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*Feb. 26.

*May 14.

THE CITY OF MONTREAL (PLAINTIFF) ..... } APPELLANT;

AND

JOHN MULCAIR, *et al.* (DEFENDANTS)..RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Municipal corporation—Highway—Encroachment upon street—Negligence —Nuisance—Obstruction of show-window—Municipal officers—Action for damages—Misfeasance during prior ownership—Non-feasance—Statutable duty.

An action does not lie against a municipal corporation for damages in respect of mere non-feasance, unless there has been a breach of some duty imposed by law upon the corporation. *The Municipality of Pictou* v. *Geldert* (1893) A. C. 524 and *The Municipal Council of Sydney* v. *Bourke* (1895) A. C. 433, followed.

An action does not lie against a municipal corporation by the proprietor of lands for damages in respect thereof, through the mistake or misfeasance of the corporation or its officers, alleged to have occurred prior to the acquisition of his title thereto.

A municipal corporation is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, (appeal side), reversing the judgment of the Superior Court, District of Montreal, in so far as it had dismissed the defendants' incidental demand with costs, and maintaining the said incidental demand as to the sum of $251.52, with costs in compensation and set off against the amount recovered by the plaintiff in the original action, and reserving defendants' recourse for such further damages as might accrue from time to time, from the continuance of the nuisance complained of.

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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The plaintiff brought an action for the recovery of special assessments for the widening of a portion of Notre Dame street in the city of Montreal, and to charge the defendants' lands for payment of the same, and the defendants, by an incidental demand, claimed damages against the city for negligence and misfeasance in permitting a nuisance to be created, to the injury of the defendants' property, by knowingly allowing a building on the adjoining land to be constructed so as to project about ten or twelve inches beyond the homologated street line and obstruct the view of a show-window in the defendants' building subsequently constructed upon the proper street line. It was alleged that an official from the city surveyor's office had pointed out the line incorrectly at the time the adjoining building was in process of construction, several months prior to the purchase of lands in question by the defendants, and it appeared that defendants had been refused permission by the civic officers, to erect their front wall upon the same line and thus an angle was made where the buildings adjoined, causing the obstruction complained of. The material facts proved in evidence are mentioned in the judgment reported. The judge in the trial court found a verdict for the plaintiff for $863.48 with interest and costs, and dismissed the defendant's incidental demand with costs, for the following reasons:—"Considérant que la projection provient du fait que la maison sur le lot No. 1791 a été construite durant l'année qui a précédé la démolition générale des maisons sur la rue Notre-Dame, pour l'élargissement de la dite rue, et qu'une erreur paraît avoir été commise alors au sujet de l'alignement; que cette projection de 8 à 9 pouces est insignifiante, si l'on prend en considération la hauteur et la largeur de la bâtisse, l'élévation et la grandeur

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des vitrines, et qu'elle ne peut causer aucun dommage appréciable à la propriété, soit comme maison de commerce, soit comme résidence." In the Court of Queen's Bench the former part of this judgment (maintaining plaintiff's action,) was affirmed and the present appeal is asserted only as to the reversal of the decision upon the incidental demand in the court below, and the reservation as to further actions for similar damages based on an annual indemnity for loss of rent or depreciation of the property.

Coyle Q.C. and *Ethier Q.C.* for the appellant. On this appeal the only questions for the consideration of the court are:—1st. Is the appellant responsible for the encroachment complained of? 2ndly. If so, have the respondents proved any damage for which the appellant can be responsible? and 3rdly. Is the basis of damages allowed, *i.e.*, an annual indemnity for loss of rent or depreciation of property, correct?

There has been no act proved to have been done by the plaintiff, or for which plaintiff can be held civilly responsible, by which the lands can have suffered since the defendants purchased the lands in question. No public nuisance is proved to have existed. The mistake charged against the plaintiff is alleged to have been committed whilst the lands belonged to other persons and is consequently *res inter alios acta.* In any case unliquidated damages cannot be set off against actually ascertained amounts due for taxes on land. Art. 1188 C. C.

