

1932

BETWEEN:

Apr. 14, 15.  
 May 9.  
 July 30.

HIS MAJESTY THE KING..... PLAINTIFF;

AND

LOUIS PICKLEMAN ET AL ..... DEFENDANTS.

*Expropriation—Hypothec—Liability of Crown for Bonus due to Mortgagee  
 —Interest—Damages*

By a clause in the deed of hypothec affecting a property expropriated, the owner (mortgagor) was obliged to pay to the mortgagee a certain sum as bonus, in the event of the loan being paid before maturity.

*Held* that the expropriating party must assume the payment of such bonus, to the exoneration of the owner (mortgagor) as part of the compensation to be paid him for the lands taken under the Expropriation Act.

2. That, as no interest is allowable against the Crown except when made payable by statute or by contract; and as the Expropriation Act provides for the payment of interest on the compensation allowed at the rate of 5 per cent, though the owner may have to pay a higher rate to the holder of a mortgage, to free the property, such higher rate can neither be allowed as interest on any part of the compensation, nor as damages.

INFORMATION exhibited by the Attorney-General of Canada to have certain properties belonging to the defendant, Pickelman, which were expropriated by the Crown, valued by the Court.

*Mr. Gregor Barclay, K.C., and E. Languedoc, K.C.,* for the plaintiff.

*Mr. J. A. Prud'homme, K.C.,* for the defendant.

The facts and points of law raised are stated in the reasons for judgment.

ANGERS J., now (July 30, 1932), delivered the following judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears that a certain emplacement consisting of lots Nos. 1,635 and 1,636 on the official plan and book of reference of St. Ann's Ward, in the city of Montreal, with the buildings thereon erected, situate at the corner of Dalhousie and Ottawa streets, belonging to the defendant Louis Pickleman, was expropriated for the purposes of a public work of Canada, to wit terminal facil-

ities for the Government Railways, by depositing, under the provisions of the Expropriation Act (R.S.C., 1906, chap. 143), on the 24th day of September, 1927, a plan and description of the same, in the Registry Office for the Registration Division of Montreal, in which the said land is situated.

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The defendant Pickleman became the owner of the above described emplacement by virtue of a deed of sale from the testamentary executors of the late Samuel Davis to him passed on the 5th day of July, 1906, before W. de M. Marler, N.P., whereof an authentic copy has been filed as exhibit A. The price paid was \$1 a square foot (\$18,412) plus a sum of \$800 representing approximately an additional 4½ cents per square foot.

The area of the land expropriated is 18,428 square feet. Counsel for the parties, at the opening of the case, declared that they had agreed upon this figure. The plan filed as exhibit C shows an area of 18,412 square feet. The difference is unimportant, but, in view of the agreement between the parties as to an area of 18,428 feet, I shall adopt this figure.

On the date of the expropriation there were on the emplacement in question a corrugated iron frame shed and the stone foundations of an old church a foot or so below the surface of the ground.

At the time of the expropriation neither the land nor the shed were utilized.

The district in which the defendant's property is situated used to be a residential district for the working class. In the last twenty-five or thirty years residents have been leaving the district, which is gradually becoming industrial. The few flats or dwellings remaining in the locality are small and obsolete; most of them are in poor condition; they have been termed slums by some of the witnesses. Rents in the neighbourhood vary between \$8 and \$15 a month. The district is still in the period of transition. The old houses which are demolished are replaced by factories and warehouses, but, if conditions remain what they are and have been in the past three or four years, it may take some time yet before the district becomes exclusively industrial. Some industries are moving to the north and east sections of the city, where there are railway facilities and

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where land is still comparatively cheap. However the locality where the defendant's property is situated is near the Lachine Canal and a railway and offers potentialities which are not to be overlooked.

The plaintiff, by the information, offers a sum of \$25,000 as compensation; the defendants, by their statement of defence, claim \$67,000 for the land and buildings, a further sum of \$700 if it is found that the Montreal Loan and Mortgage Company is entitled to recover this sum as a special indemnity under the mortgage deed affecting the defendants' property and in addition the difference between 7 per cent (conventional interest) and 5 per cent (legal interest) on \$10,000, amount of the first mortgage, and the difference between 6½ per cent (conventional interest) and 5 per cent (legal interest) on \$5,000, amount of the second mortgage, reckoning from the 24th day of September, 1927, until payment of the award by the plaintiff.

