Judgment of the Lords of the Judicial Committee of Her Majesty's Privy Council on the Appeal of Dame Harriet Morrison and others, v. *the Mayor, Aldermen, and citizens of the city of Montreal, from the Court of Queen's Bench for the Province of Quebec, Canada; to be delivered* 10*th December,* 1877.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THEIR Lordships are called upon in this Appeal to reverse two Judgments of the Court of Queen's Bench at Quebec with reference to the amount of compensation to be paid by the Respondents, the Corporation of the City of Montreal, to the Appellants, as proprietors of certain lands expropriated for the purpose of forming a park, to be called Mount Royal Park.

It appears that, by an Act of the Colonial Legislature, 27 and 28 Vict., cap. 60, the Corporation were authorized to make very extensive improvements in the city of Montreal, and for that purpose to take lands compulsorily. By the preamble it was recited that the then existing law of expropriation led to great delays, and by section 13 a new mode of assessing compensation was provided.

By that section it was enacted that in case the Corporation should not be able to come to an amicable arrangement with the persons interested in the ground or real property required to be taken, as to the price or compensation to be paid for the same, the Superior Court of Lower Canada for the district of Montreal, or a Judge thereof, should appoint three

competent and disinterested persons as Commissioners to fix and determine the price or compensation to be allowed for such land or real property, and that the Court or Judge should fix the day on which the Commissioners should commence their operations, and also the day on which they should make their report.

By sub-section 5 of that section, the Commissioners, before proceeding, were to be duly sworn, and they were vested with the same powers and entrusted with the same duties as were conferred by the laws in force in Lower Canada upon experts in reference to appraisements, one of those duties being to view the property to be appraised.

By sub-section 7 it was enacted that it should be the duty of the Commissioners to diligently proceed to appraise and determine the amount of the price, indemnity, or compensation which they should deem reasonable, and they were thereby authorized and required to hear the parties and to examine and interrogate their witnesses, as well as the members of the Council and the witnesses of the Corporation; but it was declared that the said examination and interrogatories should be made *vivâ voce* and not in writing, and consequently should not form part of the report to be made by the said Commissioners. The section then provided that if, in the discharge of the duties devolving upon the Commissioners, there should occur a difference of opinion between them, the decision of two of the Commissioners should have the same force and effect as if all the said Commissioners had concurred therein.

Sub-section 12 was as follows:—

"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 containing the appraisement of the said Commissioners, 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 hereinbefore 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."

That sub-section was afterwards amended by the

35 Vict. cap. 32, sec. 7, which contained, amongst other things, the following words:—

"Sub-section 12 of clause 13 of the Act 27th and 28th Victoria, chapter 60, is amended by adding at the end of the said clause the following words, to wit: 'for the purposes of the expropriation;' but in case of error upon the amount of the indemnity only on the part of the Commissioners, the party expropriated, his heirs, and assigns, and the said Corporation may proceed by direct action in the ordinary manner to obtain the augmentation or reduction of the indemnity, as the case may be, and the party expropriated shall institute such action within fifteen days after the homologation of the report of the said Commissioners, and if upon such action the Plaintiffs succeed, the Corporation shall deposit in Court the amount of the condemnation, to be paid to the party or parties entitled thereto."

By the 32 Vict. cap. 70 (Quebec Statutes), power was given to the Corporation to form a park, to be called "Mount Royal Park," and by section 20 it was enacted that all the land required for the park should be deemed to be within the city, and that all the powers of expropriation possessed by the Corporation of Montreal, should extend to it. By section 22, however, an alteration was made as to the mode of appointing the Commissioners to value the property to be expropriated, and it was enacted that one should be appointed by the Corporation, one by the party whose property should be expropriated, and the third by a Judge of the Superior Court.

Such being the state of the law, the Corporation on the 14th March, 1873, gave notice of their intention to take an estate of which the Appellants were the owners, called "The Mount Tranquil Estate." The estate contained 3,543,104 superficial feet, equal to about 96 arpents and $\frac{28}{100}$, and Commissioners were appointed to fix the price or compensation to be paid for the same. The Commissioners were Alexander McGibbon, Esq., on behalf of the Corporation, John McLennan, Esq., appointed by the Appellants, and Robert W. Sheppard, Esq., appointed by a Judge of the Superior Court.

