Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Mayor, &c., of Montreal v. *Drummond, from Canada: delivered 16th May,* 1876.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THE action which gives occasion to this Appeal was brought by the Honourable Lewis Drummond (the Respondent) against the Municipal Corporation of the City of Montreal (the Appellants), for damage sustained in consequence of the Corporation having closed one end of St. Felix Street in Montreal.

The Declaration alleged that the Plaintiff had built eight houses fronting St. Felix Street, which at one end opened into St. Bonaventure Street, and at the other into St. Joseph Street, and that these houses, being in immediate proximity to the Bonaventure Station of the Grand Trunk Railway Company, had acquired great value as boarding-houses and shops. It then alleged that the Corporation, "without any previous notice to the Plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, 'et par voie de fait,' closed up St. Felix Street, and built from the south end of his houses to the opposite side of the street a close wooden fence, about fifteen feet in height;" that in consequence the street had "become a *cul de sac*, and the occupants of the houses had lost their natural means of egress and regress." It also alleged that the occupant of one of the houses had

abandoned it in consequence of the destruction of his business.

The pleas of the Corporation (written in French) alleged that in closing the street they had not committed "un acte de violence et illégalité ou une voie de fait;" that they had only exercised a privilege and used a power conferred upon them by their charter of incorporation, "et qu'en exerçant ce privilége ils n'ont pas empiété sur la propriété du demandeur;" that in the several Acts of Incorporation of the city the Legislature had specially designated the cases in which they were liable to indemnify individuals from the damages resulting from the exercise of their powers, that is to say:— "1, l'expropriation forcée; 2, le changement de site des marchés; 3, le changement de niveau des trottoirs;" and that, whilst acting within the limits of their powers, they were not responsible for damage. The pleas then state that the street "n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue."

The action then is founded on a trespass and wrong illegally committed by the Corporation, and the defence, stating it generally, rests on two grounds: (1) that the street was lawfully closed under powers conferred by the Legislature, and, therefore, no wrong had been committed for which an action in this form will lie; and (2) that the Plaintiff was not by law entitled to any indemnity for the damage complained of.

The following are some of the material facts:—

St. Felix Street opens, near the north end of the Plaintiff's houses, into Bonaventure Street, and extends northwards beyond the latter street to St. Antoine Street. In its original state it ran southwards from the Plaintiff's houses to St. Joseph Street. This part of it was crossed on the level by the lines of the Grand Junction Railway Company. The Bonaventure station was a short distance from the Plaintiff's houses, the ordinary approaches to it being in Bonaventure Street. People could, however, go on foot from the station to St. Felix Street, but only by walking over some lines of railway, and contravening, in so doing, the by-laws of the company. It appears that a large number of persons, arriving by or waiting for the trains, went

in this manner to St. Felix Street, and frequented a house kept as a restaurant by one of the Plaintiff's tenants, which they could no longer do by this short cut after the fence complained of was put up. In the years 1863 and 1864 the Bonaventure Railway Station was greatly enlarged, and the goods traffic transferred from another station to it. These arrangements rendered it necessary to carry additional lines of rails across St. Felix Street to the south of the Plaintiff's houses, making the passage there difficult and dangerous. To assist these arrangements of the railway company the Corporation undertook to close the southern part of St. Felix Street and open a new street to the south of the station. The manner in which the Corporation in fact closed or shut off this southern part was by placing a wooden barrier or fence, from 10 to 15 feet high, across the street immediately to the south of the Plaintiff's houses. The place where people used to enter St. Felix Street from the railway station, as before described, was to the south of this barrier, and the cutting off of this communication caused so great a diminution of the customers of the restaurant that the Plaintiff's tenant gave up the business.

The authority under which the Corporation closed the street is a by-law made in pursuance of an Act of the Provincial Legislature (23rd Vict. c. 72).

Section 10 of this Act authorized the Council to make by-laws for various purposes, and, among others (sub-section 6), "to regulate, clean, repair, amend, alter, widen, contract, straighten, or *discontinue* the streets, squares, alleys, highways, bridges, side and cross-walks, drains and sewers, and all natural water-courses in the said city."

A general by-law was afterwards passed, section 3 of which is as follows:—

"The Council of the said City of Montreal may, and they are hereby authorized whenever, in their opinion, the safety or convenience of the inhabitants of the city shall require it, to *discontinue* any street, lane, or alley of the said city, or to make any alteration in the same, in part or in whole."

