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*Mar. 13.

*Mar. 22.

FREDERICK FAIRMAN AND OTHERS (PLAINTIFFS) ..... } ...APPELLANTS;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } ...RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH PROVINCE OF QUEBEC, APPEAL SIDE.

Municipal corporation—Montreal City Charter—Local improvements—Expropriation for widening street—Action for indemnity—52 V. c. 79 (Que.)—54 V. c. 78 (Que.)—59 V. c. 49 (Que.)

Where the City of Montreal, under the provisions of 52 Vict. ch. 79, sec. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected and, notwithstanding the subsequent amendment of the statute in December of that year, by 59 Vict. ch. 49, sec. 17, the city was bound, within a reasonable time, to apply to the court for the appointment of commissioners to fix the amount of the indemnity to be paid, to levy assessments therefor and to pay over the same to the owner, and, having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan* v. *The City of Montreal* (31 Can. S. C. R. 1) distinguished.

The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *The Grand Trunk Railway Co.* v. *Coupal* (28 Can. S. C. R. 531) followed.

APPEAL from the judgment of the Court of Queen's Bench, Province of Quebec, Appeal Side, reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

A statement of the case will be found in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

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

Fitzpatrick K.C. (Solicitor-General of Canada), and *Archer*, for the appellants, cited *Jones* v. *Gooday* (1); *Thayer* v. *City of Boston* (2); *Waldron* v. *City of Haverhill* (3); *Seldon* v. *Village of Kalamazoo* (4); *Soulard* v. *City of Saint Louis* (5); *Meuller* v. *St. Louis and Iron Mountain Railroad Company* (6); *Banque d'Hochelaga* v. *Montreal, Portland and Boston Railway Company* (7). The plaintiffs are entitled to recover indemnity for the land taken by ordinary action in the courts, as the city failed and refused within a reasonable time to take proper steps to have the indemnity fixed as provided by statute. This case is distinguished from *The City of Montreal* v. *Hogan* (8), which was a case of trespass where the city never had a title; here they have complete title and lawfully took possession of the property.

Atwater K.C. and *J. L. Archambault K.C* for the respondent. The city is prohibited from proceeding with the expropriation on account of the circumstances contemplated by 59 Vict. ch. 49, sec. 17, and cannot go on until the financial position has improved. The proposition to take possession and widen the street, etc., was always subject to the observance of the formalities of expropriation which have not been, and for the present cannot be, completed, by fixing the price and assessing parties liable for the special tax. These events not having happened the agreement became and remains ineffective, and plaintiffs have only a choice between taking mandamus to compel the city to proceed and having their property restored to its former condition, recovering damages, if any, which they may have suffered in the meantime. D Otherwise they are bound to wait till conditions permit of the

(1) 8 M. & W. 146.
(2) 19 Pick. (Mass.) 511.
(3) 143 Mass. 582.
(4) 24 Mich. 383.
(5) 36 Mo. 546.
(6) 31 Mo. 262.
(7) 12 R. L. 575.
(8) 31 Can. S. C. R. 1.

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continuation of expropriation proceedings, now prohibited by the statute. The principle upon which the indemnity was assessed in the trial court by striking an average is also wrong and, in this case, resulted in excessive damages, which could not be sanctioned by an appellate court. We refer to *Hollester* v. *The City of Montreal* (1); *The Grand Trunk Railway Company* v. *Coupal* (2); and *The City of Montreal* v. *Hogan* (3). The city must be ruled to-day by the provisions of 62 Vict. ch. 58, which also governs the plaintiffs in respect to their remedy.

The judgment of the court was delivered by

GIROUARD J.—This case affords another illustration of the glorious uncertainty of the law governing the City of Montreal. It would require the ingenuity of a Philadelphia lawyer, to use an old popular expression, to ascertain exactly where the powers of the city council end, and the rights of the citizens commence Charters after charters, containing hundreds of clauses and sub-clauses, have been passed and repealed, the last two being in 1889 and 1899, without any indication of what is old or new law, so that the greatest confusion exists in almost everything. No laws have produced more litigation, and the decisions alone of the Privy Council and of this court, in cases where the City of Montreal is a party, would form almost one volume. This confusion we pointed out in *Hollester* v. *The City of Montreal* (1); *Crawford* v. *The City of Montreal* (4); and *The City of Montreal* v. *Hogan* (3).

