1942
May 13 & 14.
1943
Jan. 8.
June 1.

BETWEEN:

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... PLAINTIFF;

AND

W. D. MORRIS REALTY LIMITED... DEFENDANT.

Expropriation—Basis of valuation of expropriated property is its fair market value at date of expropriation—Value of property not to be determined by an offer to buy or sell made for the purpose of avoiding litigation or controversy—Fair market value to be based upon the most advantageous use to which property is adapted or could reasonably be applied—Structural value of buildings or improvements not to be added to fair market value of the land except only to the extent that the construction of the buildings or improvements has enhanced the fair market value of the property as a whole—Onus of proof of value upon defendant—Net revenue resulting from rents received for expropriated property is one of the best tests of fair market value—Admissibility of evidence regarding statements made by owner of expropriated property at time of expropriation.

Plaintiff expropriated certain property in the City of Ottawa, Ontario, on which there was erected a building used for storage purposes, owned by defendant. The action is to determine the value of the expropriated property.

Held: That 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 value 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 Re Lucas and Chesterfield Gas and Water Board* (1909) 1 K.B. 16; *Sidney* v. *North Eastern Railway Company* (1914) 3 K.B. 629; *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1914) A.C. 569; followed.

2. That an offer to buy the property made by the expropriating party for the purpose of avoiding controversy and litigation is not a fair test of its market value, nor is an offer to sell it made by the owner for the same purpose to be regarded as an admission by him as to its value.

3. That evidence as to the structural value of buildings or improvements upon land based upon their reconstruction cost less depreciation at a fixed or general rate is not an independent test of value in expropriation proceedings and the value of expropriated property cannot be ascertained by adding such structural value of the buildings or improvements to the fair market value of the land by itself except only to the extent that the construction of the buildings or improvements has enhanced the fair market value of the property as a whole.

4. That while the owner of expropriated property has no right to receive by way of compensation for its loss more than the fair market value of such property taken as a whole, he is entitled to have the fair market value based upon the most advantageous use to which the property is adapted or could reasonably be applied. *The King* v. *Manuel* (1915) 15 Ex. C.R. 381, followed.

5. That the onus of proof of value in expropriation proceedings is upon the defendant. *The King* v. *Kendall* (1912) 14 Ex. C.R. 71, followed.

6. That where property is rented for a purpose for which it is adapted the net revenue resulting from the rents received for the property is one of the best tests of its fair market value as this is one of the factors that would weigh strongly with an independent purchaser.

7. That where the owner of expropriated property claims that it was of greater value at the time of its expropriation than the amount which the expropriating party is willing to pay, evidence may be given of statements or declarations made by the owner at or about the time of the expropriation that the property was worth an amount less than that claimed by the owner even if such statements or declarations were made for purposes other than those of the expropriation.

INFORMATION by the Crown to have certain property expropriated in the City of Ottawa, Ontario, for public purposes, valued by the Court.

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

L. A. Kelly, K.C. and *E. G. Charleson* for plaintiff.

J. A. Robertson, K.C. for defendant.

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

THE PRESIDENT now (June 1st, 1943) delivered the following judgment:—

This action came on for trial on May 13 and 14, 1942, before the late President of this court whose death occurred before he was able to deliver judgment which he had reserved on the conclusion of the hearing with permission to counsel to file written briefs on the question of taxes involved in this case. On the new trial that consequently became necessary counsel submitted as evidence the transcript of the evidence adduced at the previous hearing together with the exhibits filed thereat and agreed that the action should be disposed of by the Court on the basis of such material without further evidence. Counsel also rested their respective contentions upon the oral arguments

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made at the previous hearing of which a transcript had been made. In addition counsel for the defendant resubmitted his written brief on the question of taxes and counsel for the plaintiff relied upon the written brief on this subject which had been submitted on behalf of the plaintiff in the case of *The King* v. *Harris Tie and Timber Company Limited*. No question of credibility of witnesses arises and since all the issues both of fact and of law were fully dealt with on the previous hearing there is no need for any further evidence or argument. It was clearly understood that the trial before me was in every respect to be regarded as a new trial by the Court rendered necessary by the death of the late President and that the course adopted by the parties, as outlined above, was taken in the interests of convenience and economy.

The Information exhibited by the Attorney-General herein shows that the property of the defendant described in the Information was taken under the provisions and authority of the Expropriation Act, R.S.C. 1927, chap. 64, for the purposes of the public works of Canada and that a plan and description thereof were deposited of record in the office of the Registrar of Deeds for the Registry Division of the City of Ottawa on July 28, 1938. On such deposit the expropriation was completed and the property became vested in His Majesty the King under the provisions of section 9 of the Expropriation Act. It is further provided by section 23 of the same Act that the compensation agreed upon or adjudged for the expropriated property shall stand in the stead of the property. The compensation to be adjudged by the court must, therefore, represent the value of the expropriated property as it stood at the date of the expropriation. It also appears from the Information that His Majesty the King was willing to pay to the defendant or whoever was entitled thereto the sum of $63,224.77 in full satisfaction of all estate, right, title and interest free from all encumbrance and in discharge of all claims in respect of damage or loss occasioned by the expropriation. On the other hand, the defendant by its statement of defence claimed the sum of $99,467.77 by way of compensation plus interest as set out in the said statement of defence.