And subsequently, on the 11th September, 1866, a special by-law relating to St. Felix Street was made, which, after reciting that it was deemed expedient in the interest of the public to open a

new street (describing it), "and to discontinue a portion of St. Felix Street," ordains and enacts, that a new street called Albert Street be opened, and that a section of St. Felix Street, describing it by a plan and measurements (being the part to the south of the Plaintiff's houses) "be henceforth discontinued."

It was not disputed that under these powers the Corporation might lawfully discontinue this portion of the street, but it was contended that they were bound, as an antecedent condition, to indemnify the Plaintiff for the damage he would thereby sustain, and that erecting the barrier before doing so was an unlawful act and a trespass. The whole case, indeed, of the Plaintiff, so far as this action is concerned, rests on the assumption that his property has been invaded in a way to constitute "une expropriation," which, it was urged, could only be lawfully effected in conformity with Article 407 of the Civil Code of Lower Canada, "upon a just indemnity previously paid." It was argued that the Statute giving the power to make by-laws to discontinue streets should be held to have been passed subject to the general law embodied in this Article.

Article 407 runs thus: "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid."

A similar Article is found in the Code Napoleon (Article 545).

These Articles undoubtedly embody a fundamental principle of the old French law, which, whilst allowing private property to be taken for purposes of public utility, asserted its generally inviolable nature by requiring previous payment of a just indemnity. They are found both in the French and Canadian Codes under the title "De la Propriété," and in both follow the Articles which define property or ownership.

The original Article in the Code Napoleon was in effect the declaration of a principle which, in France, has been applied by numerous special laws. In the Canadian Code, also, Article 407 is supplemented by Article 1,589, which is as follows:—"In cases in which immovable property is required for purposes of general utility, the owner

may be forced to sell it, or it may be expropriated by the authority of law, in the manner and according to the rules prescribed by special laws."

In the special laws passed both in France and Canada, the principle of previous indemnity in cases of "expropriation," properly so called, appears to have been generally maintained. But exceptions have been made in works of urgency; and it is obvious that special laws, when passed by competent authority, may adopt, reject, or modify this principle.

A distinction has long been made in France, and indeed it exists in the nature of things, between "expropriation," properly so called, in respect of which previous indemnity is payable, and simple "dommage;" and a further distinction between direct damage, which gives the sufferer a right to compensation, and indirect damage, which does not.

Great research was displayed by the learned Counsel on both sides in investigating the history of French law and procedure on these subjects, the powers conferred on the Tribunals, and the conflicts between them. According to the opinion of Dalloz the first complete system of procedure is to be found in the Law, 8 Mars, 1810. A short history of this and other laws upon the subject will be found in Dalloz's "Répertoire," tit. "Expropriation," c. 1.

It is sufficient for the present purpose to note that a conflict arose under these laws between the ordinary Courts of law, and the Administrative Tribunals, during which numerous decisions bearing on the present controversy took place. It was settled, at least after the Law, 8 Mars, 1810, that the Courts of Law alone had jurisdiction to decide on the indemnity payable to owners of property in cases of expropriation, and that the province of the Administrative Tribunals was confined to cases of damage; but conflicts constantly arose as to whether particular cases fell within one or the other category, and the claims of owners of houses to indemnity for injury to their servitudes or quasi servitudes in public streets were a fertile source of them.

Demolombe adverts to these conflicts in his "Traité des Servitudes," and thus sums up the controversy. (Vol. 12, Art. 700.) Assuming, as

he does, that the owners of houses bordering on streets are entitled to indemnity when "leurs droits d'accès ou de vues ou d'égouts" are suppressed, or injuriously affected, he asks what is the competent authority to determine their claims? His answer is, "Cette question est elle-même fort délicate. C'est le pouvoir judiciaire suivant les uns puisqu'il s'agit d'une question de propriété privée. C'est au contraire, d'après les autres, le pouvoir administratif, parcequ'il ne s'agit pas d'une véritable *expropriation*, mais seulement d'un simple *dommage*, quoique ce dommage soit permanent, et nous avons déjà dit (referring to vol. 9, Art. 567), que telle paraît être aujourd'hui, après beaucoup d'hésitation et de luttes, la doctrine généralement suivie." Delalieu, in his "Traité de l'Expropriation," arrives at the same conclusion. (See Art. 152, 6th Edit., pp. 85 to 87.)

