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*May 2.

*June 24.

PHILIP F. O'CONNOR AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE NOVA SCOTIA TELEPHONE COMPANY (LIMITED) (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Ownership of roads and streets—Rights of private property owners—Ownership ad medium filum viæ—R. S. N. S. 5th sec. c. 45—50 V. c. 23 (N.S.)

That the ownership of lands adjoining a highway extends *ad medium filum viæ* is a presumption of law only which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway. Gwynne J. contra.

In construing an act of parliament the title may be referred to in order to ascertain the intention of the legislature.

The act of the Nova Scotia legislature, 50 Vic. c. 23, vesting the title to highways and the lands over which the same pass in the crown for a public highway, does not apply to the city of Halifax.

The charter of the Nova Scotia Telephone Company authorized the construction and working of lines of telephone along the sides of, and across and under, any public highway or street of the city of Halifax provided that in working such lines the company should not cut down or mutilate any trees.

Held, Taschereau and Gwynne JJ. dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership *ad medium* or to show that the street had been laid out under a statute of the province or dedicated to the public before the passing of any expropriation act.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for defendants at the trial.

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

(1) 23 N.S. Rep. 509.

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himself as *hors de cause:* we do the same. And the fact that Macdonald is now declared not to have been a warrantor cannot avail to Cully against this view for having himself summoned Macdonald *en garantie* he cannot now argue that Macdonald did not represent him. The case is not free from difficulty I am free to say. The proceedings are not regular. But the point is one of practice and procedure and I think that, under the circumstances, as the Court of Appeal in Montreal did not feel justified to interfere we should not do so.

The appeal in my opinion should be dismissed. Macdonald having taken up the *fait et cause* of Cully cannot complain if he has been condemned as *garant*. He is estopped from availing himself on this appeal of the ground that he is not a warrantor.

GWYNNE and SEDGEWICK JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Paradis & Chassé.*

Solicitors for respondent: *Geoffrion, Dorion & Allan.*

The following statement of facts is taken from the judgment delivered by Mr. Justice Sedgewick.

The plaintiffs are the owners of a dwelling house and lot of land in the city of Halifax, fronting on Spring Garden Road, a street in that city. In front of the house on the sidewalk are several ornamental trees. The defendant company in erecting a line of telephone along the street cut down portions of these ornamental trees in such a way as to lessen their beauty and diminish the shade which they afforded for the plaintiff's dwelling.

An action for this alleged trespass was brought against the company in the Supreme Court of Nova Scotia. The case was tried before Mr. Justice Meagher, who found that the plaintiffs were the owners of the dwelling; that their predecessor in title, Patrick Walsh, had vested in him the fee to the centre of the highway; that in 1862, when Mr. Walsh was owner and in possession, he had planted these trees, and from that time until his death in 1880, had cared for them frequently hiring parties to prune and otherwise attend to them; that the plaintiffs since his death had performed that duty, and that the trees in question were beneficial to the plaintiffs and their property as shade and ornamental trees. He further found that the cutting by the defendants was a mutilation of the trees, injuring their appearance materially and rendering them unsightly particularly from the plaintiff's windows, and further that the cutting in question was not an absolute necessity for the performance of the defendants' business. He assessed the damages of the plaintiffs, in the event of their being entitled to recover, at $100.00, but he directed a verdict for the defendants in consequence of his being of opinion that the effect of chapter 23 of the acts of 1887 was to vest the fee of the street in the crown, and that, therefore, the pro-

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perty of the trees injured, being in the crown, the plaintiffs could not recover for injury done them even by a trespasser. The plaintiffs appealed to the Supreme Court of Nova Scotia in *banc*, on which appeal the court was equally divided, McDonald C. J. and Weatherbe J. being of opinion that the verdict for the defendants should stand—Ritchie and Graham JJ. contra. The plaintiffs thereupon asserted an appeal to this court.

Newcombe for the appellant cited *Wansdworth Board of Works* v. *Telephone Co.* (1), *Bliss* v. *Ball* (2), *Beauchamp* v. *City of Montreal* (3).

Borden Q.C. for the respondent.