There is, therefore, a substantial difference between the amount claimed by the defendant and that which the plaintiff tenders by the Information.

The defendant includes in its total claim a special claim for $2,968.70 representing sums which are said to be payable by the defendant to the City of Ottawa by way of taxes in respect of the expropriated property for the period from July 28, 1938, the date of the expropriation, to December 31, 1939, together with interest thereon. This amount is made up as follows: $739.99 for the period from July 28, 1938, to December 31, 1938; $863.89 for the first instalment of 1939 taxes; $863.89 for the second instalment of such taxes; the balance represents interest charged by the City of Ottawa on these amounts to the date of the first trial. These sums have not been paid by the defendant but payment of them has been continuously demanded by the City of Ottawa. The contention advanced by the defendant in support of this portion of its claim is that it became liable for these taxes under the provisions of the Assessment Act, Revised Statutes of Ontario, chap. 272, section 60, subsection 5, that the assessment upon its final revision shall be " the assessment upon which the taxes of the following year shall be levied ", notwithstanding the fact that on the expropriation the property became Crown property and exempt from taxation, and that in consequence of such liability the defendant suffered damage from the expropriation for which it is entitled to compensation in addition to the value of the land. The assessment made by the City of Ottawa in 1937 became the basis for the tax levy made in 1938, while that made in 1938 became the basis for the 1939 tax levy. At the time of the assessment in each case the property stood on the assessment roll in the name of the defendant as owner with the Crown as tenant. In respect of the 1938 taxes, the defendant claims that it should have to pay only the taxes up to July 28, 1938, the date of the expropriation. In respect of the 1939 taxes the contention is more involved. It is urged that the last day for appeal against the 1938 assessment in Victoria Ward of the City of Ottawa in which the expropriated property is situate was June 25, 1938, and that consequently the time for appealing from the assessment had expired before the date of the expropriation with the result that the defendant became liable by law for the 1939 taxes by reason of the assessment of 1938 being the basis of the 1939 tax levy and that there was no way in

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which the defendant could have avoided this liability. It is, therefore, argued that this liability for taxes on the part of the defendant should be regarded as damage suffered by the defendant by reason of the expropriation.

This portion of the defendant's claim cannot be allowed for the reasons indicated in the reasons for judgment given on March 6, 1943, in the case of *The King* v. *Harris Tie and Timber Company Limited* (unreported) in which I had occasion to deal with a similar claim advanced by the defendant in that case. There the defendant had actually paid the taxes for 1938 and 1939 although the property in that case had been expropriated on July 28, 1938. The reasons for disallowing the claim in that case are applicable to the present one and are to be considered as incorporated in these reasons for judgment.

Whether the City of Ottawa can compel the defendant to pay any taxes in respect of this property after its expropriation by the Crown is not a matter for this Court to determine and no opinion is expressed on this question, but it is clear that the Crown is not liable for any taxes in respect of its property, and the Court may not make it indirectly liable for such taxes by adding to the value of the property any amounts in respect of taxes, whether they have been paid by the defendant or not. The defendant's claim for $2,968.70 is, therefore, disallowed.

The defendant also makes a claim for $318 over and above any amount that it may receive by way of interest on the compensation money. The property in question is subject to a mortgage for $25,500 in favour of the London & Scottish Assurance Corporation. This mortgage carries interest at the rate of 6 per cent per annum compounded semi-annually but the mortgagee has made an agreement with the defendant that it will accept interest at the rate of 5 per cent per annum not compounded on condition that in lieu of the additional 1 per cent rate of interest it shall be paid three months' interest as a bonus. The amount of this bonus is claimed as damage suffered as a result of the expropriation on the ground that the defendant will have to pay this bonus to the mortgagee in addition to the amount which it will receive from the Crown by way of interest. I can see no possible ground upon which this claim can be sustained.

The valuation fixed by the Court covers the total value of the property, not merely the net equity which the defendant may have in it after paying off any encumbrance, lien or charge. It, therefore, makes no difference to the value of the property what rate of interest the defendant has to pay to the mortgagee. If the rate of interest on the mortgage were lower than the rate of interest which the defendant will receive on the compensation adjudged by the Court, the value of the property would not be reduced thereby; neither should it be increased even if the defendant has to pay a higher rate of interest or a sum in lieu of such higher rate. The amount of compensation money to which the defendant is entitled, representing as it does the value of the expropriated property, cannot be affected by the contractual obligations which the defendant may owe to the owner of a mortgage on such property. No contractual relationship between the owner of the expropriated property and the owner of a mortgage upon it can have the effect of making the Crown pay by way of compensation more than the value of the property. This portion of the defendant's claim must also be disallowed.

