
1944
Sept 11-15, 20-21
1947
Dec 31

BETWEEN:

HIS MAJESTY THE KING, on the Information of the Attorney General of Canada,..... PLAINTIFF,

AND

THOMAS LAWSON & SONS LIMITED..DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 2 (d), 3 (a), 9. 23—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (a), 19 (b), 47, 50—Right to compensation statutory—Compensation for expropriated property confined to its value—No independent claim for damages for disturbance apart from value of property—Meaning of "value to the owner"—Special adaptability—Difference between "market value" and "market price"—Where property saleable and of commercial value principle of reinstatement or replacement not applicable—Meaning of "damages" in definition of "land" in s. 2 (d) of Expropriation Act—

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Meaning of "compensation money" in s. 23 of Expropriation Act—Estimate of value under s. 47 of Exchequer Court Act must not be estimate of value plus damage—Owner's right to damages for disturbance subject to tests of value—Allowance for compulsory taking.

Plaintiff expropriated property in the City of Ottawa on which there was a foundry. The action was taken to have the amount of compensation money to which the owner was entitled determined by the Court.

Held: That evidence as to the structural value of the buildings based upon their reconstruction cost, less an allowance for depreciation, is not an independent test of their additional value to the value of the land, but is receivable only to the extent that the market value of the property as a whole is enhanced by their presence.

2. That no owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is injuriously affected, unless he can establish a statutory right. *Sisters of Charity of Rockingham* v. *The King* (1922) 2 A.C. 315 followed.

3. That when property is expropriated under the Expropriation Act the owner's claim to compensation for it is confined by section 47 of the Exchequer Court Act to the value of the property as estimated by the Court, meaning thereby its value to the owner, and not to the expropriating party; that, if the owner has suffered any loss by disturbance or otherwise resulting from the expropriation, the Court, in estimating the value of the property, may take such loss into account only to the extent that it is an element in its value, but not otherwise; and that the owner has no independent cause of action for damages for such loss apart from such value. What the Court must do, when a claim for the property is made, is to estimate its value. The owner's right to compensation for loss can exist only if his loss is an element in such value; if it is not, there is no statutory authority for granting compensation for it.

4. That the special adaptability of land for a particular purpose or use is simply an element to be considered in estimating its value and is to be taken into account together with all other elements of value.

5. That the term "value to the owner", as applied to property expropriated under the Expropriation Act, has no technical or special meaning. It does not mean the owner's own estimate or opinion of its value, or its sentimental or intrinsic value, but only its "worth to him in money". This assumes that a money equivalent for the property can be obtained. Its value to the owner means, therefore, its realizable money value, as at the date of its expropriation. The amount of such money value is to be "tested by the imaginary market which would have ruled had the land been exposed for sale", and cannot exceed the amount which a prudent man in the position of the owner "would have been willing to give for the land sooner than fail to obtain it", or "the price which a willing vendor might reasonably expect to obtain from a willing purchaser".

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6. That if the term "market value" is used in the sense of meaning "realizable money value", then the terms "value to the owner" and "fair market value" or "market value", each meaning "realizable money value", are identical in meaning.

7. That where the expropriated property is saleable and has commercial value, the principle of reinstatement or replacement is not applicable in determining the amount of compensation to be paid.

8. That the statement of principles to be applied in determining the amount of compensation money to be paid to the owner of property taken under the Expropriation Act contained in *Federal District Commission* v. *Dagenais* (1935) Ex. C.R. 25 should not be followed.

9. That the word "damages" in the definition of "land" in section 2 (d) of the Expropriation Act never included any damages other than damage to the land and cannot cover damages for loss by disturbance claimed by the owner.

10. That section 23 of the Expropriation Act is not a declaration of equivalency between the compensation money and the land or property. It is not concerned with the amount or quantum of the compensation money or the manner or purpose of its determination, but only with its substitution for the land or property so that former claims against the land or property may attach to the substituted amount. The section is an auxiliary one concerned with the status of the compensation after it has been agreed upon or adjudicated.

11. That when land is valued on the basis of a more advantageous use than that to which it is put so that such higher value is not realizable without disturbance the owner is not entitled to receive compensation based both on the value of the land for such more advantageous use and also the loss by disturbance.

12. That in its anxiety to give effect to claims for disturbance as elements in the value of the land taken the Court must not go so far as to nullify the effect of the statutory direction in section 47 of the Exchequer Court Act, and produce an estimate that is not one of value but really one of value plus damage.

13. That there is no statutory authority for the allowance of 10% for compulsory taking and no rule of law requiring it. Where it has been allowed, it has been done as a matter of practice, and even then the making of it has been regarded as discretionary. Where loss by disturbance has been taken into account as an element of value and adequate compensation has been awarded there is no justification for granting any additional allowance for compulsory taking.

INFORMATION by the Crown to have the amount of compensation money to be paid for property on which there was a foundry determined by the Court.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

H. A. Aylen K.C. and *W. R. Jackett* for plaintiff.

J. A. Robertson K.C. and *A. Macdonald* for defendant.

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

THE PRESIDENT now (December 31, 1947) delivered the following judgment:

The Information exhibited herein shows that the defendant's lands described in paragraph 2 were taken by His Majesty for government purposes under the Expropriation Act, R.S.C. 1927, chap. 64, and that the expropriation was completed by the deposit of the necessary plan and description in the office of the registrar of deeds for the City of Ottawa on July 28, 1938, pursuant to section 9 of the Act. Thereupon the lands became vested in His Majesty. The parties have not been able to agree upon the amount of compensation money to which the defendant is entitled, and these proceedings are brought for an adjudication by the Court thereon. His Majesty offers $91,600, but the defendant claims $200,000 with interest and costs.

The expropriated property consists of Lots 1 to 9, both inclusive, on the south side of Wellington Street, in the City of Ottawa, and takes up the whole block between Lyon Street on the east and Bay Street on the west, except the corner of Wellington Street and Lyon Street. It has a frontage of 267 feet on Wellington Street and a depth of 101·3 feet which, at the westerly limit of the property, faces on Bay Street. On the easterly 66 feet there is an old building, known as the Devlin Block, consisting of two stories and a basement, the ground floor being used for stores and the upper one for apartments. On the remaining 201 feet the defendant has its foundry. A full description of the foundry buildings was given by Mr. N. B. MacRostie (Exhibit B) and Mr. A. J. Hazelgrove (Exhibit 11). For purposes of convenience the witnesses spoke of seven buildings, namely, office, machine shop, blacksmith shop and shipping room with pattern storage room, mould-

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ing shop, brass foundry, cupola and storage room, and storage warehouse, but agreed that they are to be regarded as one structure. There are also three storage yards and a fence. The buildings are substantial, mostly of brick construction with some stone, some parts of them consisting of three stories and others, such as the moulding room, of only one. They are approximately 40 years old

The principles to be applied in determining the amount of compensation money to which the owner of expropriated property is entitled have been discussed in many cases, including *The King* v. *W. D. Morris Realty Limited* (1). There I referred to a number of English decisions and at page 147, dealt with what I considered the two cardinal principles of expropriation law in their relation to one another, as follows:

> The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent to be estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation.

In my view, this is a correct statement of the law, provided, as will be elaborated later, that the term "fair market value" is given the meaning defined in Nichols on Eminent Domain, 2nd Edition, page 658:

> By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.

and that the Court, in estimating the value of the property, is guided by the rule, as stated by Nichols, at page 664:

> The tribunal which determines the market value of real estate for the purpose of fixing compensation in eminent domain proceedings should take into consideration every element and indication of value which a prudent purchaser would consider.

In the same case it was also held, at page 152, that while the owner has no right to receive by way of compensation for the loss of his property more than its fair market value taken as a whole, he is entitled to have such market value based upon the most advantageous use to which the property is adapted or could reasonably be applied: *The King* v. *Manuel* (2), affirmed by the Supreme Court of

(1) (1943) Ex. C.R. 140.
(2) (1915) 15 Ex. C.R. 381.

Canada. Nowhere, in my opinion, has the principle that the market value of property should be assessed upon the basis of its best or most advantageous use been better expressed than by Nichols on Eminent Domain, 2nd Edition, page 665, where he says:

> Market value is based on the most advantageous use of the property. In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

But it must be remembered that, while the prospective advantages of the property, sometimes called its potentialities or possibilities, may be considered in estimating its value, it is only the present value as at the date of expropriation of such future advantages that falls to be determined: *The King* v. *Elgin Realty Company Limited* (1).

There would be no difficulty in estimating the value of the expropriated property in the present case, and in determining the amount of the compensation money accordingly, were it not for the claims, later described as claims for damages for disturbance resulting from the expropriation, which the defendant makes in addition to its claim for the value of the property itself. These claims will be dealt with later. In the meantime, I shall deal with the evidence as to the value of the land with its buildings.

The experts called for the defendant were Mr. N. B. MacRostie, an engineer, and Mr. A. H. Fitzsimmons, a real estate broker; and for the plaintiff Mr. C. W. Ross, a real estate broker, Mr. W. L. Cassels, a surveyor and engineer, and Mr. A. J. Hazelgrove, an architect, all well known and experienced persons. Their evidence followed a well known pattern—first, evidence as to the value of the land by itself; next, evidence as to the value of the buildings based upon their reconstruction cost as at the date of expropriation, less an allowance for depreciation; and then, the addition of these two values as the market

(1) (1943) S.C.R. 49.

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value of the property. The danger of excessive awards involved in the adoption of this method of separate valuations of the land and the buildings and their addition together, unless used with proper regard to the value of the property as a whole, has often been pointed out. It is settled that what the Court is required to estimate is the value of the expropriated property as a whole, not the values separately of its component elements. It follows that evidence as to the structural value of the buildings based upon their reconstruction cost, less an allowance for depreciation, is not an independent test of their additional value to the value of the land, but is receivable only to the extent that the market value of the property as a whole is enhanced by their presence.

The valuation of the land will first be dealt with.

[Here the learned President reviewed the evidence as to the valuation of the land and concluded.]

It is impossible to fix values precisely but on the whole of the evidence as to land values I am of the opinion that $200 per foot for the most westerly 66 feet of the defendant's property would fairly represent its value as at the date of the expropriation and I so find. This includes a percentage for corner influence. In my view, this influence is 25 per cent as Mr. Ross suggests. This puts the value of the remaining 201 feet at $160 per foot, making the total value of the land amount to $45,360. On this basis the sum of $10,560, being 66 feet at $160 per foot, would represent the value of the land of the Devlin Block part of the property, but on an estimation of the value of such part separately a higher valuation should be put on this 66 feet than on the rest, except the corner, by reason of its being nearer Bank Street.

The valuations of the buildings are next to be considered. (Here the learned President reviewed the evidence as to the valuations of the buildings and continued).

The defendant's witnesses spoke of the foundry as a proper development of the land. I agree that the buildings, while not attractive in appearance, were in good condition, structurally sound and reasonably suitable for foundry purposes. The location is also a favourable one for the defendant's business. Mr. J. O. Lawson, the president and

general manager of the defendant, said the site was accepted as the hub of the industrial section of the City of Ottawa. Most of the heavy industry of the city, from which the defendant draws its customers, is in the near vicinity. The defendant company has been in existence for 60 years and acquired the present site in separate parcels from 1904 to 1910. I have no doubt that at that time the site was a suitable one for foundry purposes but I think it is also clear that since then the value of the land has greatly outgrown its value for such use and that the foundry is no longer an adequate development. Mr. Fitzsimmons stated, as one of the reasons for his valuation, that the future development of the north side of Wellington Street was assured and that the expropriated land could have been used for apartment houses or embassies. Either of such uses would have been more advantageous than its use for foundry purposes. Notwithstanding the convenience of the location, I think it is clear that the defendant could have found less expensive land for its foundry and carried on its foundry business on such land with reduced carrying costs and without loss of business. I shall have to deal with this matter again later.

Mr. MacRostie valued the defendant's lands and buildings, including the Devlin Block, at $102,313 and expressed the opinion that, if a man wished to go into the foundry business and could persuade the defendant to sell, the purchase price would be somewhere in the neighbourhood of his valuation. Mr. Fitzsimmons made his total valuation come to $100,351.92. He said that, if the defendant gave him the property to sell and a purchaser wanted to conduct a foundry business of the same type as that conducted by the defendant, he did not think he would have any hesitation in recommending its purchase at $100,000. Mr. Ross and Mr. Cassels on the other hand put their total valuation at $79,982. It should be noted that all these valuations left out of account the value of th e machinery that amounted to fixtures. And none of them took into account any of the factors of business disturbance that will be referred to later. In addition to hearing the evidence of the experts the Court had the benefit of taking a view of the expropriated property and its surroundings, which has assisted it in reaching its conclusions.

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For the purpose of determining the amount of the defendant's entitlement in the matter of interest, which will be dealt with later, it is necessary that the value of the Devlin Block part of the expropriated property should be estimated separately, and there is no difficulty involved in so doing, for the defendant's claims for damages for disturbance cannot have any application to or affect the value of this part of the property. Therefore, and having regard to the evidence as a whole, I estimate the value of the Devlin Block part of the property as at the date of the expropriation at $20,000 and find accordingly that this is the amount of compensation money to which the defendant is entitled for this part of its property.

For the rest of the expropriated property, which may be called the foundry part, including the foundry buildings, storage yard and fence, but not the fixtures, on the evidence I would, if no claims for damages for disturbance had to be taken into account, estimate the value of such foundry part at $75,000 and find the amount of the defendant's entitlement to compensation accordingly. This would, of course, include the value which the land had reached for all purposes at the date of the expropriation.

