

Supreme Court of Canada under sec. 6 of the S. C. A. A. 1879 from the judgment of the Chancery Division. The judge held that the church wardens had an interest at least which justified them in appealing. He would not, however, as a judge in chambers, overrule the decision of the Court of Appeal, but grant leave to renew the application to the full court.

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On the motion coming before the full court it was

Held, that the appeal should be allowed upon a proper indemnity being given by the church wardens to D. against all possible costs, the court expressing no opinion on the merits of the case itself. Henry J. dissenting, on the ground that it was impossible to decide the right to appeal without entering into the merits, and on the merits the church wardens had no interest in the lands or revenues.

And on the main appeal it was

Held, affirming the judgment of the courts below, that the lands in question in this case were rectory lands within the meaning of the Act 29 and 30 Vic. c. 16, entitled "An Act to provide for the sale of rectory lands in this Province."

Held, also, that the lands were held by the rector of the Church of St. James, in the city of Toronto, as a corporation sole for his own use, and not in trust for the vestry and church wardens or parishioners of the rectory or parish of St. James, and such vestry and churchwarden had therefore no *locus standi in curiâ* with respect to said lands.

PPEAL from the judgment of the Divisional Court of the Chancery division of the High Court of Justice for Ontario, pronounced on the 19th day of December, 1884. The appeal was brought *per sallem* to the Supreme Court, under the circumstances set out in the head note.

The facts and pleadings in the case are fully set out in the reports of the case in 7 Ont. Rep. pages 499 and 644, and in the judgment of Gwynne J. hereinafter given.

Howland & Arnoldi for appellant;

James MacLennan, Q. C., for the Township Rectors;

Hector Cameron, Q. C., for the Diocese of Toronto.

The argument of counsel and cases and statutes relied on sufficiently appear in the reports of the case in 7 Ont. (1).

(1) Pp. 503 et seq. & p. 647 et seq.

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Ritchie C.J.

Sir W. J. RITCHIE C.J.—In this case I have had the privilege of reading the notes prepared by Mr. Justice Gwynne and I entirely agree with him as to the proper construction to be put upon the statute. I am of opinion that the appeal should be dismissed with costs.

FOURNIER J., concurred with Gwynne J.

HENRY J.—I have not had the privilege of reading my brother Gwynne's reasons for judgment, but I concur in dismissing the appeal, and had so made up my mind. When the appeal was asked for I was of opinion that the statute bound the incumbent. He himself admitted it, and received what was necessary for his support and was willing that the balance should go to the church. The church wardens, wanting the whole sum for one parish and wanting to force an appeal after there had been an adjudication of a court of justice against them, claimed that the appellant was their trustee. I was of opinion when the application for leave to appeal was made that he was never such trustee. He himself denied it and this court forced an appeal upon him because the church wardens offered to give security for the costs. I was opposed to this at the time, and I see no ground for coming to a different conclusion now.

Independently of this the wardens had no interest, and they had no right to bring this appeal, and Mr. Dumoulin having agreed to abide by the judgment appealed from, he should not have been compelled to appeal to this court.

I am in favor of allowing the judgment in favor of the plaintiff to stand, and of dismissing the appeal with costs.

TASCHEREAU J.—I am also of the same opinion as to the taking of the appeal. I am of opinion that the appeal should be dismissed.

GWYNNE J.—This case comes before us by way of appeal direct from the judgment of the chancery division of the High Court of Justice for Ontario. The appeal is taken in the name of the defendant, the rector of the parsonage or rectory of St. James in the city of Toronto, formerly the town of York, but in the interest of the vestry parishoners and church wardens of St. James' Church, who, as the rector declined instituting, on his own behalf, an appeal from the said judgment, obtained an order from this court enabling them to appeal in the name of the rector upon their indemnifying him from all costs. The claim of the vestry and church wardens is, that they and the parishioners of the said rectory are the *cestuis que trustent* of the lands mentioned in the plaintiff's statement of claim, and that the rector of St James' parsonage, or rectory, holds the same merely as a trustee to their use, and that therefore the lands in respect of which the suit has been instituted do not come within the operation of the statutes in the plaintiff's statement of claim mentioned, that is to say, ch. 16 as amended by ch 17 of the statutes of the late province of Canada passed in the session held in the 29th and 30th years of Her Majesty's reign, and two acts of the legislature of the province of Ontario, namely, 39 Vic. ch. 109 and 41 Vic. ch. 69. Part of the land in question was granted by letters patent from the Crown bearing date the fourth day of September, 1820, by which certain land therein described was granted unto and to the use of D'Arcy Boulton, then one of the justices of the Court of King's Bench in and for the Province of Upper Canada, John Beverley Robinson, His then Majesty's Attorney General for the said Province, and one William Allan, and to their heirs and assigns, upon trust to hold the same for the sole use and benefit of the resident clergyman of the town of York and his successors appointed or to be appointed rectors of the Episcopal Church therein to

