

BETWEEN:

HIS MAJESTY THE KING.....PLAINTIFF; Dec. 3, 4 & 5.

AND

MARIA MATHER PIERCE ET AL. . . . DEFENDANTS; Mar. 9.

AND

ETHEL LALLEMAND GIFFORD, } DEFENDANT  
 Sole Heir and Executrix of the Will } " en reprise  
 of Maria Mather Pierce, Deceased.. } d'instance".

*Expropriation—Assessment of damages for loss of lease entered into by owner of land expropriated and lessee whereby the lessee undertook to erect a building on the land expropriated, said building to become the property of the owner of the land at expiration of lease.*

*Held:* That in assessing the damages resulting from the expropriation of real property by the Crown, the fact that the owner of the property expropriated had entered into a lease whereby the lessee was to erect a building on the land, which, after the expiration of the lease, was to become the property of the owner of the land expropriated, must be considered.

INFORMATION by the Crown to have certain property, expropriated for terminal facilities for the Canadian National Railway, valued by the Court.

The Crown, on May 10, 1929, expropriated certain vacant property in the City of Montreal. Defendants alleged that on May 11, 1928, they had entered into a lease with one, J. Albert Julien, by which the land was

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leased for a period of twenty years at a rental of \$14,400, payable yearly at the rate of \$720, the lessee covenanting to pay taxes and to erect a building on the land; that the lessee had already prepared plans and specifications to erect a building of the approximate value of \$25,000, which was to remain the property of the defendants at the expiration of the lease. The defendants claimed for damages suffered by them on this account as well as for the value of the land expropriated. The case is reported on the first point only.

The action was tried before the Honourable Mr. Justice Angers at Montreal, P.Q.

*C. A. Bertrand, K.C.* for plaintiff.

*C. E. Guérin, K.C.; F. Chaussé and S. V. Ozero* for defendants.

ANGERS J. now (March 9, 1938) delivered the following judgment:

This is an information exhibited by the Attorney-General of Canada whereby it appears that the lands hereinafter described were taken, under the provisions of the Expropriation Act (R.S.C., 1927, c. 64), for the purposes of a public work of Canada, to wit, terminal facilities for the Government Railways, by depositing, on the 10th day of May, 1929, a plan and description of the said lands in the Registry office for the Registration Division of Montreal, in which the said lands are situated.

[The learned Judge determined the value of the land and continued.]

There remains the question of the lease made between Maria Mather Pierce and J. Albert Julien and of the building which Julien, the lessee, was to erect on the lot and which, at the expiry of the lease, was to become the property of the lessor or her heirs.

The lease in question was executed on May 11, 1928, before J. P. Lalonde, N.P.; an authentic copy thereof was filed as exhibit D. The lease is for a period of twenty years reckoning from the first day of May, 1928. The rental is fixed at \$14,400 for the term of twenty years and is stipulated payable by equal monthly payments of \$60 each. The lessor acknowledges having received from the

lessee the sum of \$1,260 for twenty-one months in advance. The other monthly payments are to become due and exigible after the expiry of these twenty-one months, to wit, from the first of February, 1930.

The lease is made subject to, among others, the following clauses and conditions:—

1.—Le locataire a le privilège et le droit d'ériger sur le susdit terrain une bâtisse, suivant les plans qu'il jugera a propos mais en se conformant toutefois aux règlements de la cité de Montréal se rapportant aux constructions, laquelle bâtisse servira pour le commerce de fruits du dit locataire et toutes autres fins jugées nécessaires dans l'intérêt de ce dernier;

2.—Le locataire s'engage à construire la susdite bâtisse d'ici au premier mai mil neuf cent vingt-neuf, et à se conformer à tous les règlements concernant le feu, la police et la santé, et généralement à toutes les lois en force en la cité de Montréal;

3.—A l'expiration du présent bail la dite bâtisse ne pourra être enlevée du susdit terrain mais elle restera la propriété absolue de la baillesse ou de ses héritiers légaux;

4.—Le locataire s'oblige de payer toutes les taxes municipales, scolaires, générales ou spéciales, sa taxe d'eau, sa taxe d'affaires, et toutes autres taxes imposées sur le susdit immeuble et ce pendant toute la durée du présent bail.