The defendant's claim in respect of the fixtures occasions no difficulty. Counsel for the parties were able to agree upon a list of machinery and equipment that ought to be regarded as fixtures in the sense that, although the articles were chattels, they had become so affixed to the freehold as to be part of it. It is, therefore, not necessary to consider in respect of each piece of machinery or equipment whether the manner of or reason for its being fixed to the freehold was such as to make it a fixture and part of the freehold. If it were necessary, I am satisfied from the evidence and the view taken by the Court that the articles included in the list agreed upon by counsel were such fixtures. The only question is whether their value ought to be included in the estimate of the value of the expropriated property which the law requires the Court to make. The answer is in the affirmative: *Gibson* v. *Hammersmith Railway Company* (1), *Hunter* v. *Dowling* (2). Evidence as to the value of the fixtures was given for the defendant by Mr. W. Barrie, a man of experience. He was

(1) (1863) 32 L.J. (N.S.) Ch. 337. (2) (1895) 2 Ch. 223.

familiar with the machinery and equipment agreed upon as fixtures, including the cost of their purchase and installation, and gave particulars of their installed value in exhibit E. His total valuation came to $19,538.78 which he reduced by $830 for 1938 prices, leaving a valuation of $18,753.78. On cross-examination, Mr. Barrie agreed that the machinery could have been bought for 50 per cent of the price shown, and the shafting for about 60 or 70 per cent. Questions of installation cost arose in connection with the various items and Mr. Barrie was asked to prepare a further statement. His reconsidered valuation is stated in Exhibit H as amounting to $14,986.26. But counsel for the defendant contended on the evidence that in respect of certain items on Exhibit H, namely, items 7, 8, 9 and 10, the corresponding figures on Exhibit E should be accepted. I think there is much to be said for his contention and that it would be fair to make some addition to the total shown by Exhibit H. Mr. H. V. Haight, for the plaintiff, said that he had looked over the list shown in Exhibit H and considered the figures in the last column very reasonable, meaning that they were reasonably accurate. He seemed to be clear that there was no real difference between his opinion as to the value of the fixtures and that of Mr. Barrie. Then, on cross-examination, he agreed with counsel for the defendant that it was not fair to depreciate the cupolas and the brass furnaces as much as Mr. Barrie had done, but when it came to other items on the list he was not able to deal specifically with them, although he thought some of them were too high. It became apparent that he was not as familiar with the subject of the fixtures as might be desired, so that, in my opinion, the evidence as to their installed value remains approximately where Mr. Barrie left it. In connection with the fixtures Mr. MacRostie gave evidence that the cost of the footings under them amounted to $1,332.30. This sum could have been taken into account as an item of value either of the buildings or of the fixtures. I have included it in the latter. It is true of the fixtures, as it is of the buildings, that their value ought to be taken into account only to the extent that they enhance the value of the property as a whole, so that what has been said of the foundry buildings as an inadequate development of the land in view of its increased value is also applicable

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to the fixtures. On this basis and on the evidence I find no difficulty in estimating that the fixtures added a value of $17,000 to the value of $75,000 which I have found for the foundry part of the expropriated property. I think that a prospective buyer of the foundry premises would have been willing to pay such additional amount for them and that the defendant could not reasonably expect to receive more. The valuation of the foundry part of the defendant's property, including the fixtures, thus comes to $92,000, subject to the observations made.

I now turn to the defendant's other claims. In the course of the argument I requested counsel to indicate how his client's claim of $200,000 was made up and he did so, furnishing a list which is included with the other papers in the court file. The claims in respect of the land, $49,842; the buildings, $41,866 for the foundry and $10,605 for the Devlin Block; the fixtures, $19,563.78, and the footings, $1,332.30; amounting altogether to $123,209.08 have been dealt with and I have found that the amount of compensation that should be allowed if there were no other claims to be considered, would be $112,000. The remaining claims of the defendant are as follows: moving and depreciation to machines, $15,000; removal of stock in trade etc., and equipment in Devlin Block, $2,500 and $180; crating and removing patterns, $2,401 and $292.50; shelving for patterns, $200; placing and cataloguing patterns, $2,553.75; new moulding sand, $2,122.56; removing scrap, $150, pig iron, $75, coke $37.50, moulding sand in bin, $45; six month's wages, $34,332.57; loss of profits, $2,700; taxes on one of two buildings, $2,000; loss of trade, diminution to good will and incidental damages, $22,311.04; making a total additional claim of $84,900.92. For purposes of convenience these claims may be grouped together and described as the defendant's claims for damages for disturbance resulting from the expropriation. The important thing to notice is that the amount of $84,900.92 is claimed in addition to the sum of $123,209.08 representing the value of the land, buildings and fixtures as put forward by the defendant's own witnesses. I should point out that the two sums mentioned amount to a total of $208,110, which is more than the amount claimed in the Statement of Defence. The probable explanation is that there was

a mathematical error by counsel in computing the amount of the final item of $22,311.04 in order to make up the total of $200,000.

While the total of the disturbance claims amounts to $84,900.92, the amount warranted by the evidence is very much less.

[Here the learned President reviewed the evidence as to loss by disturbance and concluded.]

The total amount of the claims for damages by disturbance, proved or estimated, thus comes to $26,617.31.

The first question that arises is whether the defendant is entitled as of right to have this amount added to the sum of $92,000 already referred to. In other words, has the owner of expropriated property, taken under the Expropriation Act, an independent cause of action for damages in respect of the loss by disturbance sustained by him as the result of the expropriation in addition to his claim for the value of the property? If not, then the next question is, what effect, if any, can be given to claims for such damages? The state of the case law on the subject is chaotic. Claims have been allowed in this Court in respect of a variety of items of disturbance, including the cost of moving to new premises, the depreciation in value of machinery, equipment or other chattels through necessary removal or sale, the increased cost of doing business in the new premises, the disturbance or loss of trade or business or the chance of making profits or the loss or diminution in value of good will. The chaos exists not so much in respect of the items for which compensation has been allowed as of the basis on which the allowance has been made and its extent. The cases are numerous but I need cite only some of them, for example, *Gibbon* v. *The Queen* (1); *The King* v. *Stairs* (2); *The King* v. *Thompson* (3); *The King* v. *Condon* (4); *The King* v. *Richards* (5); *The King* v. *MacPherson* (6); *The King* v. *Courtney* (7); *Maxwell* v. *The King* (8); *The King* v. *Jalbert* (9); and *The King* v. *Goldstein* (10). These will sufficiently illustrate the conflicting views that have been expressed. There

(1) (1900) 6 Ex. C.R. 430.
(2) (1907) 11 Ex. C.R. 137.
(3) (1907) 11 Ex. C.R. 161.
(4) (1909) 12 Ex. C.R. 275.
(5) (1912) 14 Ex. C.R. 365 at 372
(6) (1914) 15 Ex. C.R. 215.
(7) (1916) 16 Ex. C.R. 461.
(8) (1917) 17 Ex. C.R. 97.
(9) (1916) 18 Ex. C.R. 78.
(10) (1924) Ex. C.R. 55.

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are similar conflicts in England in the cases dealing with the Lands Clauses Consolidation Act of 1845 and in the decisions in the provincial courts under the various Acts dealing with the expropriation of property in force in such provinces. The cases cited fall into two classes, according to the opposing views indicated in them. The judgments of Burbidge J., the first judge of this Court after its creation as a separate Court, fall into the first class of cases; he justified the allowance of compensation for loss by disturbance on the ground that it is an element of the value of the expropriated land. His view is illustrated by his statements in *The King* v. *Stairs* (*supra*), at page 139:

> Now, what the defendants are entitled to in a case of this kind where the whole property is taken and there is no severance, is compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property

and also in *The King* v. *Thompson* (*supra*), where he said of a loss on the sale of machines, tools and other articles through the expropriation of foundry premises, at page 162:

> Such a loss as this is, I think, when inevitable, an element to be taken into account in determining the value of the lands and premises taken: and the amount of the compensation to which a defendant is entitled.

Then there is the second class of cases beginning with the judgments of Cassels J., who considered that the rights of the owner were not confined to the value of the land but extended to compensation for all damages resulting from the expropriation in addition to such value. His views are illustrated in *The King* v. *Condon* (*supra*), where he held that in addition to full and fair compensation for the value of the expropriated land and buildings the owner was entitled to an allowance for contingencies, moving, good will, etc., as though the owner had separate rights in respect of each, and in *The King* v. *MacPherson* (*supra*) where he said, at page 216:

> What the land-owner is entitled to receive is the market value of the lands expropriated, together with compensation for loss, such as good-will etc, as is occasioned to him by reason of having to move from the premises occupied.

and in *The King* v. *Courtney* (*supra*), where he left no doubt as to his views when he said, at page 463:

> The defendant is entitled to be compensated for the value of his premises to him and the loss of his business.

The views expressed in these two classes of cases, are not, in my opinion, reconcilable with one another. The first question to be determined, therefore, is whether the owner of expropriated property has two separate rights to compensation, one for the value of the land and the other for the damages for disturbance, as Cassels J. considered, or only one, namely, a right to compensation for the value of the land in the estimation of which loss by disturbance may be taken into account as an element of value, as indicated by Burbidge J. The difference in effect may be very great. Both views find support in the authorities, so that the problem is to ascertain on which side the weight of authority lies.

The starting point for the solution of the problem is indicated in the judgment of the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham* v. *The King* (1). The decision itself related to the compensation to be paid to the owner of expropriated land for the injurious affecting of his remaining land by the anticipated use of the expropriated part together with lands owned by others and is not relevant to the present case where the whole of the defendant's land was taken and no question of the injurious affecting of remaining land arises, but some of the statements made by Lord Parmoor in the course of delivering the judgment of the Judicial Committee are of paramount importance. He pointed out that compensation claims are statutory and depend on statutory provisions. At page 322, he laid down the following principle:

> No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected", unless he can establish a statutory right.

It follows that if the owner has any claim to compensation his right must be found in a Canadian statute. Moreover, if the Canadian statute prescribes the standard by which the amount of his compensation is to be measured, such standard must be used regardless of whether in any given case it provides full compensation for the loss suffered by the owner of the expropriated property as a result of the expropriation or not. The owner's right to compensation is wholly a statutory one, so that if the

(1) (1922) 2 A.C. 315.

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statute has fixed the basis for its assessment the Court has no right to substitute what it may think ought to be the basis for the one which Parliament has directed it to use. Lord Parmoor indicated that the source of the owner's statutory right is to be found in what is now section 19 of the Exchequer Court Act, R.S.C. 1927, chap. 34, which provides in part as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

These provisions do more, in my view, than merely give jurisdiction to the Court. They also confer statutory rights upon the claimants. That the claimant's statutory right to compensation when his property has been expropriated or damaged by being injuriously affected is established by these sections, and not by the provisions of the Expropriation Act, can be demonstrated by reference to the legislative origin of the two enactments, as will be done later. Then section 47 of the Exchequer Court Act prescribes the standards by which the statutory rights accorded by sections 19 (*a*) and 19 (*b*) respectively must be measured. It appears in the Act under the heading, "Rules for Adjudicating upon Claims", and reads as follows:

47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

The Court is hereby given specific directions that, in determining the amount of compensation to be paid to claimants under sections 19 (*a*) and 19 (*b*), it must follow certain rules. The first direction is that where the claim is under section 19 (*a*) for any land or property taken for the purpose of any public work the Court must estimate the value thereof. This is the statutory authority for saying that the amount of compensation to which the owner is entitled is the value of the land or property as estimated by the Court. The second direction is that where the claim is for injury done to any land or property

the Court must assess the amount thereof. This must refer to a claim under section 19 (*b*) for damage to property injuriously affected by the construction of any public work. The nature and extent of such a claim was discussed recently in *The King* v. *Acadia Sugar Refinery Company Limited* (1). Since there can be a claim for damage under section 19 (*b*) only when the owner has property that is injuriously affected, it follows plainly that when the whole of his property has been taken, so that he has no property left that can be injuriously affected, he can have no right to damages under this section. And since this is the only section that authorizes any award of damages in connection with the expropriation of property, it also follows that his claim for compensation under section 19 (*a*) for the property taken from him must be limited to its value. Nowhere is he given any statutory right to damages apart from such value.

There is nothing in the Expropriation Act that runs counter to this statement. Nowhere in that Act can any provisions be found for conferring a right of compensation for property expropriated under it or prescribing any rules for the ascertainment of its amount, when it cannot be agreed upon. The explanation of this seeming lack is a simple one, namely, that since such provisions are contained in the Exchequer Court Act they are not necessary in the Expropriation Act. There are, of course, a number of sections in the Expropriation Act in which the existence of the statutory right to compensation is assumed and recognized. One of these is section 23 which reads in part as follows:

> 23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property.

It seems plain on its face that this section does not even purport to confer any right of compensation or prescribe any standard for its measurement. It is not a principal section but an auxiliary one, and is concerned only with the status of the compensation money, after it has been agreed upon or adjudicated, namely, that it shall stand in the stead of the expropriated land or property. This view of the section will be confirmed beyond dispute

(1) (1947) Ex C.R. 547; (1947) 4 D.L.R. 653

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by a study of the purpose for which it was originally introduced and its place in the statutory scheme relating to the expropriation of property, originally contained in one act, but now embodied partly in the Expropriation Act and partly in the Exchequer Court Act. It is, therefore, in my opinion, a mistake to regard the word "compensation" in section 23 of the Expropriation Act as if it were the governing word in the statutory scheme and to read into it the meaning that the owner of expropriated property is entitled not only to the value of the property but also to damages for all loss consequent upon its expropriation, when the language of section 47 of the Exchequer Court Act so plainly declares that the measure of his entitlement is the value of the land. I cannot see how there can be read into the word "value" in section 47 a right to damages apart from value. For reasons that will appear later I shall have to deal further with this important matter, but, in the meantime, content myself with saying that on my reading of the statutory enactments alone, and also in the light of their legislative history, I think it is manifest that when property has been expropriated its owner is confined in his right of compensation to its value as estimated by the Court, and has no independent right to damages for loss resulting from its expropriation apart from such value. The owner has only one right to compensation, not two separate ones.

