Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wardle v. *Bethune, from Canada ; delivered on 30th January,* 1872.

Present:

Sir James W. Colvile.
Sir Joseph Napier.
Sir John Stuart.
Sir Montague Smith.

THIS was an appeal from the Judgment of the Court of Queen's Bench of Lower Canada at Montreal, in an action that arose out of a contract for building the new Cathedral church of that city.

A Finance and Building Committee, of which the Respondent was a member, having been duly appointed, the late Mr. Wills, of New York, an architect, was instructed by them in February 1857, to prepare plans and drawings for the erection of the Cathedral and the execution of the works thereof, inclusive of the foundations and works thereto relating. These plans having been prepared and approved, Messrs. Brown and Watson, builders, of Montreal, were employed to dig trial pits in the site selected for the proposed Cathedral, for the purpose of testing the character and fitness of the soil. The charges for this work were certified by Mr. Wills, and paid by the Committee.

Mr. Wills having died, Mr. Thomas S. Scott, of Montreal, on the 29th April, 1857, was appointed by the Committee as their architect, on the understanding that the plans and designs of Mr. Wills were to be strictly followed and adhered to, and that all other necessary plans

were to be made and properly prepared by Mr. Scott himself.

Messrs. Brown and Watson having made a tender, which was accepted, for the execution of the work of the foundation, a formal agreement was entered into and duly executed on the 7th of July, 1856, by Brown and Watson, and also by the Respondent. It was agreed that the work was to be done according to the plans or drawings thereof made by Mr. Wills, and in strict conformity with the specifications thereunto annexed and made part of the contract.

The document containing these was headed, "Specifications of excavators' and masons' work required to be done, and materials furnished, for the foundation walls of Christ Church Cathedral, Montreal, according to plans prepared by the late Frank Wills, architect." It was signed by Thomas S. Scott, architect, and bears date in May 1857.

The work so undertaken was completed by Brown and Watson, in accordance with their contract, and was delivered up to the Committee, who accepted and paid for it. The Committee next proceeded to advertise for tenders, "for the erection of the Cathedral," and announced that plans and specifications could be seen at Mr. Scott's office. It was set forth in one of these—"The whole work executed on area floor to be taken as it stands, and allowed for."

The tender sent in by the Appellant was as follows:—

"I will undertake to provide all labour and materials required, and build Christ Church Cathedral according to the drawings and specification supplied by your architect (Mr. Scott) for 30,600*l*. The above amount includes work already done in foundations, which I value at 1,750*l*. Also for filling up and making good ground round building to the level given, and levelling ground in basement story as described, estimated at 250*l*. The waste in converting Caen stone, I calculate at 1-7th, or 14½ per cent.

(Signed) "W. WARDLE."

This tender was dated 29th July, 1857, and was accepted on the 5th August, subject to certain modifications; and, on the 15th August,

1857, the final contract for the building of the Cathedral was duly executed by the Appellant and the Respondent. The former undertook to execute in a proper, substantial, and workmanlike manner, and of the best and most approved materials of their several kinds, "the whole and every part of the works required to be done, and requisite and necessary to be done, in erecting, building, and completing the Christ Church Cathedral, to be erected on a lot of ground situate and being at the corner of St. Catherine Street, Union Avenue, and University Street, in the said city of Montreal, according to the plans or drawings thereof, numbered respectively from number 1 to 35 inclusive, made by Thomas S. Scott, Esq., architect, and in strict conformity with the specifications thereunto annexed, and forming part and parcel of the present contract, and also in conformity with such descriptions and details as may be furnished to the said contractor during the progress of the works by the architect."

The next clause in the contract provided that the works thereby undertaken should be commenced, prosecuted, and completed under the superintendence of the said Thomas S. Scott, and to his entire approval. It was also provided that, from the commencement of the said works until their final completion, delivery and acceptance, the care of the same, and whatever appertained or belonged thereto, should be with the said contractor; and the said party of the second part should not be accountable for any part of the said works, or any materials or anything connected therewith, which might happen to be lost, stolen, burnt, damaged, or destroyed in any manner howsoever. And in case of the like occurring during the progress of, or before the final completion, delivery and acceptance of the said works, the said contractor should, and he did thereby engage to repair and replace such part of the said works as might happen to be lost, stolen, burnt, damaged, or destroyed, at his own expense and costs, and to the entire exoneration of the said party of the second part (the Respondent). It was further agreed that the contractor should, at his own cost and charges, provide all materials required, save and except the Caen

stone that was to be furnished by the Repondents, as set forth in the specifications.

