

ROBERT WHITE (PETITIONER).....APPELLANT;

1899

*May 19.

*Oct. 3.

AND

THE CITY OF MONTREAL (CON- }
TESTANT) } RESPONDENT.ON APPEAL FROM THE SUPERIOR COURT FOR LOWER
CANADA, SITTING IN REVIEW, AT MONTREAL.*Municipal corporation—Assessment—Montreal harbour improvements—
Widening streets—Construction of statute—57 V. c. 57 (Que.)—
52 V. c. 79, 139 (Que.).*

A by-law passed in 1889 under the Quebec statute, 52 Vict. ch. 79, s. 139, provided for a special loan in aid of the Montreal harbour improvements, and appropriated \$163,750 thereof for the construction of a tunnel with approaches, as shewn on a plan annexed, from Craig street, in a line with Beaudry street, to the tunnel, passing by the side of W.'s land, and subsequently a resolution was passed to open, alongside the open-cut approach, a high-level roadway to give communication from Craig street to Notre-Dame street, on the surface of the ground. These works constituted in fact an extension of Beaudry street, from the line of Craig street, 77 feet in width, of which 42 feet constituted an open-cut approach to the tunnel and the remainder, the high-level roadway, as shewn on the plans, this prolongation being 42 feet wider than Beaudry street. The resolution provided that a portion of the expense should be paid by the parties interested and benefited as for local improvements made by the "widening" of Beaudry street. Upon proceedings to quash the assessment, the Superior Court held that it was authorized and legalized as an "existing roll," by the Act, 57 Vict. ch. 57, s. 1, (Que.), and this judgment was affirmed by the Court of Review.

Held, reversing the decision of both courts below, that notwithstanding the reference therein to "existing rolls", the application of the latter Act should be restricted to the cost of the "widening" only of the streets therein named in cases where there were, at the time of its enactment, existing rolls prepared by the commissioners fixing the limits for that purpose, and these words could not have the

*PRESENT;—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

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effect of extending the nature and character of such works so as to include works manifestly forming part of the harbour improvement scheme and chargeable against the special loan.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, which dismissed the petition of the appellant to quash an assessment roll imposing a special tax upon his lands in connection with certain expropriation proceedings and local improvements in the City of Montreal.

The petitioner contested the assessment substantially on the ground that part of the works were not, as contended, for the widening of the street upon which his property was situated, but were actually part of works in connection with the Montreal harbour improvements, the expenses of which ought to have been defrayed from funds appropriated therefor out of a special loan under a city by-law founded upon the Quebec statute, 52 Vict. ch. 79 sec. 139.

The facts of the case are stated in the judgment of the court delivered by His Lordship Mr. Justice Gwynne.

Trenholme Q.C. and *Beïque Q.C.* for the appellant. The resolution of April 13th, 1891, so far as it attempts to authorize a special assessment, is illegal. The statute 57 Vict. ch. 57 does not apply to the expropriations and works in question. The Act only applies to *widenings* in cases where there might be "existing rolls" at the time of the enactment. It cannot apply to *openings*, nor to the tunnel, nor to the "open-cut approach," nor the "high-level roadway" which were all part of the scheme for harbour improvements. See *Joseph v. City of Montreal* (1).

Atwater Q.C. and *Ethier Q.C.* for the respondent. On the 16th January, 1891, a number of proprietors,

including appellant, presented a petition for the prolongation of Beaudry street; on the 13th day of April, 1891, the council, after having received reports on the petition from the roads and finance committees, resolved that Beaudry street should be so opened at a width of 77 feet, as shown on the plan; that the land required should be expropriated, and the cost of opening said street to the line fixed upon, 42 feet, borne by the parties interested in and to be benefited by the improvements, and the cost of the 35 feet *extra* required for the high-level road should be paid by the city out of the funds for harbour improvements. Afterwards, on the 30th of June, 1891, commissioners were appointed, and in the month of September, 1891, they reported fixing the limits of proprietors interested, and subsequently fixed the indemnities to be paid for land expropriated. In 1894 a projected roll of assessment was prepared, but subsequently discontinued, and finally the present assessment roll was prepared according to the special law then in force, 57 Vict. ch. 57, ss. 1 & 3 (Que.).

