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CURRENT TOPICS AND CASES.

The judgment of their lordships of the Judicial Committee of the Privy Council in *Alexandre* v. *Brassard*, popularly known as the St. Blaise case, dismisses the appeal, by some of the appellants, from the judgment of the Court of Queen's Bench for this province, reported in Q. R., 2 Q. B., pp. 69–99. The board did not think it necessary to enter into some questions that were discussed in the court below, the argument on the appeal being restricted apparently to two contentions, first, that although it was not competent for the court to set aside the canonical decree erecting a parish, it was at liberty to inquire into the proceedings which gave rise to the decree, and if a flaw or illegality were discovered in those proceedings the canonical decree could not be treated as a decree available for the purpose of founding civil recognition. Their lordships overruled this pretension, holding that every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with the view of obtaining civil recognition. The second point was whether a debt contracted by the Fabrique is a debt of the parish within the meaning of art. 3380 R. S. Q., and would therefore constitute a bar to its dismemberment. The

Committee held that it was not. This point applied to one parish only, and does not appear to have been specially urged in the court below.

In the case of *Atlantic & N. W. Ry. Co.* v. *Wood*, which will also be found in the present issue, the argument before the Judicial Committee seems to have been reduced to a very simple question. The Railway Company admitted the respondents' right to recover compensation under the Railway Act, and that the damages to be estimated were those caused and to be caused to the remainder of their property by the intended use of the part expropriated; but the pretension was put forward that the Court of Queen's Bench had not made a re-valuation of the damages and had accepted that made by the arbitrators. It is not easy to understand how such a point could be seriously urged before the Committee unless there were something to show that the Canadian Court had declined to hear any argument as to the amount of damages. Now, although the case before our courts was argued principally upon the legal questions raised, no restriction was imposed upon counsel, so far as we are aware, in reviewing the evidence of damages. The only point discussed before the Board, therefore, was one which seems to have been founded chiefly upon a misapprehension of some remarks made by Mr. Justice Hall, which clearly do not support the interpretation sought to be placed on them, and the Judicial Committee, under these circumstances, did not consider it necessary to call upon the respondents to reply.

In the judgment following—*Casgrain es qual.* v. *Atlantic & North West Ry. Co.*—Lord Watson has treated in a very elaborate manner a case of considerable complication. The salient points of the judgment are that the attorney general, in an action under article 997 of the Code of

Procedure, has the same right to control the conduct and settlement of the suit as if there were no private relator, and may, at any stage of the case withdraw the right of using his name; and, further, that a mandamus will not lie to him, as an officer of the Crown, in such prosecution. The Committee also decided that the municipal authority of a city has power to sanction the closing of a public street. The case has considerable general interest in its bearing upon the powers of the provincial attorney-general. The appellants' counsel evidently found a formidable obstacle in art. 703 of the Revised Statutes of Quebec, which declares that the provincial attorney general "has the functions and powers which belong to the office of attorney-general and solicitor-general of England, respectively, by law or usage, in so far as the same are applicable to this province." Reference may also be made to par. 4 of this article:—"He has the regulation and control of all litigation for or against the Crown or any public department, in respect of any subject within the authority or jurisdiction of the government of the province."

At the annual dinner of the Birmingham Law Students' Society, the president, Sir Frederick Pollock, chose for the subject of his presidential address "Law Reporting," a topic with which he is specially conversant. In the course of his speech he said that they would not find any satisfactory historical instances of law reporting before the middle of the thirteenth century. The early year-books did not show much trace of official revision, or, indeed, of any revision at all. They appear to be the transcript of notes taken in Court, and represented just what might be heard by a fairly attentive lawyer who happened to be in Court. There was no care taken to verify the names of parties, still less any communication with the judge, except that occasionally they found a judge saying privily to a counsel what he (Sir Frederick) supposed the judge

did not wish to commit himself to. The year-books had everything about them in external form that was repulsive. From first to last the language of the year-books and of the other earlier reports down to the Restoration period purported to be French. In the earlier portion it was real French—that was, the French spoken by the educated people and persons of rank, but it became subsequently an English dialect of French. The court of Edward III., however, deliberately adopted English as the spoken language, and after that the spoken language in the Courts became English. The lawyers, however, continued taking their notes and writing their records in French, and the result was 'law French,' which became more and more degraded and mixed with English words till, in the sixteenth century, it was a mere jargon Sixty years ago it was supposed no lawyer had occasion to read the year-books. Since then they had found those books were not obsolete, and that it might be necessary to refer to them even for practical purposes. In any other civilised country those year-books would have been re-edited at the expense of the State. Law reports by private reporters began in the sixteenth century, and the modern system of reports might be stated to be not more than a century old—the system of having reporters permanently attached to each Court to keep up continuous reports, and who were more or less assisted by the judges in their work. He could not say when the modern practice of judges assisting law reporters by revising the judgments was first adopted. Douglas, one of the best of the eighteenth century reporters, made no mention of it in the preface to his first volume of reports, and therefore it might be inferred that up to that time no reporter had been bold enough to ask the judge for such assistance. By that time the distinction between good and bad reporting had been thoroughly established, and the distinction between authorised reports and reports which were not authorised. The only meaning of a report be-

ing authorised was that the reporter was in a certain sense recognised by the Court to which he was attached, and the judge gave him what facilities he could, and was willing to revise his judgments for the purposes of the report. There were no other kinds of authorised reports. There were not, as in some countries, official reports of the judgments delivered by the Court or a judge. Whether it would or would not be desirable to have an official source of reports and forbid the citation of any others was a question which had been much debated at various times. He thought on the whole the general weight of professional opinion had been against having such officially authorised reports.

We regret to have to record the death of two gentlemen long connected with the profession in the city of Montreal. The first, Mr. W. A. Bates, was among the oldest practitioners in the city, and was esteemed by all who knew him. He was not conspicuous as a lawyer, but was the model of a conscientious and industrious attorney. The second death is that of Mr. Justice Barry, formerly a district magistrate, and recently one of the judges of the Circuit Court. Both of these gentlemen were much esteemed, and their decease, in each case after a very brief illness, is generally regretted.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, 9 February, 1895.

Present:—The LORD CHANCELLOR, LORDS WATSON, HOBHOUSE, MACNAGHTEN and SHAND.

ALEXANDRE et al., appellants, and BRASSARD et al., respondents.

Parishes in the Province of Quebec—Canonical and civil erection and division—Jurisdiction of the courts—R.S.Q. 3371-3381—*Debt of parish.*

Held, affirming the judgment of the Court of Queen's Bench, Q. R., 3 *Q. B.* 69:—1. *The civil courts in the province of Quebec*

have no jurisdiction to annul or revise a canonical decree erecting a parish; and a decree for the canonical erection of a new parish, which is valid according to ecclesiastical law, is a sufficient foundation for proceedings with the view of obtaining civil recognition.

2. *Proceedings before the Commissioners, in accordance with the statutory provisions relating thereto, with a view to the civil recognition of a new parish, are not subject to the review or control of a court of justice.*

3. *A debt of the Fabrique is not a debt of the parish within the meaning of* 3380, *R. S. Q.*

LORD MACNAGHTEN :—

The question in this case relates to the canonical erection and the civil recognition of a new parish in the district of Iberville, in the province of Quebec, called St. Blaise, which has been formed by the dismemberment of three old parishes, St. Jean l'Evangéliste, Ste. Marguerite de Blairfindie, and St. Valentin.