[The learned President describes the expropriated property which has erected on it a building used for storage purposes, and continues:]

Since the defendant, immediately upon the expropriation, which becomes complete when the plan and description of the land have been deposited as required by section 9 of the Expropriation Act, loses all its right, title and interest in respect of the expropriated property and the compensation adjudged by the Court takes the place of the property, it is incumbent upon the Court to determine the value of the property as it stood at the date of its expropriation, for such value is the amount of compensation to which the defendant is entitled apart from any damage that the defendant may have suffered by reason of the expropriation beyond the loss of the property itself.

What, then, is the value of the property that has been described? While there is no yardstick by which the value of any particular expropriated property can be precisely and exactly measured, there are certain general principles which have been so consistently adopted by the courts that they are beyond dispute. They have been

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clearly enunciated in such well-known cases as *In re Lucas and Chesterfield Gas and Water Board* (1); *Sidney* v. *North Eastern Railway Company* (2); *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (3); and *Fraser* v. *City of Fraserville* (4); and in text books such as Cripps on Compensation, 8th edition, p. 172, and Nichols on Eminent Domain, 2nd edition, pp. 630, 658.

The first of these principles is that in expropriation proceedings the question of value of the expropriated property must be regarded from the point of view not of the expropriating party but of the owner. He is to be compensated for the loss of his property according to its value to him. Its value to the expropriating party is not a basis for determining the compensation to which the owner is entitled. This cardinal principle is clearly adopted in the Expropriation Act itself by its provisions in section 23 that the compensation shall stand in the stead of the expropriated property and generally by its description of the compensation money as the amount to which the defendant is entitled. Indeed, the principle is inherent in the term "compensation" itself.

So far as a monetary compensation can effect such a result, the defendant is to be put in the same position with regard to the value of his property as he was in before it was taken from him. The total value of his property is to remain the same although its form has changed, so that in respect of the expropriated property, while he has lost the property itself, he is still entitled to its equivalent money value. Nowhere has this cardinal principle of expropriation law been more precisely stated than by Fletcher Moulton L.J. in the case of *In re Lucas and Chesterfield Gas and Water Board* (*supra*) where he said at p. 29:

> 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.

While the value of the property to the expropriating party is to be disregarded and the owner compensated for the loss of his property according to its value to him, this

(1) (1909) 1 K.B. 16.
(2) (1914) 3 K.B. 629.
(3) (1914) A.C. 569.
(4) (1917) A.C. 187.

does not mean that the owner has any right to place his own or even an intrinsic valuation on the property. Just as he is not to suffer a financial loss of value of property through the expropriation, he has, on the other hand, no right to make a profit or have the sum total of his property increased in value through the expropriation. This fact calls for the application of a second general principle, namely, that the measure of the compensation to which the owner of expropriated property is entitled is the fair market value of the property as it stood at the date of its expropriation. Furthermore, the first principle must be regarded in the light of the second one, and the two principles must be applied to each case at the same time. 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.

While it is easy to state these general principles, their application to a particular property is not an easy matter, for the fair market value of real property cannot be ascertained with the same exactness as is possible in the case of goods for which there is a continuous and ready market. This is particularly true in the case of land with buildings or improvements on it for which the number of possible purchasers may be very limited. Nevertheless, an effort must be made to ascertain the value of the property, not intrinsically but commercially, and test such valuation if necessary "by the imaginary market which would have ruled had the land been exposed for sale", to borrow the phrase used by Lord Dunedin in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (*supra*). This is based upon the assumption that property has a money value only if someone would be willing to buy it. There are, however, useful directions that have been laid down as to the general factors that should be taken into consideration in determining fair market value.

In *In re Lucas and Chesterfield Gas and Water Board* (*supra*), Fletcher Moulton L.J. used these words (p. 30):

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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.

In *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (*supra*), Lord Dunedin, who delivered the judgment of their Lordships of the Judicial Committee of the Privy Council, after making the following statement, at p. 576:

> 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* (*supra*).

stated the following propositions:

> For the present purpose it may be sufficient to state 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.

Lord Dunedin makes it clear, however, that this value to the owner cannot be fixed apart from the price that the property could have been sold for to some purchaser, other than the takers under compulsory powers, if it had been exposed for sale, for he says at p. 579:

> The real question to be investigated was, for what would these three 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 obtaining powers.