The commissioners, acting within their powers under section 3, set aside any distinction of tunnel or high-level roadway and, considering the improvements as a whole, divided the cost into two equal parts, the city being charged with the payment of one-half, and the other half assessed on the properties of the interested parties. Their report was duly advertised and afterwards signed by the commissioners on the 28th September, 1891. This final roll was ratified by the commissioners on the 31st January, 1896, and on the 3rd of February of the same year the city treasurer gave public notice to the effect that he would proceed to the collection of said roll.

All required formalities have been strictly complied with. The statute was fully applicable to the improve-

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ments thus made in the prolongation of Beaudry street, and the second sentence of sec. 1 is not confined to a "widening" of that street, but was passed with special reference to the whole cost of the prolongation under the plans and resolution. The provisions of this Act (57 Vict. ch. 57) are the only enactments applicable to the matter in dispute, and that Act authorizes the taxation of the interested parties benefited by the improvement.

The judgment of the court was delivered by :

GWYNNE J.—The sole question involved in this appeal is whether or not an assessment made in the month of January, 1896, upon certain real estate situate on Craig street, in the City of Montreal, the property of the appellant, and upon the appellant as the owner thereof, whereby the appellant is charged with the sum of \$3,596.74, by way of contribution to the purchase money of land situate on Craig street, of two several pieces of which the appellant was seized, and acquired by the City of Montreal, in the year 1891, is made legal and binding upon the appellant under, and by force of, the provisions of the Quebec statute, 57 Vict. ch. 57.

The facts upon which the solution of this question depends are as follows :

Beaudry street in the year 1891 was and still is a street which extends from Sherbrooke street, in the City of Montreal, and after proceeding in a southeasterly direction crossing several streets parallel with Sherbrooke street, terminated at Craig street, which is a street parallel with Sherbrooke street. Now Beaudry street for the greater part of the above distance, that is to say, from Robin street, the second street from Sherbrooke street, was only thirty-five feet in width down to Craig street where it terminated.

From the opposite side of Craig street to Notre-Dame street which is the next street to Craig street, and parallel therewith, there was no street whatever in existence on a line with Beaudry street; all the land on that side of Craig street, opposite to Beaudry street, for a considerable distance along Craig street, was the property of the appellant, and was built upon. Notre-Dame street runs along the summit of a ridge 22 feet above the level of, and about 330 feet distant from Craig street; at the base of this ridge upon one side was Craig street and upon the other side, but at a much greater distance from Notre-Dame street than is Craig street, is a street called Commissioners street also parallel with Notre-Dame street or nearly so, and situate close to the water of the harbour of Montreal. From Notre-Dame street leading down to Commissioners street there was a street called Brock street, which was only 25 feet in width. This street was within the lines of Beaudry street, assuming those lines to be drawn across Craig street and so in continuation across Notre-Dame street. In the year 1878 the Corporation of the City of Montreal had conceived the idea of widening at some future time Beaudry street to 42 feet, and of making a street in continuation of it from Craig street to Notre-Dame street of the like width of 42 feet, and also of widening Brock street down to Commissioner street to the like width, but all that contemplated work, if done, and when done, was to be done on the surface of the ground like all the other streets in the city, and a plan was prepared by the city of such contemplated work which plan was duly homologated in 1878, but the work so designed and shewn upon said homologated plan was never, (at least in so far as the space between Craig street and Notre-Dame street is concerned), carried into effect by the corporation, but instead thereof a wholly different

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work was undertaken by the city under the provisions of sections 139 of an Act of the Province of Quebec passed on the 21st day of March, 1889, 52 Vict. c. 79, intituled "An Act to revise and consolidate the charter of the City of Montreal and the several Acts amending the same." By that 139th section of that Act it was enacted that :

If at any time the council shall determine to aid in the improvement of the harbour of Montreal either by contributing to works appertaining to the harbour and wharves or by opening or widening streets, ramps or tunnels adjacent or leading thereto, erecting or improving the dyke or otherwise, or in any or all of such methods, the council may, by by-law, declare and describe the nature of the intended aid and the amount to be therein expended, not exceeding in the aggregate one million dollars; and may thereby provide for the issue of bonds or debentures to the required amount, constituting a lien and charge upon the property and revenues of the city, as in the Act declared.