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which the said land is appurtenant, to make leases of the same with the consent of the incumbent, and to receive the rents due or to grow due therefrom to his own use. The letters patent contained a proviso that whenever the Governor, Lieutenant-Governor, or person administering the government of the said province, should erect a parsonage or rectory in the said town of York, and present to such parsonage or rectory an incumbent or minister of the Church of England, who should have been duly ordained according to the rites of the said church, then and whenever the same should happen the said grantees in the said letters patent named, or any succeeding trustees appointed as in the said letters patent was provided, should, by an instrument in writing under the hands and seals of the trustees then being, attested by two or more credible witnesses, transfer and convey all the parcel or tract of land, with the appurtenances by the said letters patent given or granted, to such incumbent or minister being so appointed as aforesaid, and his successors forever, as a sole corporation to and for the same uses and upon the same trusts as before mentioned and expressed; that is to say, to the sole use and benefit of the resident clergyman and his successors appointed or to be appointed rectors of the Episcopal Church in the town of York. The only Episcopal church at this time in the town of York was called St. James' Church, of which the Rev. John Strachan, then and from thenceforth until the month of February, 1847, was the incumbent.

Another portion of the land in question, together with a number of other parcels of land, was granted by the Crown by letters patent bearing date the 26th day of April, 1879, unto and to the use of the Honorable William Dummer Powell, then Chief Justice of the Province of Upper Canada, James Baby and the Reverend John Strachan, their heirs and

assigns upon certain trusts in the said letters patent declared, and among such trusts upon trust to make conveyances of the parcels or tracts of land by the said letters patent granted or any part thereof to and for such use or uses as the Governor, Lieutenant Governor, or person administering the government of the Province of Upper Canada, and the Executive Council thereof for the time being, should from time to time by order in writing appoint.

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The grantees named in these letters patent, by an indenture bearing date the 4th day of July, 1825, and made between them of the first part and the same persons as were named grantees in the said letters patent of the 4th day of September, 1820, of the second part, (after reciting therein the letters patent of the 26th day of April, 1819, and that His Excellency Sir Peregrine Maitland, Lieutenant Governor of the Province of Upper Canada and the Executive Council thereof had, by an order in writing bearing date the 2nd day of December, 1824, required the grantees in the said letters patent named to convey to D'Arcy Boulton, John Beverley Robinson and William Allan for the use of the church in the town of York and of the clergyman incumbent thereof, for the time being, the parcels of land therein described (being part and parcel of the lands by the said letters patent of the 26th of April, 1819, granted to the grantees therein named, the parties to the said indenture of the first part) conveyed, assured and confirmed unto and to the use of the said parties thereto of the second part, their heirs and assigns the same parcels of land in the said order in writing described (being part of the land now in question) upon trust, however, that the said parties to the said indenture of the second part should hold the same for the sole use and benefit of the resident clergyman of the town of York and his successors appointed or to be appointed incumbent of the parsonage or rectory of the

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Episcopal Church according to the rites and ceremonies of the Church of England in the said town to which the said land is appurtenant, or to make leases of the same with the consent of the said incumbent, and to receive the rents due and to grow due therefrom to his own use. This indenture contained a provision for the appointment of a new trustee, or new trustees in the place of a trustee or trustees dying or becoming incapable to act in the execution of the trust of the said indenture and a proviso to the same effect verbatim as that contained in the said letters patent of the 4th of September, 1800, in the event of the Governor, Lieutenant Governor, or person administering the government in the province, erecting a parsonage or rectory in the said town of York. The town of York was incorporated as the city of Toronto in 1834.

