

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of The
Mayor, Aldermen, and Citizens of the City
of Montreal v. Thomas S. Brown and Jas.
K. Springle, from the Court of Queen's
Bench for the Province of Quebec, Canada ;
delivered Saturday, November 11th, 1876.*

Present :

SIR BARNES PEACOCK.

SIR ROBERT COLLIER.

SIR HENRY KEATING.

THIS is an Appeal from the judgment of the Court of Queen's Bench of Lower Canada (appeal side), delivered on the 20th September 1873, reversing, in favour of the present Respondents, the judgment of the Superior Court sitting at Montreal of September 17th, 1870, upon a petition of the Appellants. The judgment of the Superior Court stayed the proceedings of the present Respondents, Commissioners in Expropriation, and of one Damase Masson, their Co-Commissioner, and removed the Respondents, replacing them by two other persons mentioned in the judgment. A petition similar to that of the Appellants was presented at the same time to the Superior Court by Walter Benny and others, and the judgments, both of the Superior Court and of the Court of Appeal, were delivered on both petitions. Leave to appeal also was granted to all the parties, as well as to the Appellants. There is no Appeal lodged by Walter Benny and others against the judgment of the Court of Queen's Bench, but the case for the Appellants states that the Appeal is

prosecuted not only on their own behalf, but on behalf of those parties.

The case turns upon the powers and duties of the Commissioners in Expropriation appointed under a statute passed by the Provincial Parliament of the 27th and 28th Victoria, chapter 60. That Act recites that in consequence of the rapid extension of the City of Montreal, it became necessary to lay out streets and make other arrangements for the public convenience, and that difficulty and delays were oftentimes experienced in doing so by reason of the defect of the laws then existing. We are informed that the mode of proceeding to expropriate before the Act was to make the valuations by means of the intervention of juries, as with us, in cases where agreements cannot be come to. The Act goes on to give power to the corporation of the City to adopt various ways of making the improvements in question, and to direct whether they are to be paid for out of the funds of the City or whether the cost is to be assessed upon persons interested in, and benefited by, the improvements. If the council cannot enter into an amicable agreement with the owner of any land which it may be necessary to take for the purpose of those improvements, they are then to proceed in a way pointed out by the Act, viz., that having given public notice of their intention, and a special notice to the owner, they are to apply to the Superior Court or, if the Court be not sitting, to a judge of that court in chambers, to choose and nominate three competent and disinterested persons to act as Commissioners to fix and determine the price or compensation to be allowed for the property so to be taken; and there is a sub-section which obliges the parties named to accept the nomination under a penalty specified. The Commissioners so appointed are to be sworn,

and invested with the powers, and to have the duties, of experts in conducting their valuation. It is their duty to "determine the amount of the price, indemnity, or compensation which they shall deem just and reasonable" for the land to be taken "or for the damages caused by such expropriation," and they are invested with powers to examine witnesses, to call for deeds, and all other powers necessary for the performance of their office. In case of difference the valuation of the majority is to prevail. There is then the provision upon which this case mainly turns, which is contained in sub-section 9 of the Act. That sub-section provides, "If one or more of the said commissioners at any time after their appointment shall fail in the due performance of the duties assigned to them in and by the present Act, or shall not fulfil the said duties *in a faithful, diligent, and impartial manner*, it shall be lawful for the corporation of the said city by its attorney to apply by summary petition to the said Superior Court, or to a judge thereof, as the case may be, to stay the proceedings of the said commissioners, and to remove and to replace the commissioner or commissioners who may have forfeited or violated his or their obligations, and upon such petition the said Court or judge may issue such orders as may be deemed conformable to justice." Then it goes on to provide, that so soon as the commissioners shall have completed their valuation they are to give public notice to all parties to come in at a certain time and raise any objections that may occur to them with reference to the valuation so made, and which therefore in some sense may not improperly be termed a preliminary valuation, because the Act goes on to say that,— "it shall be lawful for the said Commissioners to

“ maintain or modify at their own discretion
“ the appraisement so made by them.” The
Act then provides that the corporation shall
submit to the said Superior Court or to one
of the judges the report containing the
appraisement of the 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
“ herein-before provided for have been observed,
“ shall pronounce the confirmation and homo-
“ logation of the said report, which shall be
“ final as regards all parties interested, and con-
“ sequently not open to any appeal.” As to
that judgment by homologation therefore any
appeal upon it is thus undoubtedly taken away.