After some other provisions, to which it is not necessary to refer more particularly, there is the following clause:—"The present contract and agreement is thus made and entered into for and in consideration of the price or sum of 30,100*l.*, &c., which sum the said party of the second part doth hereby promise, bind, and oblige himself, &c., to well and truly pay to the said Walter Wardle."

This included the amount of the Appellant's estimate of the value of the work of the foundation that had been executed by Brown and Watson.

The Appellant proceeded to execute the works in strict conformity with the plans and specifications, and in a workmanlike manner; but the tower of the Cathedral, shortly after it was erected, and before the works under the contract were completed, began to sink, and it gradually subsided and sank down to the depth of several inches, causing serious injury to other parts of the building, and also causing extra expense and delay in the completion of the contract. The cause of this sinking, and of the damage consequent thereon, was ascertained to have arisen from the nature of the soil and the insufficiency of the foundation as it had been planned by Mr. Wills, and constructed by Brown and Watson.

In this state of things disputes arose between the Appellant and the Building Committee; and on the 4th March, 1861, the former brought this action against the Respondent to recover the balance that he alleged to be then due to him. The particulars of this demand are stated in the Appendix, p. 53. The balance claimed was 5,000*l.*, which included two disputed items, viz., 1,468*l.* 11*s.* 4*d.* for extra work, and 2,586*l.* 0*s.* 7*d.* for damages alleged to have been sustained by the Appellant by reason of the inferior quality of the Caen stone that was furnished to him by the Defendant under the contract. The Defendant disputed the liability for damages in respect of the Caen stone, and for so much of the sums charged for extra work as was attributable to the

work that was caused by the sinking of the tower. He made a statement of the account between him and the Appellant, whereby the apparent balance due to the latter was 1,795 dollars and 36 cents. As to this, he insisted, in his pleading, "that the foundations of the said building, and specially of the said tower, were made to bear a weight of not less than than eight tons to each superficial foot; whereas the area of such foundations ought, according to all well-acknowledged rules in the art of building, to have been so extended as not to allow of more than two tons to be sustained on each superficial foot of area; and that, owing to the want of care, attention, and skill on the part of the Plaintiff" (the Appellant). "and the defective, unskilful, and unworkmanlike manner in which he constructed the said building, tower, and spire, and the consequent injury and damage done to the said building generally, it would cost an amount far exceeding the said sum of 1,795 dollars 36 cents, simply to repair such damage, and place the said building, tower, and spire in the state and condition in which they ought to be under the said contract and specifications." He further alleged "that the said tower and spire, owing to the want of care, attention, and skill on the part of the said Plaintiff, and the defective, unskilful, and unworkmanlike manner in which they had been so constructed by him, were still sinking and threatened to fall, so much so that it would be necessary to take the same down to the foundations and entirely reconstruct the same, including the said foundations—a work which would cost, including the repairs of the building connected therewith, an amount exceeding 30,000 dollars." He concluded with an averment that, by reason of the premises, the Plaintiff was not entitled to recover any sum of money from the Defendant; and he prayed Judgment accordingly.

To this the Plaintiff replied, that all the work done by him was well and substantially done; that the subsiding of the tower did not arise from any cause over which he had any control; that as to the alleged defect in the foundations, he was wholly ignorant thereof, and that he had nothing to do with the calculations on which the foundation

were constructed, or with the work of constructing said foundations, and never warranted said work nor was bound to, and was not liable therefor, and, in fact, never saw the foundations.

The evidence disproved the allegations of negligence or want of skill on the part of the Appellant in the execution of the work done by him; but it showed that the cause of the sinking of the tower from the nature of the soil and the insufficiency of the foundation, could have been discovered and provided against, by diligence and skill, before the Appellant entered into the contract or began to build.

