 V. c. 51 s. 11.

First. All corporations and persons whatever, tenants in tail or for life, *grévés de substitution*, guardians, curators, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes-covert*, or other persons, seized, possessed of or interested in any lands, may contract for, sell and convey unto the company all or any part thereof; and any contract, agreement, sale, conveyance and assurance so made, shall be valid and effectual in law to all intents and purposes whatsoever; and the corporation or person, so conveying, is hereby indemnified for what he or it respectively does by virtue of or in pursuance of this Act.

24 Vict. ch. 17, sec. 1 :—

Whereas doubts are entertained as to whether rectors in possession of glebe lands in Upper Canada, ecclesiastical and other corporations, trustees of land for church and school purposes or either, executors appointed by wills in which they are not invested with any power over the real estate of the testator, administrators of persons dying intestate but at their death seized of real estate, are authorized by the eleventh section of the Railway Act to sell or dispose of any of such lands to any railway company for the actual use of, and occupation by, such company; and whereas it is desirable to remove such doubts and to amend the said Railway Act in the particulars hereinafter set forth: Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :—

1. The true intent and meaning of the said section of the said act was and is, that the several persons and parties hereinbefore mentioned, with respect to the lands above in this act referred to, should and shall exercise all the powers mentioned in the first subsection of the said section eleven of the said Railway Act, with respect to any of such lands actually required for the use and occupation of any railway company; and any conveyance made under the first subsection shall vest in the railway company receiving the same the fee simple in the lands in such deed described, freed and discharged from all trusts, restrictions and limitations whatsoever.

The words of section 11, so far as they can be applicable to the case, are :—

1893

THE MIDLAND RAILWAY OF CANADA v. YOUNG.

Sedgewick J.

All tenants for life, not only for and on behalf of themselves, but also for and on behalf of those whom they represent, seized, possessed of or interested in any lands, may convey to the company all or any part thereof, and any conveyance so made shall be valid and effectual in law to all intents and purposes whatsoever.

Is there here any power given to a tenant for life to contract for or convey away the interest of a reversioner or remainder man? I cannot find it. The section includes all classes of persons and corporations (except the crown) capable of conveying. It refers to parties who may without it convey lands. It likewise gives authority to persons who without it would have no authority to convey lands. But that authority is given to those only who occupy a fiduciary position, and who at law represent other persons whose rights they are thereby empowered to affect. I am not aware that a life tenant represents the remainder-man. There is no natural or legal relationship between them. The statute allows the life tenant to contract on behalf of those persons whom he represents, but it does not intimate or even suggest who they are. Where it enables *grévés de substitution*, guardians, curators, executors, administrators or trustees to contract on behalf of those whom they represent we can understand, at least, partially, what is meant. The offices which they each discharge are representative in character. Behind them, in each case, are persons whose rights they are bound to subserve, whose interest the law calls upon them to protect. Besides, these functionaries are all, in one respect or another, under the direction of the court, and either have given security for the faithful discharge of duty or have been chosen by reason of supposed fitness to discharge it. It does not, therefore, seem unreasonable that the legislature, in order to facilitate the inexpensive and speedy acquisition of railway

lands, should invest them with additional powers in regard to the disposition of land of which they officially are in charge, and should seek to make it plain that they, at all events, could convey interests larger than their own.

But these considerations do not apply in the case of a life tenant. The law casts upon him no duty towards his successor in title. No relation of trust exists between them. In my view it is for the legislature in unambiguous terms to impose that duty and create that relationship. If it has not done so the courts cannot do it.

And in this connection I may say that I am as desirous as any one of giving effect to the intention of the legislature, but when, as in the present case, it is contended that Parliament has given power to a life tenant to fix upon the price and convey away the interest of the person next entitled to possession—a person who may be well known to the company, and as easy of access as the tenant himself—and that too without that person's assent and even in spite of his protest I must have pointed out to me the expression of that intent in such clear and specific language that no doubt can remain. I am not to glean from doubtful inference, I must be satisfied by positive and direct words that what Mr. Chancellor Spragge has termed "a most violent and unnecessary interference with the rights of property" is made authoritative and legal by the statute.

It is true that in England tenants for life have power to sell the interest of the remainder-man. But in what clear and unmistakable terms has that power been conferred?

"It shall be lawful for the following parties to sell, convey or lease, tenants in tail or for life not only on behalf of themselves but also for and on behalf of any

1893

THE MIDLAND RAILWAY OF CANADA v. YOUNG.

Sedgewick J.

person entitled in reversion remainder, or expectancy." (Land Clauses Consolidation Act, 1845, sec. 7.)

There is no question there as to what the English Parliament intended, and for my part I cannot interpolate similar words in the Canadian statute without, as I think, doing violence to the elementary and fundamental principles by which statutes of this description are to be construed.

It may however be asked: What did the legislature mean by the words in question? The present case does not call for an answer to that question; but it may fairly be said that the words "for and on behalf of those whom they represent" apply only to and are apt words to describe the extended powers intended to be given to *grévés de substitution*, guardians, curators, executors, administrators and trustees, all of whom are mentioned in the section. They are as unapplicable to tenants for life as they are to "corporations and persons" also mentioned in the section—"corporations" and "persons" representing no one. But there is as much reason in the assertion that they represent persons entitled to reversionary interests as that life tenants represent them. Or, if these words do apply to life tenants they may apply to those life tenants only who by some express act or instrument have been empowered, either by the owner of the outstanding interest or by its creator, or by order of court, or by statute, to so represent that interest.