There may be a slight difference between a superficial foot in Canada and a superficial foot in England; but it will be sufficiently accurate for the purpose of this case to consider a superficial foot in Canada as equal to a superficial foot in England;

and to treat the total quantity of land to be expropriated as amounting to about 81 English acres and a fraction.

On the 26th June, 1873, the Commissioners made a unanimous report by which they fixed 210,000 dollars as the amount to be paid as compensation. On the 5th July, 1873, the report was homologated, and confirmed by the Honourable Mr. Justice Torrance, one of the Judges of the Superior Court, after due proof adduced of the observance of all the formalities and proceedings required by the 27 and 28 Vict., cap. 60, and the 32 Vict., cap. 70.

On the 18th July, 1873, the Plaintiffs commenced an action against the Respondents in the Superior Court for Lower Canada, alleging in their declaration that, in awarding the sum of 210,000 dollars, the Commissioners had fallen into error upon the amount of indemnity, and that they ought to have awarded the sum of 539,920 dollars, which was the true value of the property, for purposes of expropriation.

The Defendants, by their plea, denied that there was any error so far as the Plaintiffs were concerned or interested, and alleged that the sum of 210,000 dollars was, and is, in excess of the real value of the property.

The case was tried in the Superior Court by the Honourable Mr. Justice Johnson, who awarded to the Plaintiffs the sum of 245,000 dollars, in addition to the amount of 210,000 dollars previously paid under the award of the Commissioners. From that Judgment the Defendants, the present Respondents, appealed to the Court of Queen's Bench for the province of Quebec, and the Plaintiffs, the present Appellants, presented a cross Appeal, seeking to augment the sum awarded to them by the Superior Court by the sum of 429,920 dollars, making the total amount 100,000 dollars in excess of the amount claimed by them in their action.

The Appeal and Cross-Appeal were heard together, and on the 22nd June, 1876, the Court of Queen's Bench reversed the Judgment of the Superior Court and dismissed the action of the Plaintiffs. The Honourable Mr. Justice Monk and the Honourable Mr. Justice Ramsay, two of the Judges of the Court

of Queen's Bench, dissented from the Judgment of the majority of the Judges of that Court.

It was contended on behalf of the Respondents that, in order to maintain an action upon the ground of error on the part of the Commissioners in respect of the amount of the indemnity, it must be shown that the award of the Commissioners was erroneous with reference to the evidence which was adduced before them. It has, however, been held in the Court of Appeal in Canada, in the case of Montreal *v.* Bagg, 19 Lower Canada Jurist, 136, and also in the present case, one learned Judge only dissenting, that whenever it can be shown that the Commissioners have arrived at a wrong conclusion with respect to the value of the property or the amount of compensation, the party expropriated is entitled to maintain an action to obtain an augmentation of the indemnity. Their Lordships are clearly of opinion that that is the proper construction of the Statute. The construction contended for is wholly inconsistent with the 27 and 28 Vict., cap. 60, sec. 13, cl. 7, by which it was enacted that the examination of the witnesses should not form part of the report of the Commissioners, and also with the 7th section of the 35 Vict., cap. 32, by which the party expropriated is authorized, in the case of error on the part of the Commissioners, to proceed "by direct action in the ordinary manner" to obtain an augmentation of the indemnity, which necessarily includes the right to adduce evidence in support of the action.

The substantial question to be determined in this Appeal, therefore, is whether the evidence adduced in the action was sufficient to prove that there was error on the part of the Commissioners as regards the amount of the indemnity awarded by them. In determining that question their Lordships are of opinion that the prospective capabilities of the land ought to be taken into account, and that for the purpose of this Appeal it may be assumed that some enhancement of price ought to be made upon the ground of the proprietors being obliged to part with their land compulsorily.