It was urged on behalf of plaintiff that the lessee, under the lease exhibit D, had the right and privilege of erecting a building on lot 538 but that he was not bound to do it. I must say that I cannot share this view. Clauses 1, 2 and 3 of the lease must be read together. In virtue of clause 2 the lessee obliges himself to complete the building in question on or before the 1st of May, 1929. Clause 3 stipulates that, at the expiry of the lease, the building shall not be removed but shall remain the property of the lessor or her legal heirs. This building obviously formed part of the consideration for which Maria Mather Pierce agreed to lease lot 538 to Julien.

It was further argued by counsel for plaintiff that, on the face of the pleadings, it appears that Maria Mather Pierce, the only lessor of the lease exhibit D, does not "comprise in herself the whole of the estate and ownership of the property" and that consequently "the claim urged on the strength of the lease cannot be ascribed to the other defendants, who are in law precluded from benefiting therefrom." Again I may say that I cannot adopt this view. Whether the substitutes could have refused to acknowledge the lease under the provisions of article 949 of the Civil Code of the Province of Quebec is, as I think, wholly immaterial. One may assume that, if the lease had

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been advantageous the substitutes would likely not have wished to terminate it. The only question which matters is whether the lessee could have claimed the cancellation of the lease on account of the decease of the lessor. The question, to my mind, must be answered in the negative; the contract of lease is not dissolved by the death of the lessor: article 1661 C.C.

The point in question is to determine what value, if any, this lease represented for the lessor.

The evidence discloses that Julien did nothing towards the erection of the building in 1928. On February 14, 1929, eleven days only before the notice of expropriation, Julien made a contract with one Octave Archambault, by which the latter undertook to erect a building on lot 538, according to the plans and specifications prepared by Chs. Bernier, architect, for the price of \$19,600. The contract, which was filed as exhibit H, stipulates that the work must be completed on or before the 1st of May, 1929. The delay is indeed exceedingly short. Plans had been prepared by Chs. Bernier in January, 1929; at least the plans filed as exhibit I bear this date. Neither Archambault nor Bernier appeared as witnesses; it was stated that both were dead. No specifications were produced; none were found and from the evidence it seems very doubtful whether any were drawn up.

L. P. Boisvert, accountant for J. A. Julien, testified that he was aware of the lease exhibit D and that Julien took steps to erect the building mentioned therein.

Julien declared that, on the 26th or 27th of February, 1929, he received a notice not to build because the property was being expropriated; the notice was dated the 25th of February.

According to Julien the excavations for the foundations had been started, no precise date being indicated, but had to be discontinued owing to the expropriation.

The evidence also shows that three leases were made by J. A. Julien for stores and offices in the building which was to be erected: a lease to Mutual Brokers Montreal Limited, dated February 2, 1929, for a term of five years from the first of May, 1929, for the sum of \$3,780, payable at the rate of \$60 per month for the first four years and \$75 per month for the last year; a lease to Wolfe

Fruit Company Limited, dated February 14, 1929, for a term of five years from the first of May, 1929, for the sum of \$11,100, payable at the rate of \$175 per month for the first three years and \$200 per month for the last two years; a lease to Montreal Fruit Exchange Limited, dated February 15, 1929, for a term of five years from the first of May, 1929, for the sum of \$11,100, payable at the rate of \$175 per month for the first three years and \$200 per month for the last two years; these leases were filed respectively as exhibits E, F and G.

It may be noted that these three leases contain a clause by which the lessor gives to the lessee the option of cancelling the lease at the end of every year by giving a notice by registered letter to the lessor, on or before the first day of February, of his intention to cancel the lease.