No doubt in some of the French decisions and authorities the violation of rights of this kind has been treated as "une expropriation réelle." But in others it has been spoken of as being only analogous to it, as thus: "comme s'il subissait une expropriation réelle d'une partie de sol." (See Delalieu, p. 86; Curasson, p. 211.) Be this as it may, the result of the decisions appears to be correctly summed up by Demolombe, and it would seem that in France at the present day damage to rights such as "droits d'accès" to streets are not deemed to constitute "expropriation." Indeed, upon a reasonable construction of the language of Art. 407 of the Code, it seems to apply to property which can be actually ceded, and for which indemnity could be fixed before it was ceded.

The compensation allowed in France for "dommage," as distinguished from "expropriation," seems to be founded on an equitable principle which the special laws have adopted subject to the regulations prescribed in them. But claims for damage, other than that arising from the cession of property, being for the loss caused by the execution of the works and as a consequence of them, it would be unreasonable to require previous indemnity; indeed, in many cases, the extent of damage cannot be previously ascertained. The distinction between the damage which grows from an expropriation, and that which arises from the execution of the works ("l'exécution ultérieure des travaux"), is plainly put and illustrated

by Delalieu. The latter, he says is, " non la suite de l'expropriation, mais la suite de l'exécution de travaux," and he shows how in the nature of things the indemnity for it cannot be assessed beforehand, but should be the subject of a subsequent inquiry, even in the case where an actual expropriation has taken place. (See Delalieu, Art. 301 to 305.)

Assuming, then, that the Plaintiff had rights in St. Felix Street which have sustained damage, their Lordships think he has failed to establish an expropriation, or an injury which would give him a right to preliminary indemnity, so as to make the Corporation wrongdoers, and their act in closing the street a trespass, and " une voie de fait," because such indemnity had not been paid It seems to them that if he has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this Corporation (27 and 28 Vict., c. 60) which will be hereafter considered. (See on this point Jones and Stanstead, Ry. Co., L. R. 4, P. C. 98.)

Their Lordships observe that one of the grounds on which Mr. Justice Taschereau has sustained the action, instead of sending the plaintiff to the Special Tribunal constituted by the Act referred to, is that the parties had submitted to the jurisdiction of the Court, but they are unable to find sufficient evidence of submission or consent in the Record to justify this conclusion.

Whilst upon the considerations just referred to, it seems to their Lordships that the present action is misconceived, they are reluctant to determine the case, without considering the other points (more nearly touching the merits of the claim) which were argued at the Bar. These were: that the Plaintiff had suffered no injury which, by the French Law, would give a right to indemnity; and that, if this were not so, the legislation authorising the act which caused the damage, had taken away the right of action, without providing compensation.

It cannot be denied that the Law of France allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Demolombe enumerates as undoubted the rights " d'accès ou de sortie, des vues, et d'égouts," (vol. 12, sec. 699) and the same rights are spoken of by Proudhon (vol. 1, Art. 369.)

The right of access to a house is of course essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the Law of France he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. The occupiers of the Plaintiff's houses can go from them into St. Felix Street, and pass from it into other streets, and through them into all parts of the City. The only effect of making the street a *cul de sac* so far as the rights of access and passage are concerned (apart from the loss of customers to be presently noticed) is that the Plaintiff's tenants have to go by other streets and further to reach the southern part of the City.

The Counsel for the Plantiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house in it as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view; but the weight of authority appears to be the other way. With all their industry the learned Counsel were unable to find, in the mass of French decisions on this subject, a single case in which it has been held that closing one end only of a street was an interference with the rights of access and passage which gave a claim to compensation. On the other hand, several authorities and decisions were cited to the contrary. Demolombe, in discussing the rights of access and other rights in streets (which he acknowledges are servitudes that cannot be interfered with by the Administration without making compensation), considers the passage a man enjoys over that portion of a street, which is not necessary for immediate access to his house, to be, not a right, but only an advantage of which he may be deprived without compensation. And among the instances of interference with mere advantages, as distinguished from rights, he gives the following:—"Comme si par exemple l'Administration diminuait la largeur de la place ou de la rue, ou même si elle fermait la rue par l'un de ses bouts, de manière à en faire une impasse." (Vol. 12, sec. 699.)

In Dalloz "Répertoire," tit. "Travaux Publics," sec. 816, it is said, that to give a claim to indemnity,

according to the constant jurisprudence of the Conseil d'Etat, the damage must be material, and the direct and immediate consequence of the works executed by the Administration, and that for indirect damage no indemnity is due. And in Section 818 he gives as an instance of indirect damage, "La dépréciation causée à une maison située dans une rue, qui par suite de travaux publics a été fermée à une de ses extrémités, alors qu'elle reste, du côté opposé, une communication avec autres rues."