Notwithstanding a number of statements to the contrary, I think that the weight of judicial authority supports the same view. That being so, the statements suggesting otherwise cannot be accepted as correct. Possibly among such statements is one by Idington J. in *Dodge* v. *The King* (1), where he said:

> The market price of lands taken ought to be the *prima facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

Unfortunately, this statement, which is frequently cited, is equivocal in meaning; it can be read in the sense which the authorities I shall refer to warrant, but it is also capable

(1) (1906) 38 S.C.R. 149 at 155.

of being read as one of the statements mentioned, in which case exception can be taken to it in respect of its reference to damage, which was *obiter,* and to the extent that such reference suggests that the owner of expropriated land has a right of action for the damage done to his business in addition to his right to receive the value of the land to him. Other statements are contained in the text books. For example, Cripps on Compensation, 5th edition, page 106, says:

> The loss to an owner, whose lands are required or have been taken, omitting all questions of injury to adjoining lands, includes not only the actual value of such lands, but all damage directly consequent on the taking thereof under statutory powers.

And later:

> If the owner is in occupation of premises, he is entitled to compensation for damages incurred through the necessity of removal, since these are losses consequent on the taking of his property under statutory powers.

And these statements are repeated in the 8th Edition, at page 183. Cripps cites as his authority a dictum of Erle C. J. in *Rickets* v. *Metropolitan Railway Company* (1), as follows:

> As to the argument, that compensation is in practice allowed for the profits of the trade where land is taken, the distinction is obvious. The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation, then, is the same as in trespass for expulsion; and so it has been decided in *Jubb* v. *The Hull Dock Company.*

This dictum is also the authority for similar statements, one in Browne & Allan's Law of Compensation, 2nd Edition, page 102, under the heading "Damages for expulsion":

> Besides the loss of the property itself, there is not unusually a loss to the owner occasioned by his being turned out of his land or premises. Such loss is a subject of compensation, and includes loss of profit, costs of removal, loss of fixtures, and the like.

and another in Arnold on Damages and Compensation, 2nd Edition, page 247:

> The compensation, it will be observed, must cover all loss directly sustained by the compulsory process of expulsion, and is in principle analogous to that given in an action for trespass, except that, of course, nothing in the nature of vindictive damages can be awarded.

The origin of these statements is thus traceable to *Jubb* v. *The Hull Dock Company* (2). In that case a brewery

(1) (1865) 34 L.J.N.S.Q.B. 257 at 261.

(2) (1846) 9 Q.B. 443

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was taken by the defendant and the plaintiff claimed compensation for the loss of his business as a brewer as well as for the value of the land and buildings. The jury awarded the plaintiff £400 for his interest in the brewery and the further sum of £300 as compensation for the damage, loss and injury which he would sustain by reason of having to give up his business as a brewer until he could obtain suitable premises in which to carry on his business, and judgment was directed for these two sums. A rule nisi for a writ of *certiorari* having been obtained, the validity of the second part of the finding was challenged, but Lord Denman C. J. held that the words of section 117 of the Act under which the plaintiff's property was taken were large enough to include compensation to a landowner, parting with his premises, for loss which he would sustain by having to give up his business as a brewer until he could obtain other suitable premises for carrying it on, and that a verdict awarding, first, a sum for purchase-money, and, secondly, a further sum as compensation for such loss, was warranted by the Act. I have no doubt that these statements influenced Cassels J. in forming the opinions he expressed in the cases referred to. But although some support can be found in them for the view that the owner of expropriated property may claim compensation not only for its value to him but also, and apart from such value, for all losses consequent on its expropriation, this view, notwithstanding *Jubb* v. *The Hull Dock Company* (*supra*) and the dictum of Erle C.J. in *Rickets* v. *Metropolitan Railway Company* (*supra*), ought not, in view of later decisions, to be now accepted. It is, I think, inconsistent with the judgment of the House of Lords in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Company* (1). There the Railway company took certain lands under their statutory powers. The jury in a compensation trial under the Lands Clauses Consolidation (Scotland) Act, 1845, found that the owners of the lands were entitled to certain sums, (1) for the value of the land, (2) for the value of the buildings, and (3) as compensation for the value of the business, and the question was whether the third named sum ought to be included as part of the consideration for the sale so as

(1) (1887) 12 A.C. 315.

to be chargeable with stamp duty. The First Division of the Court of Sessions held that it should not, but their judgment was unanimously reversed by the House of Lords. Lord Halsbury L.C. pointed out that under section 48 of the statute only two things are dealt with. At page 320, he said:

> The two things, and the only two things, which are within the ambit and contemplation of the statute, are the value of the lands and such damages as may arise to other lands held therewith by reason of the particular land which is taken being taken from them.

The situation was thus identical with that under section 47 of the Exchequer Court Act. It was clear there, as it is in the present case, that since the whole of the land was taken and there was no damage to other lands the only matter to be considered was the value of the land that was taken. Lord Halsbury then went on to say, at page 321:

> It is admitted, therefore, impliedly, that the only thing which the jury had here to assess was the value of the land. My Lords, of course the word "value" is itself a relative term, and in ascertaining what is the value of the land it is extremely common, indeed it is inevitable, to go into a great number of circumstances by which that which is proper compensation to be paid for the transfer of one man's property to another is to be ascertained. A whole nomenclature has been invented by gentlemen who devote themselves to the consideration of such questions, and sometimes I cannot help thinking that the language which they have employed, so familiar and common in respect of such subjects, is treated as though it were the language of the legislature itself. We, however, must be guided by what the language of the legislature is. Now the language of the legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as "damages for loss of business" or "compensation for the good-will" taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation.

In my view, while this case recognizes that loss by disturbance may be taken into account in estimating the value of the expropriated land to the owner, it is a clear denial of the owner's right to damages for loss occasioned by the expropriation apart from such value. Lord Halsbury said that the matter seemed to him to be an exceedingly plain

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one under the section before him. In my view, the meaning of section 47 of the Exchequer Court Act is equally plain.

The same view was expressed by the Judicial Committee of the Privy Council in *Pastoral Finance Association, Limited* v. *The Minister* (1), to which further reference will be made later, where Lord Moulton, speaking of a claim in respect of prospective savings and additional profits lost to the appellants because of the expropriation, said:

> They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land.

That there is no independent cause of action for damages for business disturbance apart from the value of the land is also shown by *Re Boulton and The Standard Fuel Co. and The Toronto Terminal Railway Co.* (2). There the railway company had expropriated certain lands owned by Boulton and occupied by The Standard Fuel Company as tenants in their coal business. The arbitrator under the Railway Act awarded $214,637 as compensation for the lands taken and also $102,006.69 as compensation for the value of the buildings on the land and business disturbance, of which $62,006.69 was for the buildings and $40,000 for the disturbance. All the parties appealed from the award to the Court of Appeal of Ontario. The appeals of the owner and tenant against the award in respect of the lands were dismissed. The appeal of the Railway Company was confined to the item of $102,006.69. The grounds of this appeal were stated by Middleton J.A., at page 300, as follows:

> The value attributed to the land was as a potential site for a factory or some other industry. It far exceeds any possible value as a coal yard. That factory site value cannot be realized unless and until the owner of the land is in a position to deliver it to such a purchaser as would use it for the erection of a factory building or other factory purposes This implies the demolition of all the existing buildings and structures now upon the land and reducing it to a vacant building lot. In other words the existing business and the buildings in connection with the existing business are such a detriment to the value of the lot that unless and until they are removed its full value as a potential site cannot be realized. Any purchaser for these purposes would regard the existing business and the existing buildings as a detriment, and would abate the price accordingly. To allow this increased factory site price and then to allow a price for the detrimental building and business removal is in effect to make the purchaser pay twice.

This argument is an important one to consider in all cases where the value of the land cannot be realized with-

(1) (1914) A.C. 1083 at 1088. (2) (1933) O.W.N. 298.

out removal from it as, for example, in *Horn* v. *Sunderland Corporation* (*infra*). Middleton J.A., with whom Mulock C. J. O. agreed, accepted this argument as sound and allowed the Railway Company's appeal. At page 300, he said:

> This view appears to be sound. As a coal yard this property was not worth two thirds of the price awarded. The additional sum awarded is by reason of its possible use for business or building purposes involving the removal of the business and the destruction of the buildings. Hence the award made to the tenant cannot be sustained.

Then the tenant was allowed $20,000 for forcible taking, and expense in addition to his share in the award of $214,637. From this judgment the tenant appealed to the Judicial Committee of the Privy Council. Lord Russell of Killowen, who delivered the judgment of the Board (1), after saying that the case was *sui generis* and expressing the opinion that the view taken by the majority in the Court of Appeal was correct, said, at page 659:

> The value of the land . . . has been brought out at an increased figure by having been on the footing above indicated, *i.e.*, upon a footing which presupposes that both the buildings and the business have already disappeared . . . On that footing the value of the buildings, etc., and compensation for business disturbance, can no longer properly enter into the matter, not because the value of the land has been increased by any specific figure representing actually either the value of the buildings or damages for business disturbance; but because an increased value has been attributed to the land upon a hypothesis which is inconsistent with the existence of a claim either for the value of buildings or for damages for business disturbance.

The fact that the claim for damages for business disturbance was disallowed is tantamount, in my opinion, to the denial of its existence as an independent cause of action.

Then, finally on this point, I refer to the important judgment of the English Court of Appeal in *Horn* v. *Sunderland Corporation* (2), decided under the Acquisition of Land (Assessment of Compensation) Act, 1919, section 2, rr. 2 and 6, which provide in part as follows:

> (2) In assessing compensation, an official arbitrator shall act in accordance with the following rules:—
>
> (2) The value of the land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize:
>
> (6) The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

(1) (1935) 3 D.L.R. 657.

(2) (1941) 2 K.B. 26.

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In that case the corporation took certain land belonging to the appellant who occupied it as farm land. He claimed £47,713 for the land on the basis that it was a building estate ripe for immediate development and should be valued as such and not as a farm, but he also made a number of other claims which may be grouped and described as claims for disturbance. The arbitrator made an award of £22,700 and in so doing said:

> The said sum of £22,700 does not include any sum as compensation for the disturbance of the claimant's business by reason of his dispossession of the land. I find that the sum so assessed could not be realized by a willing seller in the open market unless vacant possession were given to the purchaser for the purpose of building development.

The owner served a notice of motion asking that the award might be remitted to the arbitrator on the ground, *inter alia*, that "the reason given by the arbitrator for not awarding any sum by way of consequential damage is erroneous in law". Atkinson J. agreed with this contention and ordered the award to be remitted to the arbitrator to assess the loss occasioned by the disturbance of the owner's business. The corporation appealed and its appeal was allowed. For the moment, I am concerned with this judgment only with regard to the question whether the right to claim damages for disturbance is an independent cause of action. Sir Wilfred Greene M.R. was emphatically of the opinion that it was not, either under the Lands Clauses (Consolidation) Act of 1845, or under the Acquisition of Land Act of 1919. As to the former he said, at page 32:

> It became the practice under the Lands Clauses Acts to ask the jury to deal separately with the elements into which the price was capable of being split, although there was no necessity to do this, since the price to be paid was a global sum . . . But one element which the jury was entitled to take into consideration was the damage suffered by the owner from disturbance, for example, of his business. It is important in considering the present case to remember that this was not a separate head of compensation such as for compensation for injurious affection, but merely one of the elements going to build up the purchase price to which the owner was entitled in all the circumstances of the case.

And he denied that even under the Act of 1919 there was a separate right to compensation for business disturbance. At page 35, he said:

> It is a mistake to construe rr. 2 and 6 as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation.

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His view was that the contention that there were two separate rights would have been incorrect if the case had been one under the Lands Clauses Act alone as being inconsistent with the decision in *Inland Revenue Commissioner* v. *Glasgow* and *South-Western Railway Co.* (*supra*) and he also held that rule 6 of section 2 of the Act of 1919 did not confer a right to claim compensation for disturbance but merely preserved an existing right. Scott L.J. was of the same view. At page 40, he said:

> It was argued before us for the respondent seller that, whatever the law had been before, the effect of r. 6 was to create a general right to compensation for "disturbance", and such other matters as are covered by the general words of that rule, over and above the price of the land taken, and that it was the statutory duty of the assessing tribunal, whatever the basis of valuation on which the price had been calculated, to add this figure to the valuation of the land to ascertain the total compensation. I do not accept that contention, for I agree with the opinion of Lord Alness (then Lord Justice Clerk) in *Venables* v. *Department of Agriculture for Scotland* (1) that r. 6 "confers no new rights although it manifestly purports to save existing rights."

And then he said of the Act of 1845, at page 42:

> The legislation recognizes only two kinds of categories of compensation to the owner from whom land is taken: (1) the fair value to him of the land taken, and (2) the fair equivalent in money of the damage sustained by him in respect of other lands of his, held with the lands taken, by reason of severance or injurious affection. For compulsory acquisition those are the only two kinds of statutory compensation.