The appellants challenge the validity of the proceedings which resulted in the civil recognition of the parish of St. Blaise on two grounds. They allege (1) that on the occasion of the application to the ecclesiastical authorities for the canonical erection of the parish an essential condition prescribed by law was not observed, and they contend that in consequence of that omission no legal foundation was laid for an application for civil recognition. They also allege (2) that in the case of the parish of St. Jean l'Evangéliste there existed a debt of the parish which formed a statutory bar to its dismemberment.

It appears that at the date of the cession of Lower Canada the jurisdiction both canonical and civil in reference to the erection and sub-division of parishes was vested in the respective Bishops of the Diocese, but subject so far as related to civil recognition to the formal assent of the Governor as representing the Crown. After the cession this jurisdiction was recognised by an Ordinance 31 George III, c. 6. Various statutes were subsequently passed dealing with the matter. The provisions of these statutes are now embodied in Title IX. (Religious Matters) ch. 1 of the Revised Statutes of the Province of Quebec.

Chapter 1 is intituled :—" Erection and Division of Parishes—" Construction and Repair of Churches, Parsonages and Ceme-

" teries—and Fabriques." It is divided into sections and sub-sections, under which the appropriate Articles are arranged.

Section 1, containing Articles 3360–3370 both inclusive, relates to the appointment of Commissioners by the Lieutenant-Governor, in each Roman Catholic Diocese of the Province, and to the general powers of such Commissioners.

Section 3366 is in the following terms :—

" All cases respecting either the erection or division of Parishes, or the " building and repairing of Churches, Parsonage Houses and Cemeteries, " and their appurtenances, belonging to Roman Catholics, shall be pro- " ceeded with and adjudged upon by the Roman Catholic Bishop or " person administering the Diocese in which it is necessary to act, and " by the Commissioners appointed for the said Diocese."

Section II. is headed :—" Erection and Division of Parishes." Sub-section 1 of Section II. headed : " Canonical erection of " Parishes " contains Articles 3371 and 3372.

Article 3371, so far as material to the present question, is as follows :—

" Whenever in any of the following cases it is required :—

" 1. To canonically erect any new parish ;

" 2. To dismember or sub-divide any parish ;

* * * * * * * *

" on a petition of a majority of the inhabitants, being freeholders, of the " territory designated in such petition interested in the matter, being " presented to the Roman Catholic Bishop of the Diocese . . . . . " the ecclesiastical authorities, and such other person as they may appoint " and authorise for the purposes aforesaid, proceed, according to eccle- " siastical law and the practice of the diocese, to the final decree for the " canonical erection of any parish, or the division or union of any parishes " . . . . . as the case may be."

Article 3372 provides for notice to the persons interested before proceeding on the petition.

Sub-section 2 of Section II. headed :—" Civil erection of Par- " ishes " contains Articles 3373–3382 both inclusive. Those Articles so far as material to the first objection on the part of the appellants are as follows :—

" Article 3373 :—Every decree for the canonical erection of a new Parish " or for the dismemberment or union of any Parishes . . . . . " rendered according to the canonical laws, forms and usages followed in " the Roman Catholic Dioceses in the Province, shall to have its effect be " publicly read and published on two consecutive Sundays from the pulpit " in the Churches or Chapels of the Parishes or missions interested in the

"said erection, dismemberment, division . . . . . together "with a notice informing the persons interested that on the expiration "of 30 days, or one day later if the 30th be a Sunday or a holiday, after "the last reading and publication of the said Canonical Decree, ten or "the majority of the inhabitants being freeholders mentioned in the "Petition presented to the ecclesiastical authorities for the rendering "of the said Canonical Decree, will apply to the Commissioners for the "civil recognition thereof, and that all having or pretending to have any "opposition or claim to bring against the said civil recognition must "file the same before the expiration of the said 30 days with the Secre-"tary of the said Commissioners."

"Article 3374:—If within the delay of 30 days no opposition be made "to the civil recognition of the Canonical Decree, or if the opposition be "dismissed by the Commissioners, the Secretary shall transmit the "said Canonical Decree to the Lieutenant-Governor, together with a "certificate signed by him to the effect that no opposition has been filed "with him within the said period, or that having been filed it was dis-"missed."

"Article 3375:—On receipt of such Decree and Certificate, the Lieute-"nant-Governor may without *procès-verbal* or report from the Commis-"sioners, issue a Proclamation under the Great Seal of the Province as "provided for in Article 3381, which Proclamation shall have and pro-"duce the same effect as a Proclamation issued in virtue of a *procès-verbal* "or report of the Commissioners."

Article 3376 deals with the case of an opposition which the Commissioners consider ought to be taken into consideration.

"Article 3381:—On the presentation of the *procès-verbal* of the Com-"missioners, containing their report as aforesaid, the Lieutenant-"Governor may issue a Proclamation under the Great Seal of the Pro-"vince, erecting such Parish for civil purposes, and for confirming, "establishing and recognising the limits and boundaries thereof; such "Proclamation shall avail as a legal erection and confirmation, for all "civil purposes, of the Parish or Parishes or sub-divisions of Parishes "therein designated, and of those which may have been formed by the "dismemberment, union or sub-division of Parishes erected and recog-"nised by the *arrêt* of His Most Christian Majesty dated 3rd March, "1722, or by any other subsequent letters patent or proclamations."

Such being the law applicable to the case the facts may be stated very briefly:—

In March, 1888, a petition was presented to the Archbishop of Montreal, praying him to dismember certain outlying portions of the three parishes and to form them into a separate parish with a view to the convenience of the inhabitants in regard to religious worship and education. After considering the opposi-

tion of the present appellants and certain other persons, the Archbishop issued a decree granting the prayer of the petition.

The petition on which this decree was made was signed by a majority of the Roman Catholic freeholders of the territory designated in the petition, but not by a majority of Roman Catholic freeholders in each portion of the three parishes forming such territory, or by a majority of the total number of freeholders in the territory unless Protestant freeholders ought to be excluded from the computation. And therefore according to the view of the appellants and the construction which they seek to place upon the enactment the petition was not in order.

Upon the decree of the Archbishop having been obtained the respondents applied to the Commissioners of the diocese for civil recognition of the new ecclesiastical parish. The appellants, and certain other persons who were co-plaintiffs with them in the action, but who have not appealed, lodged an opposition. They appeared before the Commissioners, called witnesses, and were heard in support of their objections. On the 10th of January, 1891, the Commissioners made a report to the Lieutenant-Governor, in which by a majority they stated that inasmuch as they considered that the decree had been rendered on the petition of the majority of freeholders residing in the territory designated in the petition, that an appeal from the decree to the Pope had been rejected, that all proceedings were regular, and that the oppositions were ill-founded, they rejected the oppositions and recommended that civil recognition should be granted.

The appellants, and the plaintiffs who have not appealed, applied to the Court of Queen's Bench for a writ of certiorari to quash the report. The application was refused. They then raised the present action, asking in effect for a declaration that the proceedings to which they objected were invalid, and claiming an injunction and damages. The action came on for hearing in the Superior Court before Tellier, J. On the 27th June, 1892, that learned Judge gave judgment dismissing the action with costs, upon the ground that the Court had no jurisdiction to review the Archbishop's decree or the report of Commissioners, or to arrest the action of the Lieutenant-Governor.