From this statement it is obvious that the material question in the case was whether the Appellant, as the builder of the church, was responsible for the damage that was caused by the sinking and subsiding of the tower? The liability of the Respondents, in respect of the inferior quality of the Caen stone, could only have become material if the principal defence had failed. The case came before Mr. Justice Monk on the 24th February, 1862. For the reasons stated in his Judgment (Appendix, p. 5), he maintained the Defendant's plea, and overruled and dismissed the Plaintiff's demand for damages occasioned by the bad quality of the Caen stone, and for delays by the sinking of the tower; and held that the Plaintiff was responsible for the damage caused by the sinking, and that the only sum which the Plaintiff had established as coming to him was a balance of 1,795 dollars 36 cents, against which the Defendant was entiled to set up in compensation the amount to which he was entitled for the damage of which he complained. The amount was ordered to be ascertained by a reference to experts.

On appeal to the Court of Queen's Bench, this Judgment of Mr. Justice Monk was affirmed in the month of June, A.D. 1864, with this variation that, for the reasons stated in their Judgment, the Court (*dissentiente* Meredith J.) allowed to the Appellant the sum of 400 dollars to be by him charged as and for extra work, thereby making the balance due upon the contract as and for extra work, the sum of 2,195 dollars 36 cents, leaving the same subject to compensation.

After various ineffectual proceedings to get a

report of experts under the order of the Court, such a report was at last obtained and homologated, and a final decision of the Superior Court was pronounced on the 17th April, 1867, by which it was adjudged and declared that, inasmuch as it appeared from the report of experts, &c., that the balance of 2,195 dollars 36 cents was more than compensated, paid, and extinguished by reason of the damages set forth in the plea of the Defendant, and which were occasioned to the Defendant by the sinking of the tower of the Cathedral, the Plaintiff was not entitled to recover any sum of money for the causes, matters, and things in his declaration set forth; and, therefore, that the action be dismissed with costs, except that each party was to pay the costs of his own expert.

On appeal to the Court of Queen's Bench, this Judgment was affirmed on the 9th December, 1868, Mr. Justice Caron dissenting.

The liability of the Appellant for the damages caused by the sinking of the tower was not taken to have been created by the contract into which he had entered; but it was held that, by the law of Lower Canada, this liability was imposed upon him in his capacity of the builder of the edifice that he undertook to erect, and that the contract into which he had entered had neither excluded nor qualified the application of the rule of law. The case, on appeal, therefore appears to their Lordships to depend on the right apprehension and application of this law, by which a liability is imposed on architects and builders irrespective of contract, that is not so imposed on them by the law of England.

The law is thus stated in Article 1,688 of the Civil Code of Lower Canada:—"If a building perish in whole or part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work and the builder are jointly and severally liable for the loss." In Article 1689 it is provided that, "if in the case stated in the last preceding Article, the architect do not superintend the work, he is liable for the loss only which is occasioned by defect or error in the plan furnished by him." The Code, it is true, did not come into operation until the first of August, 1866, after the commencement of the action; but the Articles

referred to are declaratory, and in part, expressly founded on the case of Brown *v.* Laurie, which was decided in 1851 by the Superior Court at Montreal, affirmed on appeal by the Court of Queen's Bench in 1854, and has since been considered to be the leading case on this branch of Canadian law. Mr. Lloyd contended that this authority, although binding on the Courts of Lower Canada, was open to review, and ought to be reviewed by this Board. But their Lordships are of opinion that a case decided so long ago by Judges eminently conversant with the law of the country, and that has since been incorporated into the Civil Code, is not open to be reviewed on this Appeal.

It was an action on a contract for building seven houses in the city of Montreal, and a balance was claimed to be due on foot of the contract.

The Defendant set up as a defence, that the Plaintiff not regarding his legal liability as master mason, did not excavate skilfully the foundations, more particularly those of the three centre houses, but laid them on a soft substance, so that the walls, when partly built, gave way. He then set up his claim for the consequential damage against the claim of the Plaintiff. The special reply of the Plaintiff was, that the contract bound him to the specifications, plans and drawings, and placed him under the direction of an architect in charge; that the depth of the excavation had been particularly marked out on the said plans and drawings, and had been executed exactly as thereby required; that when the excavation had been so made, a stratum of sand and clay had been found, which had been carefully examined by the Defendant and the architect in charge, and by them declared sufficient: that thereupon the foundations had been laid; that it was true the three centre houses had sunk a little more than was usual, which was caused by a mossy earth under the sand and clay, of which there was no indication; but that there had been no want of skill on the part of the Plaintiff, who had acted in accordance with the contract and the special orders of the Defendant. The Court held that it was sufficiently shown that proper precautions had not been taken to ascertain the nature of the ground

by probing or otherwise, but that taking it for granted that the soil was all of the same character. there had been an omission to ascertain the fact in the way in which it ought to have been ascertained.