Upon the 4th day of November, 1889, the corporation of the City of Montreal in virtue of the authority conferred by the above section passed a by-law no. 174 whereby, after reciting that it was deemed expedient in the interest of the City of Montreal, it was enacted that the corporation of the city should effect a loan not exceeding one million dollars for the purpose of preventing inundations and for the amelioration of the harbour of the said city as specified in the following section. Then section 2 enacted that the product of the said loan should be applied in the following manner, that is to say :

1. For constructing a permanent <i>levée en face de la cité</i>	\$670,353 00
2. For widening Commissioners street and <i>la rue de la Commune</i>	129,647 00
3. For constructing a tunnel under Brock street	163,750 00
4. For aiding in the construction of a <i>rampe à la rue Gale</i>	23,000 00
5. Interest and unforeseen expenses.....	13,250 00
Total.....	\$1,000,000 00

The whole as shewn on plans annexed to the by-law.

Now by this by-law the whole of the work designated therein and as shown on the plans annexed thereto, (and no one part any more than another), is described as work undertaken in the interest of the whole city and which was therefore to be paid for wholly by the city, and primarily out of the million dollar loan authorised to be effected by section 139 of 52 Vict. ch. 79, and by the by-law of the city passed in pursuance thereof, no part of such work was chargeable to or could be charged against any particular persons who were owners of property supposed to derive some special benefit from such a public work so undertaken, all the cost was chargeable to the fund specially provided by the statute and the by-law for the purpose.

We are only concerned with the work mentioned as the third item in the by-law by which the sum of \$163,750 was set apart and appropriated to the construction of a tunnel under Brock street. The land appropriated for this purpose by the plan annexed to the by-law, in so far at least as the space between Craig street and Notre-Dame street, with which we are dealing, is concerned, consisted among other lands of two several pieces of land fronting on Craig street, the property of the appellant, one of which, measuring 42 feet in width on Craig street and directly opposite to Beaudry street, extended in the direction of Notre-Dame street across the property of the appellant, and the other measuring 35 feet in width, and immediately adjoining on the north-east side of the said piece of 42 feet in width, extended in the direction of Notre-Dame street across the property of the appellant. These several pieces of land upon reaching the limit of the appellant's property entered upon the lands of other persons having their frontage on Notre-Dame street.

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The piece of land 42 feet in width proceeded from Craig street on a descending grade of one foot in 35 feet for the distance of about 238 feet from Craig street and about 80 feet beyond the limit of the appellant's property, and was appropriated, and in the actual construction of the Brock street tunnel, used for the approach thereto, the portal whereof, about 20 feet in height, is situate at said distance of about 238 feet from Craig street, from which point the tunnel is constructed under Notre-Dame street and Brock street down to the waters of the harbour. The piece of land 35 feet in width, on the contrary, proceeded from Craig street on an ascending grade and reached about the level of Notre-Dame street at the top of the arch of the portal of the tunnel, or at the distance of about 90 feet from Notre-Dame street, and continued on to Notre-Dame street where it terminated. These two pieces of land of the width of 42 feet and 35 feet respectively consisted of as separate and distinct roadways as if they were miles apart, for they not only were constructed on wholly different gradients and had each a wholly different terminus from the other, one at the waters of the harbour which were reached by a subterranean route, and the other constructed on an ascending grade from Craig street to Notre-Dame street where, on the surface of the ground there, it terminated, but they were separated from each other at their start from Craig street, and necessarily so separated, by a solid stone wall upwards of five feet in width ascending from Craig street to the height of the portal of the tunnel surmounted by a strong iron railing. The piece of land 35 feet in width would seem to have been designed and adopted as part of the tunnel work for the reason that as the whole of the roadway 42 feet in width which in 1878 the corporation had designed opening from Craig street to Notre-