In September, 1892, civil recognition was accorded to the parish of St. Blaise by a proclamation under the great seal of the Province.

On appeal to the Court of Queen's Bench the judgment of the

Superior Court was affirmed on the 23rd of December, 1893, by Lacoste, C. J., Baby, Bossé and Wurtele, JJ., Hall, J., dissenting.

Notwithstanding the able arguments on behalf of the appellants their Lordships are of opinion that the judgment of the Court of Queen's Bench, affirming the decision of Tellier, J., is correct.

It was not disputed at the Bar that the decree of the Archbishop was a good and valid decree for all ecclesiastical purposes, and that the parish of St. Blaise has been canonically erected. The argument on behalf of the appellants was that the ecclesiastical authorities were not properly put in motion, and that although it was not competent for the Court to set aside the canonical decree, the Court was at liberty to inquire into the proceedings which gave rise to it, and they contended that if those proceedings were found not in accordance with the provisions of the law, the decree could not be treated as a decree available for the purpose of founding civil recognition.

Their Lordships cannot take this view. It appears to them that the provision in question is not a limitation on the jurisdiction of the ecclesiastical authorities, or a condition precedent to the validity of all subsequent proceedings. It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on alleged non-compliance with it.

In connection with this point it will not be out of place to observe that the articles relating to the civil erection of parishes form the subject of a separate and distinct sub-section. The first article in that sub-section in its opening words speaks of "Every Decree for the canonical erection of a new Parish." The words are general. There is nothing referring them back to what has gone before, or confining the case to a decree made in the manner prescribed by the preceding sub-section. It seems to their Lordships therefore that according to the grammatical construction of the language of this sub-section, as well as according to the good sense of the matter, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with the view of obtaining civil recognition. Otherwise a canonical decree, valid according to ecclesiastical law but having the defect or flaw which the

appellants attribute to the Archbishop's decree in this case, would for all time be a bar to civil recognition. For there are no means of curing this defect or getting rid of the difficulty.

Their Lordships have dealt with this matter because it is of general interest and it formed the principal subject of the arguments addressed to them. At the same time they desire to say that they see no reason to differ from the conclusion of the learned Judges of the Court of Queen's Bench, who have held that proceedings before the Commissioners, in accordance with the statutory provisions relating thereto, with a view to the civil recognition of a new parish, are not subject to the review or control of a Court of Justice. The functions of the Commissioners in this respect are simply to inquire and report to the executive Government, and although they are empowered to dismiss an opposition made to the civil recognition of a canonical decree they are required to report the dismissal to the Lieutenant-Governor when they transmit the canonical decree to him. Persons who may consider themselves aggrieved by the dismissal of their opposition are not without remedy. But their remedy is not to be sought in a Court of Law. It appears from the judgment of Wurtele, J., as well as from Mr. Justice Baudry's Treatise (page 51) that it is the practice for the executive Government before granting civil recognition to listen to all remonstrances and objections properly brought before them. "In all "such cases," says Wurtele, J., "the parties are always heard "and the circumstances are carefully considered before any action "is taken." . . . . "It is within my own knowledge," he adds, "that on several occasions after having considered the ob- "jections made to the civil erection, the Lieutenant-Governor on "the advice of the Executive Council has declined to issue the "Proclamation and to give civil effect to a Canonical Decree."

The objection founded on the alleged debt of the Parish of St. Jean l'Evangéliste is a more serious objection in a legal point of view. For Article 3380 provides that nothing in the chapter shall extend to any parish which has contracted debts for the erection of churches or parsonage houses therein until the said debts are paid and satisfied. In the present case however the alleged debt is not a debt of the parish. It was not contracted by the parish. It was contracted by the *Fabrique*, and the *Fabrique* apparently has sufficient means to discharge the debt, or so much of it as remains unpaid, by the stipulated instalments,

without throwing any part of it upon the parish. A debt of the *Fabrique* may no doubt become a debt of the parish. But to bring about that result two things must concur. In the first place the *Fabrique* must ascertain the impossibility of paying the debt by means of the revenues at its disposal; and in the next place it must obtain an authorization for a levy upon the Roman Catholic freeholders of the parish at a meeting of the parish regularly called.

For these reasons their Lordships are of opinion that the appeal wholly fails, and they will humbly advise Her Majesty that it ought to be dismissed.

The appellants will pay the costs of the appeal.

Vernon R. Smith, Q. C., and *Dunbar Taylor* (of the Montreal bar), for appellants.

Fullerton, Q. C., Beaudin, Q. C., (of the Montreal bar), and *Bray*, for respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, 23 February, 1895.

Present:—The LORD CHANCELLOR, LORDS WATSON, MACNAGHTEN, SHAND, and DAVEY.

ATLANTIC & NORTH-WEST R. Co. (petitioners in court of first instance), appellants, & WOOD et al. (respondents in court of first instance), respondents.

Railway expropriation — Overhead passage — Right of proprietor to damages resulting from the operation of the railway — Title — Nature of the review to be exercised by the Court under the Canadian Railway Act of 1888, 51 *Vict., ch.* 29, *of an award of arbitrators.*

HELD, (*affirming the judgment of the Court of Queen's Bench, Montreal, Q. R.*, 2 *Q. B.* 335):—1. *The expropriation of an overhead passage by a railway company entitles the person expropriated to the enforcement of all the statutory rights which would follow from expropriation of surface rights.*

2. *Under the Canadian Railway Act of* 1888 (51 *Vict., ch.* 29) *a railway company is responsible, where land or real rights are expropriated, to compensate the proprietor, not only for the land actually taken, but for the direct damage to his remaining*

land resulting either from construction and severance, or from the operation of the railway. (The holding of the Court of Q. B. on these two questions was not contested on the appeal).

3. *The true intent of sub-section 2 of s. 161, of the Railway Act above mentioned, is not that the Superior Court before which an appeal is brought, should wholly disregard the judgment of the arbitrators and the reasoning in support of it, and deal with the case as if the evidence had been adduced before the Court itself and not before the arbitrators, but that the Court should examine into the justice of the award given by them on its merits, on the facts as well as the law, the case being analogous to the review of the decision of a subordinate court.*

The case having been argued on the part of the appellants, respondents' counsel were not called upon.

LORD SHAND:—

The appeal in this case is presented against a judgment of the Court of Queen's Bench for Lower Canada, reversing a judgment of the Superior Court, in the district of Montreal. The subject of the litigation is an award in an arbitration under the Canadian Railway Act of 1888 (51 Vict., c. 29), by which the majority of the arbitrators awarded a sum of $16,308 as compensation for land taken and injury done to the property of the respondents by the appellant company, in the exercise of their statutory powers by the making of a railroad passing through the city of Montreal. The respondents are the trustees of Calvary Congregational Church, Montreal, and owners in possession of the property on which the church is built. A small part of the respondents' land only, consisting mainly of part ot a lane leading to the rest of their property, was taken and occupied by the company, by their line being carried over it on trestles or arches, and by much the greater part of the compensation claimed was on account of injury done to the remainder of the property by the use of the line in the working of the railway. The appellants maintained that they were not liable to pay compensation for injury so caused to the part of the property which was not taken, and stated other defences arising from the particular state of the respondents' title, but after much discussion these pleas were disallowed by the Court of Queen's Bench which reversed the judgment of the Superior Court by which the amount

of compensation awarded had been greatly reduced. The decision on these points has been acquiesced in, and the only question on which any argument has been presented by the appellants under the present appeal relates to the nature of the review to be exercised by the Court, under the Statute, of an award by arbitrators on the merits of a claim for compensation on which they have given their decision as to the amount of compensation to be paid.