But we need not be astute to give these words a meaning. We know of many cases where legislatures without doubt intended to say one thing but signally failed to say it. We should not say it for them. The misfortune is curable by the legislatures only, not by the courts.

But, it is contended, if a life tenant has no power to dispose of a remainder-man's interest under the Railway

Act of 1859, he has that power by virtue of the amending act of 1861.

I have above written out the preamble and first section of the act. The preamble, it will be seen, deals with rectors, corporations, trustees, executors and administrators only. It is alleged that doubts are entertained as to their powers and that it is desirable to remove these doubts. No doubts appear to have been entertained as to the powers of life tenants. If what I have said is correct there could be no doubt as to their powers—they could sell their own interest and that only. So far as appears there was no intention of dealing with any classes of persons except those mentioned in the preamble, and the first section therefore proceeds to enact in effect that the persons mentioned in the preamble might (notwitstanding the doubt referred to) exercise all the powers of sale specified in section 11 of the Railway Act with respect to lands actually required for the use of the railway "and" the section proceeds "any conveyance made under the said first subsection shall vest in the railway company receiving the same the fee simple in the lands in such deed described, freed and discharged from all trusts, restrictions and limitations whatsoever." That in my judgment manifestly deals with the cases, and the cases alone, that are in doubt. The conveyance referred to is evidently a conveyance by the persons or parties just mentioned, the intent being that conveyances executed by them in their representative or fiduciary capacity of what purported to be a fee simple should in law have that effect, and that the land itself should be discharged from any "trust"—that is, the company was to be absolved from seeing to the application of the purchase money;—"restriction"—however the use of the land had been restricted by the instruments under which the vendors held, it was got rid of; or

1893

THE MIDLAND RAILWAY OF CANADA v. YOUNG.

Sedgewick J.

"limitation,"—whatever outstanding interests there might be, whatever limitations to which the land might be subject under the vendor's title, these were destroyed and an absolute estate became vested in the company. I am conversant with the principle that the preamble of an act cannot govern its enacting part; that although a particular mischief or inconvenience may be recited in a preamble the enacting clauses may extend beyond it; but at the same time it may be legitimately consulted for the purpose of keeping the effect of the act within its real scope, and generally to ascertain the legislative intent. It is a good means to find out its meaning and is, as it were, a key to the understanding of it.

It is, as I have said, clear, so far as we can gather the intent from the preamble, that the statute was not intended to deal with life tenants, nor do I think the enacting clause properly construed in any way enlarges its effect.

The latter clause of the first section forming, as it does, a part of the single sentence of which the whole section is composed must, I think, be taken to be an amplified re-expression of the first part including a declaration of the nature of the title intended to pass, and does not refer to a conveyance by a party whose case is not mentioned. This, I think, would be the obvious construction were the act in question of a character demanding a wide and liberal interpretation. That construction is, however, imperative when, as in the present case, a contrary interpretation would lead to manifest hardship and injustice.

The result of the opinion I have herein expressed will be, if adopted, that the appeal will be dismissed.

The majority of the court below had no doubt (nor have I), as to the right of the plaintiffs to recover, but they rested their decision upon the ground that while

the effect of the two acts in question was to give the life tenant a right to convey the fee simple they did not give him authority to receive that portion of the purchase money that represented the remainder-man's interest. I am inclined to think that this opinion, given as it was with apparent hesitation, was influenced largely by the opinion of the late Chancellor Spragge in *Cameron* v. *Wigle* (1), where he would appear to have held the same view.

Reference to that case will show that whatever opinion he had, whether the tenant for life could or could not convey, the plaintiffs were equally entitled to judgment. "It may be conceded," he says, "for the purposes of this case, that the tenant for life had power to contract for sale (which would involve the agreement for price) and to convey." Whether the payment of this full value to the tenant for life was a good payment is quite a different question. In support of the company's contention he takes that for granted, but assuming that he proceeds to argue that it was the duty of the railway company to see that the remainder-man's rights were secured by the payment of his share of the consideration money into court or to himself.

The reasoning of the learned Chancellor upon this latter point does not convince my judgment. I should suppose that where a statute authorizes a trustee or other person to contract for and give a conveyance in fee simple payment to that person would discharge the purchaser in the absence of any provision to the contrary. I know of no such provision in the statutes under discussion, and I am inclined to think that a railway company may, in good faith, in all cases pay to a trustee or other person empowered by statute to convey lands in fee simple the whole of the purchase

(1) 24 Gr. 8.

1893

THE MIDLAND RAILWAY OF CANADA v. YOUNG.

Sedgewick J.

money, and is under no obligation either to pay into court or to see to its proper application.

For reasons already stated I do not think that the tenant for life in the present case had authority to convey any interest but her own, and the company must therefore make good to the plaintiffs their interests in remainder.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *John Bell.*

Solicitors for respondents: *Kerr, Macdonald, Davidson & Patterson.*