The opinions of the respondents' witnesses on the question of possible damage are in direct conflict with the views of the witnesses for the appellants, who are fully as intelligent and competent and the evidence being of equal weight, damages should not be granted against appellants, the presumption being in their favour. The respondents have failed to prove any

actual damage suffered to their property or to their business. The evidence of the witnesses for the respondents appears to be based on mere generalities and the witnesses have little or no experience in valuing properties, whilst the evidence for the appellant is based on facts and figures and given by men of many years experience in the business, and whose ability and impartiality cannot be questioned. There is no evidence to shew any actual loss in the respondents' business that can be attributed to the projection of the building. This trifling projection of 8 or 9 inches in the front is no more than the depth of the pilasters which decorate the fronts of a large proportion of similar business buildings, and the contention that the respondents have suffered damages from it is wholly unfounded. The basis of valuing the damages in the Court of Queen's Bench is unjust and erroneous, and of a nature to allow speculative damages. The loss of rent allowed is a species of perpetual charge or insurance to guarantee to the respondents the same rental every year whether the property be well or badly administered, or whether there may or may not be general business depression. The indemnity allowed is *ultra petita*, not having been asked for in the pleadings. If damages are to be allowed, the proper basis for calculation is the value of the immovable itself. The appellants contend that the judgment of the Court of Queen's Bench should be reversed as to the incidental demand exclusively, and the Superior Court judgment restored in its entirety.

Lafleur and *Sicotte* for the respondents. The plaintiff neglected the duty imposed under the city by-laws and also gave an incorrect line, and tolerated the encroachments which resulted from this negligence and mistake. The plaintiff was bound to have caused the projecting wall to be demolished

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and to abate the nuisance. The defendants have the right to demand the abatement of the nuisance and to claim damages in consequence. See *Pettis* v. *Johnson* (1); *State of Indiana* v. *Berdetta* (2); and cases cited in 1 Am. & Eng. Enc. of Law, (2 ed.) at page 235 under the heading "Abutting Owners" and 2 Dillon "Municipal Corporations," pars. 731, 732.

Damages of this nature may be opposed in the present case in compensation because they result and flow from the same cause as the action, which asks for the assessment resulting from the expropriation, and the damages result also from the same expropriation and alteration of the street line. See *Davidson* v. *DeGagné* (3).

The judgment for damages is a finding of fact with which this court ought not to interfere; *Demers* v. *Montreal Steam Laundry Co.* (4). As to the amount of damages awarded no gross error has been committed and they have not been based upon false principles of law: *Levi* v. *Reed* (5); *Cossette* v. *Dun et al.* (6); *Gingras* v. *Desilets* (7).

The judgment of the court was delivered by:

GWYNNE J.—This is an action for the recovery from the defendants as now being the owners of a lot in the City of Montreal, known as lot no. 1790, on Notre Dame Street, in St. Anne's Ward, certain instalments of an assessment imposed and charged upon that lot of land by by-laws of the City of Montreal, passed in the year 1890 for the widening of Notre Dame Street before ever the defendants acquired an interest in lot 1790. To this action the defendants have pleaded the same matter by way of defence to the action and by way of incidental demand. The matter so pleaded

(1) 56 Ind. 139.
(2) 38 Am. Rep. 117; 73 Ind. 185.
(3) 20 R. L. 304.
(4) 27 Can. S. C. R. 537.
(5) 6 Can. S. C. R. 482.
(6) 18 Can. S. C. R. 222.
(7) Cass. Dig. (2 ed.) 212.