Dame street on the surface had been wholly diverted from that purpose by the section 139 of 52 Vict. ch. 79, and the by-law, it was but reasonable that surface access from Craig street to Notre-Dame-street should be furnished at the expense of the fund appropriated for the tunnel of which the piece 42 feet in width was a necessary part. However, whatever may have been the reason, it is, I think, clear beyond question that the roadway of 35 feet in width from Craig street to Notre-Dame street was part of the tunnel work as designed by the corporation and covered by the by-law. In the interval between the passing of the by-law and the month of January, 1891, a part of the appellant's buildings situate on Craig street was destroyed by fire and for that reason it seemed to several persons, of whom the appellant was one, that the time was opportune for opening the road from Craig street to Notre-Dame street, and they made a suggestion to that effect in a letter addressed to the chairman of a committee of the council called the road committee. The chairman having submitted the communication to the committee, the latter made a report to the council thereon, wherein they say that

as it is a part of the harbour improvement scheme to have a subway at Brock street they recommend

that Beaudry street be opened from Notre-Dame street to Craig street at a width of 77 feet as shown on a plan annexed to the report and that the land be expropriated, &c., &c. Now the 77 feet shown on this plan consists of no other than the two several pieces of 42 feet and 35 feet in width respectively as aforementioned appropriated and set apart by the by-law for the purposes of the tunnel. The road committee then, in their report, with full knowledge and understanding of the Brock street tunnel scheme, proceed to *recommend* that the cost of the improvement be borne and

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paid as follows:—the cost of opening the piece 42 feet in width by the parties interested in and to be benefited by the improvement, and the cost of the extra 35 feet required for the high level road to be borne and paid by the city out of the fund for the harbour improvements.

The piece of land 42 feet in width having been as already shown appropriated by the by-law 174 to the purposes of the tunnel for the construction of which that by-law had set apart \$163,750, it is difficult to understand upon what principle the road committee proceeded when they recommended that the cost of the improvement, in so far as the piece 42 feet in width was concerned, should be paid by parties interested therein and benefited by the improvement. They were certainly not proceeding in ignorance of the fact that the piece 42 feet in width was required for and was indispensably necessary for the construction of the tunnel, for their report shows that the diversion of that piece of land from the ordinary purposes of a street to the purposes of a tunnel in the construction of which the whole of the city was by the by-law declared to be interested, constituted their reason for recommending that the cost of the construction of the high level roadway should be charged to the fund provided for the construction of the tunnel.

This report, singular as it is in this form in view of the actual circumstances and facts of the case, was adopted by a resolution of the council on the 13th September, 1891, but it must, I think, be admitted as beyond all question that such resolution of the council had not and could not have the effect of charging the cost of the construction of any part of the improvement thereon which consists solely of the tunnel so far as it is on that piece of land, or

any part of the land acquired for the purpose of the tunnel to any other fund than that provided therefor by the by-law no. 174.

In the month of May, 1891, commissioners were appointed to value the land required to be taken by the city, and in the document submitting that question to them, the land between Craig street and Notre Dame was described in two several pieces of 42 feet and 35 feet in width respectively precisely as shown on the plan annexed to and adopted by the by-law no. 174, as that upon which the tunnel was to be constructed as part of the harbour improvements in which the whole city was interested.