The Respondents and a Mr. Masson were
appointed Commissioners, and they proceeded
to value the property of a Mr. Wilson, who
was the owner of a piece of land which had a
double frontage in two streets, St. Joseph
Street, which it was intended to enlarge, and
another street called McGill Street. It was
necessary to take a portion of his land for
the purpose of widening St. Joseph Street, the
effect of which would be to diminish the
frontage in both streets. The Commissioners
proceeded to value under the Act of Parliament,
and there was a difference of opinion between
them as to the value, Mr. Masson making the
lower estimate, and the present Respondents
making their estimate considerably higher, the
higher estimate being 19,500 dollars, and the
other between 7,000 and 8,000 dollars only. The
Respondents, however, having given the public
notice required by the statute, and having certain
facts brought before them of which they say
they were previously unaware, reduced their
estimate to 13,066 dollars.

Meanwhile it was known of course what their first valuation had been, and this appears to have excited great surprise and disappointment on the part of those who were to be called upon to contribute to the payment; accordingly petitions were presented to the Superior Court both by Walter Benny and others, who were to be contributories, and by the corporation, who are the present Appellants. The petitions were to the Superior Court, and contained charges of very scandalous fraud and partiality upon the part of the two commissioners who had made the higher valuation, and prayed for their removal and for the appointment of other commissioners in their place. Their Lordships think it unfortunate that such charges were made, because it turned out there was no ground whatever for them. They were made however, and the Respondents were called upon to answer them. That they were called upon to answer these charges, and that in a formal way, appears distinctly from the following order of the Court:—"By consent of all parties it is ordered
 " by his honour Mr. Justice Berthelot that delay
 " be granted to the 4th day of September next for
 " the said commissioners to answer the petition
 " of the said Walter Benny *et al.*, and the
 " Mayor *et al.*" Accordingly, they appeared, answered, and pleaded to the petitions in a formal way. To those pleas there were replications, and the case proceeded to issue. The issues having been joined, and an articulation of facts delivered, witnesses were examined on both sides; and after such examination, Mr. Justice Berthelot delivered the judgment of the Court. By that judgment it was decided that the Respondents, although not guilty of the serious charges which were made against them, had in their valuation adopted a principle which was so palpably erroneous, that its adoption amounted

to a want of diligence that justified the court in ordering their removal; and accordingly it was ordered that they should be removed and others appointed in their place, and that the valuation of the others should proceed. Thereupon the present Respondents appealed to the Court of Queen's Bench in Canada, and the first question that arises is, whether an Appeal lay from the judgment pronounced by the Superior Court to the Court of Queen's Bench. That question turns mainly upon the construction of the 1,114th and 1,115th Articles of the Code of Procedure, which embodies the provisions of previous Acts of Parliament.

The 1,114th Article of the Code provides, that error may be brought by means of a writ of error against any judgment of the Superior Court, founded upon a general verdict given by a special jury. It must be brought before the Court of Queen's Bench sitting in appeal, and questions of law are only to be argued. The 1,115th Article provides, that "an appeal lies to the same Court upon *any other final judgment* rendered by the Superior Court, except in matters of certiorari." The 1,116th Article says, "An appeal also lies from interlocutory judgments in the following cases, when they in part decide the issues, or when they order the doing of anything which cannot be remedied."