The proof adduced at trial is of two kinds: expert evidence and sales in the neighbourhood made during the few years previous or subsequent to the expropriation.

The experts are, as usual, far apart in their valuations, as regards buildings as well as land.

[The learned judge here discusses the evidence adduced on the matter of value, etc., and then proceeds.]

Taking into consideration the location of the property, its size, its adaptability as a warehouse or factory site, its potentialities at the time of the expropriation, its value to the owner and the sales effected in the district in the last fifteen years or so, I think that I shall do justice to both parties in fixing a value of \$1.90 a square foot for the land, which will mean for an area of 18,428 square feet a total of \$35,013.20.

As to the corrugated iron shed on the property, counsel for the defendant, at the opening of the trial, placed a value of \$4,000 on it and the defendant's son in his testimony stated that it had been built at a cost of \$6,000, but added that part of it had been destroyed by a tenant and that at the time of the expropriation it was worth \$4,000. To what extent was this shed damaged, I do not know; no one else spoke of the shed and I must say that the evidence on this point is not very precise nor definite. However there is no doubt that the defendant is entitled to a compensa-

tion for this shed and I think that a sum of \$3,000 will be a fair price for it.

As to the old stone foundations of a church, I consider that they constitute rather an inconvenience than an advantage to the owner as well as to the purchaser, particularly so since on all four sides these foundations are considerably distant from the boundary lines of the lot on which they are situated and their use would mean the loss of a considerable strip of land on all four sides for building purposes. I do not feel inclined to grant anything for these foundations.

The defendant Pickleman further seeks to recover a sum of \$700 which he says the Montreal Loan & Mortgage Company is claiming from him as a special indemnity for the reimbursement before maturity of the amount of \$10,000 due to it by the said defendant under a deed of obligation from the latter to the company passed on the 8th of June, 1927, affecting, among other properties, the lots and buildings expropriated; an authentic copy of the said deed has been filed as exhibit X. The claim is based on the following clause in said deed, to wit:

In the event of the said property or any part thereof being sold at forced sale, before payment of said amount advanced, or dealt with in any way that will require said Company to receive its claim judicially, said Company will be entitled to receive, and the said Borrower now obliges himself to pay an indemnity of seven per cent upon, and in addition to the amount of the loan then due in principal, interest and accessories, as liquidated damages not reducible for any reason whatever, and to secure the payment of said Indemnity, all Fines, Fees and Forfeitures, and any Insurance premiums and other accessories the said Borrower hereby specially hypothecates said above described property for a further sum of one thousand dollars.

If the amount of the loan was paid before maturity and the mortgagor was called upon to pay to the mortgagee the bonus of 7 per cent on the capital sum stipulated in the mortgage deed, to wit the sum of \$700, which the defendant Pickleman is claiming in addition to the value of the property, the Crown must, in my opinion, assume the payment of such bonus to the exoneration of the mortgagor, who should not be burdened with the same. It has been so decided by the late Mr. Justice Cassels in a case offering much similarity with the present one, namely: *The*

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*King v. Macpherson et al* (1). I find in the learned judge's reasons for judgment the following remarks (p. 234):

By the agreement entered into by the trustees of the late Sir David Lewis Macpherson and Mr. Holland, one of the defendants, there was a provision which enables the mortgagor to pay off the principal money secured by the mortgage at any time on payment of three months' interest by way of bonus. The Crown, through its agent, has paid in full the principal money due on the mortgage. The mortgagees claim that they are entitled to receive the bonus of three month's interest under the terms of their mortgage. I think they are entitled to this bonus. The question, however, arises as between the Crown who expropriated the lands and who paid off the mortgage and the mortgagor. The mortgagor claims that the Crown, having expropriated the lands including the mortgagees' interests and having paid the mortgagees, that the Crown should pay the bonus and that it should not be thrown as a burden on the mortgagor. I think that the contention of the mortgagor is correct. In the Lands Clauses Consolidation Act (1845) which is to be found in Brown & Allen's Law of Compensation (2nd Ed., p. 242), there is ample provision for securing the rights of the mortgagees. The promoter is obliged to secure the mortgagee against loss.