This statement is the same as that of Lord Halsbury L.C. in *Inland Revenue Commissioners* v. *Glasgow* and *South-Western Railway Co.* (*supra*) cited above, and equally as applicable to section 47 of the Exchequer Court Act. There could not be a more direct denial of a separate right of action for disturbance apart from the value of the land. Then Scott L.J. after reviewing the sections of the 1845 Act said, at page 45:

> These extracts from the only relevant sections show clearly that a claim for disturbance connected with the land taken must be made as part and parcel of the claim for purchase money. It cannot come under the head of compensation for severance or for injurious affection to the other lands of the owner, and the statute knows no *tertium quid* in the way of compensation.

Scott L.J. then dealt with the decision in *Jubb* v. *The Hull Dock Co.* (*supra*) and made the following statement with regard to it, at page 46:

> The decision has always been treated as an authority for the proposition that compensation for personal loss to the owner arising out of the

(1) (1932) S.C. 573 at 579.

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eviction by statutory title is to be regarded as recoverable, if at all, only as an element in assessing the price to be paid for the land taken.

I confess that I find it difficult to agree that the case has been so treated, for certainly the statements in the text books to which I have referred seem to suggest otherwise, but if it ever was regarded as an authority for the view that the owner of expropriated property had a separate right of action for damages for disturbance over and above his right to the value of the land, it ought no longer to be so regarded.

Having regard, therefore, to what I consider the plain terms of section 47 of the Exchequer Court Act and the weight of judicial authority, I have no hesitation in holding that when property is expropriated under the Expropriation Act the owner's claim to compensation for it is confined by section 47 of the Exchequer Court Act to the value of the property as estimated by the Court, meaning thereby its value to the owner, and not to the expropriating party; that, if the owner has suffered any loss by disturbance or otherwise resulting from the expropriation, the Court, in estimating the value of the property, may take such loss into account only to the extent that it is an element in its value, but not otherwise; and that the owner has no independent cause of action for damages for such loss apart from such value. What the Court must do, when a claim for the property is made, is to estimate its value. The owner's right to compensation for loss can exist only if his loss is an element in such value; if it is not, there is no statutory authority for granting compensation for it.

It follows from what I have said that the amount of compensation money to which the defendant is entitled for the foundry part of its property cannot be determined by the simple process of adding the total amount of its claims for disturbance to the sum of $92,000. Since such claims can be taken into account only to the extent that they are for elements in the value of the property it is important to ascertain what the term "value" as used in section 47 of the Exchequer Court Act means. By itself the term is an elusive one, but when it is considered that the value which the Court is directed to estimate is the value of the property to the owner, and not to the expropriating party, a still greater difficulty presents itself

by reason of differing views as to what is meant by the term "value to the owner". It has been, I think, a source of confusion and resulting error in some of the cases. Some of the confusion has been due to the assumption that, when the expropriated property has a special adaptability for a particular purpose or a particular use by the owner, it has a special value to him in addition to its market value or what he could get for it if he tried to sell it. Another reason for the confusion has been the emphasis placed on the requirement that the compensation for the property must be on the basis of its value to the owner, and not its value to the expropriating party, and the conclusions drawn therefrom, either that the former basis must be more advantageous to the owner than the latter or, at any rate, that "value to the owner" is a term of special import to the owner and connotes a right to compensation peculiar to him and one to which he would not be entitled if his right were based only on value or market value. There has thus been read into the term "value to the owner" a special right to compensation that neither of the terms "value" or "market value" would convey. But not all of the confusion is attributable to the meanings read into the term "value to the owner". Some of it is due to use of the term "market value" without definition. It is important, therefore, to ascertain as nearly as is possible what the terms "value to the owner" and "market value" mean.

The outstanding statement of the principles to be applied in determining the amount of compensation to be paid for expropriated property is that of Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board* (1), where he said:

> The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

(1) (1909) 1 K.B. 16 at 29.

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Two things are to be noticed in this statement of the need for equivalence between the expropriated land and their worth in money to the owner; one, that the term "value to the owner" does not here mean special value, but has a limitative effect and is used to restrict the owner's claim; and the other, that the compensation for the lands estimated on their value to the owner is to be based on their market value. In the *Lucas* case the land taken had peculiar natural advantages for a reservoir site when taken with other lands and the Board had statutory powers to acquire lands for such a purpose. The umpire took this special adaptability of the land into account as an element of value. Bray J. held that he was not precluded from so doing by the fact that no buyer for reservoir purposes could be found, except a buyer who had obtained parliamentary powers, and also thought that the fact that the board itself might become possible purchasers who would give a special price for the land owing to its special value ought to be considered, and upheld the award on these grounds. On appeal to the Court of Appeal it was held that the umpire had no right to consider the realized value of the land by reason of the fact that it had been taken under statutory powers for a reservoir site purpose, but should value only the possibility that the land might be required for such purpose, and that since he had not drawn any distinction between the possibility of the land being so required and the realization of such possibility he had gone on a wrong basis and the award must be remitted to him. It is clear that the owner was not entitled to any enhancement in the value of the land due to existence of the scheme for which the land had been acquired. But while there was no doubt as to what the umpire should not take into account, there were differences of opinion as to the factors that might be considered in valuing the possibility of the land being required. Vaughan Williams L.J., at page 25, agreed with the opinion of Bray J. that the fact that no buyer for reservoir purposes could be found except a buyer who had parliamentary powers did not prevent the special value being marketable, and that the fact that the board itself might become possible purchasers who would give a special price for the land ought to be considered. But Fletcher Moulton L.J., on the other hand,

expressed the opinion, at page 31, that the decided cases to his mind laid down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the land to be purchased under it. Then he added that when the special value exists also for other possible purchasers, so that there is, so to speak a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration. Thirty years afterwards, this expression of opinion by Fletcher Moulton L.J. was disapproved in the *Vyricherla* case (*infra*), to which further reference will be made later.

The view that the value of land to the owner means what he could get for it in money was put very concisely by Shearman J. in *Sidney* v. *North Eastern Railway* (1). After stating that "special adaptability is nothing more than an element of market value" and that it is "merely one kind of special value which is likely in the market to attract a class of purchasers who would come into competition," he said, at page 641:

> The value of the land which should be awarded by the arbitrator is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.

That the value of the land to the owner is the amount of money that he could get for it in a competitive field is to be deduced from the decision of the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2). There the appellant company had power to expropriate lands required for a water power development scheme. The respondents owned three properties that were necessary to it. The majority of the arbitrators had valued their lands purely as agricultural land, but their award had been set aside by the Superior Court of Quebec which held that the owners were entitled to share in the value of the scheme. The Judicial Committee held "that in assessing the compensation payable to the respondents it was not proper to treat the value to the owners of the lands and rights as a proportional part

(1) (1914) 3 K.B. 629. (2) (1914) A.C. 569.

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of the value of the realized undertaking which the appellants were proposing to carry out; that the proper basis for compensation was the amount for which the respondent's lands and rights could have been sold had the appellants with their acquired powers not been in existence, but with the possibility that that company or some other company or person might obtain those powers". At page 576, Lord Dunedin said:

> The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases, nowhere with greater precision than in the case of *In re Lucas and Chesterfield Gas and Water Board* (1) where Vaughan Williams and Fletcher Moulton L.JJ. deal with the whole subject exhaustively and accurately.

The latter part of this statement requires modification in view of the fact, as pointed out in the *Vyricherla* case (*infra*), that the opinion of the two Lords Justices on one important question were diametrically opposed to one another. Then Lord Dunedin stated two brief propositions:

> (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

In this case, as in the *Lucas* one (*supra*), the requirement that the value of the land should be estimated from the point of view of its value to the owner, not the value to the expropriating party, was limitative and restrictive of the owner's claim. And it is also plain that the amount of the value of the land to the owner is not the price which he places upon it, but the amount he could realize for it in money if he tried to sell it. Lord Dunedin put this important explanation of the market test of value to the owner as follows, at page 576:

> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking . . . the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

(1) (1909) 1 K.B. 16.

And at page 579, he put the question thus:

> The real question to be investigated was, for what would these subjects have been sold, had they been put up to auction without the appellant company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and acquiring powers.

That the value of land to the owner cannot exceed the maximum amount which a purchaser would be willing to give for it sooner than fail to obtain it is established beyond dispute by the decision of the Judicial Committee of the Privy Council in *Pastoral Finance Association, Limited* v. *The Minister* (1). There the land taken by the Minister had been bought by the appellants for the expansion of their business. Evidence was given at the trial as to the savings and additional profits which they would make in their business if it were transferred to the expropriated land and the trial judge directed the jury that they should consider what capital amount fairly represented those savings and profits, and should add that amount to the market value of the land. The Judicial Committee considered this direction erroneous. At page 1088, Lord Moulton said:

> Their Lordships are of opinion that this direction is seriously at fault. That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

(1) (1914) A.C. 1083.

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The statutory basis of assessment of compensation, where all the land was taken and there was no claim for injurious affecting of other lands, under section 117 of the Public Works Act, 1900, of New South Wales was similar to that fixed by section 47 of the Exchequer Court Act. The *Pastoral Finance Association, Limited* case is thus as applicable in Canada as in New South Wales, and is clear authority for saying that the value of expropriated property to the owner cannot exceed the amount which a prudent person in a position similar to that of the owner would be willing to give for it sooner than fail to obtain it. The maximum amount of its worth to him in money is thus what he could sell it for.

This clarification of what was meant by "value to the owner" was the last important judicial pronouncement on the subject prior to the enactment in England of the Acquisition of Land (Assessment of Compensation) Act, 1919, when certain rules for the assessment of compensation were laid down and it was provided, as already stated, that, subject to certain provisions, the value of the land should be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize. Although there are statements in the *Horn* v. *Sunderland Corporation* case (*supra*) suggesting that this principle of valuation differed from that adopted under the Lands Clauses Acts I am unable to accept such view. I cannot see any fundamental difference between it and the principle underlying the governing decisions referred to; in my view, there was a statutory adoption and declaration of a principle already recognized in such decisions.

The process of simplification of the law was greatly advanced by the illuminating decision of the Judicial Committee of the Privy Council in *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam* (1). There a harbour was being constructed at Vizagapatam and land acquired by the harbour authorities on the south of the harbour had been allocated to oil companies and other industrial concerns. This land was malarious. The appellant's land, which was south of this land, contained a spring which yielded good drinking water which

(1) (1939) A.C. 302.

could easily be made available for the oil companies and people engaged in the harbour and was acquired for the purpose of the execution of anti-malarial works. The appellant claimed compensation on the footing of its potentialities as a building site but the Land Acquisition Officer disallowed such claim, and awarded compensation on a valuation of it as partly waste and partly cultivated with an allowance for buildings and trees. On appeal to the Subordinate Judge the appellant made a further claim on the footing of its potentialities as a source of water supply. The Subordinate Judge found against its potentialities as a building site but held that the water could be sold to the oil companies and others at a profit, that the only possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded even where the only possible buyer was the acquiring authority, and assessed the value of such potentialities at a very substantial sum. On appeal the High Court of Madras set aside his award and restored that of the Land Acquisition Officer, but on appeal to the Judicial Committee of the Privy Council the judgment of the High Court was reversed. Lord Romer, who delivered the judgment of the Committee, dealt with a number of important matters. After setting forth the facts and referring to certain provisions of the Indian Land Acquisition Act, 1894, he said, at page 311:

> The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act". The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth.

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The significance of this pronouncement lies in the statement that the principles specified in the Indian Land Acquisition Act, 1894, differ in no material respect from those under the Lands Clauses Act of 1845. It can, therefore, be taken as an exposition of the principles of valuation underlying such Act and, indeed, it proceeds on that basis. It consequently follows from the statement of Lord Dunedin in the *Cedars Rapids* case (*supra*) that the law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and that of Lord Parmoor in the *Sisters of Charity of Rockingham* case (*supra*) that the English decisions under the Lands Clauses Act are applicable in the construction of the Canadian statute, that this decision is as applicable in Canada as it is in India. Its importance lies in its clear cut definition of the compensation to which the owner of expropriated land is entitled, which must be equal to the value of the land to him, as "the price which a willing vendor might reasonably expect to obtain from a willing purchaser." There is no real difference between this statement and that of Lord Moulton in the *Pastoral Finance Association, Limited* case (*supra*) or that expressed in section 2, r. 2, of the Acquisition of Land Act, 1919. This supports my opinion that the statement of principle in such section, namely, that the value of the land shall be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize, far from being a reversal of the principle applicable under the Lands Clauses Act of 1845 was, on the contrary, a statutory recognition and declaration of the principle really applicable under such Act. Lord Romer then dealt with the manner in which the increase in the value of the land by reason of its potentialities or possibilities should be measured. It was argued for the respondent that before any value could be assigned to land because of a potentiality or possibility there would have to be competition between purchasers interested in the land because of such potentiality or possibility; that if there is only one possible purchaser of the land so interested the value of the potentiality or possibility to the owner is nil; and that this is particularly so where the only possible purchaser is the one who has obtained compulsory powers

of purchase. Counsel for the respondent relied chiefly upon the dictum of Fletcher Moulton L.J. in the *Lucas* case (*supra*), to which I have referred. Lord Romer could not accept this argument; he doubted the helpfulness of the suggestion that the arbitrator should put himself in the position of holding an imaginary auction and described it as an entire waste of the arbitrator's imagination: nor could he see how the requirement of competition between purchasers could be an essential condition of there being any value in a potentiality. At page 316, he said:

> The value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion . . . if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it.