The contention of the appellants on this question is thus stated in their case :—

" The appellants are willing to admit for the purposes of the present " appeal that the construction of the railway over the lane in question " constituted such an expropriation of a real right belonging to the " respondents as to entitle the proprietors to recover under the Act such " direct damages, contemplated by the Act, as are caused and to be " caused to the remainder of the property by the intended use of such " expropriated real right by the Railway Company ; but they submit " that the Court of Queen's Bench was under the Act bound either (1) " itself to examine and weigh the evidence and decide upon it as in a " case of original jurisdiction, not whether the award of the arbitrators " was manifestly incorrect and unreasonable, but what upon the evidence " taken before the arbitrators was the just amount of damages ; or (2) to " remit that question to the Superior Court for its decision."

The decision of the question depends on the meaning to be given to the 161st section of the Railway Act already mentioned, (sub-section 2) which is in these terms :—

" Whenever the award exceeds $400 any party to the arbitration may " within one month after receiving written notice from any one of the " arbitrators or the sole arbitrator, as the case may be, of the making of " the award, appeal therefrom upon any question of law or fact to a " superior court of the province in which such lands are situate, and upon " the hearing of the appeal the court shall, if the same is a question of " fact, decide the same upon the evidence taken before the arbitrators as " in a case of original jurisdiction."

It is maintained by the appellants that, where an appeal from the award of arbitrators involves questions of fact, the Court considering for themselves the evidence taken by the arbitrators ought to deal with the case as if the whole question of the amount of compensation to be awarded had come before them in the first instance, and ought not to pay regard to the decision of the arbitrators or to give weight to their award, as they might do in dealing with a decision on facts coming before them otherwise

for review. The view maintained by the appellants is thus stated in their case:—

"Paragraph 2 of Section 161 of the Railway Act is express that upon "the hearing of the appeal, the Court shall, if the same is a question of "fact, decide the same upon the evidence taken before the arbitrators as "in a case of original jurisdiction. This, it is submitted, has not been "done; but on the contrary, the Court appears to have laid down the "principle that the arbitrators had a discretion which was not to be "interfered with unless exercised in a manner unreasonable or manifestly "incorrect. It is submitted that the arbitrators allowed an excessive "and unreasonable amount of compensation, based upon exaggerated "estimates of the value of the property and of its depreciation by the "near presence of the railway, and upon the mere hypothesis, inade-"quately supported by evidence, that the church must and would be "removed and a new one built in another place. . . . . It is sub-"mitted that the Court was bound to examine and weigh the evidence "on these various grounds of estimated damage, and to decide the case "upon and in accordance with their own appreciation of that evidence "and not the appreciation of the arbitrators, or to remit the case for such "action by the Superior Court.

"The appellants . . . submit that the appeal should be allowed "on the ground that neither of the Courts below has decided the facts "according to the law now laid down upon the evidence as in a case of "original jurisdiction, and that the appellants are entitled to such decis-"ion, and they submit that the case should be remitted for such decis-"ion to the proper Court, or that it should be so decided here, or that "such other relief be granted to them as their lordships may deem just."

In the evidence laid before the arbitrators there appears to have been a wide conflict of views, as is common in such cases, as to the nature and extent of the injury to be inflicted on the property of the respondents by the use of the railway. It is sufficient for the present purpose to observe that several witnesses, whose evidence seems to have commended itself to the judgment of the arbitrators, considered that the church and the property on which it was built would be so injuriously affected by the use of the line in the running of trains that it might be necessary to have the church removed to another site to be acquired by the trustees, and in any view that serious injury was done to the property, and that a very substantial sum was due by way of compensation.

The view which the Court of Queen's Bench took of the evidence and of the arbitrators' award on the amount of compensation and the grounds of the award is expressed by Mr. Justice

Hall in delivering the judgment of the Court, Mr. Justice Bossé dissenting. After laying down the principle that a railway company is bound to compensate a proprietor, not only for land actually taken but for the direct damage to his remaining land "resulting either from construction and severance, or from the "use of the railway line and the operation of its traffic service," the learned Judge added :—

"Applying that principle and the jurisprudence I have quoted, to the "facts of the present case, we must conclude that the arbitrators were "justified in taking into consideration the injurious effect upon the "present occupation of appellants' premises, resulting from the noise and "vibration caused by the train service in such close proximity to their "church. That it is a direct and tangible and appreciable damage, in the "sense of the Act, will be apparent from considering the result if the "appellants were the tenants only, and not the proprietors of the church "in question. Would they be content to pay the same rental for the "use of a church edifice thus situated as for one as free from disturbance "as Calvary church was before the construction of the railway? Clearly "not; and if its rental availability and value are diminished, certainly "its use by its own proprietors has suffered a corresponding depreciation, for which it is possible to establish a pecuniary estimation and "enforcement. Is that estimate which the present arbitrators have "made, judicious and suitable? In the face of the evidence adduced, it "cannot be said to be unreasonable nor manifestly incorrect, and we do "not feel warranted, therefore, by substituting our discretion for theirs, "to adopt an estimate of damage which might be open to equal criticism, and even less defensible according to the evidence by which both "they and we are bound."

From these observations their lordships think it is clear that the Court for themselves fully considered and weighed the evidence taken before the arbitrators on the facts on which the amount of compensation depended, and decided the question of amount (which in such cases must generally be a matter of estimate) according to their own judgment. The learned Judges, as the result of their examination of the evidence, came to the conclusion that if they were to adopt a different estimate of damage from that to which the arbitrators gave effect the result might be liable to criticism equal to that to which the award was open (and to which it had no doubt been subjected in the argument), and their estimate might be even "less defensible, "according to the evidence" than that of the arbitrators, and therefore they sustained the award, among the considerations stated in the formal judgment being the following, viz. :—

"Considering that amongst the powers thus conferred is the right not "only of expropriating the land of third parties and of laying tracks "upon such expropriated land, but of operating a train service thereon;

"Considering that in the present case the maintenance of such train "service will cause direct damage, loss, and inconvenience to said "trustees, and greatly injure the use and enjoyment of their remaining "property for church purposes, to which use it had been applied and "dedicated for many years prior to the date of said expropriation notice, "and that the arbitrators acted within their legal powers and functions "in taking into consideration not only the value of the expropriated pre-"mises, but the direct damage caused and to be caused to the remainder "of the property by the intended use of such expropriated real right by "said Railway Company."

