

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Mayor, &c. of Montreal v. Harrison Stephens, from the Court of Queen's Bench for the Province of Quebec, Canada; delivered February 1st, 1878.*

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Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal in a suit brought by Mr. Stephens against the mayor, aldermen, and citizens of Montreal, in which he prayed the Superior Court to declare void an assessment which had been made upon him as his share of the amount to be paid for certain lands which were taken for the purpose of improving the street called Little St. James Street, in the city of Montreal; he also prayed for damages to be awarded to him by reason of his having had his goods distrained under a warrant of distress for the amount of that assessment.

It is not necessary, having regard to the view which their Lordships have taken, to refer to the earlier proceedings.

It is sufficient to state that on the 3rd July 1867, it was resolved by the Corporation of the city of Montreal to widen Little St. James Street on its north-west side from Place d'Armes Hill to St. Gabriel Street, and that a petition was presented by the corporation to one of the Judges of the Court, in which they represented the fact, and after stating that they had given the necessary notices, prayed that his Honour would choose, nominate, and appoint three competent and disinterested persons to act as com-

missioners to fix and determine the price and compensation to be awarded and allowed for each and every of the said lots of ground or real property required by the corporation for the purposes of the said improvement, and that a day might be fixed and appointed upon which the said commissioners should begin their operations, and also the day upon which they should make their report. Upon that petition an order was made on the 19th January 1868, by which three commissioners were appointed for the purpose of fixing the amount of compensation to be paid for the lands which were required to be taken for the improvements, and it was also enjoined that the said commissioners should commence their operations on the 15th day of January then current, and should make their report on the 15th day of April then next. That order was made in conformity with the provisions of clause 2 of the 13th section of the 27th and 28th Victoria, chapter 60, which is in the following words: "The Court or Judge, as the case may be, to whom the said petition shall have been presented shall appoint three commissioners as aforesaid and fix the day on which the said commissioners shall begin their operations, and also the day on which they shall make their report; provided always, it shall be lawful for the said Court or the said Judge to extend the said delays upon reasonable grounds being shown to that effect." By clause 5 of the same section it is enacted "that the commissioners shall be duly sworn before the prothonotary of the said Superior Court in the form specified in the annexed schedule marked A, and they shall be vested with the same powers and entrusted with the same duties as are conferred by the laws in force in Lower Canada upon experts in reference to appraisements, and they shall be entitled to receive a remuneration not exceeding 4 dollars per day

“ each during the whole time they shall of  
 “ necessity be occupied in the performance of  
 “ the said duties.” By the 333rd section of the  
 Code of Procedure of Lower Canada it is enacted,  
 with regard to experts, that they shall “ fix the  
 “ time and place at which they will proceed with  
 “ the investigation, and notify the parties, al-  
 “ lowing a delay of at least three days when  
 “ the distance from the domicile of the parties  
 “ respectively does not exceed five leagues, and  
 “ one day more for every additional five leagues.”  
 The commissioners, having the duties of experts  
 imposed upon them by the 5th clause, were  
 bound to fix the time and place at which they  
 would proceed with the investigation, that in-  
 vestigation being to ascertain the amount which  
 was to be paid for the land necessary to be taken  
 for the improvement of the street. The com-  
 missioners then having been appointed, fixed the  
 day. It has not been shown in the present case  
 what was the day fixed for commencing their  
 proceedings, but it may be assumed that they  
 were commenced before the 24th April when the  
 last protest was presented. The commissioners  
 had first to ascertain and determine the amount  
 to be paid for the land required, and afterward,  
 to make their report on the day fixed by the  
 Judge, the 15th April.—By the 11th clause of the  
 section, it was enacted that—“ So soon as  
 “ the said commissioners shall have completed  
 “ the proceedings relating to the appraisement,  
 “ and determined the price or compensation for  
 “ the pieces or parcels of land or real property  
 “ about to be expropriated, they shall give public  
 “ notice by means of two placards, one in the  
 “ French and the other in the English language  
 “ to be posted upon or in the immediate vicinity  
 “ of such pieces or parcels of land or real estate;  
 “ that on the day mentioned in the said notice  
 “ all parties interested or claiming indemnity,  
 “ who may consider themselves aggrieved by

“ the said appraisalment, shall be heard before  
 “ them in one of the rooms of the City Hall;  
 “ and when such parties aggrieved or claiming  
 “ indemnity shall have been heard as aforesaid,  
 “ it shall be lawful for the said commissioners  
 “ to maintain or modify, at their own discretion,  
 “ the appraisalment made by them of any piece  
 “ or parcel of land or real estate as aforesaid.”  
 Then section 12 proceeds: “ On the day fixed  
 “ in and by the judgment appointing the said  
 “ commissioners, the corporation of the said  
 “ city, by their attorney or counsel, shall submit  
 “ to the said Superior Court, or to one of the  
 “ Judges thereof respectively, the report con-  
 “ taining the appraisalment of the said commis-  
 “ sioners for the purpose of being confirmed and  
 “ homologated to all intents and purposes, and  
 “ the said Court or Judge, as the case may be,  
 “ upon being satisfied that the proceedings and  
 “ formalities herein-before provided for have been  
 “ observed, shall pronounce the confirmation and  
 “ homologation of the said report, which shall  
 “ be final as regards all parties interested, and  
 “ consequently not open to any appeal.”