Nor could Lord Romer see how the fact that the only possible purchaser of the land had statutory powers could prevent the potentiality from having value. He agreed that the fact that compulsory powers of acquiring land for a particular scheme could not be allowed to enhance the value of land acquired for it and that the valuation must be made as though no such powers had been acquired. The pressing need of the purchasers to acquire the land is never allowed to enhance its value. But he could not see why the value of the land should not be enhanced by the fact that the persons having statutory powers are possible purchasers. In these circumstances he disapproved the dictum of Fletcher Moulton L.J. in the *Lucas* case (*supra*) and preferred that of Vaughan Williams L.J. At page 323, Lord Romer returned to his basic test in the determination of value to the owner when he said:

> Even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers.

Finally, having decided that the judgment of the High Court must be reversed, Lord Romer expressed the opinion that the award of the Subordinate Judge was such that

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"the Harbour Authority, however willing purchasers they might be, would not have agreed to pay anything like that sum". Ordinarily this would have meant referring the matter back to him but the parties asked the Committee to state the amount of the award. And Lord Romer did so, fixing the value of the land at a certain price as being "the total price which the Harbour Authority would have been willing to pay".

The explanation of what "value to the owner" means, given by Lord Moulton in the *Pastoral Finance Association, Limited* case (*supra*), was cited with approval in the Supreme Court of Canada in *The King* v. *Northumberland Ferries Ltd.* (1) by Rand J., at page 504, and also by Kellock J., at page 510.

From the judicial decisions certain propositions clearly emerge. In the first place, the special adaptability of land for a particular purpose or use is simply an element to be considered in estimating its value and is to be taken into account together with all other elements of value. It is not something the value of which is to be estimated apart from the value of the land and added thereto. In the case of property of commercial value, there can be no special value over and above what a prudent purchaser would be willing to pay or a willing vendor might reasonably expect to obtain. That is the maximum amount of the owner's entitlement whatever his own conception of its value may be.

It is also a mistake to assume that the requirement that the compensation for expropriated property should be on the basis of its value to the owner, and not of its value to the expropriating party, is necessarily advantageous to the owner or insisted upon in his interest. In many cases exactly the reverse is true, as, for example, in the *Lucas* case (*supra*) and the *Cedars Rapids* case (*supra*), where the emphasis upon the requirement was for the purpose of making sure that the owner received *only* the value of the property to him and did not participate in any enhancement of value created by the expropriating party through the existence of the scheme for which the property was acquired. In such cases, the value of the property to the owner is much less than its value to the expropriating

(1) (1945) S.C.R. 458.

party, and the requirement is limitative in effect and restrictive of the owner's claim. There may even be cases where the value of the property to the owner by reason of the conditions under which he holds and the restrictions to which it is subject may, in terms of money, be nil: *Stebbing* v. *Metropolitan Board of Works* (1), as explained in the House of Lords by Lord Dunedin in *Corrie* v. *MacDermott* (2); *Township of Pickering* v. *The King* (3). This limitative and restrictive effect of the requirement is frequently lost sight of. Where it has such effect it safeguards the expropriating party from having to pay more than the value of the property to the owner. On the other hand, there are cases where the value of the property to the expropriating party may be less than its value to the owner. For example, it may have been taken for a purpose demanding the demolition of the buildings on it, so that its value to the expropriating party for such purpose is really only the value of the land, less the cost of such demolition. In such cases, it would obviously be unfair to the owner to compensate him on the basis of such value. The fact is that the statement that the compensation must be based on the value to the owner, and not on the value to the expropriating party, is really two statements in one, to be used together as counterparts of one another. It is just as important to exclude the use of the latter basis as it is to insist on the use only of the former. The statement is not concerned with whether the one basis is more favourable to the owner than the other or not; what is really meant to be emphasized is that the value of the property for the use for which the expropriating party has acquired it cannot be allowed to increase or decrease the amount of compensation that should be paid to the owner for it. He is entitled to its value apart from such use and it does not matter to him what its value to the expropriating party for such use may be, except only to the extent that such value might possibly affect the price that the expropriating party might be willing to pay, as suggested by Lord Romer in the *Vyricherla* case (*supra*). Under the circumstances, I cannot see how the requirement can result in any special right of compensation to the owner. That is clearly not its purpose.

(1) (1870) 6 Q.B. 37.
(2) (1914) A.C. 1056.
(3) (1947) Ex. C.R. 446.

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The term "value to the owner", as applied to property expropriated under the Expropriation Act, may now be defined. It has no technical or special meaning. It does not mean the owner's own estimate or opinion of its value, or its sentimental or intrinsic value, but only its "worth to him in money". This assumes that a money equivalent for the property can be obtained. Its value to the owner means, therefore, its realizable money value, as at the date of its expropriation. The amount of such money value is to be "tested by the imaginary market which would have ruled had the land been exposed for sale", as suggested by Lord Dunedin, and cannot exceed the amount which a prudent man in the position of the owner "would have been willing to give for the land sooner than fail to obtain it", as Lord Moulton put it, or "the price which a willing vendor might reasonably expect to obtain from a willing purchaser", as Lord Romer defined it.

Thus stated, the definition of "value to the owner" is essentially the same as that of "fair market value", as given in Nichols on Eminent Domain, 2nd edition, at page 658, which I repeat:

> By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.

And there is nothing in any of the judgments referred to that could warrant the suggestion that "value to the owner" means something different or something more. If the term "fair market value" were used with this definition of it in mind and with due regard to the last part of it, there would be no confusion through its use. It has been recognized that "market value" is not an easy term to define. Each of its component words involves differences of opinion as to meaning, and when the two are joined the difficulty of definition is intensified. Some of the confusion results from the assumption that it is the same as "market price". There is, I think, in the discussions on the subject, a preponderance of opinion that "market value" does not mean the same thing as "market price". The latter assumes a condition of fact, namely, an existing, available market for property of the kind in question, similar to that which exists for various com-

modities, or for securities, capable of absorbing all that is fed into it, with a governing price at any given time readily ascertainable. There may perhaps be a similar kind of "market price" for some kinds of real estate, but it can only be of a very limited nature, as, for example, in the case of similar properties, such as lots in a subdivision that are selling steadily. But it is obvious that in the case of an individual property, not similar to others, and particularly one having special adaptability for some purpose or use, there cannot be any such "market price". Here the matter of value is not a question of fact in the same way as the value of a commodity or security for which there is a continuous market and an ascertainable price, but is basically one of assumption and opinion based upon the surrounding relevant circumstances. It has, therefore, become necessary to define what is meant by "market value" and to include in such definition a statement of the principle to be applied in its ascertainment. Some of these definitions appear in a footnote to page 661 of Nichols in his Article 217, at page 658, the whole of which deserves study. In my view, they deserve repetition by reason of the basic thought upon which they are framed. They are as follows:

Fair cash value.

and:

The highest money price which the land would bring if sold in the open market to one buying with knowledge of all the purposes to which it was adapted, allowing a reasonable time in which to find a purchaser.

and:

Value of land for any and all uses to which it might be put, in the light of present business conditions and those that might reasonably be expected in the immediate future.

and:

What probably could be obtained if a purchaser was sought, applying the ordinary business methods.

and:

Its value in view of all the purposes to which it is naturally adapted; that means that its market value, if it is unoccupied, is fixed by its value for the most valuable of those purposes.

And other definitions, not in Nichols, read:

What a buyer would be warranted in paying and a seller justified in accepting.

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and:

> The present worth of all the rights to future benefits arising from ownership.

The same governing idea runs through all these definitions as underlies the statements of Lord Dunedin, Lord Moulton and Lord Romer in their definitions of the meaning of "value to the owner" or their enunciation of the principle governing the amount of compensation to be paid. All the definitions of "market value" connote "realizable money value". It might well be that the use of some such term in the place of "market value" would result in less confusion than has existed. But if the term "market value" is used in the sense of meaning "realizable money value", or as defined by Nichols, then the terms "value to the owner" and "fair market value" or "market value", each meaning "realizable money value", are identical in meaning.

While it might be necessary to deal somewhat differently with the case of a property of an exceptional character, the nature of which need not now be determined, where the test of realizable money value might not be adequate for the proper estimation of its value, I think it may safely be said that in the case of saleable property the test of "value to the owner", as explained in the decisions, or of "fair market value", as defined, each meaning "realizable money value" is properly applicable. This is so even in the case of a property where the number of purchasers may be small or where there is only one possible purchaser, as in the *Vyricherla* case (*supra*), for, as Audette J. put it in *The King* v. *Manuel* (1), "it has nevertheless a commercial value". It would, therefore, be applicable in the case of a private residence, and would certainly be applicable in the case of an industrial property like the defendant's foundry.

It being thus established that the defendant's claim to compensation for the expropriation of its foundry property must be measured, according to section 47 of the Exchequer Court Act, by the value of the property as estimated by the Court; that it has no independent cause of action for damages for loss resulting from the expropriation apart from such value; and that, such value, although it

(1) (1915) Ex. C.R. 381.

means value to the owner, cannot exceed the amount which a prudent purchaser would be willing to pay or a willing seller reasonably expect to obtain, that is to say, realizable money value, it seems clear that the principle of reinstatement or replacement, being the cost of placing the defendant in the same position or in an equally advantageous one as that which it occupied at the date of expropriation, cannot be applicable in determining the amount of compensation to which it is entitled. It might be that no purchaser would be willing to pay a price for the property large enough to cover the cost of reinstatement or replacement and that a willing seller could not reasonably expect to obtain such a price, in which case the cost of reinstatement or replacement would exceed the realizable money value of the property. If that were so there would be no statutory authority for paying the excess over such value and the owner, as Lord Parmoor pointed out in the *Sisters of Charity of Rockingham* case (*supra*), in the absence of such statutory authority, would have no right to it.

The non-applicability of the principle of reinstatement or replacement as a measure of compensation for expropriated property, where it is saleable and has commercial value, has been stated in this Court in several cases: *The King* v. *Wilson* (1), affirmed by the Supreme Court of Canada; *The King* v. *Peters* (2) and *The King* v. *Blais* (3).

The difference between an assessment of compensation for property on the basis of its value and one based on the cost of reinstatement or replacement was dealt with in *The King* v. *Northumberland Ferries Ltd.* (4). There two vessels were appropriated by the Crown under the War Measures Act, R.S.C. 1927, chap. 206, and the Minister of Justice referred the determination of the amount of compensation payable to the owner to this Court. The statutory provision establishing the basis of the compensation was section 5 (1) of The Compensation (Defence) Act, 1940, Statutes of Canada, 1940, chap. 28, which provided in part as follows:

5. (1) The compensation payable in respect of the acquisition of any vessel . . . shall be a sum equal to the value of the vessel . . ., no account being taken of any appreciation due to the war.

(1) (1914) 15 Ex. C R. 283
(2) (1915) 15 Ex. C R. 462.
(3) (1915) 18 Ex. C.R. 67.
(4) (1944) Ex C R. 123; (1945) S C R 458.

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In this Court, Angers J. held that the doctrine of reinstatement applied to the acquisitioning of a vessel as well as to the expropriation of land and applied such doctrine in determining the amount of compensation payable in respect of one of the vessels. In respect of this part of his award his judgment was unanimously reversed by the Supreme Court of Canada. At page 477, Rinfret C.J. pointed out that what the Court must do was to find out the value of the vessel and that since the trial judge had based his award upon what it would have cost, either to build a new ship or to purchase other ships to replace the one taken, the award could not stand. At page 489, Kerwin J. said that value to the owner was far different from replacement value. At page 494, Hudson J. agreed with the Chief Justice that the trial judge had been in error in accepting the replacement value as a proper test of compensation under the Act. At page 499, Taschereau J. expressed the opinion that the words used in the Act made it impossible to apply the principles of the reinstatement or replacement value and that if the award were to be based on the value of substituted property the claimant might obtain a larger amount than Parliament had decided he should get. At page 504, Rand J., expressed a similar view. After approving the definition of value to the owner in the *Pastoral Finance Association, Limited* case (*supra*) he said:

> But re-instatement is something quite different; it is placing the owner from whom property is taken in a substantially equivalent condition by means of substituted property. The cost of furnishing that substitute might exceed by far the value, which the owner would be willing to pay as the value of the property to him.

While I do not quite see how the standard suggested in the concluding clause can be applicable, it is clear that compensation based on the cost of reinstatement or replacement may exceed the value of the property and that when the statute specifies value as the basis of compensation the cost of reinstatement or replacement must be excluded. Then at page 516, Kellock J., in a clear cut statement, dealt with the reason for excluding the principle of reinstatement as follows:

> Reinstatement is not limited to the value of the property taken, but involves the substitution of other property and a consideration of its value or cost. It is applicable in cases when the principle *restitutio in integrum* governs, but it is quite inapplicable to cases such as the case at bar, for that principle is excluded by the terms of the governing

Statute which confines the tribunal assessing compensation to a consideration of the value of particular property, without regard to other property which may be necessary to place the person whose property is taken in the same position in which he was immediately prior to the exercise of the compulsory powers.