The commissioners in a report made by them in the month of September, 1891, say that the parties interested in the work for which the land submitted to them to value the price of, was required were the proprietors of all the lots of land situate within the following limits, that is to say :

1. On the north-east by a line following the centre of Parthenais street as opened or projected from Sherbrooke street to Notre-Dame street and continued from thence to the River St. Lawrence.
2. On the south-east by the River St. Lawrence.
3. On the south-west by a line along St. André and Campeau streets from Sherbrooke street to Craig street, thence along Craig street to Lacroix street, thence along the centre of Lacroix street to Notre-Dame street, and continued from thence to the River St. Lawrence, all the lots fronting on St. André and Campeau streets, and on the north-west side of Craig street, between Campeau and Lacroix streets, no further than to the distance of 150 feet in depth.
4. On the north-west by a line following Sherbrooke street, as opened or projected from St. André street to Parthenais street including the lots fronting on the north-west side of Sherbrooke street, but no further than to the depth of 150 feet.

This description of the lands to be benefited by the projected improvement for which the land, the price of which was to be determined by the commissioners, was required, seems to disclose that it was well under-

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stood that the improvement by which such an extent of land was to be specially benefited, was the whole of the works of harbour improvements as mentioned in the by-law 174, or at least the projected tunnel work thereby provided for; and not by any means so small a work as the opening a street of 330 feet in length from Craig street to Notre-Dame street, and according with such understanding no assessment of the lands within the limits named was ever made under sec. 228 of 52 Vict. ch. 79, but in 1893 the city proceeded not to open a street between Craig street and Notre-Dame street, 77 feet in width, but to construct the tunnel under Notre-Dame street and Brock street from Craig street to the harbour on the piece 42 feet in width, as designed and adopted by the by-law 174, and the plan annexed thereto, and to construct the high level street on the piece 35 feet in width between these streets as also designed by the said by-law and the plan annexed thereto. The construction of the tunnel work proceeded into the year 1895, when, as is said, it was found that the sum of \$163,750 set apart for that work was insufficient, but for what reason such insufficiency arose, or at what stage of the work it was discovered, does not appear. It is obvious, however, that the price of the land required and used in the construction of the tunnel work therein is part of the cost of the improvement authorized by the by-law, and constituted in fact the first charge upon and was payable out of the fund appropriated by the by-law to the tunnel work, and that before the work of construction should have been commenced; and there is no suggestion that it was not so paid, and if so paid out of the fund charged therewith there is an end of that matter; but paid or not paid, however much the \$163,750 set apart for the improvement designed to be accomplished by the

completion of the tunnel should prove to be insufficient for that purpose, such deficiency could not in any respect affect the rights of the owners of the land required for and used in the construction of the work, to the price of the land so used which was by the by-law charged upon that fund.

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Before such deficiency was ascertained the Act 57 Vict. ch. 57 was passed on the 8th day of January, 1894, by which it was enacted that

notwithstanding any law to the contrary, the cost of widening each of the following streets, namely, Pine Avenue, Bleury street, Milton street, Inspector street, Cathedral street and Lagauchetière street, shall be paid as follows, namely: one-half by the city, and one-half by the proprietors fronting on the lines of the said streets assessed to a depth not exceeding one hundred feet. For the following streets: Ontario street from Frontenac to eastern limits, Beaudry street, Pantaléon street, St. Catherine street from Désery street to the eastern limits, and Viger Square, the *cost* shall be paid as follows: one-half by the city and one-half by the proprietors interested as per existing rolls prepared by the commissioners in each case fixing the limits.

Now the contention of the appellant is that the assessment made upon his property on Craig street in January, 1896, is absolutely void for the reason that the above Act, as is contended, relates solely to the *cost of widening* the streets therein named, of which Beaudry street is one, and that the land taken from the appellant and others between Craig street and Notre-Dame street was not taken for any such purpose but for the construction of the Brock street tunnel and the works in connection therewith to the cost of which or any part thereof the Act has no application.

The Superior Court has held that the Act of 1894 has authorised and made legal the assessment of 1896, the effect of which is to charge the appellant with a liability to reimburse the Corporation of the City of Montreal to the amount of \$3,596.74 as part of the purchase money of the two several pieces of land

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between Craig street and Notre-Dame street, part of which was acquired from himself and used in the construction of the tunnel under the aforementioned by-law 174, and which purchase money was therefore chargeable and charged against the fund appropriated by the by-law to the cost of the tunnel. The Court of Review, Doherty J. dissenting, have affirmed this judgment.