These cases, like the present one, turned upon the application of section 17 of 59 Vict. ch. 49:—

> The said council shall not be bound to make the improvements, the cost whereof in whole or in part has to be paid by the city, and which

(1) 29 Can. S. C. R 402.
(2) 28 Can. S. C. R. 531.
(3) 31 Can. S. C. R. 1.
(4) 30 S. C. R. 406.

exceeds the limits of the power to borrow, without prejudice to recourse for damages, losses and expenses incurred by reason of the non-execution of the said improvement.

This Act was sanctioned and became law on the twenty-first of December, 1895.

It appears that at this time and for a few years previously, the appellants were proprietors of a valuable property known as Erskine Church, at the corner of St. Catherine and Peel streets, upon which they intended to erect stores. In 1894, architect Dunlop prepared plans for them with a view of making such alterations to the church building as would be necessary for a departmental store. On the second of November, 1894, the majority of the proprietors in the district sent the following petition to the city council :—

We, the undersigned proprietors and taxpayers of St. Antoine Ward, respectfully suggest the immediate purchase of the strip of land about fifteen feet in width projecting into Peel street, between St. Catherine street and Dominion Square.

We understand that this property can be had at a reasonable price without any expropriation proceedings, and as the owners have applied for a permit to erect a building thereon, according to plans prepared by A. F. Dunlop, architect, it is essential that early action be taken.

This is a matter of great importance, as Peel street at that point is already too narrow for the traffic on it and must eventually be widened.

The petition having received the recommendation of both the Road and Finance Committees, the council at its session of the twentieth of May, 1895, adopted the said recommendation, which reads as follows :—

That they have considered the accompanying petition and recommend that the line of the proposed widening of Peel street on the east side be extended to St. Catherine street, as shewn on plan hereunto annexed, so as to make said street of a uniform width between Dorchester street and St. Catherine street, in the St. Antoine Ward.

They further recommend that the city attorney be instructed to take the necessary steps to procure said change in the homologated plan of said St. Antoine Ward.

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Consequently the city attorneys applied to the Superior Court for a modification of the homologated plan of the city, which was granted by Mr. Justice Doherty on the eighth day of June, 1895.

On the nineteenth of June, 1895, the appellants forwarded to the city surveyor, Percival W. St. George, and the Road Committee, the following offer:—

> Having the intention to take advantage of the dispositions of the charter of the City of Montreal, relative to the annual expropriations which will take place according to section 222 of the charter, as amended by 54 Victoria, chapter 78, (Quebec), and being desirous and willing to cede and abandon to the said city that part of that immovable property designated as numbered fourteen hundred and fifty-seven, (1457), of the cadastre of St. Antoine Ward, in said city, which said part of immovable belonging to us is situated and comprised within the old line of Peel street and the new line, as it appears by the homologated plan of the said ward, we respectfully ask now from you to indicate the lines of said homologated plan as regards said part of said immovable property to be so expropriated in order that we may get the benefit of said cession so made the said city, and in order that said portion of immovable property be inscribed in the list of annual expropriations to be made during this year.
>
> We, moreover, consent that the city should take at once possession of said land.

The offer was duly recommended by the Road and Finance Committees and, finally, on the twenty-third of August, 1895, the council adopted their reports, which read as follows:—

> That they have considered the accompanying offer of cession of a strip of land on Peel street according to section 222 of the charter as amended by the Act 54 Vict. chap. 78, and they recommend that said strip of land lying between the old line of Peel street and the homologated line of said Peel street be expropriated under the provisions of the law governing the annual expropriations and the said strip of land, as shewn on plan hereunto annexed, be included in the list of properties to be expropriated this year.

