

HIS MAJESTY THE KING, ON THE INFORMATION  
OF THE ATTORNEY-GENERAL OF CANADA, ON THE  
RELATION OF THE NATIONAL BATTLEFIELDS COM-  
MISSION,

1918  
Dec. 21.

PLAINTIFF;

AND

ANNIE TIMMIS, WIDOW OF THE LATE WILLIAM  
MILLER; SARAH MARY MILLER, WIDOW OF  
ALBERT PIERRE LEPINE; MARY LEPINE AND  
HILDA LEPINE; LOTTIE MILLER, OF THE  
STATE OF MICHIGAN, WIDOW OF THE LATE TIMOTHY  
McLAUGHLIN; EMMA MILLER, WIFE OF  
WILLIAM HALLANDAL, AND THE SAID WILLIAM  
HALLANDAL, BOTH PERSONALLY AND TO ASSIST  
AND AUTHORIZE HIS SAID WIFE; JOHN MILLER  
AND VERNON MILLER, OF THE STATE OF  
MICHIGAN AND NOW OF PARTS UNKNOWN; WIL-  
LIAM AULDRICH, GRACE AULDRICH,  
VERON AULDRICH, ALL THREE OF THE STATE  
OF MICHIGAN; MARK SIDNEY AULDRICH,  
ALSO OF THE SAID STATE, BOTH PERSONALLY AND AS  
LEGAL GUARDIAN TO HIS TWO MINOR CHILDREN,  
LEAH AULDRICH AND CECIL AULDRICH,  
ISSUE OF HIS MARRIAGE WITH THE LATE SARAH  
MILLER, AND HIS MAJESTY'S ATTORNEY-  
GENERAL OF THE PROVINCE OF QUEBEC,

DEFENDANTS.

*Expropriation—Compensation—Title of owners—Deed—Prescription  
—Infancy:*

By a deed between father and son, executed in 1880, it was pro-  
vided, that in consideration of the son's release of his rights in the  
estate of his mother, the father "promises to transfer to his son, at  
his demand, all his rights and pretensions into certain two lots of

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land." The demand to transfer was never made and prescription had meanwhile run against this right, except for the interruption thereof on account of the minority of certain children. The Crown expropriated the land for the purposes of the National Battlefield at Quebec.

*Held*, that the deed created a gift upon a potestative condition exercisable by the donee and his heirs, a mere *jus ad rem* to demand the transfer but conveying no fee in the land, which was extinguishable by prescription; that the compensation monies may be paid to the owners in possession subject to their undertaking of indemnifying the Crown in respect of any claims which might be asserted by the children against whom prescription was not acquired,—such right being a divisible right.

**I** NFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 11 and November 28, 1918.

*E. Belleau*, K.C., and *L. S. St. Laurent*, K.C., for plaintiff.

*Donald McMaster*, K.C., and *A. Gobeil*, K.C., for defendants.

AUDETTE, J. (December 21, 1918), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby certain lands were taken and expropriated for the purposes of the "National Battlefields at Quebec", by depositing, on the 20th September, 1911, a plan and description of such lands in the office of the Registrar of Deeds for the County or Registration Division of Quebec, P.Q.

The Crown, by the information, offers the sum of \$3,557.40, with interest thereon from the 20th September, 1911, to the date of judgment—this amount being payable to whomsoever is declared by the Court entitled thereto.

Four of the defendants,—Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine—have appeared by solicitor and counsel and by their plea admit the amount so offered by the information to be a fair and just compensation and ask that the same be paid over to them.

The defendant, Emma Miller Hallandal, who, on the 16th April, 1917, filed a plea whereby she declared herself satisfied with the amount offered by the Crown, concluding by a demand to share in the same, also, on the 14th May, 1918, filed a disclaimer or *retraxit*, whereby she discontinued, surrendered and abandoned any claim herein.

The defendant, the Attorney-General of the Province of Quebec, who, made a party hereto in respect of the ground rent upon the lands expropriated, although duly served, made default in delivering a defence and did not appear at trial. The offer made by the information in respect of the arrears and capital of this ground rent, is the sum of \$200.63, and judgment should be entered in favour of the Province of Quebec for the amount so offered, with interest.

Counsel appearing at trial for the plaintiff and for the four above-mentioned defendants declared the Attorney-General of the Province of Quebec would be satisfied with the sum of \$200.63, without interest; if so, that interest should accrue to the other defendants who recover.

All the other defendants—excepting those just mentioned—have been duly served either out of the jurisdiction of the Court, or, being of parts unknown, were called by the newspapers, and being thus served with the information, have made default in deliver-

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ing a defence—including William Hallandal, the husband of the above-mentioned defendant Emma Miller Hallandal, who also did not appear.

But for a certain clause, hereafter mentioned, appearing in a deed of the 20th November, 1880, the compensation monies,—excepting, however, in respect of the ground rent,—would have been paid to the four defendants represented by counsel; hence the institution of the present action with the object of allowing the Crown to pay to the proper persons and have proper title.

This deed *inter vivos* of the 20th November, 1880, —Exhibit No. 5,—is practically, for all purposes, a deed of agreement,—*un acte d'accord*—as between father and son in respect of the abandonment of the rights the son had in the estate of his mother, his father's first wife. The deed, after reciting and describing the lands he thus released and the consideration the father pays therefor, proceeds as follows:—"And as a further consideration for the "present *cession de droits successifs*, the said William Miller promises to transfer to his son, at his "demand, all his rights and pretensions as they now "are into two certain lots of land situated without "the limits of the City of Quebec, on the Plain of "Abraham, between Grande Allee and the Cime du "Cap, theretofore known as lots Nos. 67 and 68 on "a certain plan, but now known as lots Nos. 161A "and 161B, of the Parish of Notre Dame of Quebec, "Banlieue of the City of Quebec."

