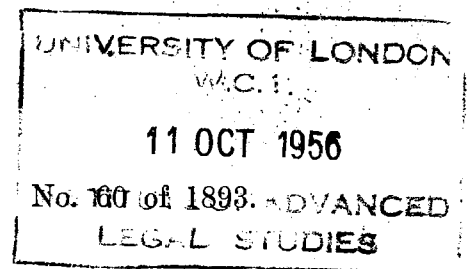


7,1895

In the Privy Council.



*ON APPEAL from the Court of Queen's Bench for Lower Canada,
Province of Quebec (Appeal Side).*

BETWEEN

THE HONOURABLE THOMAS CHASE CASGRAIN . *Appellant,*

AND

THE ATLANTIC AND NORTH WEST RAILWAY } *Respondents,*
COMPANY }

AND

THE CITY OF MONTREAL *Intervening Party.*

APPELLANT'S CASE.

1. This is an appeal from a Judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), of the 23rd of December, 1892, which reversed the Judgment of the Superior Court for Lower Canada, sitting in and for the district of Montreal, of the 16th of May, 1891.

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2. The proceedings were commenced by the then Attorney-General for Lower Canada, the Hon. A. Turcotte, against the Respondents, the Atlantic and North West Railway Company, under the provisions of sects. 997, 998 of the Canadian Code of Procedure, which are as follows :—

3. Sect. 997.—(1.) Whenever any association or number of persons acts as
10 a Corporation without being legally incorporated or recognized ;

(2.) Whenever any Corporation, Public Body or Board violates any of the

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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, privileges and franchises, or exercises any power, franchise, or privilege 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 interest; 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.

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4. Sect. 998.—The summons for that purpose must be preceded by presenting to the Superior Court in Term, or to a Judge in Vacation, of a special information containing conclusions adapted to the nature of the contravention, and supported by affidavits to the satisfaction of the Court or Judge, and the writ of summons cannot issue upon such information without the authorization of the Court or Judge.

5. The Respondents are a Corporation incorporated by an Act of the Dominion Legislature (42 Vict. c. 65) for the purpose of making a Railway passing through Montreal, and are subject to the provisions of the General Railway Act, the Revised Statutes of Canada, c. 109.

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That Act provides, *inter alia*, as follows :—

6. Sect. 2 (h).—The expression “highway,” includes any public road, street, lane, or other public way or communication.

7. Sect. 8, sub-sect. 30.—Upon payment or legal tender of the compensation or annual rent so awarded or agreed upon to the persons entitled to receive the same, or upon the payment into Court of the amount of such compensation in the manner hereinafter mentioned, this award or agreement shall vest in the Company a power forthwith to take possession of the lands or to exercise the right to do the thing for which such compensation or annual rent has been awarded or agreed upon.

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8. Sect. 12.—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 authority 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 completion of the works replacing the highway; and every company which violates the provisions of this section shall incur a penalty of not less than \$40 for each such violation, but in either case the rail itself, if it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction.

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9. The proceedings were taken by the Attorney-General on the relation of William Walker upon the allegation that the Respondents had violated the provisions of the Acts by which they were governed, and had exercised a power, franchise or privilege which did not belong to them by carrying their railway along a street or lane in Montreal called Blache Lane without the authority of the Municipal Council, and blocking up and obstructing it under the following circumstances :—

Record, p. 22.

10. Blache Lane was a *cul-de-sac* leading out of a street called Mountain Street, about 28 feet wide. It had been open and unobstructed at least from the year 1801, when it appears on a plan made by a W. Charland, now kept among the public documents of the Corporation of Montreal. Shortly before 1860 one of the proprietors of adjoining land claimed the lane, and placed a fence across it and planted it. Another owner of adjoining land commenced an action against him on the ground that it was a public street over which he had rights of way, and on the 9th of March, 1864, the Court of Queen's Bench for Lower Canada (Appeal Side) gave judgment for the Plaintiff on the ground that it was a public street, and ordered the obstructions to be removed. In the year 1865 the then city surveyor entered it in a schedule made by him of the streets of the city, and in 1869 the footpath was repaired at the expense of the municipal authorities.

Record,
p. 393.
Record,
p. 394.
Record,
p. 252.

Record,
p. 257.

Record,
pp. 392, 454.
Record,
p. 392.