From the date of the letters patent of the 4th September, 1820, the grantees therein named and the trustees for the time being of the lands thereby granted, and from the 4th July, 1825, the same persons, as trustees for the time being of the lands in the indenture of that date mentioned, held the several pieces of land now in question in trust for the sole use and benefit of the Rev. John Strachan as the clergyman who was incumbent of St. James Church, in the town of York (afterwards the city of Toronto) until the 16th day of January, 1836, when by letters patent of that date, under the great seal of the province of Upper Canada, after reciting the provisions of the Imperial statute 31st Geo. 3, authorizing the Governor, Lieutenant Governor, or person administering the government of the province, with the advice and consent of his Majesty's executive council within the same, to constitute and erect in every township or parish which then was or thereafter might be formed, constituted or erected within such province one or more parsonage or rectory, or parsonages or rectories, according to the establishment

of the church of England, a parsonage or rectory was erected and constituted at the city of Toronto, in the township of York, according to the establishment of the church of England, and by the said letters patent it was declared that such parsonage or rectory should, "be hereafter known, styled and designated as 'the first parsonage or rectory within the said township of York, or otherwise known as, the parsonage or rectory of St. James.'" By these letters patent certain lands situate in the township of York and therein mentioned, whereof the crown was seized, were set apart as a glebe and endowment to be held appurtenant with the said parsonage or rectory, and by letters patent of the same date the Rev. John Strachan, then the clergyman and incumbent of the church of Saint James, in the said city, received the presentation to the said rectory and was duly inducted thereinto, and from thenceforth he became entitled as the rector of the parsonage or rectory of Saint James, not only to the sole use and benefit of himself, as rector of the said parsonage or rectory of the lands mentioned in the said letters patent of the 16th January, 1836, but also to the sole use, benefit, and enjoyment in like manner of the lands mentioned in the letters patent of the 4th September, 1820, and in the indenture of the 4th July, 1825, as the endowment of the said parsonage or rectory; and accordingly the trustees for the time being of the said last mentioned letters patent and indenture, who from the granting of the said letters patent of the 16th January, 1836, constituting the said parsonage or rectory, and the presentation and induction thereinto of the said Rev. John Strachan as the rector thereof, held the said lands in trust for the sole use and benefit of the rector of the said parsonage or rectory and his successors as a corporation sole, by a deed bearing date the 10th of February, 1841, after reciting the letters patent and indentures in virtue of which they held the said lands

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in trust, and the erection of the said parsonage or rectory, and the presentation and induction therein of the said Rev. John Strachan, as the rector thereof, did grant, convey, assure, and transfer unto him, as rector of St. James and his successors in the said rectory as a sole corporation, the said lands, &c., to have and to hold the same as rector of St. James, and his successors in the said rectory forever as a sole corporation to and for the same uses and upon the same trusts as are mentioned and expressed in the said letters patent of the 4th September, 1820, and the said indenture of the 4th July, 1826, therein recited, that is to say, as to the lands in question here to the sole use and benefit of the said rector and his successors as rectors of the said parsonage or rectory. In the month of February, 1847, the Rev. Henry James Grasett succeeded the Rev. Dr. Strachan as rector of the said rectory and continued to be such rector, and in the possession and enjoyment of the lands now in question and of the rents, issues and profits thereof to his own sole use and benefit, as such rector until his death in the month of March, 1882.

For sixty years, therefore, the lands now in question have been held and enjoyed to the sole use and benefit of the incumbent, for the time being of the church of St. James in the city of Toronto, and for upwards of forty of those years the legal and equitable estate therein has been vested in the same incumbent as rector of the rectory erected by the letters patent of the 16th January, 1839, and his successors as a corporation sole for the sole use and benefit of the rector for the time being of the said rectory, and during all that time no pretension has ever been asserted that any part of the land now in question was held in trust for the use or benefit in any particular of the vestry or churchwardens of, or of the parishioners attending, the parish church of the rectory or parish of Saint James, and I must say that in my opinion there is no foundation whatever for any

