

any compensation for the altering of the level of the street, "it had to be sought by other process than this action, to wit, by resort to the tribunal provided by the 27 & 28 Vict., chap. 60."

If this reason be founded, it is needless to carry our investigation further, for we have no authority to decide the issues. It is well, however, to bear in mind that what respondent has to establish is an absolute absence of jurisdiction over the matter. Nothing less will do, because the defendant did not decline the jurisdiction by preliminary plea—*exception déclinatoire*—within four days from the return of the writ, as required by law. (Arts. 107 and 114, C. C. P.) "Le *déclinatoire ratione personae* ne peut être, pour la première fois, proposé en cause d'appel." Carré, 11, 142, note; 143, note 1st. "Le *déclinatoire ratione materiae* peut être proposé en tout état de cause, même en appel." 11, 147, art. 170, note 3rd, and No. 128. See also *Gray & Dubuc*, 2 L. R., Q., p. 234. The omission to raise the question of jurisdiction by the usual exception was probably due to the fact that it was not generally considered, at the time this action was begun, that a suit for damages, such as this is, fell within the provisions of the 27 & 28 Vic., chap. 60. But in May, 1876, the Judicial Committee held, in the case of *Drummond & The Mayor, &c.*, of Montreal, that a claim for damages for closing a street so as specially to injure the plaintiff's property, could only be urged before Commissioners appointed under the provisions of the 27 & 28 Vic. The opinion of the Judicial Committee is thus expressed:—"It seems to them (their Lordships) that if he (respondent) has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this Corporation (27 & 28 Vic., c. 60), which will be hereafter considered." And further on they say:—"Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised (question of right of indemnity), since in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27 & 28 Vic., c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party, 'by reason of any act of the Council for which they are bound to make compensation,' shall be ascertained in

the manner prescribed by the Statute, excludes by necessary implication actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that, in their view, the Corporation, having acted within their powers, the plaintiff's claim (if sustainable at all) is of a kind which would fall to be determined by the Commissioners under the special Act." (22 L.C.J. p. 9.)

Formal as this opinion appears to be, appellants contend that it cannot be considered conclusive authority, because it is contrary to the jurisprudence of our Courts, and because the point was never urged before the Courts here or before the Committee.

It may perhaps be said there was no jurisprudence on the point because it never was raised, so far as I know. But there have been many actions such as this, and common acceptance is perhaps as conclusive in a matter of this kind as if it had been formally decided.

Be this as it may, it is very certain that what has never been contradictorily argued cannot be considered definitively settled. I am, therefore, of opinion that we are not precluded from deciding differently from that judgment, and that it is our duty now to examine the question, and to express our opinion upon it. The enquiry seems to me to divide itself into two questions:—

1st. To what cases does the 27 & 28 Vic. apply?

2nd. Does the Act create a tribunal or only a *mode de procédure*?

With regard to the first question, the portion of the Act 27 & 28 Vic., chap. 60, which refers to the special "tribunal," is under the rubric "Expropriation and special assessment." After repealing the former legislation, so far as inconsistent with this Act (sec. 10), the Statute goes on to enact that "the Council of the said city of Montreal shall have power to order, by resolution, the opening or widening of streets, public highways, places or squares, or the construction of public buildings, and to order at the same time that such improvement shall be made out of the city's funds, or that the cost thereof shall be assessed," &c., (sec. 11.) Then if the Council of the said city determines, by resolution, to undertake or carry out "any of the said works," and if the person who is seized or possessed as proprietor of any lot of ground