11. In the year 1885 the municipality of Montreal, in accordance with the provisions of their statutes of incorporation, prepared a plan of the district showing, *inter alia*, the proposed improvements, which was duly homologated by the Superior Court, and thereby became binding upon the city and all other persons. On this the properties were marked which would be required for widening Blache Lane, and continuing it till it joined a street called Donegani Street. In accordance with this plan the city subsequently expropriated a part

Record, p. 59.

Record,
pp. 61, 90.

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12. By the law of Lower Canada the property in public streets is vested in the municipality, and not in the adjoining owners.

Record,
p. 105.

13. In the year 1887 the Respondents, who were erecting a large station not far from Blache Lane, proceeded to take under their compulsory powers the parts of the properties on each side of Blache Lane required for their works.

Record,
p. 289.

14. They did not take any steps to expropriate Blache Lane itself, or the land which had been purchased by the municipality of William Walker as above mentioned.

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Record, p. 84.

15. On the 1st day of February, 1888, the Respondents applied to the Municipal Council for their approval of plans showing the mode in which they proposed to cross the streets in the neighbourhood of their station. There was evidence that it could have been seen from these plans that their works would close Blache Lane. They did not, however, apply to the council for permission to obstruct the lane, or to carry their railway along it.

Record, p. 99.
Record,
p. 359.

16. In or about the year 1888 the Respondents proceeded to entirely close the entrance to Blache Lane, and to make an embankment upon it, and to run their railways along it.

17. There was evidence that the Respondents, at the time the arbitrations took place with reference to the purchase of the lands adjoining Blache Lane, had promised to some of the proprietors that Blache Lane should be replaced by a street giving a better access to Mountain Street. The evidence on this point was conflicting, and the question appears to have little bearing upon the present appeal.

Record, p. 21.

18. On the 4th of January, 1889, the Attorney-General for the Province of Quebec, the Hon. A. Turcotte, at the request of William Walker, authorized Messrs. Barnard and Barnard to use his official name to sue the Respondents, on condition that the Plaintiff made a deposit of 200 dollars to indemnify the Government against the costs of suit.

19. A petition was accordingly presented to the Supreme Court on February 19th, 1889, in the name of the Hon. Arthur Turcotte, in his capacity of Attorney-General of the Province of Quebec, which alleged that up to the year 1887 a street or lane called Blache Street or Blache Lane, having its outlet in Mountain Street, had been from time immemorial dedicated to the public and was public property. That the Respondents had closed the said street and made all ingress and outgress impossible to the public. That the closing the said street and keeping it closed so as to deprive the public in general, and the proprietors in the vicinity in particular, of using the same was illegal, and constituted the exercise by the Respondents of a power, franchise and privilege which did not belong to them, and was a case governed by Article 997 of the Code of Civil Procedure for Lower Canada. That the proceeding was taken at the request of William Walker, and that security for costs had been given by Thomas Darling. The petition concluded that a summons under the said Article should issue and the Respondents be condemned to re-open the street and leave it free for public use, and that in default of their doing so within fifteen days of judgment it should be re-opened at their expense. The petition was granted by Mr. Justice Mathieu, and a writ of summons issued accordingly, and William Walker made the deposit of 200 dollars as security for costs.

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Record, p. 22.

Record, p. 24.

20. The Respondents demurred to the action on the grounds, first, that Article 997 was not applicable to the case; secondly, that the Corporation of Montreal should have been joined. They also pleaded that having been incorporated by a Dominion Statute they were not amenable to the provincial authorities.

Record, p. 25.

21. They pleaded for a further plea, by way of exception, that Blache Lane had been always a private and not a public road, that the Respondents had acquired the lands adjoining the lane, including that of William Walker, who had received compensation for his land and all damages resulting from the expropriations, and had no legal interest entitling him to claim the re-opening of the lane.

Record, p. 26.

22. A demurrer was filed by the Plaintiffs to the first plea, and has been sustained both by the Superior Court and the Court of Queen's Bench, and the Respondents have not appealed. The Plaintiffs joined issue on the second plea.

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Record, p. 47.

Record, p. 20.

Record, p. 9.

23. On the 10th of September, 1889, the City of Montreal filed a petition for leave to intervene, which the Respondents contested on various grounds; but on October 5th, 1889, judgment was given by Mr. Justice Mathieu allowing the intervention. As the Interveners are not parties to the present Appeal it is unnecessary to state more fully the grounds of the judgment. Both Courts have held that it formed a sufficient answer to the second of the legal defences raised by the Respondents.

Record, p. 98.