such pretension, and therefore such vestry, church wardens or parishioners have no *locus standi in curia* to maintain this appeal. The present rector was well advised not to appeal on his own behalf from the judgment of the Chancery Divisional Court, for I entertain no doubt that whatever may be the proper construction to put upon the words, "rectory lands," as used in the preamble of 29 and 30 Vic. c. 16. the language of the enacting clause is abundantly sufficient to include, and as I think was framed with preciseness *ex abundanti cautela* for the purpose of including, the lands now in question as lands which had been granted by the Crown as appurtenant to, and belonging to, and appropriated for, the rectory of St. James, equally as it did include within its operation the lands set apart for the like purpose by the letters patent of the 16th January, 1836.

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If it were necessary to put a construction upon the words, "rectory lands," as used in the preamble, I should not feel disposed to put upon them the narrow construction that they apply only to the lands mentioned in the letters patent erecting and constituting the several rectories which were erected under the Imperial statute 31st George III. To my mind it is plain that whether the church, which was known as St. James' Church, in the town of York, had a legally constituted parish attached to it or not, it was in popular phraseology understood to be a parish church, whatever may have been supposed to be the bounds of the parish, and from the language of the letters patent of the 4th September, 1820, I think there is no doubt that the intention of the Government was that, whenever rectories should be established under the provisions of the Imperial statute 31st Geo. III, the church of St. James, for whose incumbent the letters patent of September, 1820, made some provision, should be the parish church of a parish or rectory to be so erected

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and constituted. In this opinion I am confirmed by the language of the letters patent of the 16th day of January, 1836, declaring that thereafter the parsonage or rectory thereby erected should be known as the first parsonage or rectory within the township of York, otherwise known as the parsonage or rectory of St. James.

The lands which had been granted and settled by the Crown in trust for the sole use and benefit of the clergyman for the time being incumbent of St. James' Church prior to the letters patent of the 16th of January, 1836 became, upon the issue of those letters patent, as much part of the lands granted by the Crown as an endowment of the rectory and appropriated to the use of the rector of St. James' for the time being as did the lands mentioned in the letters patent of the 16th January, 1836, and came as much within the term "rectory lands" as did the latter. Under the circumstances attending the erection of the rectory of St. James and the presentation to that rectory of the incumbent of St. James' Church, in the City of Toronto, which church became the parish church of the rectory, we can well conceive that the provision which the Crown had already made for the sole use and benefit of the incumbent of the Church of St. James before its erection into the parish church of the rectory of that name, operated on the Government in determining what further provision for the endowment of the rectory should be made in the letters patent constituting the rectory. The statute 29th & 30th Vic. ch. 16 was plainly, as I think, passed for supplementing the powers then already vested in the incorporated synods of the several dioceses by placing under their control (as the proper power in the church to have the management and disposition of the temporalities of the church) all lands granted by the crown for, and forming part of, the endowment of any rectory, as effectually as prior statutes

had placed under their control property otherwise acquired for a like purpose. In the view of the very great increase in the value of the property held as an endowment of the rectory of St. James beyond what was at all necessary for the support of its rector, and which endowment was, in fact, sufficient for the support of many clergymen of the church having the cure of souls, and but ill provided for in other parishes, nothing was more natural than that the synods of the dioceses, constituted as they are of the clergy and laity of the church, should, after the decease of any living incumbent having vested interests during his life, have the disposition of the property constituting the endowment of the rectories within the respective dioceses, with the view of providing means for extending the influence and services of the church throughout the poorer parts of the dioceses. Accordingly it was upon the application of the provincial synod that the act 29th and 30th Vic. ch. 16 was passed. The act was passed in the undoubted interest of the church, and the rights of all living persons having vested interests in lands situated as those in question here are, were scrupulously preserved. Hitherto the application of the act to the lands in question here has never been doubted, and I am of opinion that there is no room whatever for a doubt as to its application to them.

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The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *Frank Arnoldi.*

Solicitors for respondents (plaintiffs): *Moss, Falconbridge & Barwick.*

Solicitors for the Rev. Henry G. Baldwin *et al.* respondents (defendants): *Armour & Gordon.*

Solicitor for township rectors respondents (defendants): *Alfred Hoskin.*