THE CHIEF JUSTICE and FOURNIER J. concurred in the judgment delivered by Mr. Justice Sedgewick.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

GWYNNE J.—This action is based wholly upon the contention that the fee in the highway upon which the land of the plaintiffs abuts is their soil and freehold *ad medium filum viæ*, and that in right of such freehold the trees growing upon that half of the highway which adjoins the land of the plaintiffs, the tops of which the defendants, for the purposes of the business for carrying on which they have been incorporated, have lopped off, were their property, whereby, as is contended, the defendants have subjected themselves to this action of trespass. It is admitted that the law in England is that a *primâ facie* presumption in law arises that waste lands of a manor on the sides of a public highway, and the soil to the middle of the high-

(1) 13 Q. B. D. 904. (2) 99 Mass. 597.
(3) M. L. R. 7 S C.. 382.

way, belong to the owner of the adjoining freehold. In *Doe d. Pring* v. *Pearsey* (1) it is said that the origin of this presumption is unknown, but that in all probability it has arisen from, and is founded upon, the supposition that the proprietors of the adjoining lands at some former period gave up to the public for passage all the land between their enclosures and the middle of the road, or that it has arisen from its being a matter of convenience to the owners of the adjoining lands and to prevent disputes as to the precise boundaries of the property. In *Holmes* v. *Bellingham* (2) it is said that the presumption is based upon the supposition, more or less founded on fact, but which at all events has been adopted, that when the road was originally founded the proprietors on either side each contributed a portion of his land for the purpose. In *Berridge* v. *Ward* (3) Erle C.J. states the rule thus:—"Where there is a conveyance of a piece of land which abuts on a highway, and there is nothing to exclude the highway, the presumption of law is that the soil of the highway *usque ad medium filum*, passes by the conveyance;" and Williams J. there states the rule thus:—"That the conveyance of a piece of land, to which belongs a moiety of an adjoining highway, passes the moiety of the highway by a general description of the piece of land." The presumption, then, is that by a grant or conveyance of a piece of land in England, abutting on a highway, there is to be implied a grant or conveyance of the soil of the highway *ad medium filum*, and as the presumption is only a *primâ facie* one it can be rebutted, and so it is held to be always a question of intention to be collected from the terms of the conveyance and the surrounding circumstances. *Marquis of Salisbury* v. *Great Northern Ry. Co.* (4). The rule that

(1) 7 B & C 304.
(2) 7 C.B. N.S. 329.
(3) 10 C.B. N.S. 415.
(4) 5 C.B. N.S. 174.

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the soil and freehold of a highway, *ad medium filum*, is presumed to be the property of the owner of the soil and freehold in the adjoining land cannot be said to be founded upon the same reason as is the rule in relation to the soil and freehold in the bed of a stream adjoining a piece of land granted and conveyed, for it cannot be said that there is any ground for a supposition that the land covered with the waters of a stream, *ad medium filum aquæ*, was given up at some remote period by the proprietors of the land on either side, *ad medium filum*, to the public for passage. I must confess that I cannot see any necessity whatever for the introduction of a rule or presumption of law, based upon the supposition upon which the rule in England is based, into the jurisprudence of any part of the Dominion of Canada, where the origin of every highway can be easily traced, and where there is no pretence for the existence of such a supposition, and where, therefore, the presumption could not be rested on the sole foundation upon which it is said to rest in England; as, however, the presumption, if it is to be considered as forming part of the law of Nova Scotia, can be rebutted by the terms of the grant or deed of conveyance construed in the light of all surrounding circumstances, the first question which arises is: Is there anything in any of the deeds of conveyance under which the plaintiffs claim title which rebuts the presumption? And secondly; If not is or is not the presumption rebutted by any of the acts of the Legislature of Nova Scotia? The case of the *Marquis of Salisbury* v. *Great Northern Ry. Co* (5) was that the Marquis, being the owner of the freehold on both sides of a turnpike road, sold two pieces of land which abutted on the turnpike road to the railway company. In the plans and books of refer-

(1) 5 C.B. N.S. 174.

ence required by the standing orders in parliament the pieces of land conveyed to the company were numbered respectively 75 and 79, and the deed described their exact contents; the deed only conveyed 75 and 79, which, however, adjoined the road which on the plan was numbered 47. The road was, in fact, the property of the Marquis, but at the time of the conveyance was supposed to be the property of the trustees of the turnpike, in whom the control over the turnpike was vested. The deed of conveyance referred to and incorporated the schedule and plan, and specified the lots conveyed as numbered 75 and 79, and coloured red. Under these circumstances it was held that the intention of the parties clearly was that only the parcels numbered 75 and 79 should pass and that the soil of the road did not pass out of the Marquis, the vendor, and that therefore he was entitled to recover in ejectment a portion of the turnpike which had been enclosed and taken possession of by the defendants, they having, under powers in their act, substituted another road for the piece of the turnpike which the defendants had taken possession of.