24. The parties proceeded to take evidence at *enquête*, and it was agreed that the Plaintiff and the Intervener should be each entitled to avail himself of the evidence given by the other.

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25. In addition to the facts above stated, other evidence was adduced to show that Blache Lane was a public highway. The only evidence to the contrary was the statements of the city surveyor and some other officers of the city that they considered it a private lane. They did not, however, give any reason for this opinion, or prove any acts of ownership by any private person.

Record,
p. 119.

26. On July 9, 1890, the Attorney-General (the Hon. Arthur Turcotte) gave a special power of attorney to C. A. Geoffrion, who was the counsel for the Respondents, authorising him to instruct on his behalf Messrs. Barnard and Barnard to suspend all proceedings till further orders; and on Messrs. Barnard and Barnard, as counsel for William Walker, refusing to do so, the Attorney-General, on July 31, 1890, filed a formal discontinuance of the action without costs.

Record,
p. 120.

27. By the Canadian Code of Procedure it is provided—

S. 450. A party may, at any time before judgment, discontinue his suit or proceeding on payment of costs.

S. 451. Discontinuance may be effected by a simple declaration to that effect signed by the party or his attorney, and delivered into Court or filed in the prothonotary's office. It has no effect, however, against the opposite party unless it has been served upon him.

S. 452. Discontinuance replaces matters as of course in the state in which they would have been had the suit or proceeding not been commenced.

S. 453. A party who has effected a discontinuance cannot begin again unless he previously pays the costs incurred by the opposite party upon the suit or proceeding discontinued.

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28. On the same 31st of July, 1890, the Attorney-General wrote to Messrs. Barnard and Barnard a letter stating that he had ascertained that William Walker and the other proprietors whose lands abutted on the lane had commenced actions in their own names against the Respondents for damages for closing the lane; and having satisfied himself that, aside from the interests of those gentlemen, there was no public interest which required the reopening of the lane, he must refuse to allow his name to be further used in this prosecution, which was evidently being used only to force the payment of the damages sought to be recovered in the private suits.

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Record,
p. 127.

10 **29.** This letter appears to have been written, and the discontinuance filed, after communications from the Respondents and their advisers, and without giving the relator, William Walker, who had incurred heavy costs, any opportunity of explanation, and no proof was given of the statements in the letter other than the fact that William Walker, and the other adjoining owners, had commenced civil actions to recover compensation for the losses they had sustained by the closing of Blache Lane, which was not, and could not have been, claimed in the proceedings brought in the name of the Attorney-General.

Record,
p. 234.
Record,
p. 474.
Record,
p. 465.

30. On the 22nd August, 1890, William Walker filed a petition praying for a writ of mandamus to the Hon. A. Turcotte, in his capacity of Attorney-General, commanding him to withdraw the discontinuance, and to allow the Petitioner to proceed to obtain final judgment in the proceedings against the Respondents, with costs against the Hon. A. Turcotte personally, and a writ of mandamus was issued accordingly.

Record,
p. 121.

Record,
p. 128.

31. The Hon. Arthur Turcotte having ceased to fill the office of Attorney-General, the said William Walker, on the 28th of August, 1890, applied for and obtained a summons in *reprise d'instance* against the Hon. J. E. Robidoux, who had accepted the office.

Record,
p. 134.

32. On the 1st of September, the Hon. J. E. Robidoux appeared in his capacity of Attorney-General, and submitted himself to the Courts.

Record, p. 13.

30 **33.** The Hon. A. Turcotte, on the 3rd of September, 1890, filed an answer to the proceedings taken against him personally, alleging that he had acted in his official capacity, and in good faith, that he had a discretion to allow or

Record,
p. 135.

APPELLANT'S CASE. — refuse the use of his name, and that at the time of his filing the discontinuance the proceedings were being used in the private interests of the relator, and not in the public interest.

Record, p. 17.

34. The evidence having been completed, the case came on for hearing on the merits in respect of the original action, the intervention of the City of Montreal, and the proceedings on mandamus before Mr. Justice Mathieu, on the 16th of May, 1891, when the Court gave judgment and held—

1. That the action should be revived in the name of the Hon. J. E. Robidoux.
2. That the Attorney-General could not withdraw the permission to use his name without the authority of the Court, and the discontinuance, in the present case, was not justified, and must be rejected.
3. That the proceedings in mandamus were unnecessary, and the writ of mandamus must be discharged, but without costs.
4. That the case came within the provisions of section 997 of the Code of Procedure, as the Attorney-General alleged that the Respondents had assumed the power of closing a street which they had no power to close, and had thus assumed a power not given them by the law.
5. That the Respondents were not authorized to close the street, and the demands of the Plaintiff and the Intervener were well-founded as far as the street was concerned.
6. That the Intervener had not proved any damages. The judgment therefore ordered the Respondents to re-open the street within six months, and in default authorized the said William Walker and the Intervener to re-open the street at the cost of the Respondents.