The judgment in effect holds that there is a distinction made by the Act between the streets named in the first part and those named in the latter part of the first section of the Act as above extracted, and that such distinction consists in this, that the word "widening" is to be confined to the streets mentioned in the first sentence of the section, and that as regards the streets mentioned in the second sentence of the same section, it is to be construed as including the *opening* of a *new street* or the *prolongation* of an *existing* one. And the judgment holds that the lands taken from the appellant and others between Craig street and Notre-Dame street, and the work done thereon constituted simply a prolongation of Beaudry street from Craig street to Notre Dame street, as if done under the ordinary powers contained in section 140, and the other sections of the Act relating to the opening of streets, and so within the operation of the Act 57 Vict. ch 57.

The reasoning upon which the construction is based I understand to be that otherwise no effect could be given to the words at the close of the second sentence of the section, viz. :

as our existing rolls prepared by the commissioners in each case fixing the limits,

but that construction, as was I think well argued by the learned counsel for the appellant, wholly assumes it not only to be an established fact but one which

was present to the mind of the Legislature that there was no existing roll fixing the limits by commissioners of the lands to be assessed for the cost of *widening* any of the streets named in the second sentence of the section, which widening had not yet been completed when the Act 57 Vict. ch. 57 was passed. The words referred to seem to be open to an intelligent construction by reading them thus as relating to the cost of *widening* (which is the only word used in the Act for the purpose of which the Act purports to be passed) any of the streets named, the cost to be by an assessment "as per existing rolls" in each case, if any such there be. This seems a more reasonable construction than to give to the word "widening" as used by the Legislature, the construction contended for by the respondents.

The true construction of the Act appears to me to be that it is in express terms limited to the "widening" of the streets named, that is of any of the streets named in the section, and that like all other Acts, not expressed to be retroactive or in so far as it is not expressed to be retroactive, it must be construed as relating to future undertakings. If the words "as per existing rolls," &c., had not been inserted the statute would relate wholly to future undertakings of the nature and character named in the Act, but the insertion of those words makes it retroactive in so far that it shall apply to undertakings of the nature and character named in the Act if any such there be which have proceeded so far as fixing the limits of lands liable to be but not yet assessed for payment of the cost of such work; but the words under consideration cannot be construed as extending the nature and character of the works in relation to which the Act is expressed upon its face to be passed.

There are moreover many considerations which to my mind render it impossible to construe the Act as

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having any application to the cost of the work for which the lands in question have been in fact taken and applied by the Corporation of the City of Montreal; or to the cost of any part of such work. There is not a syllable in the Act which justifies the conclusion that the Legislature had any knowledge that the sum of \$163,750 set apart by the by-law no. 174 to defray the cost of the undertaking therein described as a tunnel under Brock street would prove insufficient for that purpose, or that they had it in contemplation to charge the cost of that work to any other fund than that provided by the by-law for the purpose, nor to supplement the deficiency of that fund, if such there should prove to be, by charging the price of the land appropriated to the construction of the tunnel to the parties assessed therefor by the assessment now under consideration in appeal. There is not a syllable in the Act which leads to the conclusion that the Legislature had it in contemplation by the Act 57 Vict. ch. 57, to separate the cost of acquiring the property upon which any work contemplated by the Act was to be performed from the residue of the cost of the work to which the Act relates or that they had it in contemplation to make thereby a provision for the cost of any part of the work covered by the by-law. So to construe the language used in the Act is in my judgment wholly unwarranted and irreconcilable with the principles applicable to the construction of statutes.

For all of the above reasons I am of opinion that the appeal must be allowed with costs, and that the assessment against which this appeal is taken must be quashed and declared to be absolutely null and void and not authorised by the statute 57 Vict. ch. 57.

Appeal allowed with costs.

Solicitors for the appellant: *Béique, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Ethier & Archambault.*