The reason of the law as it was explained by Mr. Justice Day in giving judgment, is two-fold: first, that the employer, who is supposed to be unskilled, has a right to expect that the builder who contracts to build houses for him will provide that the foundation shall be such that the houses erected on it shall stand; secondly, "there is a motive of public policy which would subject the builder to this risk, and renders it necessary that he should take extreme care in the construction of buildings." The ancient law of France is that which has prevailed in Lower Canada. Mr. Justice Day says, as to this law, that "on looking through the books anterior to the Code Napoléon, the Court does not find any express warranty for what was called in that Code '*vices du sol*,' but the expression invariably made use of is, that the builder was bound to warrant the solidity of the building, which he could not do unless he warranted the solidity of the foundation, and therefore the one warranty must be held to include the other."

The Court decided that although the proprietor employs an architect to supervise and direct the work, and the builder follows his directions, this does not exonerate the builder from responsibility, but the law holds him jointly and severally bound with the architect; and "that the importance of guarding life and property makes this rule of law such as not to go beyond the strict bounds of reason." As the builder had not taken proper and available precautions, and the buildings proved unsound because of the insufficient foundation, he was held to be liable for the consequences.

The learned Judge (Rolland) who presided in the Court of Queen's Bench when the case came before it on appeal, adverts to the importance of establishing a "rule certain" for architects and builders, in the execution of works entrusted to them. He states that the "ancien droit Français" made all the responsibility for defaults to fall on the builder, and especially those that proceeded from the nature of the soil, because the builder was bound to know his art, and to make himself sure

that the ground was sufficiently solid to sustain the buildings to be erected. The only restriction attached to this warranty was as to its duration, which was limited to ten years. The rules established by the new legislation in France, for deciding questions that might arise on this point, were not (he says) in force in Lower Canada. The old French authorities were abundantly cited in the argument, and considered by the Court.

Their Lordships are of opinion that the case of Brown *v.* Laurie is a conclusive authority against the proposition that the work having been done according to the terms of the contract and under the superintendence of an architect selected by the employer, the builder is exempted from the liability which would otherwise attach to him. It is therefore unnecessary to examine the French authorities on which the learned counsel for the Appellant relied in order to establish this proposition, whether they are cases decided on the old law of France, or on Article 1792 of the Code Napoléon, which (it may be observed) is not identical in its terms, with Article 1688 of the Civil Code of Canada.

It has, however, been argued on behalf of the Appellant that, admitting the authority of Brown *v.* Laurie to its fullest extent, the case under appeal is not to be governed by it, inasmuch as the faulty construction in this case was in the foundation laid by Brown and Watson, and that the Appellant cannot be held liable for the defects in their work. This is, in fact, the ground on which Mr. Justice Caron dissented from the Judgment of the other Judges of the Court of Queen's Bench.

Their Lordships have not been altogether free from doubt on this point; but, after a full consideration of the learned and able arguments and of the authorities which have been adduced, they have come to the conclusion that the Judgment under appeal is correct, and ought to be affirmed.

The broad general rule of law established by the case of Brown *v.* Laurie—"the rule certain for architects and builders in the execution of the works entrusted to them," is that there is annexed to the contract, by force of law, a warranty of the solidity of the building that it shall stand for ten years at least. It was not expressly decided

whether this was to be taken as an absolute warranty, or with an implied exception of cases in which the building gives way, within the time, wholly or in part, from causes that could not have been discovered or removed by due vigilance and competent skill. But this at least was expressly decided that the approval and direction of a supervising architect, or his omission to ascertain the nature of the soil of the foundation, by known and available tests, does not exonerate the builder from the consequences of following such direction, or of building on the foundation without making himself sure of its sufficiency.