While the owner is entitled to have every element of the value of the property to him taken into consideration, the decisions make it clear that it is not the intrinsic value of the property to the owner but its commercial or marketable value that must be ascertained. In other words, the price must be fixed upon the assumption that some purchaser other than the expropriating party would be willing to pay such a price. If the property were exposed for sale the limit to which legitimate competition by purchasers would reasonably force the price is the limit of the entitlement of the owner. In *Sidney* v. *North Eastern Railway Company* (*supra*), Rowlatt J. said, at p. 635:

It is well settled that the compensation must represent the value to the owner, not to the purchaser. But the value to the owner is not confined to the value of the land to the owner for his own purposes; it includes the value which the requirements of other persons for other purposes give to it as a marketable commodity, provided that the existence of the scheme for which it is taken is not allowed to add to the value.

And Shearman J. said, at p. 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.

The same view as to what is meant by fair market value is expressed in Nichols on Eminent Domain, 2nd edition, p. 658, where the author, after laying down the proposition that "the measure of compensation is the fair market value of the lands", says:

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 at page 664, the same author makes the following statement:

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

In my view this is a correct statement of the general rule that should guide the Court in assessing the value of the expropriated property to the owner. In effect it follows that the question the Court must ask itself is—what would a purchaser, other than the expropriating party, after considering all the advantages of the property, be willing to pay for it The needs of the expropriating party are not to be taken into account; the value of the land to the owner and the amount of compensation to which he is entitled through the forcible taking of his property from him cannot be either increased or decreased by the importance or value of the purposes to which the expropriated land will be put after the expropriation is completed.

While it is true that, even when all the relevant information has been brought to the attention of the Court and weighed by it, the value of any particular expropriated property still remains to a large extent a matter of

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opinion, such opinion will rest upon a sounder foundation the more closely it is the result of the application of the guiding principles that have been enunciated.

Evidence as to the value of the expropriated property in this case was given on behalf of the defendant by George Acheson, the president of the defendant company, A. H. Fitzsimmons, a real estate broker, N. B. MacRostie, an engineer, and W. J. Abra, an architect, and on behalf of the plaintiff by W. C. Ross, a real estate broker, who had made a valuation for the Department of Public Works towards the close of 1939, and L. Cassels, a surveyor and engineer, who had been associated with Mr. Ross in his valuation. As frequently happens in cases of this sort there was a wide difference between the opinions of the witnesses for the defendant and those for the plaintiff as to the value of the property. Mr. Acheson placed its value at, say, $100,000; Mr. Fitzsimmons valued the land at $26,785 and the building at $65,400, making a total of $92,185; Mr. MacRostie took the same value for the land but valued the building at $65,969, making his total valuation come to $92,754; Mr. Abra gave evidence only as to the value of the building which he placed at $72,539. For the plaintiff, Mr. Ross put the value of the land at $18,179.50 and that of the building at $45,045.27, making his total valuation come to $63,224.77, the amount tendered by the plaintiff by the Information. Mr. Cassels agreed with the valuation given by Mr. Ross. Counsel for the defendant stressed the fact in argument that the witnesses for the defendant had arrived at their respective valuations independently of one another, whereas those for the plaintiff had worked together. In my view, not much, if any, importance is to be attached to this fact. Other evidence as to value showed that the property was assessed by the City of Ottawa in 1938 at $40,800 for the land and building. It also appeared that the defendant carried this property on its books at a value of $74,439.88 as shown by its balance sheet dated December 31, 1937, the last one prior to the expropriation. Evidence was also given, although exception was taken to it, that Mr. Ross had recommended a settlement to the Department of Public Works, which was acceptable to the defendant, of $80,000 together with $2,968.70 for taxes, $318.75 for three months' bonus on the mortgage together with interest to the date

of payment on the balance owing to the defendant and its taxed costs. This recommended settlement was not approved by the department. It is clear that the recommendation was made by way of compromise and that it was acceptable to the defendant on the same basis. It is well established that an offer to buy the property made by the expropriating party for the purpose of avoiding controversy and litigation is not a fair test of its market value, nor is an offer to sell it made by the owner for the same purpose to be regarded as an admission by him as to its value. The evidence as to the proposed compromise settlement cannot, therefore, be accepted nor can the amount of the proposed settlement be regarded as evidence of the value of the expropriated property in these proceedings at all.

(The learned President reviews the evidence as to value given by the expert witnesses for plaintiff and defendant, and continues:)

Some observations of a general nature may properly be made with regard to the evidence given in this case by the expert witnesses. In the main, they followed a general pattern; opinion evidence was given, first, as to the fair market value of the land by itself; then, a structural valuation was placed upon the building itself, by calculating its replacement or reconstruction cost as at the date of the expropriation, either on the basis of its cubical contents at a price per cube unit or on the basis of the quantities of various materials in the building at prevailing prices for such materials, and deducting therefrom a depreciation at a fixed rate; finally, the fair market value of the land by itself and the structural value of the building by itself, arrived at in the manner indicated, were added together and the total was given as the value of the expropriated property. This method of appraisal of the value of the building has sometimes been called the "quantity survey method". It is the fair market value of the property itself, taken as a whole, the land with the buildings upon it, that must be considered, for it is the whole property and not the land or the buildings separately, that is being expropriated. It is a matter of common and general knowledge that in many cases the separate calculation of the structural value of a building by estimating its replacement cost and deducting there-

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from a depreciation at a fixed rate and the addition of such structural value to the fair market value of the land by itself, if it can be separately ascertained, would result in a total valuation of the property greatly in excess of its fair market or real value.