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has been held to offer no defence to the action and it is only with the incidental demand that we have to deal. The material facts upon which the incidental demand is based are these: The owners of lot number 1791 on Notre Dame Street, which lies to the east of and adjoining to the lot 1790, in the summer of the year 1890 erected a house upon their lot 1791 the foundation of which encroached across the homologated line of the street into the street for the distance of twelve and three quarters ($12\frac{3}{4}$) inches. Upon this foundation from the level of the street columns were constructed upon which the front wall was built, which columns extend only 8 to 9 inches into the street. On the 17th November, 1890, the defendants acquired the lot 1790 by purchase, and in the summer of 1891 they proceeded to erect a house upon the front of their lot on Notre Dame Street. It was then found that the house erected in the previous year upon lot 1791, before ever the defendants had acquired any interest in lot 1790, encroached upon the street to the extent above mentioned, and the defendants applied to the city officials for leave to erect their house upon a line in continuation of the line upon which the house on lot 1791 had been built. Neither any official of the city nor the city corporation itself had any power or authority whatever to authorise any encroachment across the homologated line of the street, and the defendants being so informed by the city officials proceeded to build their house along such homologated line. To this action, which was commenced in the month of August, 1892, the defendants on the 3rd of December, 1892, file this incidental demand which is for $5,000 damages alleged to be sustained by them by reason of the encroachment upon the street of the building erected on lot 1791 which, as is alleged, has made the defendants building on lot 1790, less suitable

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for their trade and has diminished its value. The damage alleged is that the projection of the building on lot 1791 for the distance of from 8 to 9 inches into the street prevents persons coming from the east along the same side of the street from seeing the defendants' show-window as soon as, but for the above encroachment, they could, and that thereby the defendants' trade is damaged and their house lessened in value to the defendants' damage of $5,000. The learned judge who rendered judgment in the case in the Superior Court, according to his appreciation of the evidence, was of opinion that this projection of the adjacent building beyond the homologated line of the street was insignificant and did not cause any appreciable damage to the defendants and he therefore dismissed the incidental demand and rendered judgment for the plaintiff in the action for the whole of their demand.

If this case turned wholly upon the question whether the projection spoken of causes actionable damage to the defendants I should entirely concur with the judgment of the learned judge of the Superior Court. It is true that in the evidence taken at the *enquête* there were not wanting expert valuators produced by the defendants who, on their examination in chief, singularly concurred in estimating the defendants' damage caused by the projection at $300 per annum, but none of them gave any satisfactory explanation of their mode of arrival at this estimate; one, indeed, whose estimate however only reached $250 per annum, gave his reasons very confidently which may be taken to be the reasons of all. One of these gentlemen, while he admits that there are no data to go upon, nevertheless thinks that the loss occasioned to the defendants by their show windows being obstructed by the 9 inch projection *would probably* be from $300 to $400 per annum. Another gentleman, *while he can-*

not say there is any loss upon rental, nevertheless thinks the defendants loss to amount to from $300 to $400 per annum, because he thinks a show window is a good mode of advertising and the view of the show-window is obstructed by the 9 inch projection to persons coming up the same side of the street from the east. A third, who in like manner estimates the defendants damage at $300 per annum, gives no reason for his opinion further than that a prominent window is of great value for the business of merchant tailors doing business for cash. A fourth, who also estimates defendants' loss at $300 per annum, says that *he speaks only from information*, that he has been informed that the projection spoken of would to persons in the business of the defendants, that is merchant tailors, make a difference of $300 per annum in the rent. The fifth, who alone gives his reasons, a Mr. Rielle, says:

> The effect of the projection is that *the defendants door* cannot be seen by persons moving west on that side of the street until they are practically opposite the door itself, and as a consequence many a one *may pass their door* without seeing it, *and in the event of the adjoining store being occupied for the same kind of business* the defendants window could easily be taken for the show-window of the adjoining building.

It is not then, in the opinion of this witness, the view of the show-window which is obstructed, but a door which is at the angle of defendants building immediately contiguous to the projection. "It is difficult," he says, to estimate with precision "the damage resulting from such a condition of things," and he accordingly proceeds to solve the difficulty, "from two points of view" thus:—

> First, a certain number of people, transient customers, will undoubtedly pass the defendants' door without seeing it *and will consequently* make their purchases elsewhere. *Assuming* one such case to happen daily, and an average loss of seventy-five cents or a dollar in each, *we have a yearly loss of two hundred and fifty dollars*, say four

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thousand dollars at five per cent; *or assuming again* that the sale o one suit of clothes per week is lost on which five dollars would be netted, we have $250 per annum of loss.