On the tenth of October, 1895, the appellants wrote to the city clerk:—

We are ready to allow the city to take possession of the piece of property necessary for the widening of Peel street as ceded by us some time ago from the old Erskine Church property and now awaiting the expropriation of the same. We ask also that a "firimite sidewalk" be made both on Peel street and St. Catherine street, and would be willing to pay half the cost of the same. We are making important improvements upon the property and expect to have the same ready for occupation on December 1st: we would, therefore, urge that this sidewalk be proceeded with at once.

An estimate of the cost of the firimite sidewalk was made by the city surveyor on the fourteenth of October, 1895, shewing that it would cost $1,554.95. The construction of this sidewalk was recommended by the competent committees, and on the eighteenth of November, 1895, the council adopted their reports, which are in the following terms:—

'That they have considered the accompanying petition of F. Fairman and C. C. Holland, and they recommend that a firimite sidewalk be laid outside of their property, corner of Peel and St. Catherine streets at an estimated cost of one thousand three hundred and thirty-two dollars and ninety-five cents ($1,332.95) one half the cost thereof to be paid by the petitioners and the other half by the city.

As the season was too far advanced, this firimite sidewalk, about twelve feet wide, was not constructed till May, 1896, and at the same time the balance of the land, two and one-half feet, was paved in asphalt as part of the carriage road; but in the fall of 1895, the corporation at once cut down a row of trees and laid down a temporary sidewalk and took possession of the piece of land in question, fourteen and one-half feet by one hundred and seventy feet, making 2,487 square feet, says Mr. St. George, which was immediately open to the public and has ever since remained in the possession of the city as part of Peel street.

Nothing further was done towards fixing or paying the indemnity. The respondents thought that, armed with the new powers granted to them by the Legislature in December, 1895, they were not called upon to

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move. In September, 1896, they were sued for what the appellants alleged to be the value of the property forming, they alleged in their declaration, 2,486 feet in superficies, namely, eighteen dollars per square foot, or a total of $44,748. What was their answer? They admit that they are bound to pay an indemnity under the expropriation laws, but only when the limits of their borrowing powers will permit them to do so, as provided for by section seventeen of 59 Vict.. ch. 49, quoted above. In the alternative, they offer back the land, and at the argument before us invoked our decision in *The City of Montreal* v. *Hogan* (1).

The two cases are not alike. In the latter case there was no cession by the proprietor, no possession by order of the city council, but merely the tortious acts of its officers. Hogan alleged in fact that the city had taken possession of his land illegally. Here, on the contrary, the city has a valid title. The proprietors say so, and the city does not deny it, and could not deny it. Section 313 of the charter of 1889, which was then in force, enacts that the city may acquire any property required for public utility either "by agreement or expropriation." The agreement was perfect, and the fact that the price to be paid was to be determined by the commissioners to be named by the court, is not inconsistent with the validity of the cession, for even under the common law the price of sale may be determined by third parties to be named. Pothier, Vente, *nn.* 24 and 25. Even section 222, as amended in 1890, by 54 Vict. ch. 78, sec. 7, recognizes the validity of such a cession. Expropriation, that is transmission of land, and payment of indemnity are two different things. The latter is a personal right which may be renounced by the proprietor, partly or wholly. He may be willing to rely upon the credit

(1) 31 S. C. R. 1.

and good faith of the expropriating party. This indulgence is often in the best interests of all parties, and it is not surprising to find it sanctioned by the jurisprudence of all modern countries. De Lalleau, *nn.* 753, 754; Am. & Eng. Encycl. of Law, vo. "Eminent Domain," pp. 1102, 1144.

The city's pretention that under section 17 of the Act of 1895, 59 Vict. ch. 49, they are not bound to proceed, is altogether unfounded. This enactment applies only to future improvements, and not to past ones, for instance the enlargement of Peel street in the fall of 1895. The respondents understood this so well that in May, 1896, they laid down the pavement, asphalt in part on the carriage road, and the firimite sidewalk, in pursuance of the order of the council in 1895. They should have done more; they should have demanded from the court the appointment of commissioners to fix the indemnity and collected the same.

The appellants are therefore entitled to their indemnity, without waiting any longer. If the respondents are called upon to pay otherwise than provided by the expropriation laws they have only themselves to blame. They even allege in their plea that they do not intend to proceed, and nothing else is left for the proprietors to do but to take their remedy at common law. They might perhaps have forced them to move by writ of mandamus, but the city cannot take advantage of that objection, as they were in default and now declare they will not act under the expropriating statutes.