The cost of buildings or improvements upon the land is to be taken into account only in so far as the construction of them has enhanced the fair market value of the property. It cannot be too strongly stressed that compensation in expropriation proceedings is to be adjudged on the basis of the value of the expropriated property to its owner, and not on that of its cost to him. Cost to the owner and value to the owner, meaning thereby fair market value, are not necessarily the same. Evidence as to the structural value of buildings or improvements upon land based upon their reconstruction cost, less depreciation at a fixed or general rate, is not admissible an an independent test of value in expropriation proceedings and the value of expropriated property cannot be ascertained by adding such structural value of the buildings or improvements to the fair market value of the land by itself, except only to the extent that the construction of the buildings or improvements has enhanced the fair market value of the property as a whole.

Furthermore, the value of the land with buildings or improvements upon it of a kind for which there is only a limited market cannot be ascertained without careful consideration of the uses to which the property is adapted and applied. This leads to the application of another general principle which has frequently been enunciated in this court, and may be stated as follows, namely, that while the owner of expropriated property has no right to receive by way of compensation for its loss more than the fair market value of such property taken as a whole, he is entitled to have the market value based upon the most advantageous use to which the property is adapted or could reasonably be applied. In *The King* v. *Manuel* (1), Audette J. not only dealt with the quantity survey method of appraising the value of buildings upon land but also laid down the general principle that the market value of expropriated property should be based on its best use. As to the quantity survey

(1) (1915) 15 Ex. C.R. 381.

method of appraising value and the essential difference between intrinsic value and market value, he made the following remarks, at p. 384:

> Now this appraisal of the value of buildings made under what is called "the quantity survey method", while it undoubtedly discloses the intrinsic value of the property does not necessarily establish its market value The compensation under the statute is not to be assessed upon the basis of the intrinsic value, but upon the basis of the market value of the property.
>
> The intrinsic value is the value which does not depend upon any exterior or surrounding circumstances. It is the value embodied in the thing itself. It is the value attaching to objects or things independently of any connection with anything else * * * and it would be proceeding upon a wrong principle to take the "quantity survey method" as a basis to ascertain the compensation as it would give the result of the intrinsic value and not of the market value.

and, at page 386, he said:

> It would seem that the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the land—although all of these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation. *The King* v. *Kendall* (1), affirmed on appeal to the Supreme Court of Canada; *The King* v. *N.B. Ry. Co.* (2); and *The King* v. *Loggie* (3).

With regard to the principle of assessing market value on the basis of best use, Audette J. said, at page 383:

> Now this property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, viz.: as a gentleman's residence commanding a good view and located in a fairly desirable portion of the City of Ottawa.

In *The King* v. *Loggie* (*supra*) where it was held that where an old shipyard, not used as such at the time of the expropriation, had been taken for the purposes of a public work, compensation should not be assessed on the basis of separating the various factors or component parts of the shipyard and estimating their several values but the yard must be regarded as a whole and its market value as such assessed as of the time of the expropriation, Audette J. expressed a similar view as to market value based on best use when he said, at page 89:

> The court has come to the conclusion that this property must be assessed on its market value with the best uses to which it can be put by its owners,—that is, an old discarded shipyard, slightly repaired at times, with all of its prospective capabilities at the date of the expropriation.

(1) (1912) 14 Ex. C.R. 71. (2) (1913) 14 Ex. C.R. 491.
(3) (1912) 15 Ex. C.R. 80.

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In my view, this principle of assessment of market value based upon best use of the property is correctly stated in Nichols on Eminent Domain, 2nd edition, para. 219, p. 665, where the author says:

> Market value is based on the most advantageous use of the property. In determining the market value of a piece of real esate 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.

In the determination of the most advantageous use to which the property can be put, while the prospective advantages of the property should be considered, it must not be forgotten that any such prospective advantages may be taken into account only in so far as they may help to give the property its present value, *vide The King* v. *Elgin Realty Company Limited* (1), where Taschereau J., who delivered the judgment of the Supreme Court of Canada, said, at page 52:

> 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. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (*supra*).