35. From this judgment the present Respondents appealed to the Court of Queen's Bench for Lower Canada (Appeal Side), but neither the then Attorney-General, nor the Hon. A. Turcotte, appealed from that part of the judgment which rejected the discontinuance which had been filed by the latter. Nor was there any appeal in the proceedings in mandamus.

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Record,
p. 481.

36. On the 14th January, 1892, the then Appellants suggested that the Hon. J. E. Robidoux had ceased to be Attorney-General, and had been replaced in his office by the Hon. T. Chase Casgrain.

37. On the 13th of May, 1892, the Hon. T. Chase Casgrain filed a petition stating that he was desirous to take up the instance in his official capacity, and to support the judgment of the Superior Court, which was granted.

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Record,

p. 483.

Record,

p. 514.

38. The case came on for argument in the Court of Queen's Bench before Baby Blossé, Blanchet Hall, and Wurtelle, JJ., on the 6th and 7th of June, 1892, and on the 23rd December, 1892, the Court gave judgment reversing the judgment of the Court below, and dismissing the original demand, the intervention of the City of Montreal, and the writ of mandamus, the whole with costs in favour of the then Appellants, the Atlantic and North West Railway Company, and the Hon. A. Turcotte personally, in both Courts.

Record,

p. 515.

Record,

p. 516.

39. The grounds of the judgment were :—

1. That it had not been proved that the Defendant Company had assumed any power or franchise which did not belong to them, or had not been conferred on them by law.
2. That the Articles 997 and 998 of the Code of Procedure were not applicable to the case.
3. That the intervention should have been rejected for the same reason.
4. That the Attorney-General had a right to withdraw his consent to the proceedings, and require to be dismissed from the Court.
5. That the Attorney-General had given as his reason that private and not public interests were involved, and that this appeared from the evidence to be the case.
6. That a writ of mandamus would not lie against an officer of the Crown.

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The reasons for this judgment were delivered by the Hon. Judge Blossé, and are printed in the supplemental Record. From this judgment the Appellant obtained leave to appeal to Her Majesty in Her Privy Council.

40. The Appellant submits that the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) is erroneous, and that the judgment

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— of the Supreme Court is correct and should be restored for (amongst other) the following

REASONS.

1. Because Blache Lane was shown to be a public street, and the Respondents carried their railway along it without the leave of the municipal authority, and otherwise illegally obstructed it.
2. Because if Blache Lane was a private lane the Respondents had no right to take possession of it, and in particular of the addition to it purchased by the City of Montreal, without proper proceedings in expropriation and the payment of due 10 compensation.
3. Because the Respondents were proved to have violated the provisions of the Acts by which they were governed, and to have exercised a power, franchise or privilege which did not belong to them and was not conferred on them by law.
4. Because the case was within the provisions of sects. 997 and 998 of the Canadian Code of Procedure.
5. Because the right of the Attorney-General to discontinue the proceedings was not properly before the Court of Queen's Bench. 20
6. Because the Attorney-General had no right to discontinue the proceedings, at any rate without the consent of the Court, nor did he give any legal or sufficient reason for doing so.
7. Because the notice of discontinuance by the Attorney-General was irregular and invalid, and was not filed in due exercise of his discretion as Attorney-General.

8. Because there was no appeal in the proceedings on the writ of mandamus, and the Court had no authority to interfere with the judgment of the Superior Court thereon, or to make any order with respect to the costs of such proceedings. APPELLANT'S
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9. Because the judgment of the Supreme Court was right, and the judgment of the Court of Queen's Bench was erroneous in fact and in law.

HENRY MASON BOMPAS.

EDMUND BARNARD.

In the Privy Council.

*ON APPEAL from the Court of Queen's Bench
for Lower Canada (Appeal Side).*

CASGRAIN

V.

ATLANTIC AND NORTH WEST
RAILWAY COMPANY,

AND

THE CITY OF MONTREAL
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APPELLANT'S CASE.

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