After quoting Sections 22 and 29 of the Expropriation Act, R.S.C., 1906, chap. 143, of which Sections 23 and 30 of the Expropriation Act of 1927 are a reproduction, Mr. Justice Cassels adds (p. 235):

It seems to me that if the Crown chooses to expropriate and get rid of the mortgage, the amount which is thrown as a burden on the mortgagor by reason of the expropriation should be added to the compensation allowed. It will be noticed that Sec. 22 of The Expropriation Act hereinbefore quoted only bars the right as between the Crown and the mortgagee. It leaves the relative rights as between mortgagor and the mortgagee as they were at the time of the expropriation. It could not be intended to take away the legal rights of the mortgagees. On the other hand, it would be unjust that the Crown availing itself of the privilege of paying off the mortgage should compel the mortgagor to suffer.

See also Cripps on Compensation, 6th Edition, p. 295, last paragraph.

The claim for the indemnity of \$700 is conditional upon the payment of the same by the mortgagor to the mortgagee; and the mortgagee can only recover it in the event of the amount of the loan being paid before maturity. Needless to say, if the defendant Pickleman did not pay off the mortgage before the date of its maturity, i.e., the 1st day of June, 1932, there can be no claim on the part of the mortgagee for the indemnity. It appears from the memorandum of claim filed by the mortgagee, the Montreal Loan and Mortgage Company, as part of exhibit X

that no reimbursement had been effected on the 5th day of May, 1931, and there is no evidence in the record to show that it was effected between that date and the 1st day of June, 1932. The payment by the plaintiff of the special indemnity of \$700 will therefore be conditional upon the defendant Pickleman showing that the capital sum of the mortgage was reimbursed before the 1st day of June, 1932, and that, as a consequence, the mortgagee demanded payment of said indemnity and received it.

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Should there be any difficulty in determining whether the indemnity is in fact exigible, the matter may be referred to me in chambers by counsel.

There remains the claim for the difference between the conventional interest on the two mortgages as stipulated in the mortgage deeds and the legal interest from the 24th day of September, 1927, to the date of the award by the plaintiff. I cannot entertain this claim: the rule is that the Crown is not liable to pay interest, except in cases where there is an express agreement to pay it or where the liability is fixed by statute; among the latter are expropriation cases, where the interest is recoverable from the time the land or property is acquired or taken by the Crown and then the rate of the interest is fixed at 5 per cent; R.S.C., 1906, chap. 143, s. 31; section 32 of chap. 64, R.S.C., 1927, contains a similar disposition. See *Algoma Central Railway Co. v. The King* (1); the judgment of the Exchequer Court was reversed by the Supreme Court (2) and the judgment of the latter affirmed by the Privy Council (3) on a different question. I do not think that the difference between the statutory interest and the conventional interest can be claimed as damages: see the case of *Algoma Central Railway Co. v. The King* above cited (at p. 270) and also *The London Chatham & Dover Railway Co. v. The South Eastern Railway Co.* therein cited (4).

(1) (1900) 7 Ex. C.R. 239, at pp. 269 and 270.

(2) 32 S.C.R. 277.

(3) (1903) A.C. 478.

(4) (1893) L.R., A.C. 429.

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I may add incidentally that the claim of the defendant for the difference between 7 per cent and 5 per cent on the sum of \$10,000 appears to me inconsistent with his claim for the special indemnity of \$700 relating to the same mortgage.

There will accordingly be judgment as follows:

1. The lands and real property herein expropriated are hereby declared vested in His Majesty the King;

2. The compensation for the lands and real property so expropriated, with all damages arising out or resulting from the expropriation, is hereby fixed at the total sum of \$38,013.20 with interest from the 24th day of September, 1927;

3. The defendant Pickleman is entitled to recover the said sum of \$38,013.20 with interest as aforesaid, upon giving to the Crown a good and valid title free from all mortgages and incumbrances whatsoever, and particularly of the mortgages in favour of The Montreal Loan and Mortgage Company and of the Trustees and Executors of the late James Benning or their assignees;

4. The defendant Pickleman will further be entitled to recover the sum of \$700 upon showing that the amount of the mortgage in favour of the Montreal Loan and Mortgage Company was reimbursed before maturity and that as a consequence he the said defendant had to pay to the said mortgagee the indemnity of 7 per cent amounting to \$700, provided for in the mortgage deed;

5. The defendant is entitled to his costs.

*Judgment accordingly.*

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