While the structural value of buildings and improvements upon land, based upon their reconstruction cost less depreciation at a fixed rate, is not an independent test of value, it does not follow that evidence of such structural value should be rejected altogether. Indeed, where the character of the buildings or improvements is well adapted to the land and its location, their structural value may afford a test of the extent to which the construction of the buildings or improvements has enhanced the market value of the property as a whole.

Having in mind the care that must be taken in dealing with separate valuations of the land and the building upon it and the need of keeping constantly in mind the value of the property as a whole on the basis of its best use by the owner, and in so far as it may be possible in

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

this case to ascertain separately the fair market value of the land, I should point out that the onus of proof of value in expropriation proceedings is on the defendant, *vide*—*The King* v. *Kendall* (*supra*), affirmed by the Supreme Court of Canada. I see no reason for preferring the valuation for the land of $26,785 given by Mr. Fitzsimmons and Mr. MacRostie on behalf of the defendant to that of $18,179.50 given by Mr. Ross and Mr. Cassels for the plaintiff and if I were to find the fair market value of the land in this case separately I would adopt the latter figures. If I were required to find the reconstruction cost of the building as at the date of the expropriation I would be inclined to accept Mr. Abra's estimate of $95,385,20 on the ground of his qualifications as an architect and his long standing in his profession, but even if this estimate were accepted it would be subject to a reduction of $7,500 in view of the evidence that a saving of that amount of steel could be effected without in any way lessening the strength of the building. I might, however, make the comment that I think it strange that there should be such a wide divergence between the witnesses of the defendant and those of the plaintiff in their estimates of reconstruction cost. I cannot, however, for the purposes of these proceedings, accept the rate of depreciation of 25 per cent that Mr. Abra adopts. The difference in approach on the question of depreciation between Mr. Abra on the one hand and Mr. Ross on the other illustrates the difficulty involved in attempting to assess the real value of expropriated property by ascertaining separately the fair market value of the land and the structural value of the building upon it, apart from the market value of the property as a whole. Mr. Abra considered that his rate of depreciation, namely 25 per cent, which had regard to the type of construction and the physical state of the building, was ample. His view was that the condition of the building was good and that there was little or no damage to it; he considered that it was capable of being used for storage purposes for over 100 years. In his depreciation allowance he took into account only the physical condition of the building. His estimate of this was that of an architect and I would not take exception to it from that point of view; but it does not take into account any questions of market value; indeed, Mr. Abra's evidence did not purport to be based on market

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value. On the other hand, Mr. Ross in arriving at his rate of depreciation of 40 per cent approached the question from the point of view both of physical depreciation and of decrease in market value. He and Mr. Cassels considered not only physical depreciation, but also other factors having to do with the market value of the property rather than merely the physical condition of the building. Mr. Ross pointed out that buildings became obsolete in time and their market value becomes less on account of changes in conditions and method of construction. Mr. Ross and Mr. Cassels also considered that the building should have further depreciation on account of its long and narrow shape. There is an outside wall 476 feet long; if the building were twice the width and only 100 feet long instead of 200 it would have the same floor area with an outer wall of only 356 feet. While this fact may not affect the life of the building or its physical condition or its structural value from the point of view of its physical condition it certainly does affect the market value of the property. Even with respect to the adaptability of the building for storage purposes this fact is of importance. As Mr. Ross points out, goods might have to be moved the full length of the building; in the case of the second and third floors, goods have to be unloaded from the elevator and moved to the northerly end of the building; on these floors the building is not as convenient even for storage purposes as a square building would be; this does not apply to the ground floor where there are entrances both from Sparks Street and Wellington Street. This disadvantage in the use of the building would affect the market value of the property, for an intending purchaser would look upon it as a defect. The same defect would make the building less adaptable to other uses. It was also pointed out by Mr. Cassels that the presence of the driveway all the way through the length of the building involved wastage of space which would not occur if the building were a square one. In addition, Mr. Ross and Mr. Cassels took other factors into account in fixing their rate of depreciation, such as the obsolescence of the building for its original purpose and its limited adaptability for use. Originally it was erected for garage and showroom purposes but it is no longer suitable for such purposes; the building lacks lighting for showroom purposes