In Dalloz "Récueil," 1856, part 3, p. 61, an important Arrêt of the Conseil d'Etat is set out, given in a case in which the owner of a house in a street at Toulouse, one end of which had been closed, claimed an indemnity of 40,000 fr. One of the considérants of this Arrêt, which affirmed the judgment of the Conseil de Préfecture rejecting the claim, is as follows:—

"Considérant que si la Rue de l'Orme-sec a été fermée aux voitures à celle de ses extrémités qui aboutissait à la dite place, elle est restée ouverte du côté opposé, et se trouve encore en communication avec la nouvelle Rue de l'Orme-sec, qu'ainsi la dite maison n'ayant pas été privée de son accès à la voie publique, la dépréciation qu'elle aurait pu éprouver ne constituerait point un dommage direct et matériel qui pût donner droit à une indemnité, &c."

It certainly then appears that in France the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with a servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and if this be so, there seems to be no reason or authority for declaring the law to be otherwise in Canada.

The authorities referred to leave untouched the question whether, if a street were stopped at both its ends, indemnity would be payable. It is enough to say that should such a case arise, it might possibly be contended with effect that a virtual destruction of the undoubted rights of access to the houses in the street so closed had been occasioned which would give to their owners a title to indemnity.

It was further contended for the Plaintiff that beyond the mere passage through the street of which the occupiers of his houses were deprived, he had sustained special damage by reason of the loss of

customers, who formerly came from the railway station into the street and were now prevented from doing so, and that thus the value of his houses for the purpose of the particular trades carried on in them was depreciated.

But it is to be observed that there was no authorized road from the railway station to this street, and the people who came into it from the station did so in an irregular manner, and by passing over the lines and works of the railway, in contravention of the bye-laws of the Company. This source of profit was obviously of a precarious kind, and cannot be regarded as permanent. The street does not appear to have been much used, being inconvenient, if not dangerous, from the frequent passing of railway trains, and, apart from the custom of the railway passengers, no special advantage seems to have been derived from its being a thoroughfare. French cases were cited to the effect that the loss of customers (unless, indeed, the right of access as before interpreted is infringed) would not be such a direct and immediate damage as would give a claim to indemnity. (See Dufour, "Droit Administratif appliqué," 275, 277, 323.) A similar decision was given by the House of Lords in Ricket *v.* Metropolitan Railway Company, L.R. 2, H.L. 175.

Whether, if the closing of the street had cut off the Plaintiff's houses from a place the occupiers had long used in connection with them, as from a wharf upon a public river, or had rendered the immediate approach to the houses difficult or inconvenient, he would have been entitled by French law to indemnity upon the principle on which two English decisions, turning upon facts of the kind just supposed, were determined, it is unnecessary to consider. But the present case differs from the supposed ones. The immediate access to the houses is not obstructed, and the occupiers of them had no special object beyond that of their neighbours in going to the part of the city which lies south of the barrier. Indeed, there is no evidence that any inconvenience was felt on this score, and probably none could have been given, for there appears to be another street, easily accessible to the occupiers of the Plaintiff's houses, by which this part of the city can be reached, and which, whilst only a little further, is probably more

commodious, being less liable to obstruction from the operations of the railway. The gravamen of the damage, as proved, was the loss of the custom of the railway passengers already adverted to. No doubt the distinctions in the cases on this subject are fine. The English decisions (which are only referred to by way of illustration) as well as the French have been conflicting, and the boundary lines between them are in consequence somewhat indistinct. (See Metropolitan Board of Works *v.* McCarthy, L.R. 7, H.L. 213. Beckett *v.* Midland Railway Company, L.R., 3 c., p. 97.)

One ground of damage complained of is due not to the discontinuance of the street, but to the manner of closing it. It is said the barrier which has been erected darkens the Plaintiff's houses.

It may be that the Plaintiff has some ground of complaint on this head, but he has not alleged in his declaration that the windows of his houses have been deprived of light, but only that the street has been darkened; nor does the evidence distinctly show a deprivation of light to an actionable degree, nor is such a deprivation found as a fact by the experts or the Judges. The great contest in the cause has been as to the damage arising from the suppression of the street, and not that due to the form of the barrier. Throughout Mr. Justice Taschereau's Judgment, in which that learned Judge ably supports his own view, there is no allusion to loss of light as a substantive grievance. If, however, this or other damage has been occasioned by the proximity of the barrier, it would be recoverable, if at all, under the Corporation Statutes. The amount of damage assessed in the action is, in the main, given in respect of loss of custom and the consequent depreciation in the value of the houses.