And Estey J. agreed with the conclusions of Rand and Kellock JJ. While the decision in this case was not in respect of property taken under the Expropriation Act, I can see no reason why the statement of Kellock J. and the other expressions of opinion referred to should not be equally applicable in such a case in excluding the cost of reinstatement or replacement as a basis for measuring the amount of compensation money to which the owner of the expropriated property would be entitled. The case is also of interest by reason of the *obiter* opinions on the subject of the principles to be applied in determining the compensation payable for property expropriated under the Expropriation Act. In this connection it is, I think, worthy of note that there does not seem to have been any reference either in this Court or in the Supreme Court of Canada to section 47 of the Exchequer Court Act and its requirement that, in determining the amount of compensation to be paid to the owner of expropriated property, the Court must estimate its value. The section is not referred to in the judgment of Angers J., and it does not seem to have been dealt with by counsel in the course of the argument on the appeal to the Supreme Court. At any rate, I did not find any mention of it in either of the factums of the parties to the appeal. Nor does there seem to have been any reference to the judgments of Lord Halsbury L.C. in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Company* (*supra*) or of Sir Wilfred Greene M.R. and Scott L.J. in *Horn* v. *Sunderland Corporation* (*supra*), which I referred to earlier, showing that in England, where land was taken under the Lands Clauses Act the basis of the compensation payable for it was the value of the land. The omission of these references may explain the assumption that seems to have been made in the case that the principles for the assessment of compensation in the case of property expropriated under the Expropriation Act were different from those applicable in the case under review. I cannot accept the correctness of such assumption. Apart from the direction that no

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account is to be taken of any appreciation due to the war, I can see no material difference between the basis of compensation for vessels acquired under the War Measures Act directed by section 5 (1) of The Compensation (Defence) Act, 1940, and that for property expropriated under the Expropriation Act fixed by section 47 of the Exchequer Court Act. In each case, the Court must determine the amount of compensation to be paid to the owner according to the value of the thing taken, and such requirement excludes the test of the cost of reinstatement or replacement.

In view of my reading of the Acts comprising the statutory scheme relating to the expropriation of property and my interpretation of the leading judicial decisions on similar legislation elsewhere, I must express my dissent from some of the opinions expressed by my learned predecessor, the late President Maclean, in the frequently cited decision of this Court in *Federal District Commission* v. *Dagenais* (1). There the owner showed that he had planned to construct an apartment house on the expropriated land; that he had paid $1,000 to an architect for the plans of the building; that his construction plans had so far advanced that he had a building survey made and had staked the bounds for the excavation for the foundation of the proposed building, at a cost of $43; and that he had moved on the property a working office and that a lot of material including a cement mixer was made ready to move preliminary to the commencement of construction, at a cost of $100; and he claimed these three amounts. In the compensation of $5,850 which Maclean P. allowed he included the sum of $1,143, the amount of the three items of expenditure mentioned because, as he put it, at page 37:

> Either the lands were that much more valuable in the hands of the defendant by reason of the expenditures made and liabilities incurred by him, in connection with the commencement of the construction of his apartment house, or, he would be entitled to be compensated in this amount as a loss or damage directly caused by the taking of his lands;

He did not decide which reason was to be adopted, saying:

> I do not think it matters how this amount enters into the calculation of the compensation allowed.

(1) (1935) Ex C.R. 25.

With respect, I think it does matter which reason is adopted: the former is consistent with the statute and the weight of judicial opinion, the latter is not. I do not think it could be said that the items of expenditure for plans and the like ought to have been excluded from consideration altogether for they might quite properly, having regard to the facts of the case, have been taken into account as an element of the value of the land taken with the construction of the apartment house about to commence, and no exception should be taken to the amount of the award solely on the ground of the inclusion of these items in it. But objection must, I think, be taken to the statement of principles made in that case. At page 32, Maclean P. said:

> It is the value of the lands to the defendant that must be considered, not its value to the Commission, nor necessarily the amount it would fetch in the market if the owner were desirous of selling it.

I am unable to reconcile the last part of this statement with the statement of Lord Moulton in the *Pastoral Finance Association, Limited* case (*supra*) that the owner is entitled to that which "a prudent man" in the position of the owner "would have been willing to give for the land sooner than fail to obtain it" or that of Lord Romer in the *Vyricherla* case (*supra*) that the compensation must be determined "by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser." These statements are direct negations of the statement cited. But the criticism of the *Dagenais* case goes further. Counsel for the plaintiff in that case urged that "the only two things which are within the ambit and contemplation of the statute are the value of the lands taken, and such damages as may arise from other lands being injuriously affected by the construction of any public work." The contention is strikingly similar to the statement of Lord Halsbury L.C. in the House of Lords in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Company* (*supra*), which I have already cited, but Maclean P. refused to accept it. At page 32, he said:

> The point is an important one and requires consideration. If the provisions of the Expropriation Act are to be construed in the sense suggested by Mr. Hill, then I fear some of our courts in this country have been astray in their method of arriving at the amount of compensation

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payable in such cases, and the same would be true of other jurisdictions where the legislative authorization for the compulsory taking of lands are expressed in somewhat the same terms as here.

With this statement I agree. I think there is no doubt, as I have already indicated, that in a number of cases, both in Canada and elsewhere, the Courts have gone beyond the statutory limits. Maclean P. went on to enumerate the various kinds of items in respect of which compensation has been allowed and then, at page 33, enunciated his view of the principles to be applied in determining the amount of compensation to be paid to the owner of property taken under the Expropriation Act, as follows:

> The principle seemed to be followed in such case was that the displaced owner should be left as nearly as was possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense, for which compensation was claimed, was directly attributable to the taking of the lands. This would seem to be founded on common sense and reason. The measure of compensation should, in justice, be the loss which the owner has sustained in consequence of his lands being taken, because it could never have been contemplated that the community should benefit at the expense of a few of its members. Compensation should be proportionate to the loss which the owner has sustained, an equivalent of what is taken from him or that which he has given up. The Expropriation Act, section 23, speaks of "the compensation money . . . adjudged for any land or property acquired or taken"; the "compensation money" does not appear to be limited by the statute to the "value" of the lands taken, in fact, I think, the word "value" is not once mentioned in the Act. The "compensation money" it seems to me, is to be the equivalent of the loss which the owner has suffered for any land "taken", and is not to be ascertained only by considering the "value" of the land. I think, it must have been within the contemplation of the Act, that "compensation money" should include any loss suffered by the owner, and which was incidental to, or flowed from, the taking of lands. The word "land" is definied in the Act as including ". . . easements, servitudes and damages, and all other things done in pursuance of this Act for which compensation is to be paid by His Majesty under this Act". The true construction of the word "damages" in this interpretation clause is perhaps difficult to determine, and in the absence of argument by counsel upon the point, I hesitate to express any opinion as to its intended meaning.

I should add that this statement was referred to with approval by Kerwin J. in the Supreme Court of Canada in *Irving Oil Company Ltd.* v. *The King* (1).

It may safely be said that it is not possible to find any statement in this Court which extends the right of an owner to compensation when his property has been expropriated under the Expropriation Act further than this

(1) (1946) S.C.R. 551 at 556.

one. But I am also of the opinion that no statement departs farther from the limits of the statutory right to compensaion that Parliament has fixed. I think that the explanation for the broad statement of Maclean P. is to be found in his desire to ensure that the owner of expropriated property should receive the fullest possible measure of compensation when his property was taken from him. But, whether this is so or not, I think that the statement is open to objection in point of law, on a number of grounds. In the first place, it seems to me that Maclean P. has adopted as a basis of compensation the principle of reinstatement or replacement, although, for the reasons already stated, such a principle is not applicable. A second reason is to be found in his seeming assumption that the whole of the statutory scheme relating to the expropriation of property is embodied in the Expropriation Act. The manner in which he dealt with the word "value", his reference to section 23 of the Expropriation Act, his statements that the "compensation money" does not appear to be limited by the statute to the value of the land taken and that the word "value" is not mentioned in the Act, and his further opinion that the compensation money is not to be ascertained only by considering the value of the land all strongly suggest that he based his opinion exclusively on a consideration of the terms of the Expropriation Act to the exclusion of other statutory enactments and that he found justification for his statement through regarding the word "compensation" in section 23 of the Expropriation Act as the governing word to which the fullest possible effect must be given. If the Expropriation Act were the only statutory enactment to be considered, and if the word "compensation" in section 23 were the governing word in the whole statutory scheme, as to which I shall have something to say later, there would be some force in the argument. But the weakness of the statement lies in the fact that the Exchequer Court Act as part of the statutory scheme was either ignored or disregarded. I do not see how Maclean P. could have made the statements he did, if he had section 47 of the Exchequer Court Act in mind with its specific direction to the Court that the amount of the owner's compensation for his expropriated property must be determined on the basis of the Court's estimate of its value. If, on the other hand,

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he did have this rule for the adjudication of the owner's claim in mind, then I must conclude that his statement is a negation of the statutory direction. To read the word "value" in section 47 as if it included not only the value of the land taken, but also damages for loss apart from such value, would simply render the mandatory language of the section nugatory. Moreover, I have no hesitation in saying that the statement is against the weight of judicial authority. Under the circumstances, with respect but without any doubt, I have come to the conclusion that the statement in the *Dagenais* case, which I have cited, is erroneous in point of law and ought not to be followed.

There are two other matters to which reference should be made. One is the effect of the inclusion of the word "damages" in the definition of "land" in section 2 (*d*) of the Expropriation Act, and the other the interpretation of the word "compensation" in section 23 of the same Act, having regard to the place of such section in the statutory scheme relating to the expropriation of property. Both matters have given rise to differences of opinion.

The definition reads as follows:

> 2. In this Act, unless the context otherwise requires,
>
> (*d*) "land" includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act;

I have already cited the comments of Maclean P. in the *Dagenais* case (*supra*), where he said:

> The true construction of the word "damages" in this interpretation clause is perhaps difficult to determine, and in the absence of argument by counsel upon the point, I hesitate to express any opinion as to its intended meaning.

The definition was also referred to in *The King* v. *Irving Oil Company Limited* (1). In this Court, O'Connor J. said, at page 231:

> While damages are included in the definition of "land" under Section 2 (*d*) of the Act, this is clearly damage for land injuriously affected set out in Section 23.

But in the Supreme Court of Canada, Kerwin J., at page 555, expressed the opinion that O'Connor J. had erred in thus limiting the meaning of the word "damages" in the definition. I shall revert to this difference of view

(1) (1945) Ex. C.R. 228; (1946) S.C.R. 551.

later. Then Rand J. after stating that the provisions of the Expropriation Act dealing with compensation are in general language, and setting out the definition, said, at page 560:

> The use of the word "damages" and the further language "and all other things done in pursuance of this Act", indicate the comprehensive sense in which the word is used and that it is intended to cover not merely the value of the land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause.

Then he referred to the opening statement in section 23 of the Act:

> The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; . . .

And said of the section, at page 561:

> This language must be construed, within the limits mentioned, in the sense of compensation "by reason of" the acquisition or taking of land or property. The clause "shall stand in the stead of such land or property" can only mean that, with the compensation money in the hands of the owner, he is in an equivalent position of holding his land or property instead of the money. He is, therefore, under that section, in the sense indicated, to be made economically whole.

And then he stated that there was nothing in the Exchequer Court Act which is in conflict with that view and referred to the provisions of section 47 of that Act and also to section 50. With the utmost respect and fully appreciating the importance of these statements, I find myself in disagreement with them in a number of respects. They are similar in effect to the statement of Maclean P. in the *Dagenais* case (*supra*) from which I have already expressed my dissent. Nor am I able to accept this view of the effect of the use of the word "damages" in the definition of "land" in section 2 (*d*). And I have already indicated an opinion as to the purpose of section 23 and the meaning of the word "compensation" as used in it that is divergent from that expressed by Rand J. Under the circumstances, I think it desirable to set forth the reasons which have led me to my conclusions in respect of these two matters.

I shall deal first with the definition of the word "land" in section 2(*d*) in so far as it includes "damages and all other things for which compensation is to be paid by the Crown under this Act", being primarily concerned with the inclusion of the word "damages". It is important to note that the statutory definition applies "unless the context otherwise requires", and it must follow that, where

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the context does not permit its use, it is not applicable. It is obviously inapplicable, for example, in section 3 (*a*) which empowers the Minister to enter into and upon any land and survey and take levels of the same: "land" cannot there include "damages". Nor can the definition apply in section 9 to the requirement that "land" taken by His Majesty shall be laid out by metes and bounds, or that a plan and description of the land shall be deposited in the office of the registrar of deeds: to read the word "land" as including "damages" would be absurd. In order to see what application, if any, the part of the definition referred to can have, it is essential to trace it back to its legislative source and ascertain what was intended to be covered by it when it was first included in the definition and what was the purpose of such inclusion. The definition of "land" in section 2 (*d*) of the present Expropriation Act is to be found in exactly the same terms in the Expropriation Act, R.S.C. 1906, chap. 143, section 2 (*f*), in the Expropriation Act of 1889, Statutes of Canada, 1889, 52 Vict., chap. 13, section 2 (*f*), and in The Expropriation Act R.S.C. 1886, chap. 39, section 2 (*f*). Many of the provisions of these Acts trace their origin to An Act respecting the Public Works of Canada, Statutes of Canada, 1867, 31 Vict., chap. 12, which I shall refer to as the Public Works Act of 1867. This Act, in addition to setting up a Department of Public Works, also, *inter alia*, gave its Minister power to expropriate lands and set up a Board of Arbitrators with authority to determine and award compensation. Prior to 1886 the definition appeared, in substantially the same terms as now, in The Government Railways Act, 1881, Statutes of Canada, 1881, 44 Vict., chap. 25, section 3 (6). But the part of the definition that causes the difficulty, had its origin in An Act to amend an Act respecting the Public Works of Canada, Statutes of Canada, 1874, 37 Vict., chap. 13, which I shall call the Act of 1874. Section 3 (2) of this Act provided:

> 3. (2) The expression "lands and property" includes real rights, easements, servitudes and damages, and all other things for which compensation is to be paid by the Crown under the said Act.