It was argued that the decision of the Superior Court was not a final judgment within the meaning of that article of the code, inasmuch as it was given in a proceeding commenced by petition under the provisions of the Act of Parliament referred to, and had not the incidents of a judgment subject to an appeal, not having been commenced by a writ of summons, the ordinary mode of commencing an action; further that it was not enforceable by writ of execution, but was merely a decision in a matter where the Superior

Court had summary and final jurisdiction. It was also contended that inasmuch as the right of Appeal from the homologation of the report was taken away, it was not probable that the Legislature intended a proceeding before homologation to be appealable. On the other hand, it is to be observed that the terms of Article 1,115 of the code are quite general: "Any other final judgment rendered by the Superior Court;" that the decision of the Superior Court is not only in the form of an ordinary *jugement motivé*, which is the form required in a case where the judgment goes by appeal to the Court of Queen's Bench, but it is expressly described as a judgment by the Court which pronounced it. It is true that the cause was commenced by petition, but copies of that petition were regularly served on the parties, they were by the Court called upon to answer, and did so by pleas, to which there were replications, then articulations of facts, and the other proceedings usual in an ordinary suit. Witnesses were called; they were examined and cross-examined on both sides by the advocates of the respective parties, and finally judgment was delivered, declining to give the costs which were prayed for by the petition, but entailing other serious consequences, as well as pecuniary loss, on the Defendants in the suit. The Judges of the Court of Queen's Bench considered that under the circumstances, looking to the real substance, and not merely to the form of the proceedings, the Respondents had the right of appeal from what was to all intents and purposes a final judgment of the Superior Court. They further held that the prohibition of an appeal from the judgment homologating the report was to be confined to the subject matter to which it applied, and could not be extended inferentially to another and totally different

proceeding. It must be borne in mind that the rule of law in this country, that an appeal does not lie unless given by express legislative enactment, does not prevail in French or Canadian law, where the presumption is in favour of the existence of what one of the Judges of the Queen's Bench in Canada terms the "sacred right of appeal."

Having regard to these considerations, and to the observations of Lord Westbury in the case before this Board of *Boston v. Lelievre*, to the effect that upon questions of procedure their Lordships would be slow to reverse decisions by Canadian or other Colonial Courts unless they were fully satisfied that their proceedings were wrong, their Lordships have come to the conclusion that the judgment of the Court of Queen's Bench, so far as it admits the Appeal, should be affirmed.

That being so, there remains the question between these parties upon the merits, and their Lordships entertain a clear opinion that the decision of the Court of Queen's Bench was right in reversing the judgment pronounced by the Superior Court.

It is necessary to see upon what ground it really was that the Superior Court pronounced a sentence of removal against the Respondents. They expressed that ground with sufficient clearness. They were of opinion that the Respondents in making their valuation proceeded upon a wrong and erroneous principle, not justified by, but contrary to law, and so palpably contrary to law that the adoption of it necessarily showed that want of diligence which would come within the provisions of the Act of Parliament to which reference has been made. Even if the Respondents had adopted a wrong principle, their Lordships are far from thinking that this would of itself neces-

sarily justify a finding of "want of diligence." But it is unnecessary here to enter upon the discussion which seems to have taken place in the court below, as to the exact meaning of those words, because their Lordships are unable to concur in the view taken by the Superior Court as to the principle to be adopted in the valuation of land to be expropriated under this statute. The Superior Court were of opinion that in valuing such land the prospective capabilities of it are not to be taken into consideration; that this is not a legal element in the calculation; that you are to look at the land and what is upon it at the time that the valuation takes place, and that you are not to go into what they are pleased to term hypothetical or speculative inquiries as to what purposes the land might advantageously be applied to. Their Lordships are of opinion that the prospective capabilities of land may form and very often is a very important element in the calculation of its value, and therefore they cannot concur in the view of the Superior Court, which seems to have supposed that that consideration was to be absolutely excluded in a valuation under the Act of Parliament. The learned Counsel who argued on the evidence was desirous of showing that the Respondents carried into effect the principle which they adopted erroneously; but whether they came to a right conclusion upon the figures, or made clerical or other errors which might be easily rectified, are matters upon which their Lordships do not feel it at all necessary to give an opinion. The Respondents were removed not for having carried into effect a right principle erroneously, but for having adopted an erroneous principle. Their Lordships consider that the principle adopted by the Respondents was not erroneous, and, therefore, that the

inference of want of diligence drawn from it fails.

On the whole, their Lordships are of opinion that the Court of Queen's Bench were right in their judgment, and will therefore humbly advise Her Majesty that that judgment be affirmed, and that this Appeal be dismissed with costs.