The other questions argued turned upon the Special Statutes relating to the Corporation. It was contended that these Acts excluded an action for indemnity, and gave no compensation in cases like the present. For the Plaintiff it was denied that the action was thus excluded, but it was said that, if taken away, compensation was given.

Upon the English legislation on these subjects, it is clearly established that a Statute which authorizes

works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the Statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable, if the work causing it had been executed without statutable authority.

In the Canadian Act (23 Vict. c. 72), authorizing the by-law in question, no compensation is expressly provided for the damage which may be caused by any of the acts it authorizes to be done. But in a previous Act (14 and 15 Vict., c. 128), provision for compensation is expressly made in two instances. Thus, the power to make by-laws for altering the footpaths or side-walks of any street is conferred subject to the provision "that the Council shall make compensation out of the funds of the city to any persons whose property shall be injuriously affected by any such alteration of the level of the footpath in front thereof." And the power to make bye-laws for changing the sites of markets and appropriating the sites, saves to any party aggrieved "any remedy he may by law have against the Corporation for any damage he might thereby sustain."

The Counsel for the Corporation referred to two or three other instances of express provisions in former Acts relating to this Corporation, and also to sets of Acts authorizing roads, bridges, and other public works, which provided compensation in express terms, and contended that it might be inferred from this course of legislation that the intention was to exclude compensation, whenever it was not expressly given.

On the other hand, the Counsel for the Plaintiff relied on the fact that no compensation was provided by the Act authorizing the bye-law in question, although the power it conferred would, it was

said, justify an interference with property, and with undoubted servitudes, and also upon the difference between English and French law, arising from the existence of the Article of the Code, and the dissimilar systems of procedure in the two countries. Their contention, in substance, was that the special Acts should be read with and subject to Article 407 of the Code in the cases to which it was applicable, and also to the general law which gave, in certain cases at least, a right to indemnity for damage.

Whatever may have been the effect of the special Acts relating to this Corporation before the passing of the 27 and 28 Vict., c. 60, they must now be read and considered with it. That Act is indeed a Statute upon expropriations. After reciting in the preamble that much difficulty was often experienced in carrying out the law in force relating to expropriations for purposes of public utility, it establishes a tribunal consisting of Commissioners for determining the value of property expropriated, and a system of procedure for such cases. Then the 18th section enacts that these provisions shall be extended to all cases in which it becomes necessary to ascertain the compensation to be paid for any damage sustained by reason of any alteration in the level of footways made by the Council, or by reason of the removal of any establishment subject to be removed under any bye-law of the Council, "or to any party by reason of any other Act of the Council, *for which they are bound to make compensation*."

It was contended for the Corporation that this general Clause referred only to such compensation as was expressly mentioned in their Statutes, though they could only point to two instances of such compensation which could satisfy the words, and these were contained in a Road Act (36 Geo. III, c. 9), the powers of which were transferred to the Corporation. Whilst, for the Plaintiff, it was said that if it be held that actions for indemnity are taken away, this sweeping clause ought to be construed so as to comprehend all cases of damage for which, by the general law, indemnity would be due, and as being, in effect, equivalent to the common clause in the English Statutes containing the words "otherwise injuriously affected."

Reading the clause in the latter sense, compensa-

tion would be expressly given by it to all who may suffer—to use the English phrase—actionable damage. A provision to this effect, if it be made, would no doubt be equitable and reasonable; whereas, if it be not made, the scheme of compensation provided by these Acts would seem to be defective. Their Lordships, however, do not think it necessary to decide in this Appeal the question thus raised;—since, in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27th and 28th Vict., 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.

It may be observed that the question of procedure in cases of this kind is not merely a technical one. This was pointed out in the Judgment of this Committee in Jones *v.* the Stanstead Railway Company. It is there said: "The claim for damages in an action in this form assumes that the Acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the Tribunal to which recourse should be had."

On the whole case, their Lordships find themselves unable to concur in the Judgment pronounced by the majority of the Judges of the Court of Queen's Bench, and they will humbly advise Her Majesty to reverse both the judgments below, and to direct that the action be dismissed with costs. The Respondent must pay the costs of this Appeal.

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