Again he says:

One simple remedy would be to take down the front of defendants' building and set it up again in a line corresponding with the projecting building. The cost of such an operation would in my opinion represent the measure of damage suffered by the defendants and I estimate it as follows:

His estimate then is for pulling down and re-erecting the front wall on the new line, etc.	$3,250
Loss of rent of two stores, say.....	1,200
Loss of business during operation, say.....	1,250
	$5,700

and he concludes thus:—

I take the ground that the only real way to decide the problem is to take down the front of the building and *re-erect* it on the line of the adjoining property, and that is my estimate of such an undertaking—five thousand seven hundred dollars including loss of rent and loss of business.

This witnesses estimate which is founded wholly upon assumptions, amounts to this, that *assuming* the daily or weekly loss to be as *assumed*, the yearly loss would amount to $250, and the only way in the opinion of this witness to compensate such loss is to estimate the cost of pulling down the defendants' building and to re-erect it on a line with the building on lot no. 1791 and by so extending the encroachment on the street to transfer to the adjoining neighbour the damage of which the defendants complain as being caused to them by the nine-inch projection on lot 1791.

The defendants also called two of their salesmen whose mode of estimating the damage alleged to be caused by the projection is no less singular. They undertook to prove the damage by comparison of their sales in different years. It is necessary here to premise that the defendants' building was completed in

February, 1892, and that in December of that year, after ten months' occupation, they profess to have discovered the damage of which they complain in their incidental demand. The building was erected so as to have in it two shops capable of being used separately with domiciles above. In February, 1892, the defendants entered into occupation of the shop in the half of the building next adjoining lot 1791, the other or westerly half in which was constructed the show window spoken of as being so good as an advertising medium they did not occupy that year. Now the sales in the year commencing in February, 1892, amounted to $20,797.82; in the year 1893, to $25,609.15. During this year they occupied both shops and had the benefit of the show window in the westerly shop. In the year 1894 they let this shop, retaining in their own occupation the shop next adjoining lot no. 1791, and which they had occupied in 1892; this diminution of $4,811.33 from the sales of the previous year they attribute to their not having had the benefit of the window in the westerly shop which they had had in the previous year. The tenant of that shop had the benefit of the window in it. Then in 1895 their sales in the shop which they had occupied in 1892 and 1894 amounted to $17,466, and the conclusion sought to be drawn from this evidence is that the amount of the sales in 1895 being $4,811.33 less than the amount of the sales in 1894, and $3,321.76 less than the amount of the sale in 1892, the first year of occupation, is attributable to the 9-inch projection complained of which was in existence, and had the same operation during the whole period for which the sales are given.

The plaintiff also called several witnesses, all of whom unanimously concur that the projection complained of is absolutely innocuous to the defendants,

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that it does not in any respect diminish the value of defendants' building whether for sale or rental or use for purposes of trade; they say that such projections, in one form or other, as columns, pilasters, porticos and such like are quite common in the city of Montreal and nobody thinks of complaining of them as damaging to an adjoining building, and in the opinion of some of the witnesses not one person in ten thousand would think of complaining of the projection in the present case. Some of the witnesses who have passed the place hundreds of times never in point of fact noticed the projection until their attention was called to it for the purposes of the present suit. All of those witnesses give their reasons for the conclusion in which they all concur as to the projection being innocuous to the defendants in an intelligent and clear manner and one, by a plan which he has made, and lines drawn thereon from several points to the defendants' shop, seems to demonstrate almost the correctness of that conclusion. In short, comparing the evidence given on the part of the plaintiff with that given on the part of the defendants who present this incidental demand, the former so appears to carry conviction with it, and the latter to be so imaginative, speculative, assumptive and illusive, that for my part I find it impossible to arrive at any other conclusion than that arrived at by the learned judge who rendered judgment in the case in the Superior Court.