Twelve witnesses have been examined by the plaintiffs upon the question of value of the land and as many for the defendant. There is great variance in their opinions, as always happens in such cases, ranging from five dollars to twenty-five dollars per foot. The trial judge (Lemieux J.), who maintained the action,

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considered all the witnesses equally competent and reliable and he therefore took the average of their figures, and acting upon that principle, which this court condemned in *The Grand Trunk Railway Co.* v. *Coupal* (1), allowed them about thirteen dollars per foot. or a total of $32,818.50. Chief Justice Lacoste, who dissented in appeal, considers that this amount is not too much. With due deference, I believe it is not only exaggerated but also arbitrary.

The appellants and one D. Graham bought and took possession of the Erskine Church property on the 23rd of September, 1892, although the deed was signed only on the 20th of April, 1893. There was at that time quite a "boom" in real estate on St. Catherine street in the neighbourhood, where several of the large retailers of the lower town had already moved up, or were about to move. The price paid by the appellants was six dollars per square foot, or a total of $128,730.

A summary of the registered transfers in that district, proved in the case, shews that about six dollars per foot was the market price from 1889 to 1897. In 1889 only one sale was recorded, corner of Mansfield street, bought by the Bank of Montreal for six dollars per foot. In 1890 and 1891 no transfer appears. In 1892, one for $2.33 and another for $9. In 1893, eight transfers, three below $6, two at $6, and one at $7.25, one at $9.86 and one at $11. In 1894, two transfers, one at $5 and the other at $9.92. In 1895, one at $5.70. In 1896 and 1897, to May, one at $5.

The appellants paid cash $28,730, and the balance of $100,000 they promised, by the deed of sale, to pay on the 23rd of September, 1897, with interest at the rate of five per cent from the 23rd of September, 1892.

On the 17th of November, 1892, to avoid a *partage* or licitation, Mr. Fairman purchased the one-third of Mr.

(1) 28 Can. S. C. R. 531.

Graham for $12,000 ; but if we take into consideration the one-third of the purchase money the latter paid in cash, namely $9,576.66, his share of the interest of the balance for nearly fourteen months, amounting to about $1,934, his share of the taxes, amounting altogether to $1,100, insurance and probably some law costs in relation to the transaction, it is clear that Mr. Graham merely recouped himself without realising any profit. Up to the time of the expropriation, the plaintiffs received no rent, and from the 1st of January, 1896, their tenants, H. and N. E. Hamilton, agreed to pay them $7,000 per annum and the taxes during the whole duration of the lease, viz., ten years. The landlords undertook to make certain alterations in the buildings, which they did during the fall of 1895, but there is not the slightest evidence of their cost or value.

The rate of interest payable to the *bailleurs de fonds* establishes that, at the time of the expropriation, in 1895, the appellants considered that five per cent was the value of money. Witnesses for the plaintiffs, Bishop and Dunlop, who alone express an opinion upon the subject, think that real estate should bring a net return of six per cent says one, and four and one-half says the other. Probably five per cent is the correct figure, just as the rate of interest on money agreed to by the appellants. At that rate it will take $6,436 of the rental to pay the interest on the original purchase price, leaving only $564 per annum for insurance and wear and tear, without speaking of the alterations made in 1895, to make a church building suitable for a departmental store.

The wear and tear, insurance and taxes, Mr. Bishop, the only witness who speaks on the subject, values at one and one-half per cent, or about $1,930 per annum. We know that the taxes amount to $1,100, thus leaving $830 to be charged annually against the property for insurance and wear and tear.

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Under these circumstances, I would give the appellants six dollars per square foot, the price they paid or $14,916 with interest thereon from the 1st of November, 1895, date of the expropriation and possession, for which amount, judgment should be entered against the respondent, the whole with costs before all the courts

Appeal allowed with costs.

Solicitors for the appellants: *Archer & Perron.*

Solicitors for the respondent; *Ethier & Archambault.*