Now the lots expropriated herein are the lots 161A and 161B mentioned in that deed of 1880, Exhibit No. 5.

The demand to transfer these lots was never made by the son or by any of his heirs and assigns up to date. Thirty-eight years have elapsed since the date of that deed. W. H. Miller, the son, died on the 27th February, 1889. On his death prescription had run against that right for eight years, three months and seven days. The prescription of 30 years has since run and been acquired against this right in respect of four of W. H. Miller's children; but through the interruption caused by the minority of the children of Sarah Miller Auldreich, the prescription of 30 years has not been acquired as against herself, her heirs and assigns. And there being no evidence on the record of their respective ages, I am unable to ascertain when the 30 years will expire.

Annie Timmis, the second wife and widow of the late William Miller, appears to be the registered owner of the property and to have had constructive possession of these vacant lots ever since. She has paid taxes upon the same. She was sued by the City of Quebec for such taxes, because she appeared to all intents and purposes to be the apparent legal owner of the same, and she satisfied such claim.

Without expressing a considered opinion on the nature and effect of the above-mentioned provision in the deed of the 20th November, 1880, it would appear to be nothing more than a gift upon a potestative condition exercisable by the donee and his heirs, a *jus ad rem* as distinguished from a *jus in rem* which did not convey the fee in such land, but only a right to demand such transfer. And such right is a divisible one which, as exercisable by four of the parties mentioned in the paragraph 8 of the information, has been extinguished by the acquired

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prescription of 30 years. The only possible claim that could now be set up would be on behalf of the children of Sarah Miller Auldrich for one-fifth of the monies, namely, the sum of \$711.48, with interest from the 20th September, 1911, to the date hereof. See *Domat's Civil Law* (Strahan's trans.)<sup>1</sup>, and *Page v. McLennan*.<sup>2</sup>

Therefore, under such circumstances, out of the compensation monies,—the ground rent, capital and interest should first be satisfied. Then the balance should be paid to the four defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine, in the following proportion, viz.: one-half to Annie Timmis; one-quarter to Sarah Mary Miller; one-eighth to Mary Lepine; one-eighth to Hilda Lepine. However, these monies will be paid to these four defendants only upon the condition precedent that they shall first give to the Crown good and sufficient title to the lands in question, with covenant to indemnify if at any time any trouble arise in respect of such title,—and moreover, upon these four defendants also giving to the Crown a bond, to the satisfaction of the Registrar of the Court, whereby they will undertake to indemnify the Crown in respect of any claim which might be hereafter made by the children, or their heirs and assigns, of the said Sarah Miller Auldrich. This bond to run up to and expire on the date when the prescription of 30 years would expire, reckoning in such computation of years the time such prescription ran in the lifetime of both W. H. Miller and his daughter, Sarah Miller Auldrich, when of age.

<sup>1</sup> Vol. 2, p. 431, and foot note.

<sup>2</sup> (1895), 7 Que. S.C. 368.

In the final adjustment between the four defendants—Annie Timmis, Sarah Mary Miller, Mary Lepine, and Hilda Lepine,—the amount of the taxes paid by Annie Timmis alone, must be adjusted and equally borne by the said four defendants.

Coming to the question of costs, it is conceded that the amount offered by the Crown was accepted—but as the Crown did not see fit (with proper justification) to pay such compensation money to the four defendants in question, who were all claiming the same,—these defendants were put to cost which, but for this expropriation, they would not have been subjected to. I am therefore of opinion that these defendants should be compensated in a fair manner with respect to such cost and the giving of a bond, which I hereby fix at the lump sum of \$200.

Therefore there will be judgment as follows:

1. The lands expropriated herein are declared vested in the Crown since the 20th September, 1911.

2. The compensation for the lands so expropriated is hereby fixed at the sum of \$3,557.40, with interest thereon from the 20th September, 1911, to the date hereof.

3. The defendant, His Majesty's Attorney-General of the Province of Quebec, is entitled to recover from the plaintiff,—upon giving good and sufficient title and the release of the said ground rent—the sum of \$200.63, with interest thereon from the 20th September, 1911, to the date hereof.

4. The defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine,—upon giving to the Crown good and sufficient title to the land in question, with covenant to indemnify the same if at any time trouble arise in respect of such title, and

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moreover upon their giving to the Crown the bond as above-mentioned, are entitled to recover and be paid by the said plaintiff the balance of the said compensation monies, namely, the sum of \$3,356.77, with interest, in the following respective proportion, viz.: one-half to Annie Timmis; one-quarter to Sarah Mary Miller; one-eighth to Mary Lepine; one-eighth to Hilda Lepine, the amount of the taxes paid by Annie Timmis being first adjusted and borne equally by the said four defendants in their respective proportion.

5. The said defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine, are entitled to their costs, which are hereby fixed at the lump sum of \$200.

*Judgment accordingly.*

Solicitors for plaintiff: *Belleau, Baillargeon & Belleau.*

Solicitors for defendant Emma Miller: *McGaughey & McGaughey.*

Solicitors for defendants Annie Timmis et al: *Campbell, McMaster & Papineau.*