In *Ernst* v *Waterman* (1), where the owner of the land laid it out into town lots with streets and had sold the lots on either side of the streets, it was held by the Supreme Court of Nova Scotia that the sale of the lots on either side of the streets did not pass out of the vendor the soil of the streets *ad medium filum*. The above presumption of law was urged in support of the contention that the soil of the streets had passed but Thompson J. pronouncing the judgment of the court said: "The presumption is by no means conclusive, and it may be rebutted" which it was held to be sufficiently by the lots being numbered on either side of the streets on a plan, and by specified dimensions of

(1) 4 Russ. & Geld. 272.

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each lot which sufficiently showed an intention to exclude the streets. It was held that under the circumstances the vendor retained in himself the fee in the soil of the streets while he dedicated them as streets to the use of the public.

The same point had been decided by the Supreme Court of Nova Scotia in 1876 in *Pugh* v. *Peters* (1), where it was held that lots being sold by specific numbers on a plan with the dimensions specified in the deed sufficiently rebutted the presumption that the soil of the adjoining street had passed and that the deed only passed to the grantees, in relation to the street, the easement and right of user of it as a street.

These judgments appear to me to be sound in principle and to have been well supported by the statute law of Nova Scotia, for by the statute law of that province all deeds and also all copies of any plans and schedules annexed thereto are required to be registered, so that every person interested can readily ascertain the precise limits of the land expressed by the deeds to be conveyed. Then by chapters 44-45 of the Revised Statutes it is enacted that any road which had theretofore been or should thereafter be made or altered without any demand for compensation by the proprietors of the land through which such road runs, within one year from the opening thereof, such acquiescence of the proprietors shall be held to be a voluntary surrender to Her Majesty for ever for a public highway of all the land through which the road passes. Even in such a case the absolute title to the soil and freehold in the road is to be held to have been surrendered to and vested in Her Majesty for ever for a public highway, while by chapters 46 and 47 the control over all highways and the providing for their maintenance and repair is placed in the respective municipalities within which

(1) 2 R. C. 139.

the roads are; and by chapter 49 it is enacted that where a line of road has been altered and the old road has been abandoned any of the proprietors of the land adjoining the old road may by petition apply to the council of the municipality to shut or otherwise dispose of the same. These provisions are but re-enactments of similar provisions in chapters 61, 62, 69 and 113 respectively of the Revised Statutes of 1851.

Now in the present case the plaintiffs claim title to the soil and freehold of the highway adjoining a lot of land devised to the female plaintiff by her father one Patrick Walsh, and they claim the trees in question as their property in virtue of such devise. We are not furnished with an extract of this devise from the will of Patrick Walsh, but we assume that the will passed all his estate in the lot. Walsh's title was derived from one Patrick Lynch who as trustee of one Wiswell held the lot upon trust for sale for the benefit of Wiswell's creditors. We have not either the precise description of the lot as contained in these deeds but assume that it conformed to the description in the deed by which the lot was conveyed to Wiswell which we have and which was executed in May 1847 by one William G. Anderson. We have also the description contained in a deed dated in April 1812 from one William Lawson who conveyed the land therein mentioned to one Brenton Haliburton who by a deed dated in April 1847 conveyed the same land presumably by the same description to the said William G. Anderson. We have also the description contained in a deed executed in 1809 of land conveyed by John Woodin to William Lawson and one Grassie and of the piece thereof allotted by deed of partition to the said William Lawson who conveyed it to the said Brenton Haliburton who conveyed it to the said William G. Anderson. The

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description in the deed of 1809 from Woodin to Lawson and Grassie is as follows:—

All that lot of land and field situate and being in the township of Halifax beginning at the north-west corner of a lot of land near the Windmill hills formerly the property of Richard Bulkley, Esq., deceased; thence running westerly 363 feet until it meets the common; thence southerly on the common 880 feet; thence easterly on the lot formerly belonging to Joseph Fairbanks, Esq., 363 feet; thence on the aforesaid lot of Richard Bulkley, deceased, until it meets the bound first mentioned, containing by estimation 7¼ acres more or less.