The Court dealt with the award as one which it was their province to review on the facts as appearing on the evidence adduced before the arbitrators, and in so doing in the opinion of their lordships they acted rightly and in accordance with the Statute. It would be a strained and unreasonable reading of the words of the Statute "as in a case of original jurisdiction", to hold that the evidence was to be taken up and considered as if it had been adduced before the Court itself in the first instance and not before the arbitrators, and entirely to disregard the judgment of the arbitrators and the reasoning in support of it. Such a reading of the Statute would really make the Court the arbitrators and the sole arbitrators in every arbitration in which an appeal on questions of fact was brought against an arbitrator's award. It appears to their lordships that this was not the intention of the legislature, and that what was intended by the Statute was not that the Court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits, on the facts as well as the law. Previously to this enactment the Court had power, only to approve of or set aside the award of arbitrators. This might often cause much expense and inconvenience, in renewed proceedings before the arbitrators, and the purpose of the legislature seems to have been to enable the Court to avoid this, by giving power to make or rather to reform the award by correcting any erroneous view which the arbitrators might have taken of the evidence; that in short they should review the judgment of the arbitrators as they would that of a subordinate court, in a case of original jurisdiction, where review is provided for. And it is in this view worthy of notice that the enacting words of

sub-section 2 of section 161 are followed by this provision of sub-section 3: "Upon such appeal the practice and proceedings "shall be as nearly as may be the same as upon an appeal from "a decision of an inferior court to the said Court."

The Court of Queen's Bench has, in their lordships' opinion, rightly acted on this view, and their lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Hon. Edward Blake, Q. C., (of the Ontario Bar) and *H. Abbott, Q. C.*, (of the Montreal Bar,) for the appellants.

Vernon R. Smith, Q. C., and *A. D. Taylor*, (of the Montreal Bar), for the respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, 9 February, 1895.

Present:—The LORD CHANCELLOR, Lords WATSON, MACNAGHTEN, SHAND, and DAVEY.

HON. T. C. CASGRAIN, Atty.Genl. (plaintiff *par reprise d'instance*) appellant, v. THE ATLANTIC & NORTH-WEST RAILWAY CO. (defendant), respondent, & THE CITY OF MONTREAL (a party intervening).

Corporations—Actions against, under Art. 997, *C. C. P.—Discontinuance of action taken in name of attorney general—Mandamus.*

HELD, (*affirming the judgment of the Court of Queen's Bench, at Montreal, Q. R.*, 2 *Q. B.* 305):—1. *The words "exercises any power, franchise, or privilege," in article* 997 *of the Code of Civil Procedure, do not include every act done by a corporation which can be shown to be contrary to law, but such acts only as are either professedly, or from their very nature manifestly done in the assertion of some special power, franchise, or privilege; e. g., the closing of a lane by a company under the pretext that they had acquired private interests which entitled them to close it, does not involve the assertion of any power, franchise, or privilege within the meaning of Art.* 997, *though the act might be sufficient to sustain an indictment for nuisance at the instance of the attorney general.*

2. *In an action brought under Art.* 997, *C. C. P., the attorney general is the sole* dominus litis, *and has the same right to control the conduct and settlement of the suit as if there were no private relator, and he may at any stage of the case withdraw the right of using his name.*

3. *A mandamus will not lie to the attorney general, as an officer of the Crown, in a prosecution under Art.* 997, *C. C. P.*

4. *The municipal authority of a city has power to sanction the closing of a public street.*

LORD WATSON:—

In this case, their lordships heard a very full argument upon a great variety of questions. They have not found it necessary to decide all of these questions; but they have thought it right to express their opinion upon some points, the decision of which is not, in the view which they take, necessary to the disposal of the appeal.

It is impossible to appreciate the various questions presented for decision, without referring, in detail, to the circumstances in which these have arisen, and also to the peculiar course of the present litigation in the Courts below. Before adverting to these proceedings, their lordships will notice certain facts which are either not in dispute, or have, in their opinion, been established by evidence.

The respondent company were incorporated by an Act of the Dominion Legislature, which empowered them to carry their line of railway through the city of Montreal. For effecting that purpose, they proposed to take and use a rectangular piece of ground (hereinafter referred to as "the area"), lying between Mountain Street and Bisson Street, two of the public streets of the city, which run parallel to each other. There was a lane wholly situated within the area, known as Blache Lane, which opened off Mountain Street and terminated in a *cul de sac*. The lands abutting on the lane belonged to private individuals, by whom it was used as an access to their properties. The company duly expropriated such parts of these properties as lay within the area, and had a frontage to the lane; and thus acquired the right to exclude all access to Blache Lane, except from Mountain Street.

The company submitted to the City Council, for approval, a plan for their contemplated works which showed, *inter alia*, that the line of railway was to be carried over Mountain Street by

means of a bridge, one of the abutments of which completely closed the entrance to Blache Street from Mountain Street. It also showed that the whole area, including the *solum* of Blache Lane, was to be occupied and used for railway purposes. The company also applied to the Council for leave, instead of carrying their railway by a bridge over Bisson Street, to close and occupy that part of the street which adjoins the area, offering, at the same time, to protect the city from all claims of damage resulting from the closing of the street.

The plan in question, and the application for leave to close Bisson Street were remitted to the Road Committee of the Council, who recommended that the company should be permitted to make bridges over Mountain Street and other streets as shown on the plan; and that they should be allowed to close Bisson Street, upon certain conditions, which need not be specified. On the 20th February 1888, the plan and application, together with the report of the Road Committee, were considered at a special meeting of the City Council, called for that purpose, when the report was unanimously adopted, with the exception of the recommendation with regard to Bisson Street, which was sent back to the Committee for further consideration. It is unnecessary to notice what followed upon the remit. It is sufficient to say that the crossing of Bisson Street was subsequently arranged.

After receiving the assent of the Council, the company proceeded with the construction of their line; and, before the end of the year 1888, the railway was formed across Mountain Street, upon the area in question, and across Bisson Street. In the course of these operations, the whole of the area, including the old site of Blache Lane, was covered by an embankment of considerable height, in order to bring it up to the proper level of the railway road.

In the month of February, 1889, after the railway had been for some time in actual operation, the company were served with a Writ of Information, bearing to be in terms of Article 997 of the Civil Procedure Code for Lower Canada, at the instance of the Honourable Arthur Turcotte, who was at that time Attorney-General for the Province, which prayed that the company should be condemned to open Blache Lane, and leave it free for public use, and that, in default of their so doing, the same should be opened to the public at their expense. It was set forth in the Writ, that the proceedings had been instituted by the Attorney-

General at the request of William Walker, one of the proprietors whose land fronting Blache Lane had been expropriated by the company, who had found security to indemnify the Government against costs, in accordance with the provisions of Article 997. It appears that the Attorney-General had, upon the 4th January, 1889, given Mr. Walker's solicitors a written mandate authorising them to prosecute the company in his name.

In view of the objections which are urged by the company against the competency of the proceeding, it becomes necessary to notice the averments which are made on behalf of the Attorney-General, in support of the conclusions of his writ.

The first and cardinal averment is, that Blache Lane was a public street, and had been so from time immemorial. That is followed by an allegation that the company, after they had acquired by expropriation the land abutting on the lane, "under "pretext that thereby all rights of servitude in favour of pro- "prietors abutting on said street had become vested in the said "company alone," had closed the lane at its intersection with Mountain Street, and had made all ingress and egress impossible to the public in general. That statement imports that the company justified their operations, not upon the ground that the lane was the property of the public, and that they were possessed of some power, franchise, or privilege which enabled them to close it at their own hand, but on the ground that it was private, and that they had acquired all the servitudes of way by which it was affected.