In cross-examination Julien declared that he was solvent and that he would have erected his building; he admitted however that in 1934 he had made a compromise with his creditors and added that he had paid the amount agreed upon.

It was extremely difficult in the circumstances, particularly on account of the lack of specifications and the non-appearance of the architect and the contractor as witnesses, to say what the building in question would have been worth after twenty years.

Gaspard Archambault, who has been in the construction business since 1913, stated that he examined the contract exhibit H and the plans exhibit I with a view to making an estimate of the cost of the building contemplated. According to him the contract is rather summary and, as there are no specifications, it is difficult to value the cost of the construction. He made an estimate of \$28,874 and added \$400 for the plans, which makes a total of \$29,274. This amount is for a building of a moderate value. A sum of \$19,600 for a building of the size and nature indicated by the plans would represent a value of approximately 13 cents per cubic foot. In witness's opinion the contractor must have made his reckonings for an economical construction; he must have purposed using second hand materials. A building erected in these conditions would be a third class building. This is the cheapest kind of construction which the City of Montreal permits; its average life is

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about forty years. In the present case the life of the building, in witness's opinion, would not have exceeded thirty years; the lessee would have had no interest in spending money for its upkeep, considering that at the end of twenty years the ownership of the building was to become vested in someone else. Archambault fixed the depreciation of this building after twenty years at two-thirds of its cost, which I may say does not seem to me excessive in the circumstances. This means that, at the expiry of the lease, the building would have been worth about \$6,500. The value of this capital in 1929, realizable in twenty years, computing the interest at 5%, compounded yearly, would be approximately \$2,500. I deem it fair to allow this sum to the defendants, with interest thereon at the rate of 5% per cent per annum from the date of the expropriation, namely, the 10th of May, 1929.

It is almost impossible to determine with any degree of precision the amount of rent which the defendants might have received from Julien under the lease exhibit D. It is indeed problematical whether Julien would have succeeded in renting all the space in the building; and it is very doubtful, assuming that he would have been able to rent it all, whether he would have collected all his rentals.

The lessor has already received \$1,260, being the rent for twenty-one months paid in advance. The balance of the rent from February 1, 1930, to the expiry of the lease is \$13,140. In view of the general depression existing since the end of 1929 and the removal of the fruit terminal, in 1932 or 1933, from the location it occupied between Mountain, Aqueduct and Rolland streets and the railway tracks (see plan A) to a place on Richmond street near Trudel avenue, it seems to me almost certain that Julien would have found it difficult to rent his building after 1933 and, as a consequence, to pay the rent of the lot to the defendants. He made a compromise with his creditors in 1934 at 50 cents on the dollar; he was evidently not in a very good financial position. What he could have done with his building after 1933 is, to say the least, extremely uncertain and hypothetical. I am inclined to believe nevertheless that the defendants would have collected a certain proportion of their rent and I think that they should be granted some compensation on this account. After giving

the matter careful thought and consideration, I have come to the conclusion that I would be doing justice to both parties in granting to the defendants the sum of \$2,000 as rent for lot 538 after February 1, 1930.

I think it is fair to allow to the defendants the customary allowance of 10% on the value of the land for forcible taking; 10% on \$15,736.50 is \$1,573.65; the total compensation granted to the defendants will accordingly be \$21,810.15. See Cripps on Compensation, 7th edition, p. 198.

There will be judgment as follows:—

(1) The lands herein expropriated are hereby declared vested in His Majesty the King as of the 10th of May, 1929;

(2) The compensation for the lands so expropriated, with all damages arising out of or resulting from the expropriation, is hereby fixed at the total sum of \$21,810.15, with interest at the rate of 5% per annum from the 10th day of May, 1929, date of the expropriation, to the date hereof;

(3) The defendants are entitled to recover the said sum of \$21,810.15, with interest as aforesaid, upon giving to the Crown a good and valid title, free from all mortgages, charges and encumbrances whatsoever;

(4) The defendants are also entitled to their costs.

*Judgment accordingly.*

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