

the appellant, that he should not be held to proceed until he had time to file a factum.

The Court did not think the appellant was entitled to succeed on this motion. A factum is not required in appeals from the Circuit Court, unless it be specially ordered, and the Court will not make such order without some cause shown, and particularly on the part of defendant, the effect of such order being to create a great delay. Parties can always make a factum if they desire it.

Motion rejected.

SUPERIOR COURT.

Montreal, Nov. 30, 1878.

JOHNSON, J.

THE ATTORNEY-GENERAL, *Pro Regina*, v. THE MONTREAL CITY PASSENGER RAILWAY CO., & THE TRUSTEES OF THE MONTREAL TURNPIKE ROADS, *mis en cause*.

Street Railway Company—Nuisance—Exercise of powers under Statute.

A street railway company was authorized by Statute to lay its track "along the highways in the Parish of Montreal" leading into the streets of the city. *Hebt*, that the Company in laying its track inconveniently close to the property on one side of a highway, and thus apparently favoring the property on the other side, had not exceeded its powers, and an action for the abatement of the alleged nuisance was dismissed.

JOHNSON, J. This is an action for the abatement of an alleged nuisance. The Attorney-General says that the City Passenger Railway Company at a certain part of their track, from the church at Coteau St. Louis, to the station of the Quebec, Montreal and Occidental Railway, have abused and acted in excess of their powers, by laying their track too near the property of the plaintiff; so near, in fact, that neither man nor beast can conveniently use the highway along which the railway runs, to the great injury in particular of the estate of the late Stanley C. Bagg. The plea is that the Railway Company has acted within its powers as well with respect to the municipality of Cote St. Louis, as with respect to the Trustees of the turnpike roads, and that they have done no injury to the party whose interests are said to be more particularly affected. The latter part of the plea opened the door to much evidence that I thought irrelevant at the trial, and I said so—and I still think so, for surely if the Railway

Company has acted within its powers, the injury, if any, of an exercise of legal power, should not expose them to take up their track. I therefore do not express any opinion that can affect the result of the case upon the point of injury. The evidence showed that the track was, at the place indicated, put very near indeed to the sidewalk—I should say very inconveniently near. It was also in evidence that this eccentric course was detrimental to the estate in question, and very beneficial to the estate Beaubien on the opposite side of the road, because nobody would buy lots to build on when the first step from their front door would expose them to get their toes cut off on a horse railway: and at the same time the extension of the track to that semi-rural locality was a boon to the class of people likely to live there. All this may or may not have resulted, as was more than insinuated, from the personal influence of the opposite proprietor, who appears to have been an officer of the Turnpike Trust; but I think I can only look at the question of power or no power to run this railway along that highway. That depended on the different statutes:—1st. There was the 3rd Vict., c. 31, of the Special Council, which gave the Turnpike Trustees exclusive control of the turnpike roads, of which this is one; therefore, it became necessary for the C. P. Railway Co. to get the Trustees' permission, which was done. Then all that remains is to see that besides the authority of the Turnpike Trustees the Railway Co. had the power to take their track where they have taken it. Their act of incorporation is the 24th Vict., ch. 84; and the fourth section gives the power not only along the streets of the city, but "along the highways in the Parish of Montreal leading into the said streets, and contiguous thereto, or any of them." Although, therefore, this may be injurious to adjacent proprietors, it would be impossible to hold that the exercise of a right, within the limits of the powers conferred upon them, however inconvenient that exercise may be to one or more individuals, can expose the defendants to undo what the law has authorized them to do. The action is therefore dismissed. I have no power to give costs against the Crown, but the law allows me to recommend that they be paid, and I think the defendants are entitled to their costs, and I see besides