The next averment is to the effect that the closing of the street was particularly damaging to Mr. Walker, and the other proprietors whose lands had been in part expropriated; that the expropriation was made "on the distinct understanding that the "said properties would not, by reason of the said expropriation, "lose their frontage on a street;" whereas, by reason of the closing of Blache Lane, these properties had "no outlet what- "ever in rear." The street contemplated in the "distinct un- "derstanding" was obviously not Blache Lane, and the evidence supplies the information that it was a new street which Mr. Walker alleges the company undertook to make for his and others' convenience, as part of the compensation for the lands which had been taken by compulsion. It is difficult to conceive of what relevancy these averments can be, in an action brought by the Attorney-General for the public interest. They relate ex-

clusively to the rights of Mr. Walker and others to be compensated for lands which had been expropriated by the company; and their introduction is calculated to beget a suspicion, that the prosecution on behalf of the general public was expected to promote the enforcement of these private claims. It is manifest that the interest of the public in the opening of Blache Lane was infinitesimal. Even if the lane were opened to Mountain Street, they could derive little or no advantage from it; and, if the consent given by the City Council to the construction of an abutment which closed the entrance from Mountain Street were valid, their privilege of using Blache Lane would consist in the right to perambulate the bottom of a pit, which they could only reach by means of a balloon, or some similar contrivance.

The next and last averment is simply a plea in law, which sets forth that the closing of Blache Lane constituted, in the circumstances previously detailed, "the exercise by the said com-"pany of a power, franchise, and privilege, which does not be-"long to it, or is not conferred upon it by law, and is a case "governed by Article 997 of the Code of Civil Procedure for "Lower Canada."

In their defence, the company denied the allegations of the petitioner, and averred that Blache Lane was private property; and that Mr. Walker, and all other persons, whose lands fronting the lane had been expropriated, had been fully compensated, on the footing that the lane was to be closed and occupied for railway purposes. They also pleaded by way of demurrer, that the allegations made in the writ were insufficient in law to support its conclusions. After hearing parties upon that plea, Mr. Justice Mathieu, on the 29th March, 1889, reserved it for consideration along with the merits of the cause.

On the 10th September, 1889, the City Council of Montreal presented a petition for leave to intervene in the suit. The company opposed the petition, upon the ground, mainly, that the suit was one brought under Article 997 of the Code, and that the terms of the Article do not warrant the admission of any party other than the Attorney-General to take part in its prosecution. Their objections were overruled, and the City Council were allowed to intervene in the cause, "for the purpose of watching "the proceedings, taking such conclusions or making such decla-"rations therein as they may be advised."

On being thus admitted, the Council filed grounds of interven-

tion. These consist of a detailed statement of facts tending to show that Blache Lane was one of the public streets of the City; and they conclude by preferring a claim against the company, which they were allowed to support by proof, for the sum of $20,000, as damages already sustained by the City through the closing of the lane. The statement is certainly not characterized by an excess of candour. It carefully avoids all reference to the fact that the Council themselves had sanctioned the exclusion of the public from the lane, by authorising the only public access to it to be closed. From the date of their intervention, until the present appeal was brought, the Council appear to have taken a very active part in the litigation, and a large proportion of the proof led was adduced by them.

On the 31st July, 1890, the Hon. Arthur Turcotte, as Attorney-General, lodged in Court a notice, signed by himself, in these terms :—" Arthur Turcotte, the said petitioner, hereby discontin-
" ues the present action without costs, and prays *acte* of this,
" his said discontinuance." On the same day, he gave notice of his intention to discontinue to Mr. Walker's solicitors, who had till then conducted the case on his behalf, by a letter in which he explains his reasons for taking that step, as follows :—" Care-
" ful enquiry has satisfied me that aside from the interest of
" these gentlemen " (*i. e.*, Mr. Walker and others in his position)
" there is no public general interest which requires the re-open-
" ing of this lane. The private relator, at whose request I insti-
" tuted the prosecution above-mentioned, having chosen, along
" with the parties interested with him, to resolve his remedy to
" have the lane re-opened into an action to recover the damages
" caused him by its being closed, I must refuse to allow my name
" to be further used in this prosecution, which is now being evi-
" dently pushed solely with the object of forcing the payment of
" the damages sought to be recovered in the private suits."

At this time, the proofs for the Attorney-General, the interveners, and the company, had been practically completed. Nearly the whole of the evidence led for the Attorney-General consisted of productions and oral testimony bearing upon the averments, made in the information, with respect to the private interests of Mr. Walker and others, the obligation said to have been undertaken by the company to give them a new road as an access to their properties, and the amount of the damages which they had suffered by reason of their not getting that access.

Amongst his witnesses, there were three gentlemen who had acted, two of them as arbitrators and the other as umpire, in assessing the compensation due to Mr. Walker; and their lordships observe, with regret, that these gentlemen were subjected to an irregular and improper examination, by counsel representing the Attorney-General, as to the reasons and motives by which they were influenced in making their award. His evidence also disclosed the fact that Mr. Walker had, on the 3rd February, 1889, raised, and was still pursuing, an action, concluding to have it declared that the award was made on the condition and understanding that his property, after expropriation, was to be bounded by a new street fifty feet wide, and also to have the company condemned to pay him damages in respect of their failure to fulfil that condition.

Mr. Walker, the relator, after the discontinuance was filed, presented an incidental petition to the Court praying that a writ of mandamus should issue "in this cause," commanding Mr. Turcotte, in his capacity of Attorney-General, to withdraw his discontinuance, and to allow the petitioner to obtain a final judgment upon the merits of the writ of information. The grounds upon which the application was made were substantially these: —that the discontinuance of the action was the result of a corrupt agreement between the Attorney-General and the company; that, in the circumstances of the case, the Attorney-General was bound by law to prosecute, at the relation of any citizen of the city of Montreal; and that, if the Attorney-General had any discretion as to discontinuing the suit, which was denied, such discretion had not been properly exercised, and could be controlled by the Court.

Notwithstanding the opposition of the Attorney General, a writ of mandamus was issued, in the terms craved, on the 22nd August 1890; but the final determination of the matter was delayed until the hearing of the cause upon its merits. On the 28th August, Mr. Turcotte ceased to hold the office of Attorney-General, and was succeeded by the Hon. Joseph E. Robidoux, who, on the 1st September, became officially a party to the action, and submitted himself to the decision of the Court.

The cause, including the incidental proceedings for mandamus, was heard by Mr. Justice Mathieu, who gave judgment on the 16th May, 1891. The learned Judge held that the permission, originally given to Mr. Walker, by the Attorney-General, to use

his name in the prosecution of the writ, could not be withdrawn without the authority of the Court; and that the discontinuance was not justified and must be rejected. He therefore discharged the writ of mandamus as being unnecessary. The learned Judge also held that Blache Lane was shown by the evidence to have been one of the public streets of the city, at the time when it was closed by the company; and that the case came within the provisions of Article 997, inasmuch as the company, in closing the lane, had assumed a power which the law did not accord to them. He accordingly condemned the company to re-open the lane within six months from the date of his judgment, and, in the event of their failing to do so, authorised the interveners and Mr. Walker to re-open it, at the expense and risk of the company. The learned Judge dismissed the interveners' pecuniary claim, on the ground that they had not proved any damage.