The reason for the inclusion in the definition of the words in question will sufficiently appear from an examination of the Act of 1874, but in order to ascertain what the words

covered it is necessary to refer to the Public Works Act of 1867.

What was intended to be covered by the words "all other things for which compensation is to be paid by the Crown under the said Act" can, I think, be seen from section 25, which provided:

> 25. The Minister . . . may enter upon any uncleared or wild land, and take therefrom all timber, stones, gravel, sand, clay or other materials, . . . or may lay any materials or things upon any such land, for which compensation shall be made at the rate agreed on or appraised and awarded as herein provided; and the Minister may make and use all such temporary roads to and from such timber, stones . . . and may enter upon any lands for the purpose of making drains . . . or for keeping such drains in repair, making compensation as aforesaid.

But we are primarily concerned with what was meant to be covered by the word "damages". To ascertain this, reference must be made to the provision of the Public Works Act of 1867 relating to the Board of Arbitration and their jurisdiction. Section 31 of the Act reads as follows:

> 31. The Governor may, from time to time, constitute a Board of Arbitration and appoint any number of persons not exceeding four, who shall be arbitrator or arbitrators and appraiser or appraisers for Canada. and who shall arbitrate on, appraise, determine and award the sums which shall be paid to any person for land or property taken for any Public Work, or for loss or damage caused by such taking, . . . and with whom the said Minister has not agreed, and cannot agree;

This, I think, is the statutory authority for the payment of compensation for expropriated property with the jurisdiction to award it vested in the Board of Arbitration. At first sight, it appears that the words "loss or damage caused by such taking" would include any loss or damage caused by the taking, but further examination of the Act, shows that no such wide meaning was intended. It is plain, for example, from section 32 which sets out the Arbitrator's oath of office that he is to deal with two kinds of claims, one being for compensation for land or property taken possession of for some public use and purpose, and the other for compensation for "damages consequent upon the construction of any public work". And there is further clarification in section 34, under the heading "What Cases may be referred to Arbitration" which laid down how and in what cases claims were to be made, referring to the kind of claims as follows:

> Any claim for property taken, or for alleged, direct or consequent damage to property, arising from the construction, or connected with the execution of any public work, . . .

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The proper meaning is further indicated by section 37, with its provision for limitation of time within which the claims must be made, which provided:

> 37. No claim for land or other property alleged to have been taken for, or injured by, the construction, improvement, maintenance, or management of any Public Work, or for damages alleged to have been occasioned directly or indirectly to any such land or other property by the construction, maintenance or management of any such Public Work, . . . shall be submitted to or be ascertained by the arbitrators . . . unless such claims . . . have been filed . . . within twelve months next after the loss or injury claimed of, when such claim relates to the taking of, or damage occasioned to, land or other property,

It is plain, I think, from these provisions of the Public Works Act of 1867 that there were only two classes of claims for compensation in respect of expropriated property. One was for the taking of the land or property for any public work, and the other was for injury or damage to property, arising from the construction or connected with the execution of any public work. These were clearly the forerunners of the claims now coming under sections 19 (*a*) and 19 (*b*) of the present Exchequer Court Act. The word "damages" in the Public Works Act of 1867 did not, in my view, refer to "damages" other than those occasioned to the land or property, of the same nature and kind as those for which a claim may now be made under section 19 (*b*) of the Exchequer Court Act. It did not cover any "damages" that there were not actually damages to the land. Consequently, it was clear that where an owner's land was taken, and he had no land to which any injury or damage was done, he had no claim for damages apart from his claim for compensation for the land taken. No change in this respect was made by An Act to extend the powers of the Official Arbitrators, Statutes of Canada, 1870, 33 Vict., chap. 23, so that when the word "damages" was included in the definition of "lands and properties" by section 3 (2) of the Act of 1874, it had the same meaning as was assigned to it by the Public Works Act of 1867. The word did not cover damages for loss by disturbance, such as those under consideration in the present case.

Nor did the subsequent legislative history change the meaning of the word "damages" or enlarge its scope. In the Revised Statutes of 1886 the statutory enactments relating to the expropriation of property which were previously contained in the Public Works Act of 1867 and its

amendments were set out in two separate Acts, one, chap. 39, called "The Expropriation Act", being the first Act under that name, and the other, chap. 40, called "An Act respecting the Official Arbitrators", by which the powers entrusted to the Board of Arbitration by the Act of 1867 were vested in the Official Arbitrators. Sections 31, 32, 34 and 37 of the Public Works Act of 1867 were continued by sections 5, 3, 6 and 8 respectively of the Official Arbitrators Act without change. But the definition of "land" containing the words included by section 3 (2) of the Act of 1874 was inserted in The Expropriation Act as section 2 (*f*). It seems obvious, therefore, that when the word "damages" first appeared in the definition of "land" in the first Expropriation Act in 1886 it had no wider meaning in relation to the expropriation of property than that which was originally given to it in 1867. Then in 1887 an important legislative change was made by An Act to amend The Supreme and Exchequer Courts Act and to make better provision for the Trial of Claims against the Crown, Statutes of Canada, 1887, 50-51 Vict., chap. 16, which may be called the Exchequer Court Act of 1887. This Act constituted the Exchequer Court of Canada as a separate court distinct from the Supreme Court of Canada. By it the Official Arbitrators Act was repealed and the jurisdiction vested in the Official Arbitrators by that Act was vested in the newly constituted Exchequer Court. The provisions contained in the Public Works Act of 1867, and continued in the Official Arbitrators Act of 1886, to which I have referred, were embodied in sections 16 (*a*) and 16 (*b*) of the Exchequer Court Act of 1887, which are in exactly the same terms as sections 19 (*a*) and 19 (*b*) of the present Exchequer Court Act. Section 19 (*b*) is thus now the only statutory authority for any claim for damage in respect of the expropriation of property, reading as follows:

> Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

That being the only claim for damage in respect of the expropriation of property over which the Court has any jurisdiction, it cannot properly be contended that the inclusion of the word "damages" in the definition of "land" in the Expropriation Act can cover any "damage" other

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than that with which it is competent for the Court to deal. There has been nothing in the course of legislation since the introduction of the word "damages" into the definition in the Act of 1874 to enlarge its scope; and there can be no justification for giving it a larger meaning than the jurisdictional authority of the Court permits. The word "damages" in the definition of "land" in section 2 (*d*) of the Expropriation Act cannot, therefore, have a wider meaning than the word "damage" in section 19 (*b*) of the Exchequer Court Act. This study of the legislative origin and history of the word "damages" in the definition of "land" leads me to the conclusion that the opinion of O'Connor J. in the *Irving Oil Company* case (*supra*) was right. I think this will further appear from the examination of the purpose for which the word "damages" was first included in the definition. I am also quite unable to see how the use of the word "damages" can have the effect stated by Rand J. There is nothing in the legislative origin or history of the word to suggest that its use was "intended to cover not merely the value of the land itself, but the whole of the economic injury done which is related to the land." Indeed, in my opinion, the legislative history of the word "damages" in the definition, together with the reason for its inclusion therein, is against such a view. As I see it, the word "damages" never included any damages other than damage to the land. It cannot, therefore, cover the damages for loss by disturbance claimed by the defendant, and counsel cannot rely upon it as an escape from the rule that the sole measure of the defendant's entitlement is the value of its land, and that its claims for damages for loss by disturbance can be taken into account only as elements of such value, and have no status apart therefrom.

The reason for the inclusion of the words "and damages etc." in the definition of "lands and property" by section 3 (2) of the Act of 1874 may now be considered. It is to be found in the Act itself. In the Public Works Act of 1867 there was no machinery for dealing with the compensation after it had been agreed upon between the parties or appraised and awarded by the Official Arbitrators or for converting claims against the expropriated property into claims against the compensation money and the purpose

of the amending Act of 1874 was to remedy such defect. This purpose is indicated by section 1, which provided:

> 1. The compensation money agreed upon or awarded by the official arbitrators for any lands or property acquired or taken by the Minister of Public Works, and which may under the said Act be taken by the said Minister without the consent of the proprietor, shall stand in the stead of such lands or property; and any claim to or incumbrance upon such lands or property shall, as respects the Crown, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects the lands or property themselves, which shall, by the fact of the taking possession thereof under the said Act, become and be absolutely vested in the Crown, as shall also any lands or property taken possession of by the Crown under the said Act, whether there be or be not any conveyance, agreement or award respecting the same, subject always, to the determination of the compensation paid and to the payment thereof when such conveyance, agreement or award shall have been made.

Then section 2 provided for the payment of compensation into Court in certain cases, notice to the parties interested, distribution of the compensation by the Court, costs, and other matters. And section 3 was the interpretation clause in subsection 2 of which the words "and damages etc." were included in the definition of "lands and property". It will be seen at once that section 1 of the Act of 1874 is the forerunner of section 23 of the present Expropriation Act and was introduced for the same purpose as that which it now serves. It will also be seen that in section 1 the only compensation money referred to is the "compensation money . . . for any lands or property acquired or taken". There is no reference to compensation money for land or property injuriously affected by the construction of any public work, as there is in section 23 of the present Expropriation Act, nor is there any reference to compensation money for damages occasioned to lands or property, within the meaning of the Public Works Act of 1867, or to any of the "other things for which compensation is to be paid by the Crown under the said Act" within the meaning, for example, of section 25 of the 1867 Act. There was no need for any such references if the words "lands or property" in section 1 of the Act of 1874 were made to include "damages and all other things for which compensation is to be paid by the Crown under the said Act", as was done by the definition in section 3 (2). The definition did not in any sense enlarge the field in respect of which compensation money could be agreed upon or

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awarded, for that had been settled by the Public Works Act of 1867, as I have indicated, but was merely descriptive of what compensation money was referred to. The only purpose it served was to declare that the compensation money agreed upon or adjudged by the arbitrators should stand in the stead of the lands or property not only when it was compensation money for lands or property acquired or taken, but also when it was compensation money for lands or property injured by the construction of any public work or for damages occasioned to lands or property, within the meaning of the Public Works Act of 1867, and also when it was compensation money for other things as, for example, things done under section 25 of the Act of 1867. The definition was definitive for such purposes of the expression "lands or property". Section 1 of the Act of 1874 remained in somewhat the same form when it was incorporated into The Expropriation Act of 1886 as section 11. It will be remembered that this Act included in the definition of "land" under section 2 (*f*) the definition of "lands and property" enacted in the Act of 1874 by section 3 (2). The definition thus served exactly the same explanatory purpose in 1886 as it had in 1874 when it was first introduced. But the need for explanation of the section disappeared with its amendment by section 22 of the Expropriation Act of 1889, which provided as follows:

> 22. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or incumbrance upon such land or property shall, as respects Her Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in Her Majesty.

This carried on through the 1906 revision, chap. 143, section 22, into section 23 of the present Expropriation Act. It is obvious that the purpose of the amendment made in 1889 was to bring the opening words of the section into line with sections 16 (*a*) and 16 (*b*) of the Exchequer Court Act of 1887. It will also be seen that the purpose of ensuring that the compensation money referred to in the section included compensation money for land or property injured as well as for land or property acquired

or taken, which the definition in the Act of 1874 served, was now accomplished by amendment of the section itself. For it will be noted that instead of speaking only of the "compensation money agreed upon or awarded . . . for any lands or property acquired or taken by the Minister of Public Works" as section 1 of the Act of 1874 did, section 22 of the Act of 1889 spoke of "the compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work". While the need for explanation of what the words "compensation money" were intended to cover was thus eliminated by amendment of the section, the definition itself remained unchanged. It is no longer necessary in respect of section 23 so far as the words "land or property" in that section are concerned and the context does not now permit its application. What purpose, if any, the definition now serves need not here be determined. Consideration ought, I think, to be given to its amendment with a view to eliminating a source of possible confusion.

This study of the origin and purpose of the inclusion of the word "damages" in the definition of "land" will also help in ascertaining the proper place of section 23 of the Expropriation Act in the statutory scheme governing the expropriation of property and the interpretation to be placed upon the word "compensation" contained in it. In the first place, it is clear that section 23 is not the source of the statutory authority for the payment of compensation. Such authority existed long before its predecessor, section 1 of the Act of 1874, was even thought of. It is, as I have said one of a number of sections in the Expropriation Act which assume and recognize the existence of a statutory right to compensation. Moreover, I suggest that the place of the section in the statutory scheme cannot be ascertained by looking only at the first sentence in the section and concentrating on the statement that the compensation money "shall stand in the stead of such land or property". It is necessary to look at the whole section and see what the purpose of that statement was. When section 1 of the Act of 1874 is looked at in its setting it will be seen that the compensation money was made to stand in the stead of the land or property so that a claim to or incumbrance

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upon such land or property, extinguished as regards it because of its expropriation, should be converted into a claim to such compensation money in its stead. That was, I think, a prime intendment of the section. This view is supported by the other sections of the Act of 1874. The whole Act was designed to provide machinery, whereby the rights of those who had had claims against the land or property would be preserved against the compensation money which took its place, and to deal with the compensation money after it had been agreed upon or awarded. That is what I had in mind when I said earlier that section 23 of the Expropriation Act is not a principal section but an auxiliary one. Under the circumstances, I am quite unable to read section 23 and the words "shall stand in the stead of such land or property" as Rand J. did. In my opinion, section 23 is not a declaration of equivalency between the compensation money and the land or property at all. It is not concerned with the amount or quantum of the compensation money or the manner or purpose of its determination, but only with its substitution for the land or property so that former claims against the land or property may attach to the substituted amount. The section is concerned with the status of the compensation after it has been agreed upon or adjudicated. I cannot agree, therefore, that the word "compensation" in section 23 of the Expropriation Act can possibly be regarded as the governing word in the statutory scheme. In my view, the term "compensation money" in section 23 of the Expropriation Act is merely descriptive of the status of the amount of compensation which has already been agreed upon or adjudicated, and in so far as the amount has been adjudicated the reference must be to an adjudication in accordance with the direction contained in section 47 of the Exchequer Court Act. The adjudicated compensation money referred to in section 23 of the Expropriation Act thus means the amount of compensation determined by the Court pursuant to section 47 of the Exchequer Court Act, and this means, in the case of land or property acquired or taken, the value thereof as estimated by the Court.