and the south side of Wellington Street is no longer desirable for display purposes. It was also agreed that the building is not suitable for apartments or a hotel and cannot be used for office purposes. Generally it is suitable for storage purposes, but as has been indicated, not as suitable even for such purposes as a squarer building would be. All of these factors were taken into account by Mr. Ross and Mr. Cassels in assessing their rate of depreciation. While I do not question Mr. Abra's rate of depreciation based upon the physical condition of the building, and agree that the adoption of a certain rate of depreciation based entirely upon its physical condition may be sound for certain purposes, I must come to the conclusion that the estimate of depreciation made by Mr. Ross and Mr. Cassels, resting as it does upon a wider basis and taking into account factors other than mere physical condition is more acceptable and affords greater assistance to the Court in enabling it to determine the value of the property for the purpose of these proceedings. Indeed, their estimate is really more than an estimate of depreciation in the ordinary sense of the term, meaning, as it does, an allowance for wear and tear. In effect, it is an estimate of the extent to which the reconstruction cost of the building exceeds its real value from the point of view of its enhancement of the market value of the property as a whole; it might also be regarded as an attempt through the application of a depreciation rate to arrive at an appraisal of the value of the building in relation to the property as a whole. I likewise prefer their estimate to those of Mr. Fitzsimmons and Mr. MacRostie, although the estimates of these witnesses also rested upon a wider basis than that of Mr. Abra, for the reason that it is, in my view, a closer estimate of real value. If I were, therefore, to take Mr. Abra's estimate of reconstruction cost, amounting to $95,385.20, and to subject it to a depreciation of 40 per cent, even including in that rate the steel saving of $7,500, this would result in a depreciation of $38,154, and a structural value of the building of $57,231.20, which, added to the land value of $18,179.50, would result in a total valuation of the property of $75,410.70.

While it is permissible to consider the replacement cost of buildings or improvements upon land, subject to the

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conditions already indicated and provided that proper deductions are made for depreciation, it must never be lost sight of that it is the property as a whole, and not the land or the buildings separately, that is being expropriated and that it is the fair market value of the property as a whole based upon its most advantageous use to the owner that must be ascertained. In my view the property in question in these proceedings should be looked at in the light of its history, its present condition and its adaptability, with the building obsolete for its original purposes as a garage and show room, not adapted for use as an apartment, hotel or office building, but suitable for storage purposes; such purposes, in my judgment, constitute the most advantageous use to the owner to which the property could be applied. The property should, therefore, be regarded primarily from this point of view, and its fair market value as a whole should be ascertained, based upon its adaptability for use for storage purposes.

From this point of view the value of the property as a source of revenue to its owner may well be considered. Where property is rented for a purpose for which it is adapted, the net revenue resulting from the rents received for the property is one of the best tests of its fair market value, for this is one of the factors that would weigh strongly with an intending purchaser. In this case the evidence as to net rental revenues from the property is the strongest evidence that was adduced in favour of the defendant. The property was leased by the defendant to the Crown on February 27, 1933, for a period of five years commencing March 15, 1933, at an annual rental of $9,800 and the lease was renewed on February 8, 1938, for the same annual rental for a further period of five years, which, but for the expropriation, would have expired on March 15, 1943. The property was used for storage purposes by the Canadian Army Service Corps of the Department of National Defence. The average annual net rental revenue for the five years preceding the expropriation was said to be $7,698.93, or a return of 7·6 per cent on a capitalization of $100,000, before taking into account any allowance for depreciation.

This strong evidence on behalf of the defendant, while it is of great importance as a test of the value of the property to the defendant for the most advantageous use

that he could make of it, cannot, however, be looked at by itself for it is subject to some discount. The true rental value of the property cannot be ascertained solely by consideration of the rental paid during the period when the property was in the occupancy of the Crown. The evidence shows that prior to the lease of the property to the Crown in 1933 the average net revenue from it for the fourteen-year period, from 1919 to 1932 inclusive, was $3,426.81, although it may be that this latter amount should be increased by the addition of some revenue for space occupied by the defendant itself under the name of Capital Storage Company during 1931 and 1932, but no particulars as to such additional allowance were given. Mr. Fitzsimmons used the net annual rental revenue of $7,698.93 as a base against which he tested his own valuation of the property at $92,185 and says that he took the lease to the government largely into consideration in arriving at his valuation. His statement was that if the net return of $7,698.93 were capitalized, there would be a return of 7 per cent on $109,985 or a return of 8 per cent on $96,237, without depreciation allowance. Mr. Ross, for the plaintiff, expressed the opinion that the lease was very favourable to the owner of the property, considering the rentals formerly paid for it up until 1933. In the fourteen-year period before this date the maximum gross rental obtained in any one year was $6,000 and the average gross rental for the whole period was approximately $5,200, as against $9,800 per year since the commencement of the Crown lease, with the average net rental revenue for the said period being $3,426.81 per year, as compared with $7,698.93 for the Crown lease period. If Mr. Fitzsimmons had used the average net rental revenue from the building during the whole of its rental history as a base against which to test his valuation of the property he would have been driven to a much lower valuation than the one he made. Mr. Ross also expressed the opinion that the rate of rental paid by the Crown could not be continued for very long, although it must be remembered that the lease ran to March 15, 1943. He also stated that he did not think that the building would have brought a rental of that rate from an occupancy other than a government occupancy. I have no doubt that this opinion is well founded. If this net rental revenue is beyond that which might

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normally be expected, it is to that extent subject to discount as a test of market value of the property. Such higher net rental revenue may not be used by itself as a test of value, for a capitalization based upon it would be in excess of real value to the same proportionate extent as the higher net rental revenue exceeds that which might normally be expected. In this connection it must be remembered that the questions of market value and net rental return as a test of such value must be considered not in the light of present wartime conditions, but only in that of conditions as they obtained on July 28, 1938, the date of the expropriation.