If the Act of the 27th and 28th Victoria, chapter  
 60, had not been altered or amended, it would  
 have become the duty of the assessors of the city,  
 under section 22 of the Act, to assess the amount  
 to be paid for expropriation upon the different  
 persons benefited by the improvements. But by the  
 12th section of the 29th and 30th Victoria, chapter  
 56, section 22 of the 27th and 28th Victoria, chap-  
 ter 60, was repealed, “ and it was enacted that the  
 “ commissioners, at the same time that they  
 “ determine and fix upon the amount of the  
 “ price, indemnity, or compensation for each  
 “ and every of the pieces or parcels of ground  
 “ required by the corporation of the said city  
 “ for purposes of improvements, shall also pro-  
 “ ceed to assess and apportion, in such manner  
 “ as to them may appear most reasonable, the price

“ or compensation, indemnity, or damage, and  
 “ cost of such expropriation or improvement, in  
 “ whole or in part, conformably to the resolution  
 “ of the said council, upon all and every the  
 “ pieces or parcels of land or real estate which  
 “ shall have been benefited or may hereafter be  
 “ benefited by such improvement.”

The assessors under the Act of the 27th and 28th Victoria, chapter 60, section 22, were to commence the assessment as soon as the report of the commissioners should have been ratified and confirmed: but by the 29th and 30th Victoria, chapter 56, section 12, the commissioners are to assess and apportion the compensation at the same time that they determine upon and fix the amount of it. It was contended in argument that the words “ at the same time ” were merely directory, but their Lordships are of opinion that the words were used by the Legislature to denote that the fixing of the amount and the apportionment of it should both be completed whilst the powers of the commissioners as commissioners exist, that is to say, within the time fixed by the Judge for the making of the report, or that to which the time has been duly extended.

It therefore appears to their Lordships to be clear that the commissioners could not assess and apportion the amount after their report had been homologated. The Act, however, does not say that the persons who are named as commissioners shall assess and apportion, but that the commissioners shall do it, that is, they are to do it *qua* commissioners, and not as individuals. After they have made their report, they are *functi officio* as commissioners.

No act of the commissioners can be performed by a less number than a majority of them. If after their report has been homologated two of them should die a judge could not appoint fresh commissioners to make the apportionment under

the 27th and 28th Victoria, chapter 60, section 13, sub-section 10; nor if, after the commissioners have made their report they should fail in their duty in making the assessment, could a judge, under sub-section 9 of the last-mentioned section, remove or replace them.

For these reasons their Lordships are of opinion that the decision of the Court of Queen's Bench was correct; being of that opinion it is unnecessary for their Lordships to decide the other questions which have been raised in this case. One of these questions is whether, according to the true construction of the 31st Victoria, chapter 37, it did or did not apply to a proceeding which had been commenced before the day on which the Act was passed.

It was urged that unless the assessment be upheld the corporation will have no means of recovering the amount of the valuation which they deposited and paid for the land taken for the improvements. Upon this their Lordships must remark that the deposit was made after the corporation had full notice that the parties objected to their proceedings.

The only remaining question is as to the effect of the action and the judgment which has been pronounced upon it. The prayer of the Plaintiff is, "That the said pretended assessment roll be declared to be illegal, irregular, null and void, and of no effect, and that it be set aside, and the Plaintiff's property be declared free from the said pretended assessment and taxes." It was contended that the Plaintiff had no right to have the assessment set aside altogether. He certainly does pray to have it set aside, but the substance of his prayer is that it be declared null and void as to him, and that it did not warrant a distress being made upon him. The action was a mere personal action, in which he sought to be relieved

from the distress upon his property and to have damages for the illegal act of seizure. The judgment does not declare that the assessment is to be set aside, but merely "That this Court is "unanimously of opinion that the judgment of "the inferior Court which has declared null the "assessment made by the commissioners ought "to be affirmed." It cannot have the effect of a judgment in rem, and must be construed to mean that the assessment was null and of no effect against the Plaintiff, and that he recover the damages assessed by the Superior Court.

For these reasons their Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench. The Appellants are ordered to pay the costs of this Appeal.

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