

Chan. Cham.]

RE DOLSEN—EX PARTE PAPIN.

[Quebec Rep.]

CHANCERY CHAMBERS.

RE DOLSEN.

Quieting Titles Act—Statutes—Con. Stat. U. C., c. 83—Effect of a mortgage in fee by a tenant in tail.

It is at least doubtful whether a mortgage in fee by a tenant in tail in possession bars the entail, and whether upon a discharge being executed the mortgagor does not take back his original estate.

[February, 1872.—MR. TAYLOR.]

MR. TAYLOR, Referee of Titles.—The petitioner is under his father's will tenant in tail in possession of the land in question. He asks, however, a certificate of title as owner in fee simple, subject to a mortgage in fee to one Scane, claiming that the effect of this mortgage is to bar the entail. (Con. Stat. U. C., c. 83, s. 16).

Mr. Leith, in his Real Property Statutes (page 338), respecting a mortgage in fee made by a tenant in tail, says: "On a mortgage in fee the equity of redemption will belong to the mortgagor, not as tenant in tail, but freed of the entail, and descend to the heirs general instead of to the heirs in tail." No authority is cited in support of this statement. Mr. Shelford, when treating of the corresponding clause in the English Statute (Shelford Real Prop. Stat. 359), does not consider this as quite clear. He accordingly says that, "in mortgages in fee, whether of freeholds or copyholds, when it is intended that the equity of redemption shall be discharged from the entail without any further assurance, it will be proper to frame the proviso of the redemption, not so as to make the estate of the mortgagee void on payment of the money, but to direct that he shall re-convey it to the uses intended; for if the condition in the former case should be performed, it might be contended that the tenant in tail became seized of his former estate in tail."

The mortgage in the present case is in the short form under the Statute, 27 and 28 Vict., c. 31; the proviso being that upon payment the mortgage shall be void. The best course for the petitioner to adopt will be to execute a disentailing deed, and thus remove any doubt on the subject.

It may be remarked that even in any case it is doubtful if taking on payment a certificate of discharge under the statute will have the effect of giving the mortgagor an estate in fee simple, the statute saying that such a certificate when registered shall be as valid and effectual "as a conveyance to the mortgagor, &c. of the original estate of the mortgagor."

Scane—Solicitor for the petitioner.

QUEBEC.

EX PARTE PAPIN.

Petitioner for a Writ of Habeas Corpus.

Held—1st. That the powers conferred by the Local Act of the Province of Quebec, contained in section 17 of the 32 Vict., ch. 70, on the Corporation of Montreal for cumulative punishments therein enacted, are unconstitutional.

2nd. That the By-Law of the Corporation of the City of Montreal, imposing a fine and imprisonment for the infraction of its provisions against gambling, made under the provisions of the Statute 32 Vict., chap. 70, section 17, passed by the Legislature of Quebec in

1869, is null and void, inasmuch as by the British North America Act, 1867, section 92, sub-section 15, the punishment imposed by Local Legislatures for an offence against its own laws, cannot be cumulative.

[Montreal, 24th Nov., 1871.—In Chambers.]
Drummond, J.]

In the Recorder's Court for the City of Montreal, the petitioner was convicted of gambling in a tavern in the city, contrary to the By-Law in such case made and provided, and was condemned to pay a fine of \$20 and to be imprisoned for two months, and was, in consequence, committed to the common gaol about the 2nd November, 1871. A writ of *Habeas Corpus* was issued, and the case was argued in Chambers. The Counsel for the petitioner, amongst other objections to the conviction and commitment, contended that the Legislature of Quebec exceeded its authority in granting to the Corporation of Montreal, by the Act 32 Vict., ch. 70, sec. 17, the powers of punishment for infraction of by-laws more extensive than it possessed itself with respect to offenders against its own laws. By that Local Act the Corporation is vested with the right of imposing a cumulative punishment, fine and imprisonment, whereas the Local Legislature does not possess that right, under the British North America Act, 1867, 30 and 31 Vict., ch. 3, sec. 92, sub-sec. 15.

DRUMMOND, J.—The most important point to be considered is the extent to which the Local Legislature can empower the Corporation to punish by fines, imprisonment or both, parties detected in the infraction of the by-laws. The Local Legislature, under the 32 Vict., ch. 70, 1869, cannot endow Municipal Corporations with powers of punishment for infraction of their by-laws more extensive than it possesses itself. The enactments of the British North America Act, 1867, 30 and 31 Vict., ch. 3, sec. 92, sub-sec. 15, are as follows: "The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Therefore the punishment imposed by Local Legislatures cannot be cumulative; it must be either fine, penalty or imprisonment; it cannot be fine and imprisonment. This provision, therefore, limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to Corporations any greater powers of punishment than they possess themselves, so that the 32 Vict., ch. 70, sec. 17, is clearly unconstitutional in so far as it assumes to authorize the imposition of punishment by fine and imprisonment for infraction of a by-law of the City of Montreal. This section 17, of the 32 Vict., ch. 70, being the clause relied on to maintain the commitment and conviction in this matter, Papin having been condemned to pay \$20 and to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged.

Order for his discharge granted.