Even after giving great weight to the evidence as to net annual rental return from the expropriated property I must come to the conclusion that the valuations as to the property given on behalf of the defendant, are substantially in excess of its real value.

There remain for consideration two other items of evidence. Of these the assessment of the property at $40,800 in 1938 by the City of Ottawa is receivable as evidence for what it is worth. There may be cases where a municipal assessment might afford some check against an exorbitant claim, but, generally speaking, evidence of a municipal assessment is not of itself to be relied upon as evidence of market value for expropriation purposes, and I do not regard the assessment made by the City of Ottawa as proof of value in this case.

There is one other statement as to value that deserves comment. The owner of expropriated property may give his opinion as to its value, even although he is not an expert, since he is presumed to have sufficient knowledge of such matters as the price paid for the property, the rents or other income received from it, its adaptability for use and other factors having a bearing on its value as to warrant the reception of his statement as evidence, although his opinion as to value is to be regarded really as a statement of the maximum amount of his claim and is subject to discount on the ground of bias. On the other hand, where the owner of expropriated property claims that it was of greater value at the time of its expropriation than the amount which the expropriating party is willing to pay, evidence may be given of statements or declarations made by the owner at or about the time of the expropriation that the property was worth an amount less

than that claimed by him, even if such statements or declarations were made for purposes other than those of the expropriation. In this connection, it should be noted that, although Mr. Acheson, the president of the defendant company, expressed the opinion that the expropriated property was worth $100,000, the defendant company itself carried the property on its books at a value of $74,439.88, as shown by its balance sheet, dated December 31st, 1937, just a few months before the expropriation. This evidence is receivable against the defendant's company contention as to the value of the property as an admission against interest. While no particulars were given as to how this valuation on the books of the company was arrived at, it is not to be assumed that the defendant would depress the value of its assets on its balance sheet.

While the evidence as to the amount at which the defendant company carried the expropriated property on its books is not conclusive as to its value, I have reached the conclusion that this amount is not far short of its real value. I have already expressed the opinion that the valuations put forward on behalf of the defendant were too high. I would have been inclined to accept the valuation placed by Mr. Ross and Mr. Cassels on the property except for the fact that, in my opinion, they gave less weight to its rental value than they should have done, but, on the other hand, Mr. Fitzsimmons in confining his figures to the period of time the property was in the occupany of the Crown attached too much weight to this evidence. Having regard to the property as a whole and its most advantageous use to the owner as property adapted for storage purposes and giving as careful consideration as I can to the value of the premises as a source of net rental revenue to the owner, but taking also into account the obsolescence of the building for its original purposes, and its limited adaptability for use, namely, as Mr. Fitzsimmons put it, " it is just suited to the purpose for which it is being used in the locality in which it is situated ", and the long and narrow shape of the building making it less desirable than a square building would be, all of which factors an intending purchaser other than the Crown would be entitled to take into account, and considering also the valuations arrived at after depreciation, together with the defendant's own estimate of the value of its property shortly before the expropriation, I have come to the con-

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clusion that the sum of $75,000 would be the equivalent in money value of the property and adequately represent its fair market value as it stood at the date of its expropriation and that this amount would be just and adequate compensation to the defendant for the loss of value of its property. I, therefore, find that the value of the expropriated property as it stood at July 28, 1938, was $75,000 and adjudge that this is the amount of compensation money to which the defendant is entitled, less the sum of $16,000 paid to the defendant on account on December 30, 1939.

The defendant has legitimate grounds of complaint against the Crown for its delay in bringing these proceedings. Although the lands were taken by expropriation on July 28, 1938, the information herein was not filed until June 12, 1941, almost three years later. In the meantime the Crown has had the use of the premises and the defendant has had no returns from them. While this is regrettable the Court cannot go further in relief of this grievance than the provisions of the Expropriation Act permit. Section 32 of the Act provides for the allowance of interest at the rate of 5 per cent per annum on the compensation money to the date of judgment where the amount awarded is greater than that tendered by the Crown, but the Act provides nothing further for delay in bringing the matter to adjudication. The maximum amount of interest permitted by the statute should, under the circumstances, be allowed.

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King, and 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 $75,000, as the value of the expropriated property, as it stood at July 28, 1938, less the sum of $16,000 paid on account on December 30, 1939, together with interest at the rate of five per cent per annum on $75,000 from July 28, 1938, to December 30, 1939, and on $59,000 from December 30, 1939, to the date of judgment. The defendant will also be entitled to its costs of these proceedings throughout, including, of course, the costs of the first hearing before the late President.

Judgment accordingly.