In this description no mention is made of the highway but the line or "bound" first mentioned namely "from the northwest angle of the lot of land near the windmill hill formerly the property of Richard Bulkley, westerly 363 feet until it meets the common," is the southerly limit of the highway in question; and the area contained within the limits described south of such south limit of the highway is just 7⅓ acres that is to say a little in excess of the 7¼ acres expressed to be intended to be conveyed. The description in the deed of partition between Lawson and Grassie of the piece of the above land which was allotted to Lawson and conveyed by him to Haliburton is as follows:—

All that northerly half of the said lot and field which is situate and being next to the road or street leading from Halifax to the common and is described as follows: Beginning at the north-west corner of the lot of land formerly owned by the said Richard Bulkley, thence running westerly 363 feet until it meets the common; thence on the common 440 feet, thence easterly to the said field of Richard Bulkley, thence northerly on the said field to the place of beginning.

The description in the deed from Haliburton to Anderson is that:

Lot of land lying southward of the road leading from the jail to the common now called Spring Garden Road, being the northern half of a lot purchased by William Lawson and George Grassie from John Woodin.

Immediately after his purchase Anderson appears to have subdivided the piece of land into town lots num-

bered on a plan which was filed by him in the Surveyor General's office, and the lot now under consideration was conveyed by him to Wiswell as lot no. 4, under the description following, that is to say, as:

Situate, lying and being on the south side of Spring Garden, in the city of Halifax, being a portion of the field conveyed to the said William G. Anderson by Brenton Haliburton by deed bearing date the 15th day of April, in the present year, which said lot is marked on the plan of division of the said field filed by the said W. G. Anderson in the Surveyor General's office as lot no. 4, and is described and bounded as follows: Beginning at the north-west corner of lot no. 3, thence running westerly on Spring Garden Road 52 feet to the north-east corner of lot no. 5, thence southerly on the division line between lots numbers 4 and 5, 104 feet to the north-west corner of lot 18, thence easterly along the division line between lots nos. 4 and 18, 52 feet to the south-west corner of lot no. 3, thence northerly on the division line between lots nos. 3 and 4, 104 feet to the place of beginning on Spring Garden Road.

Now Woodin who conveyed to Lawson and Grassie acquired the piece so conveyed to them from one Jonathan Belcher, who as appears by the abstract of the title on registry in the case was the grantee of the crown in 1764, of the said piece of land under the following description, viz.:

A lot of pasture land in the township of Halifax, bounded on the north by the high road on the west by the common, on the south by the lands of James Monk, on the east by lands of Richard Bulkley, measuring 7 acres.

Now, Anderson, assuming him for the sake of argument to have been seized of the fee in the soil of the highway *ad medium filum*, having subdivided the piece of land described in the deed of conveyance thereof to him into town lots, designated by numbers on a plan which was filed in the office of the Surveyor General, and having sold and conveyed the lot under consideration as the lot designed no. 4 on that plan describing it by its number on the plan and by metes and bounds which, as a matter of fact, do not

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include any part of the highway, and the deed of conveyance of such lot together with a copy of the plan whereon the lots were designated by numbers having been registered as required by law, the natural and reasonable inference is that neither did Anderson intend to convey nor Wiswell to purchase any estate, if Anderson had any, in the soil and freehold of the highway and so that the *primâ facie* presumption insisted upon is rebutted; and this inference is justified and supported by the authority of the *Marquis of Salisbury* v. *The Great Northern Railway*(1), and of *Pugh* v. *Peters*(2), and *Ernst* v. *Waterman* (3), in the Supreme Court of Nova Scotia, both of which latter cases were, in my opinion, well decided and should be followed especially upon a question which is one purely of the law of Nova Scotia; so that in this view no estate in the soil of the highway was ever vested in any of the intermediate parties through whom the plaintiffs claim from Anderson, and therefore not in the plaintiffs. But apart from this it is plainly apparent from the abstract of title in the case that so far back as 1764 the highway in question, while the estate therein was in the crown, had been laid out and appropriated as a public highway, and that the soil and freehold therein never passed out of the crown to Belcher the grantee of the piece of land "bounded on the north by the highway" unless it can be held that by the presumption of law insisted upon the estate of the crown *ad medium filum* is to be deemed to have passed by implication from the crown to Belcher; but in my opinion the crown cannot be prejudiced or in any manner affected by an invocation of the presumption insisted upon or be divested by implication of its estate in a piece of land which is in point of fact outside of the limits of the description of the piece granted, because of the crown itself having been pleased to appropriate for a public highway