The practical application of the principles I have stated to the facts of the present case is not an easy matter. I

have already found that if no claims for damages for disturbance had to be taken into account I would estimate the value of the defendant's foundry property at $75,000, to which $17,000 must be added as the value of the fixtures, making a total of $92,000. I have also found that the total amount of the defendant's claims for damages for disturbance comes to $26,617.31. Then, having come to the conclusion that such claims can be taken into account only to the extent that they are elements in the value of the property, I expressed the view that the amount of compensation money to which the defendant is entitled cannot be determined by the simple process of adding the two amounts of $92,000 and $26,617.31 together.

There are a number of reasons for this view. I have already found that although the land on which the defendant's foundry is situate was a suitable site for a foundry at the time it was acquired, its value since then has greatly outgrown its value for foundry purpose use. The evidence establishes this fact. One of the reasons given by Mr. Fitzsimmons for his valuation of the land was that the future development of the north side of Wellington Street was assured so that the land could have been used for apartment houses or embassies, either of which uses, I think, would have been more advantageous than its use for foundry purposes. In view of this fact I am of the opinion that there is a portion of the amount of $26,617.30 which the defendant has no right to add to the sum of $92,000 I mentioned. For this conclusion I find support in the decision of Lord Russell of Killowen in *Re Boulton and The Standard Fuel Co. and The Toronto Terminal Railway Co.* (1)., where it was held that when property actually occupied as a coal yard was valued on the basis of most advantageous use as a site for a factory, which value could not be realized without demolition of the buildings on the property and removal of the coal business, it would be inconsistent with a valuation on the basis of such most advantageous use that there should also be a claim either for the value of the buildings or for damages for business disturbance; and also in the judgment of the English Court of Appeal in *Horn* v. *Sunderland Corporation* (2). It will be remembered that the owner

(1) (1935) 3 D.L.R. 657. (2) (1941) 2 K.B. 26.

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of land, which he occupied as a farm, claimed a large sum on the basis of the value of his land as a building estate ripe for development, and also a substantial amount for loss by disturbance of his farming operations. It was held that he could not have both. The head note reads that the Court of Appeal held "that when land being used for agricultural purposes is ripe for building and compensation for its compulsory acquisition is fixed on the basis of its value as building land, compensation for disturbance shall only be awarded to the extent (if any) that the value of the land for agricultural purposes together with the compensation for disturbance exceeds the compensation payable on the basis of the land being building land". I have some reservation of doubt in my mind as to whether the state of the law in Canada, as I see it, would permit the Court to go as far as this, but otherwise I agree with the statement of Sir Wilfred Greene M.R., at page 35:

> In the present case the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realize from the land a sum which never could have been realized on the basis of agricultural user. Now he is claiming that the land from which he is being expropriated is for the purpose of valuation to be treated as building land and for the purpose of disturbance as agricultural land, and he says that the sum properly payable to him for the loss of his land is (*a*) its value as building land plus (*b*) a sum for disturbance of his farming business. It appears to me that, subject to a qualification which I will mention later, these claims are inconsistent with one another. He can only realize the building value in the market if he is willing to abandon his farming business to obtain the higher price.

And I wholly agree with the statement of Scott L.J., at page 42:

> The Act of 1919 being disregarded, the question falls to be considered solely under the Act of 1845. If so, I ask myself: How can the respondent be entitled to a money payment by way of compensation for disturbance of his farm on the top of a price ascertained by valuing the whole of the land as land immediately ripe for building development and thus producing a figure much greater than the market value of it as a farm? Ex hypothesi, the building value is only realizable if and when the land is offered in the market as building land, which necessarily postulates that the selling owner will have given up his farm and cleared the land of all its farm buildings, stock and implements, or, at

least, is ready and willing to do so at his own expense. Conversely, in so far as he chooses to leave that task to be performed by the purchaser, he must submit to the deduction of the cost of it from his price.

These statements are, *mutatis mutandis*, applicable in the present case. Since part of the sum of $92,000 referred to is attributable to a valuation of the land on the basis of a more advantageous use than for foundry purposes, which could not become a reality without removal of the foundry business, it follows that some portion, at any rate of the amount of the claims for disturbance must be offset against the valuation on such more advantageous use basis. This may be justified on the ground, as Lord Russell of Killowen suggested, that where the valuation is on the more advantageous use basis, not possible of realization without disturbance, it is inconsistent that there should also be a claim for disturbance. There is also another way of looking at it. Since the higher value of the land can exist as realizable money value only through removal and consequent disturbance, some of the so-called loss through disturbance is, in a sense, already included in the amount of $92,000. The defendant cannot receive compensation based on value of the land for a more advantageous use than for a foundry and also for disturbance of the foundry business. To realize the former, the disturbance must be suffered, so that to allow a valuation based on a use which could not be realized without disturbance and also to allow on top of that a claim for disturbance would amount either to payment twice for the same element of value or compensation for a loss not really suffered.

If the whole amount of the claims for disturbance were less than the difference betwen the valuation of the land based on its most advantageous use and its value or the value of equally suitable land for foundry use purposes would be, then no portion of the claims for disturbance should be added to the sum of $92,000. But I do not think that can be the case here. Just how much of the total amount of $26,617.31 should be disallowed is, however, not easy to determine. The evidence bearing on the matter is limited. Mr. Fitzsimmons agreed that the land had increased in value. Mr. Lawson admitted that if the foundry were located some streets away it would not make much difference to it. But Mr. Ross gave the most helpful

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assistance when he said that there was no other vacant land for a foundry site in the immediate area "until you get down to Duke Street or Sherwood Street or Broad Street". While he did not have any definite prices for land in the Duke Street area, the land values in that area, aside from buildings, would be considerably lower than that which he and Mr. Cassels placed on the Wellington Street frontage of the defendant's property. For the foundry part of it Mr. Ross' valuation of the land was $27,060, as against my estimate of $34,800. While it is difficult to determine the amount to be disallowed, I am satisfied that it is a substantial portion.

There is another aspect of the claims for disturbance that must be looked at. In *Horn* v. *Sunderland Corporation* (*supra*) Scott L.J. pointed out that in the Lands Clauses Act of 1845 there is no express provision giving compensation for disturbance, and then said of it, at page 43:

> If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken, (1) for the value to him of the land, and (2) for injurious affection to his other land, it is plain that the judicial eye which has discerned that right in the Act must inevitably have found it in (1), that is, the fair purchase price of the land taken. That conclusion is consonant with all the decisions, so far as I can discover.

But while the judicial eye may have discerned the right to compensation for loss by disturbance in the requirement that the owner is entitled to compensation for the land taken from him according to its value to him, this does not mean that the amounts of the items of the claims for disturbance that may be taken into account as elements in such value are merely to be added to the amounts of all the other elements of value. What the Court is directed to do is to estimate the value of the land. There is a difference between taking elements into account in the estimation of such value and merely adding them together. In its anxiety to give effect to claims for disturbance the Court must not go so far as to nullify the effect of the statutory direction in section 47 of the Exchequer Court Act, and produce an estimate that is not one of value but really one of value plus damage. It follows that even the balance of the defendant's claims for disturbance over and above that which it must bear must face the tests of value set by Lord Moulton and Lord Romer. It could happen in certain cases that the claims for disturbance were so

great that it would be inconceivable that a prudent purchaser would be willing to go so far as to pay them in addition to what he considered was the value of the land. In the *Pastoral Finance Association Limited,* case (*supra*) Lord Moulton pictured the prudent purchaser considering how far he would go in order to get the land he desired. Just as in that case he would not add the capitalized value of the savings and profits so it might be that the owner's total claims would exceed what he would be willing to pay. It seems to me that the tests of value put by Lord Moulton and Lord Romer assume a hypothetical negotiation between the owner and the prudent purchaser, the owner not wishing to lose the sale and the purchaser desiring to obtain the property. In such negotiation the owner by reason of disturbance might well ask a figure higher than if there were no such disturbance, and the prudent purchaser might be willing, under the circumstances, to pay more than he otherwise would. It is assumed that at some stage in the negotiations the views of the two will meet at a certain amount. It is the function of the Court to determine this amount. It is obviously not possible for the Court to find with precision what the prudent purchaser would be willing to pay or what the willing seller could reasonably expect to obtain. At best, this must be a matter of opinion. This fact is recognized in the direction in section 47 of the Exchequer Court Act that the Court shall estimate the value of the land. It must do so as best it can in the light of all the facts.

Under all the circumstances, I have come to the conclusion that if I were to award the defendant the sum of $105,000 for the foundry part of its property this would adequately cover every element of value that could properly be taken into account, and at the same time meet the tests of value I have referred to. I think that a prudent purchaser, anxious to obtain the property, might well be willing to pay that amount rather than fail to obtain it, and I am certainly of the view that a willing seller could not reasonably expect to obtain more. I, therefore, estimate the value of the foundry part of the defendant's property at the sum of $105,000, and determine the amount of compensation money to which the defendant is entitled for it accordingly.

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In addition to the claims for disturbance, counsel for the defendant also claimed an allowance of 10 per cent for compulsory taking over and above the loss suffered by disturbance. There is no justification for a claim so made, either in England or in Canada. Cripps on Compensation, 8th edition, page 213 speaks of the allowance for compulsory purchase as follows:

> The fact that lands have been taken under compulsory process does not alter the principle of valuation, and the customary addition of 10 per cent. can only be justified as a part of the valuation and not as an addition thereto. In practice the 10 per cent is applied to the value of lands only, and not to incidental damage; this percentage may be taken to cover various incidental costs and charges to which an owner is subject whose land has been taken, and if no percentage were added such incidental costs and charges would have to be considered in assessing the amount of compensation.

Arnold on Damages and Compensation, 2nd edition, page 248, contains a similar statement. In Canada the practice has been similar. The 10 per cent allowance has been made in a large number of cases, for example, *Symonds* v. *The King* (1); *Dodge* v. *The King* (2); *The King* v. *MacPherson* (3); *The King* v. *Hunting* (4); *The King* v. *The Royal Nova Scotia Yacht Squadron,* et al (5). There is no statutory authority for the allowance and no rule of law requiring it. Where it has been allowed, it has been done as a matter of practice, and even then the making of it has been regarded as discretionary. In *Dodge* v. *The King* (*supra*) Idington J. said that the percentage may be added "to cover contingencies of many kinds". The leading case on the subject in Canada is *The King* v. *Hunting* (*supra*). There Fitzpatrick C.J. said that "the 10 per cent allowance does not, of course, profess to be anything but a covering charge." Idington J. agreed that there was no rule of law rendering it an invariable consequence of compulsory taking, but expressed the opinion that in the majority of cases, "it is no more than justice demands". Anglin J. spoke of it as something to cover incidental and contingent losses and inconveniences, but Brodeur J. disapproved it. The granting of the allowance has been criticized in a number of cases in Ontario, for example, in *Re Watson and City of Toronto* (6). In

(1) (1903) 8 Ex. C.R. 319 at 322.
(2) (1906) 38 Can. S.C.R. 149 at 156.
(3) (1914) Ex. C.R. 215 at 232.
(4) (1917) 32 D.L.R. 331.
(5) (1921) 21 Ex. C.R. 160
(6) (1916) 38 O.L.R. 103.

England, in cases where land is taken compulsorily by Government departments or local or public authorities, the Acquisition of Land Act, 1919, applies and section 2 of that Act specifically enacts that no additional allowance shall be made for compulsory purchase. Similar legislative action to abolish any allowance for compulsory taking might well be taken in Canada. In the present case, I think that an allowance of 10 per cent might have been made to cover loss by disturbance instead of taking the claims for disturbance into account as elements of value of the land, but where the loss by disturbance has been thus taken into account and adequate compensation has been awarded, as I think has been done in the present case, I can see no justification for granting any additional allowance for compulsory taking, and I have not done so.

This leaves only the matter of interest to be dealt with. In respect of the foundry part of the defendant's property it has continued in undisturbed possession of it since the date of the expropriation, and is, consequently, not entitled to any allowance for interest. Indeed, it does not make any claim for it. But the matter is otherwise in respect of the Devlin Block part of the property. The defendant collected the rents from the tenants of the block until the Crown took over on September 10, 1942, and subsequently collected rent from one tenant, amounting to $100, but, otherwise, collected no rents after September 1, 1942. I have estimated the value of the Devlin Block at $20,000, so that the defendant is entitled to interest on that sum at the rate of 5 per cent per annum from September 1, 1942, to the date of judgment, less the sum of $100 referred to. And the defendant is also entitled to its costs.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from July 28, 1938; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $125,000 together with interest at the rate of 5 per cent per annum on $20,000 from September 1, 1942, to this date, less the sum of $100; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.