It was urged that at the time when the Commissioners made their award it had been determined by the Superior Court that, in valuing land for the purpose of expropriation, the prospective capabilities

were not to be taken into consideration; and that, although that decision was reversed on appeal to Her Majesty in Council, the appeal had not been decided at the time when the Commissioners made their reports, and that it must be assumed that the Commissioners did not take into consideration the prospective capabilities.

The Commissioners in their Report are silent as to their reasons; but their Lordships, having regard to the evidence adduced before the Commissioners and to the amount awarded by them, viz., 210,000 dollars, cannot suppose that the Commissioners excluded from their consideration the prospective capabilities, or the fact that the expropriation was compulsory. Calculating the dollar at 4*s*., the sum awarded was equal to 42,000*l*., which for 81 acres was at the rate of nearly 520*l*. an acre for the land which at the time of the expropriation was producing but little, if any, profit.

The 245,000 dollars awarded by the learned Judge in addition to the 210,000 dollars awarded by the Commissioners make a total of 455,000 dollars, which at 4*s*. a dollar is equal to 91,000*l*., or upwards of 1,120*l*. an acre for each of the 81 acres, of which some of the witnesses stated that not more than one-half was fit for building purposes.

The learned Judge held very properly that the only question before him was one of fact, which must be determined by the evidence given in his presence.

The real issue, as it appears to their Lordships, was, Was there error on the part of the Commissioners in awarding only the sum of 210,000 dollars, and, if so, to what extent were the Plaintiffs entitled to an augmentation of it.

The Report of the Commissioners, which under the former law would have been final, must, notwithstanding the alteration of the law, be considered correct until it is proved to be erroneous. The onus of proving error on the part of the Commissioners lay upon the Plaintiffs. The judgment of the Commissioners, as expressed in their Report, was entitled to great weight. It was not in this case merely the judgment of a majority. The Report was unanimous, and was one in which the Commissioner appointed by the Appellants them-

selves concurred. Their Lordships are of opinion that it ought not to be lightly overturned, and that the learned Judge did not give sufficient weight to it. He treated the question before him as he would have done if he had had to assess the amount of compensation in the first instance. He said he must determine it according to the evidence which he had heard, and by which he considered himself to be bound as absolutely as he would be by evidence proving the items of a tradesman's bill.

Treating the subject in that manner, the opinion of the Commissioners had no more weight attached to it than if they had made no report at all. In another part of his Judgment the learned Judge remarked:—"I have to judge according to the evidence. As I view the case, the law no more makes me judge of the value of real estate, apart from the sworn evidence before me, than it makes me judge of the value of pork, or flour, or any other thing of which the value is in question before me. In the one case, as in the other, I can only know what is proved." If this evidence is untrue, it was the business of the Defendants to contradict it, which they have not done. If it is true, I have done no injustice in acting upon it.

The learned Judge seems to have taken too narrow a view of his functions. It was his duty to make use of his own judgment and experience in deciding whether the opinions of the witnesses were sufficient to outweigh the judgment of the Commissioners. In their Lordships' opinion the learned Judge attached too much importance to the opinions of witnesses, which were chiefly of a speculative character; and they have to observe that the amount awarded by him exceeded the valuation of some of the claimants' own witnesses.

Their Lordships, therefore, concur with the majority of the Judges of the Court of Queen's Bench in the opinion that the judgment of the learned Judge of the Superior Court cannot be sustained. This being so, they are driven to the alternative of either affirming the judgments of the Court of Queen's Bench or of themselves fixing the amount of indemnity which ought to be paid. Notwithstanding the obvious inconvenience of the latter course, they would consider it their duty to adopt it if they saw clear proof that there had been

a miscarriage of justice. But having listened with great attention to the arguments of the learned counsel for both parties; and having weighed with great care all the evidence in the cause, they have come to the conclusion that they would not be justified in declaring against the opinion of the majority of the Judges of the Court of Queen's Bench that there was error on the part of the Commissioners with regard to the amount of indemnity determined by them.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the Judgments of the Court of Queen's Bench and to dismiss this Appeal. The Appellants must pay the costs of the Appeal.

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