(1) 5 C. B. N. S. 174. (2) R. & C. 139.
(3) 4 Russ & Geld. 272.

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the piece of land outside of the limits of the piece described in the grant. But however this may be the question in the present case is in my opinion put beyond all doubt by chapter 23 of the statute of the legislature of Nova Scotia passed in 1887 which statute is in its terms purely a declaratory act and which declares that—

> The legal title to all highways and the lands over which the same pass is hereby declared to have been heretofore vested in Her Majesty the Queen for ever for a public highway.

Nothing can, to my mind, be clearer than that this was intended to be, and is, a plain legislative declaration that the legal estate in all highways then already laid out, including the one in question which has been laid out in the township of Halifax as early as 1764, had always continued to be vested in Her Majesty from the time of their being originally laid out respectively but subject to the easement of the public therein as a public highway. When the act declares that "all highways have been heretofore (that is to say up to the time of the passing of the act) vested in Her Majesty for ever for a public highway," such vesting must at least relate back in all cases to the period when each highway was first laid out and appropriated to public use, and in case of the highway in question, by reason of its having been laid out when the seisin was in the crown, to the original seisin of Her Majesty in right of her crown, which seisin as to this highway the act in effect declares had never passed out of Her Majesty. The law as it had already stood was that when the property of private persons was appropriated for the purpose of making a new road in substitution for an old one, however the old one may have been founded, the acquiescence of the private proprietors in the appropriation of their land for the new road for one year without demand of compensation for the land taken

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should be held to be a voluntary surrender to Her Majesty for ever for a public highway—that is to say should operate as a surrender to Her Majesty of her original seisin to date in that case from the time when the acquiescence ripened into a title in the crown by surrender. But chapter 23 of 1887 goes farther and declares that the legal title to all highways—including all then in existence—" and the lands over which they pass have been heretofore (that is say up to the time of the passing of the act from the time they were first made to be highways respectively) vested in Her Majesty the Queen for ever for public highways," that is to say subject to the easement of the public therein as public highways. Thus the cases of the *Board of Works of Wandsworth* v. *the Telephone Co.* (1), and *Coverdale* v. *Charlton* (2), though relied upon in argument have really no application whatever in the present case. There the words " vest in " as used therein were construed to be limited to transferring simply all control over the roads as highways which was plainly all that by the context and surrounding circumstances was intended to pass and not the soil and freehold in the highways which were left in the precise condition in which they then were, but the words " vested in Her Majesty, &c " as used in the present act, have by the express terms of the act and its manifest object and context a very different and more extensive meaning as already shown. The plaintiffs have wholly failed to establish their title to the trees as asserted in their statement of claim and if they had established such title I should entirely concur in the judgment of Mr. Justice Weatherbe that still they could not recover against the defendants for the cutting of the trees, because the act of cutting was clearly justified by the act of Parliament although the manner might amount to

(1) 13 Q. B. D. 904. (2) 4 Q. B. D. 104.

mutilation of which the owners of the trees might complain.—But not only was no such case made by the plaintiffs but no evidence was given or offered which would justify a judgment as for mutilation. It was also suggested but scarcely argued that the plaintiffs even though not owners of the trees cut could recover as persons suffering direct and special injury from a public nuisance in excess of that sustained from the nuisance by the public.—But whether any act be a public nuisance or not is a matter of fact and no such case has been made nor has any act of the defendants been found or proved to be a public nuisance.—The act of cutting has not been and could not be so found upon the evidence.—The act was lawful although the manner might have been injurious to the owner and only to the owner of the trees, and even if a case for public nuisance had been made and proved by reason of the defendants' act in cutting the trees, the injury in such case complained of by the plaintiffs in the damage done thereby to their land by depriving it of the ornament and shade of the trees would not be such a direct and peculiar injury sustained by the plaintiffs in excess of the damage occasioned by the nuisance to the public as would support an action at suit of the plaintiffs, However no such claim has been made by the plaintiffs.