The company appealed to the Court of Queen's Bench, who, on the 23rd December, 1892, reversed the decision of Mr. Justice Mathieu. Before the appeal was heard, Mr. Robidoux had ceased to be Attorney-General, and was succeeded in office by the Hon. T. C. Casgrain, the present appellant, who appears to have entertained a more sanguine view of the merits of his cause, and a more modest estimate of his official privileges, than his predecessor. He was made a party to the record, upon a petition which sets forth that he was "desirous to take up the *instance* in this "cause in his official capacity, and support the judgment in this "cause rendered in the Court below, dismissing the discontinua-"tion of the Honourable Arthur Turcotte, and maintaining the "original conclusions taken by him to the effect that Blache "Lane be ordered to be, and be opened with costs."

The Court before whom the appeal was heard consisted of Baby, Bossé, Blanchet, Hall, and Wurtele, JJ., who were unanimously of opinion that whether he ought or ought not to permit the action to be continued in his name was a matter entirely within the discretion of the Attorney-General; that the Court had no right to interfere with the exercise of his discretion, and no jurisdiction, in any event, to issue a mandamus against an officer of the Crown in his position. They accordingly held that the discontinuance of the action on the 31st July, 1890, was valid and effectual. Upon the merits, the learned Judges were of opinion that it had not been established, by satisfactory evidence, that Blache Lane was a public street; and they appear, so far as

the interveners were concerned, to have attached considerable weight to the fact that they had not only been parties to the closing of the lane, but had been guilty of laches in not objecting until the railway was completed and in operation. They held, in these circumstances, that the case did not fall within Article 997 of the Code, and they dismissed the original action, the intervention of the City Council, and Mr. Walker's writ of mandamus.

The City Council have submitted to the judgment of the Court of Queen's Bench, and were therefore not represented in the argument addressed to this Board. In the course of that argument, the legality and propriety of their admission to the suit as interveners were fully discussed. Their lordships entertain doubts whether, in an action brought by the Attorney-General under Article 997, any other party can be entitled to appear and prosecute, as an intervener, in terms of Article 154 of the Code. Even more doubtful is their right to prosecute a claim of damages which was not within the conclusions of the original writ. But in the absence of the City Council, who are out of the case, and seeing, that, now, neither the appellant nor the respondent company have any real interest in its determination, their lordships abstain from deciding the point. They will proceed to deal with such questions raised in the argument as appear to them to require notice, in the order in which they were presented by counsel.

The first of these questions is, whether the information, as laid, discloses any cause of action under Article 997, which enacts as follows:— "In the following cases:— 1. Whenever any associa- "tion or number of persons acts as a corporation without being "legally incorporated or recognised; 2. Whenever any corpora- "tion, public body or board, violates any of the provisions of the "Acts by which it is governed, or becomes liable to a forfeiture "of its rights, or does or omits to do acts the doing or omission "of which amounts to a surrender of its corporate rights, privi- "leges and franchises, or exercises any power, franchise or privi- "lege which does not belong to it or is not conferred upon it by "law, it is the duty of Her Majesty's Attorney-General for Lower "Canada to prosecute, in Her Majesty's name, such violations of "the law whenever he has good reason to believe that such facts "can be established by proof, in every case of public general in- "terest, but he is not bound to do so in any other case unless

" sufficient security is given to indemnify the Government against " all costs to be incurred upon such proceeding, and in such case " the special information must mention the names of the person " who has solicited the Attorney-General to take such legal pro- " ceedings, and of the person who has become security for " costs."

The respondent company are not alleged to have incurred a forfeiture of their corporate rights, or to have been guilty of any act or omission which implies a surrender of these rights. The charge which the Attorney-General prefers against them is, that, in closing Blache Lane, they exercised a power, franchise, or privilege which did not belong to them and was not conferred upon them by law. It therefore becomes necessary to consider what kind of acts are indicated by the statutory expression "exercises any power, franchise, or privilege." Their lordships are of opinion that the words were meant to include, not every act done by the company which can be shown to be contrary to law, but such acts only as are either professedly, or from their very nature manifestly done in the assertion of some special power, franchise, or privilege. The company might illegally occupy and use a public road, and exclude the public, in such circumstances as to bring them within the provisions of Article 997. On the other hand, if one of their goods trains ran off the line and blocked a highway, and they failed to remove the obstruction within due time, they would be liable to an indictment for nuisance, but could not, in their lordships' opinion, be reasonably said to have committed the nuisance, in the exercise of a power, franchise, or privilege which did not belong to them.

The Attorney-General does not, in his information, allege that the company closed Blache Lane in the assertion of any power possessed by them to close a public street. On the contrary, he avers that they did so under the pretext that they had acquired private interests in the lane which entitled them to shut it up. Neither does he state any fact or circumstance from which it could reasonably be inferred that the company must have seen and known that they were not dealing with private property, but with a public street. The reason for so limiting his averments may very well be explained by the fact that, after a voluminous proof, one judge has come to the conclusion that the lane was a public street, whilst five learned judges are of opinion that the evidence is insufficient to support that conclusion. Their lordships are of

opinion that the averments in the writ, although sufficient to sustain an indictment for nuisance at the instance of the Attorney-General, do not amount to a relevant allegation that the lane was closed by the company, in the exercise of any power, franchise, or privilege, within the meaning of Article 997.

Upon the next question, that which relates to the discontinuance of the action, their lordships entertain no doubt that the decision appealed from is right. The Attorney-General was the sole *dominus litis*, and had the same right to control the conduct and settlement of the suit as if there had been no relator.

Counsel for the appellant, although they referred to, did not very seriously press, two points which appear to have been relied on in the Courts below. One of these was that a new Attorney-General might so far disturb judicial arrangements made by his predecessor, as to retract a discontinuance by the latter; and the other that the Attorney-General for Lower Canada, as an officer of the Crown, stands in this exceptional position, that a mandamus will lie at the instance of his relator, to compel him to perform what the Court may conceive to be his official duty, in a prosecution under Article 997 of the Code. There is no authority for either of these propositions, which are so plainly erroneous, that it is unnecessary to take any further notice of them.

But it was strenuously urged, on behalf of the appellant, that in a prosecution under Article 997, the Attorney-General does not possess the usual powers of a plaintiff and *dominus litis*. In so far as concerns the right to discontinue, it was maintained by the Attorney-General, that he is the mere servant of the Court, and cannot refuse to insist until final judgment, unless he has leave from the Court. In support of that strange assertion, his counsel relied upon Article 998 of the Code, which enacts that, without the authorization of the Court or Judge, no writ of summons can issue under Article 997. Whatever may be its practical effect, that enactment is plainly intended to be for the protection of the persons or companies against whom the writ is directed. It enables the Court or Judge, in their discretion, to prohibit the issue of a writ; but it cannot imply any unusual right, on their part, to interfere with the discretion of the prosecutor to withdraw or insist, after their authority has been given to the institution of his action.