When there has been a breach of warranty of the stability of the building, the onus is on the builder to show that he is exempted from liability, by some exception in his favour. It is of primary importance that he should make sure of the sufficiency of the foundation on which he proceeds to build, for without a sufficient foundation the warranty could not be kept. It is an inseparable incident, an essential part of the warranty; the warranty of stability of the edifice, includes by necessary implication, the warranty of sufficiency of foundation; and such is the law as explained in Browne *v.* Laurie. The architect and builder are therefore bound to provide whatever is essential to the stability warranted.

The exemption from responsibility, on the part of the builder, for the breach of warranty, must be made out (if at all) by legal implication. There is not in the Code any express exception in favour of the builder; and there is none in his contract.

The exemption for which the Appellant contends is, in effect, that whether the foundation was altogether insufficient; whether it was constructed without the use of known and available tests for ascertaining the nature of the soil; whatever may have been the amount of negligence or want of skill in its construction, and however practicable for him, before he adopted it at his own estimate of its value as the basis of his building, to have ascertained that it was, in fact, insufficient (as it then stood) for such a purpose, yet he was in nowise concerned with the matter, and under no responsibility for the consequences of having upon this foundation erected the building which he had

contracted to erect and complete, subject to the warranty of stability annexed by law. To sustain his contention it must be held that the warranty of sufficiency of foundation is not included in that of the stability of the building, except in the case where the builder of the building is also the constructor of the foundation. But the sufficiency of the foundation is an inseparable incident to the stability warranted, and could not be the subject of an implied exception. The special responsibility for a breach of the warranty has been incurred by the builder, not as the constructor of an insufficient foundation, but because the stability of the edifice erected has in fact failed, and the failure has not been shown to have been excused by law. If it were otherwise, the law might be evaded by the contractor building only upon a foundation completed by another who was under no obligation to do more than to realize what the architect had designed, or even what the employer alone may have directed.

The French authorities relied on by the Appellants, exclusive of such as are inconsistent with what has been decided in Browne *v.* Laurie, or such as are under the Code Napoléon, may be reduced to those which Mr. Justice Caron has selected in support of his Judgment.

It is important, moreover, to keep in mind that the authorities which exonerate the builder from responsibility for a breach of the warranty, when he acts under the guidance of an architect, are set aside in Browne *v.* Laurie on account of the importance of protecting property and life, which makes it strictly reasonable to maintain the responsibility of architect and builder alike. Accordingly, if the builder thinks fit to trust to the vigilance or skill of the architect, without the independent exercise of his own judgment, he acts at his own risk. He cannot escape frem liability when he has omitted to use such known and proper precaution as he ought to have used if he had had the sole and undivided responsibility.

If, then, for the purpose of public safety, the builder cannot act upon the design and under the direction of the architect, except upon his own responsibility for the consequences, how can it be consistently maintained that he can, without

incurring any such responsibility, adopt and act upon the design of the foundation after it has been realized by the intervention of a third party who has been employed to do, and has done, nothing more than merely realize this design, in conformity with the direction of the architect or of the employer? If the public protection requires that the builder should not act upon the design in the first instance, except upon his own responsibility, it would seem to be not less requisite that he should not be exonerated from a like responsibility if, after it has been realized, he has estimated its value for the purpose of his contract, and adopted it as the basis upon which he erects the building which he has contracted to build, and the stability of which he is bound by law to warrant.

It is further to be observed with reference to the French authorities, that not only are those to be excluded from consideration which proceed upon the opinion that the builder is not responsible when he follows the design or direction of a supervising architect, but also the distinction is to be noted which was well pointed out by Mr. Bompas in his able argument, between cases founded upon negligence in fact and those that depend simply upon a breach of the warranty of stability. There is a further distinction between the case of a head contractor who is the master builder, and that of particular sub-contractors, or distinct and separate workmen.

In the work of Fremy-Ligneville, to which Mr. Justice Caron refers, the head contractor is admitted to be equally responsible with the architect for "vices du sol." "La sûreté publique" requires, he says, that they should be so responsible.

Whatever may be said as to "vices de construction" in buildings where separate constructors have been employed, and the responsibility of each of the constructors has been confined to his own separate part of the work, no authority has been referred to which shows that the contractor, who is the builder of the edifice, has been exempted from full responsibility, when it was practicable for him to have ascertained beforehand, by the use of known and available tests, a defect that affects the stability of the building which he has contracted to erect.