The appeal must therefore, in my opinion, be dismissed with costs.

SEDGEWICK J.—The first question to be considered is as to whether or not the plaintiffs' property extended to the *medium filum* of the street independently of the statute upon which Mr. Justice Meagher bases his opinion. The doctrine is elementary that the law presumes the ownership of half the soil over which a highway exists to be in the owners of the land on either side of that highway, and that although lands

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described in a conveyance may be bounded by or on that way, the ownership *ad medium filum viæ* will pass. It is likewise as elementary that the application of this doctrine depends upon the facts in each case. It is a presumption only, and where, as in Ontario and the North-west, road or street allowances have been made in the original survey of the country the presumption is destroyed, and owners of land abutting upon such roads or streets do not take to the middle thread. It must also, I think, be taken to be settled law in the province of Nova Scotia, upon the authority of *Koch* v. *Dauphinee*(1), that lands expropriated for highways under provincial statutes become vested in the crown as its property, the right of the original owner, upon payment of compensation, being extinguished. It is likewise clear that where there has been no expropriation or other acquisition by the crown or municipality of lands for highway purposes the law presumes that the original proprietor has dedicated the highway to the use of the public, and that upon such dedication the right of the public to use such highway is paramount and perpetual. Mr. Justice Meagher has expressly found, upon what I think is satisfactory evidence, that Spring Garden Road, the street in question, had not been laid out under any statute of the province; he further found, in effect, that it had been dedicated to the public before any expropriation act had been passed by the provincial legislature, and he was of opinion, and I agree with him, that there was nothing in evidence to rebut the presumption of which I have spoken, as to the plaintiffs' ownership extending to the centre of the street. The material question then is: Does the act upon which the learned judge relied apply to the city of Halifax?

The act is as follows:—

(1) James 159.

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An act to amend chapter 45 of the Revised Statutes, 5th series, "of laying out of roads other than great roads."

Be it enacted by the Governor in Council and Assembly as follows :— (1.) The legal title to all highways, and the lands over which they pass, is hereby declared to have been heretofore vested in Her Majesty, the Queen, forever for a public highway. (2.) Every highway or street now opened or used as such shall be deemed to have been laid out under the statute of this province applicable thereto unless the contrary can be shown.

I am clearly of opinion that this act does not, and was not intended to, apply to the city of Halifax. If we are permitted to look to the title of the act this is manifestly clear. The title indicates that the object of the legislature is to amend chapter 45 of the Revised Statutes. The assertion that that chapter applies to the city of Halifax is not even arguable ; its sole object is to provide machinery for the expropriation of land in order to the making or changing of highways. The charter of the city of Halifax provides an altogether different machinery for the same purpose, and for that reason chapter 45 cannot be held to apply to the city. If, then, we are at liberty to look to the title of the act of 1887 it simply means that the lands expropriated for highway purposes, under chapter 45, shall vest in Her Majesty for these purposes, and that all highways and streets outside of the city of Halifax shall be deemed to have been expropriated unless the contrary is shown.

The act has obviously been drawn by a person unacquainted with legal draughtsmanship. The first section is ungrammatical in form. It is otherwise ambiguous and difficult of interpretation. According to recognized usage its first section should have specified the special act it was intended to amend and it should then have proceeded by distinct paragraphs to indicate the character and extent of such amendment.

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It is manifestly obvious from the title that chapter 45 only was the statute to be amended. Are we to ignore that intent by reason of any supposed rule forbidding reference to such title? Suppose an act with the same title contained the following words only: "The word 'twenty' in the first line of the second section of the said act is hereby repealed and the word 'thirty' substituted therefor." Is there any possible method of interpreting such an act without reference to the title? In such a case would not the courts be imperatively bound to call the title to their aid in the interpretation rather than to do what would otherwise be a necessity, treat the act as absolutely meaningless and nugatory? So in this case we cannot shut our eyes to the fact that the legislature intended, and only intended, to amend the general Provincial Road Act. They did not intend to legislate in respect to the streets in the city of Halifax.