Their lordships can hardly conceive anything less calculated

to advance the interests of justice than to make the Bench prosecutors as well as Judges, by devolving upon the Court before whom the cause depends, the duty of determining whether the Attorney-General shall, or shall not continue to insist. Apart from plain considerations of policy, it is clear that he must always be in a better position than the Court to decide whether he ought or ought not to discontinue the action. Their lordships have come without difficulty, and certainly without regret, to the conclusion, that the learned appellant has underrated his official powers and privileges. With one exception, the authorities cited appeared to them either to have no bearing on the point, or to be inconclusive. Section 703 of the Revised Statutes of Quebec, 1888, which was not referred to by the appellant's counsel in their opening, and was not noticed in their reply, although cited by the respondents, is, in their lordships' opinion conclusive. It enacts that the Attorney-General " has the functions " and powers which belong to the office of Attorney-General and " Solicitor-General of England respectively, by law or usage, in " so far as the same are applicable to this Province." It is scarcely necessary to observe that the power to discontinue an action, independently of the Court, is possessed by the law officers of England; and that no reason exists for holding that an enactment, which confers the same power upon the law officer of the Crown for Lower Canada, is inapplicable to that Province.

Upon the assumption that his predecessor had the power to discontinue, to be exercised according to his own discretion, it was argued for the appellant, that the discontinuance could not be given effect to, in the first place because it did not comply with the requirements of Article 450 of the Civil Procedure Code, and, in the second place, because it was not accepted by the respondent company. It is difficult to say which of the reasons thus alleged was most destitute of plausibility.

Article 450 enables a plaintiff to discontinue his action, and, if he thinks fit, to bring a new one, without the consent, and against the will of the defendant. It is made an indispensable condition that, in such a case, the plaintiff shall pay the costs incurred by the defendant in the suit which he seeks to discontinue. The Article has no application whatever to any case where the parties are agreed as to the terms upon which the suit is to be withdrawn.

But then it was argued that, as matter of fact, the company

never accepted or intimated their willingness to accept the discontinuance. The argument is somewhat audacious, seeing that the discontinuance has been all along impeached upon the ground that it was the result of a corrupt agreement between Attorney-General Turcotte and the company to put an end to the action. That they were agreed as to the discontinuance, on the terms which it specifies, has never been disputed; but corruption was denied, and, although proof was allowed and led upon the point, there is not a tittle of evidence to prove it. And, in both Courts below, unsuccessfully in the first, but successfully in the Court of Queen's Bench, the company have pleaded that the discontinuance was valid, and terminated the suit.

The greater part of the argument was directed to the merits of the cause, and, in particular, to the question whether Blache Lane was a public or a private street. Their lordships do not think it necessary to determine whether the decision of Mr. Justice Mathieu or the decision of the Court of Queen's Bench, upon that point, ought to be followed. If the lane was private property, there is admittedly an end of the Attorney-General's case. On the other hand, if the lane was a public street, their lordships are of opinion that his case equally fails, because the City Council had power to authorise, and did authorise, the company to close it.

The plan which has already been referred to was submitted by the company to the City Council, for the purpose of informing that body of the extent to which, and the manner in which the construction of their railway would affect the streets of Montreal, and of obtaining their consent to the works indicated on the plan. And it is not disputed that the Council, in whom the public streets of the City are vested by Statute, was the only authority competent to deal with the application. The evidence clearly proves, and the plan, which speaks for itself, also shows, that the Council were distinctly apprised that the design of the company was, not only to close the entrance to Blache Lane from Mountain Street, but to occupy and use the lane for the purpose of constructing their railway track. The Council gave their express assent to the carrying out of that design, so that the only question left is, whether they had a legal right to do so. The answer to be given to that question depends upon the construction of Section 12 of the General Railway Act, cap. 109 of the Revised Statutes of Canada, 1888.

The clause, in so far as bearing on this point, enacts that " the " railway shall not be carried along an existing highway, but " shall merely cross the same in the line of the railway, unless " leave has been obtained from the proper municipal or local au- " thority therefor; and no obstruction of such highway with the " works shall be made without turning the highway so as to " leave an open and good passage for carriages, and, on comple- " tion of the works, replacing the highway."

The enactment just quoted appears to their lordships to deal with two separate matters, the first being, the carrying of the permanent track along a public highway, and the second, the temporary occupation and obstruction of a highway, for the purpose of constructing the permanent works. In the first case, the company are empowered to carry their line along a highway, upon condition of their obtaining the consent of the proper authority. In the second case, it is imperatively enacted that they shall remove the obstruction, and restore the highway to the site which it occupied before their operations commenced, as soon as their operations are completed.

If the first branch of these enactments be taken *per se*, their lordships see no reason to doubt that it must be interpreted as giving the local authority an absolute discretion to sanction the construction of the permanent line of railway along a public road, unqualified by any condition to the effect that the public must not be thereby excluded from the use of the road. The appellant's counsel argued that the discretion conferred upon municipal and local authorities by the first enactment is qualified by the provisions of the second. The result of sustaining that contention would be, that the company, as soon as they had, with the leave of the proper authority, completed the construction of their permanent track upon a public highway, would incur a statutory obligation to remove it, and to restore the highway to its original condition.

The clause under consideration, enacted in 1888, was not new legislation. It merely re-enacted, without verbal alteration, section 12 of the Canadian Statute, 14 & 15 Vict. cap. 51, and extended to the Dominion the same statutory provisions which had previously been in force within the Provinces of Ontario and Quebec, before and after their separation.

In the year 1857, two cases, involving the construction of Section 12 of the Canadian Statute, were decided in the Supreme

Court for Upper Canada. The first of these,—*Regina* v. *Grand Trunk Railway Co. of Canada* (15 Q. B. Toronto, 121),—was an indictment for nuisance against the company, who had, in constructing their line, occupied for a considerable distance, the whole of a public street, to the exclusion of the public, with the leave of the municipality. The prosecutor maintained that the municipality had no power to grant such leave. The Judge of first instance, and the learned Judges of the Court of Queen's Bench, held that under Section 12 the municipality had power to sanction the closing of a public street; and that, their leave having been duly given, no indictment would lie. In the second case,—*Re Day and The Town Council of Guelph* (15 Q. B. Toronto 126),—the same question was raised in different circumstances, and was decided in the same way.

Their lordships cannot assume that the Dominion Legislature, when they adopted the clause *verbatim* in the year 1888, were in ignorance of the judicial interpretation which it had received. It must, on the contrary, be assumed that they understood that Section 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their lordships, even if they had entertained doubts as to the meaning of section 12 of the Act of 1888, would have declined to disturb the construction of its language which had been judicially affirmed.

The practical result of these views is, that effect ought to have been given to the discontinuance filed by the Attorney-General in July 1890; and that the Court of Queen's Bench were right in dismissing the action upon that ground. But the discontinuance was without costs, and it follows that the Court ought not to have given the company the costs incurred by them prior to its date. Their lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from, with the variation as to costs which they have indicated. The appellant must pay to the respondent company their costs of this appeal.

Appeal dismissed.

Bompas, Q. C., and *Hohler*, for appellant.

Hon. Ed. Blake, Q. C., and *H. Abbott, Q. C.*, (both of the Canadian bar) for respondents.

BAR ELECTIONS.—At the annual meeting of the bar for the district of Montreal, held May 1, the elections resulted as follows :—

Bâtonnier—Hon. J. E. Robidoux, Q. C.
Syndic—Mr. Arthur Globensky, Q. C.
Treasurer—Mr. C. B. Carter, Q. C.
Secretary—Mr L. E. Bernard.
Council—Messrs. W. W. Robertson, Q. C., Eugène Lafleur, J. A. C. Madore, R. Dandurand, Hon. H. Archambault, Q. C., L. J. Ethier, Q. C., C. A. Geoffrion, Q. C., and John Dunlop, Q. C.