The case on which most reliance has been placed on behalf of the Appellant is Lambert's case, reported in Denisart's collection of new decisions (Vol. iii, page 313, ed. 1784). In that case an architect prepared a plan of a house, which Lambert (a baker at Marseilles) approved. A mason contracted to build according to this plan. The building had been raised to the first story, under the supervision of the architect, who perceived the incapacity of the mason, and caused the contract to be rescinded, and a new agreement was made with another mason to finish the work. This mason, under the guidance of the architect, finished the work. The house soon after fell down. The Public Prosecutor instituted proceedings before the Judges of Police, who condemned the first mason to pay a fine of 1,000 livres, and suspended him for three years. They acquitted the architect.

The experts who first inspected the premises during these proceedings, reported that the walls of the foundation were not *a plomb*; that too soft stones had been used, and that the mortar was thin. A second set of experts added that the fall of the house was due exclusively to the fault of the first mason.

The second mason then sued the employer in the Civil Court of Marseilles for compensation for his work and labour, and also for damages for the loss of his tools, &c., which had been lost in the ruins. The employer cited the architect and the first mason in guarantie.

The Court condemned the employer to pay the second mason the amount due for his work, and also damages for the loss of his tools, and it also condemned the architect and the first mason to guarantee the owner from this condemnation, as well as from the damages suffered by him from the fall of the house.

The architect appealed against this sentence, which was confirmed by the Parliament of Aix (24th of May, 1740), except as to the damages suffered from the fall of the house.

There is not a report of the arguments used, or of the reasons on which the Judgment proceeded. The second mason, who was not employed to rebuild, but merely to finish the erection of

the house, may not have been taken to be a builder of the edifice, subject to full responsibility within the meaning of the law of warranty. It was not shown that the default of the first mason was such as the second mason ought to have detected before he began to do his own work. The second report of the experts is rather to the contrary. The appeal was on behalf of the architect only; as all who were interested had been made parties to the proceedings, their equities, *inter se*, were adjusted according to the merits. The principal defaulter—the original contractor for building the house—was held responsible as well to the public as to the parties who suffered by his default.

No rule or principle of law can be safely collected from this Report, that could or ought to have been considered as authoritative in settling the law of Lower Canada otherwise than as it has been settled in the present case, in which the liability of the architect, or of Brown and Watson has not been put in issue.

It is not necessary for their Lordships to consider what ought to have been the ruling of the Courts in Lower Canada, if the sinking of the tower, and the consequent damage, had been shown to have been caused by a latent defect in the work done before the date of the contract of the Appellant, and which he could not by the exercise of care and skill have discovered. It plainly appears that, when he contracted to build the Cathedral, and accepted the foundation at his own estimate of its value as the basis of his work, he had the means of knowing the nature of the soil; he had the dimensions of the foundation; he had the plans of the architect before him, and he must be taken to have known the nature and special character of the structure he was about to erect. Applying his scientific knowledge to the subject, he ought to have known that this foundation was insufficient. Their Lordships, therefore, are of opinion that under the law of Canada he is liable, just as he must have been if he had in terms contracted to build from the ground on the bare site.

The parties concerned have proceeded on what proved to be a common error, but this cannot

alter the rule of law. To use the language of Lord Mansfield as to a rule somewhat analogous, "At first the rule appears to be hard, but it is settled on principles of policy, and when once established, every man contracts with reference to it, and there is no hardship at all." (3 Dougl. R. 390.) The contract here has been drawn up so as not to contain any express provision with a view to exclude or modify the full responsibility imposed by the law on the Appellant. It superadds special clauses, protective of the employer, by which he is exonerated from contingent liabilities. The Appellant must be assumed to have known the law when he entered into the contract. Whatever the hardship of the case may be, it is not within the province of their Lordships to relieve. Their duty is to decide what the law is by which the case must be governed. The principal point being thus decided against the Appellant, they do not think it necessary to say more on the subordinate questions, and especially on that relating to the Caen stone, than that they agree with the Canadian Courts in their conclusion on these points, and in the reasons by which it is supported. Their Lordships will, therefore, humbly advise Her Majesty that the Judgment appealed from ought to be affirmed, and the Appeal be dismissed with costs.

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