But the case in my opinion does not rest solely upon a question as to whether or not the defendants have in point of fact sustained damage to any, and if any, to what amount occasioned by the projection into the street which is complained of. An action of this nature cannot be sustained unless it is alleged in the pleadings and proved in evidence that the corporation have committed a breach of some duty alleged to have

been owed by them to the party complaining from which breach of duty the damage complained of has arisen. The incidental demand in the present case does not allege any breach of any duty alleged to have been due by the corporation to the incidental plaintiffs. It does not allege the committal by the corporation of any public nuisance for damage arising from which the defendants as parties specially injured were entitled to sue. It alleges no act of misfeasance whatever by the corporation as giving a right to the defendants to present their incidental demand. It does not allege either any single act of non-feasance by the corporation of any duty owed to the public which is contended to have given to the defendants ground in law for presenting their incidental demand. That the non-feasance of any such duty would not give any cause of action to an individual injured thereby unless an action should be expressly given by statute, [*see* the judgments of the Privy Council in *Municipality of Pictou* v. *Geldert* (1), and *Municipal Council of Sydney* v. *Bourke* (2),] must be taken to be conclusive; and there is no such statute in the present case. The allegation in the incidental demand is simply to the effect that the incidental plaintiffs are suffering damage by the decrease in value of their property by the city of Montreal *allowing* the proprietors of lot No. 1791 to build beyond the homologated line of Notre Dame street *or* not obliging them to build in a straight line, *and allowing* them to hide the incidental plaintiffs' place of business. There is not a *single act* alleged whereby the corporation of the city of Montreal professed to allow the owners of lot 1791 to encroach upon the street when erecting their building. The corporation had no power whatever to allow any such encroachment. If they had

(1) [1893] A. C. 524. (2) [1895] A. C. 433.

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assumed to do so such action on their part would have been simply inoperative and void, and would not in the slightest degree have interfered with the defendants' right themselves to indict the encroachment as a nuisance, or to bring an action against the persons maintaining the erection in the street for the damage alleged to be thereby caused to them. The construction of the incidental demand as pleaded, and the only construction which can be put upon the expression therein "in allowing" etc., must be, and the sole foundation upon which the incidental demand is based is, a contention that the plaintiff is liable to an action at the suit of the defendants for damages suffered by them and occasioned by the owners of lot 1791 having wrongfully erected their building so as to encroach upon the public street, and so as to do to the defendants the damage complained of. No cause of action which is maintainable at law against the corporation is involved in such a statement of facts. There is no allegation that the corporation is given by any Act of Parliament power to abate the nuisance complained of *propriâ manu*, or otherwise than by the same process of law as is open to the defendants who, if they really suffered the damage of which they complain, had a substantial motive to act themselves, and as already observed, upon the authority of the Privy Council in the cases above referred to, neglect of the corporation to take action to abate the nuisance and so to remove the cause of damage would not give a cause of action to the defendants to recover the damages alleged to be attributable to the nuisance unless such action be expressly given by statute.

The Court of Queen's Bench in appeal have reversed the judgment of the Superior Court and have given judgment against the plaintiff upon the incidental demand for the sum of $250 per annum, the precise

amount of the annual damage occasioned by the encroachment as estimated by the witness Rielle for the reasons given by him as already stated. This judgment proceeds upon the ground therein alleged that the line upon which the building upon lot 1791 was erected in 1891 was given by the corporation and that the persons who erected that building were bound to conform to the line so given. But there is not any allegation in the incidental demand that the corporation did give to the owners of lot 1791 the line upon which they constructed their building. There is no issue raising such a point, and consequently no evidence was admissible for the purpose of establishing the existence of a fact not alleged, and as to the existence of which there was not any issue joined to be tried. With submission I find it difficult to see how a mistake, if one was made, by the corporation in giving the line in 1891 to the owners of lot 1791 can be invoked by the defendants who at that time had no interest whatever in the lot 1790, upon which in 1892 they erected the building alleged to be damaged, the mistake, if made, was wholly *res inter alios acta*, and if the fact of the mistake having been made by the corporation was a fact necessary to be established in order to support the incidental demand, the corporation of the City of Montreal surely have a right to insist that the facts necessary to be established to enable the defendants to recover should be alleged upon the record. Such a mistake, if made, may have given to the owners of lot 1791 a cause of action against the corporation for any damage occasioned to them by the mistake, but how the defendants can avail themselves of such a mistake as giving to them a cause of action against the corporation in the absence of any statute to that effect I fail to see ; no such cause of action is expanded upon the record.