We are not, I conceive, obliged to disregard this intention out of deference to what is said to be a rule of construction, a rule which I may say has probably been just as much honoured in the breach as in the observance.

I doubt whether as a matter of law there is at present any rule at all upon the subject. In none of the cases referred to in the text books has the existence or authority of the rule been the point to be determined. The assertion of the rule has been *dicta* and nothing more. There is this difference too between English and colonial statutes. In England the title of an act is a creation of modern growth; at one time acts were passed without it and there is even now no binding rule as to its character. Colonial legislatures have, on the other hand, always been under a constitutional obligation, by virtue of express instructions from the

(1) See Maxwell on Statutes, pages 49 to 52 and cases there cited.

crown, to take care that no clause shall be inserted in any act foreign to what the title of it imports, and I know as a matter of practice that in the legislature of Nova Scotia it is the title of the act alone that is read while going through its different stages in the House of Assembly except when before the House in committee of the whole. It is true that when a bill there passes its third reading, the motion is "that the bill do pass and that the title be &c., &c.," just as in our House of Commons the motion is "that the bill do pass its third reading, and that the title be as in the motion paper," but the legislators have before them in both cases, from the introduction of the bill until it receives its final assent, in its title what its object is.

We cannot, with propriety, shut our eyes to the words of the title when it may be absolutely necessary to have regard to these words in our attempt to ascertain the legislative intention, and I submit that when, as in the present case, obvious omissions are inadvertently or ignorantly made the title may and must be regarded with a view of ascertaining the objects or purposes which the legislature has in view.

My view upon this point is strengthened and supported by the consideration that the legislature of Nova Scotia by a subsequent statute (chapter 60 of the acts of 1890, section 5), passed an act expressly in relation to the city of Halifax, and provided, in effect, that all of the streets of the city should thereafter be vested in the corporation. This latter statute would be absolutely meaningless if the legislature then had supposed that the act of 1887 affected the streets of the city of Halifax. If they had been by that act vested in the crown they could only have been taken from the crown by a statute expressly declaring that it was the interest of the crown which was being affected. Here there is no such declaration, and the statute itself is

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equivalent to a legislative declaration that the act of 1887 had not the extended meaning which is now sought to be given to it. The result would, therefore, seem to be that the land upon which the trees mentioned in the pleadings were growing was the plaintiffs' land, subject to the rights of the public to use the same for street purposes.

Now, what were the rights of the defendant company? They were incorporated by the act of 1887, chapter 100, and were authorized to construct and work lines of telephone along the sides of, and across and under, any public highway or street, with the consent of the council having jurisdiction to give such consent, but it was further provided that in working such lines the company should not cut down or mutilate any trees.

In the present case the company obtained the consent of the city council to erect their telephone line along Spring Garden Road, and in front of the plaintiffs' residence. To that extent only was the city in any way implicated in the alleged trespass. The mutilation of the trees was, therefore, an act in direct violation of the company's charter, and by such mutilation they became liable to this action to the extent of the damage incurred. These damages have been assessed at $100, and no complaint has been made that they are excessive.

Questions were raised at the argument as to whether the statute of 1887 vested the fee simple of highways in the crown, or only an easement,—as to whether, assuming the street in question to be vested in the crown, the plaintiffs had not still an action against the defendants by reason of their wrongful act—as to whether the city of Halifax might not, in the exercise of its controlling power over streets, cut down or mutilate trees growing on the highway for the public

benefit, &c., &c. It being settled that the plaintiffs owned the trees in question and that the defendant corporation mutilated them without authority, either from the plaintiffs or the municipal authorities, and that they were therefore trespassers, these questions do not demand discussion in the present case.

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On the whole I am of opinion that the judgment of Mr. Justice Meagher should be reversed, and that the judgment should be entered for the plaintiffs for the sum of $100 with interest from the date of trial, together with all the costs of the court below and of this court.

Appeal allowed with costs.

Solicitor for appellants: *John M. Chisholm.*

Solicitor for respondents: *F. G. Forbes.*