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If ever the question of the liability of the corporation should arise between them and the owners of lot 1791 it will be necessary to consider whether a mistake in the line of a street can be established to have been made and given by the corporation otherwise than by the production of a *procès-verbal* mentioned in sec. 12 of by-law no. 3 of the consolidated by-laws of the corporation which enacts that it shall be the duty of the City Surveyor.

> when required by any person wishing to build on any street or public place in the city to establish, by a survey, the line of such street or place in the city *and to draw up a procès-verbal of the same a copy of which shall be delivered to the proprietor* or person requiring such alignment on payment of a sum of two dollars to be accounted for to the City Treasurer.

It is, in my opinion, only by force of this by-law, that the corporation assumed any obligation to give to a proprietor of a lot abutting on a street the boundary line of his lot upon the street. There is no such obligation imposed by the common law, nor is it suggested that there is any Act of Parliament which imposes such an obligation; neither does there seem to be any good reason why an owner of a lot should not himself incur the responsibility of ascertaining the boundary lines of his own land which is situate upon a street; that he can do so is apparent on the by-law, for by it the corporation is only called into action by a requisition of the person desiring to build on his land. There is an homologated plan of the line of the streets which is accessable to everyone, and any surveyor or civil engineer employed by the lot owner is as competent to determine the line with reference to the homologated plan as is the City Surveyor, but by the above by-law, and by that alone, the city corporation have assumed the obligation as therein stated, and such being the mode by which the obligation is incurred, it will have to be considered and determined

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whether or not it is not by the by-law that the city must be judged upon a question arising as to the fulfilment of the obligation; in other words whether it is not only by a *procès-verbal* given as directed by the by-law, that the act of the City Surveyor, or of his subordinates, can be held to be the act of the corporation. It is a matter of grave importance to municipal corporations like the city of Montreal that acts of their servants should not be deemed to be acts of the corporation unless they are done within the scope of the authority conferred upon the servant doing the act, and as a mode is prescribed by the by-law, (by which alone the obligation is assumed), to be followed for the purpose of procuring the corporation to give to a proprietor the line of his lot where it abuts upon a street in the city, that that mode alone should be pursued in order to make the act of the servant the act of the corporation. The defendants have always had, and still have the right if they are damaged in the manner alleged, to bring their action against the person who erected and maintains the building which does the damage alleged. I have already said that in my opinion the incidental demand as pleaded did not warrant the reception of any evidence for the purpose of establishing a fact not alleged, namely, that the city corporation gave to the owners of lot 1791, as the homologated line of the street, the line upon which they erected their building, but evidence with that view was offered by the defendants and taken down at the *enquête*, and, as the judgment now in appeal has proceeded upon that evidence, I must say that in my opinion it was wholly insufficient for the purpose for which it was adduced, even if it had been admissable as upon a point put in issue in the case. The evidence was that of the mason who was employed to erect the building by the owners of lot

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no. 1791. He said that a person, whom he did not know but who, he supposed, came from the office of the City Surveyor, made certain marks upon the old side-walk and upon the old building which was about to be removed for widening Notre Dame street there, and that this person told witness that the homologated line of the street was 21 feet 6 inches, to the best of the witness's recollection, from those marks, and that he, the witness, measured such distance, and so himself determined the site of the line of the street, and so *non constat* but that the error was committed by the witness himself, for no error appears in the line of the street at either side of the building erected on lot 1791. Now this evidence does not disclose any act whatever which can be said to have constituted a breach of any duty which the corporation owed to the defendants, nor can the act of the person who made the marks spoken of by the witness, even assuming him to have been a subordinate in the City Surveyor's office, be said to have been the act of the corporation upon the true construction of the by-law which seems to me to have been framed so as to prevent the corporation being affected by any such loose act open to the confliction in evidence incident to oral testimony, and held responsible for it as an act of the corporation, even though committed by one of their servants.

For all of the above reasons I am of opinion that the appeal should be allowed with costs, and the judgment of the Superior court restored.

Appeal allowed with costs.

Solicitors for the appellant: *Roy & Ethier.*

Solicitors for the respondents: *Sicotte, Barnard & Macdonald.*