

THE KING ON THE INFORMATION OF THE ATTORNEY-  
GENERAL OF CANADA,

PLAINTIFF;

AND

WILLIAM MOLSON MACPHERSON,  
PERCIVAL FREDERICK JOSEPH,  
RIDOUT, ROBERT LEO DEFRIES,  
and FREDERIC M. HOLLAND,

DEFENDANTS.

1914  
April 27

*Expropriation—Market value of land taken—Question as to adding 10% to value considered as a matter of right—Crown's liability to pay bonus due under mortgage on lands expropriated.*

On the 14th April, 1913, the Crown, represented by the Minister of Public Works, registered a plan and description under *The Expropriation Act* for the acquisition of certain property in the City of Toronto for Post Office purposes. Five days prior to such registration the defendant H. on behalf of certain other defendants, entered into an agreement for the purchase of the property in question for the sum of \$100,000. The court found that at the date of the agreement to purchase neither H. nor the defendants for whom he bought were aware of the intended expropriation by the Crown, although the property had not been previously in demand in the real estate market.

*Held*, that the price paid for the property by the defendant H. should be taken at its actual market value for the purpose of compensation.

2. That the defendants were not entitled as a matter of right to have ten per cent. added to the market value of the property.
3. Where there is a mortgage upon property in which the mortgagor stipulates for a bonus to be paid him in case the principal is sought to be paid before the mortgage falls due, the Crown expropriating before that event must assume the payment of such bonus in addition to paying the value of the property taken.

THIS was a case arising upon the expropriation of certain lands by the Crown for Post Office purposes in the City of Toronto.

The facts are fully stated in the reasons for judgment.

January 26th, 27th and 28th, 1914.

The case was heard at Toronto before the Honourable Mr. Justice Cassels.

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*E. E. A. DuVernet, K.C., and W. G. Thurston, K.C.,*  
 for the plaintiff; *A. W. Anglin, K.C., F. J. Dunbar and*  
*R. L. Defries* for the defendants.

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CASSELS, J., now (April 27th, 1914) delivered judgment.

For the purpose of acquiring land upon which to erect the new post office for the City of Toronto certain properties adjacent to the existing post office had been expropriated by the Dominion Government. On the 26th January, 1914, and during the following days, three out of the six cases were tried before me in Toronto. The other cases were not ready for trial, but came up before me in Toronto on March the 18th, 19th, 20th and 23rd. These cases present no features beyond the ordinary case of property expropriated for public purposes. There is nothing peculiar to any of them such as for instance the expropriation of the terminal yards of a railway, as to which different principles for allowing compensation may apply.

Before proceeding to deal with the cases in detail, it may be well to set out what I conceive to be the law which governs as to the allowance of compensation. It has to be borne in mind that where lands are required for a public work, no matter how unwilling the owner may be, nevertheless he has to yield in the public interest.

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.

Market value has been defined as follows:

“ The value that a vendor not compelled to sell,  
 “ not selling under pressure, but desirous of selling,

“ is to get from a purchaser not bound to buy, but  
 “ willing to buy.”

In *Dodge v. The King* (1) the following is said in the judgment of the Court:

“ The market price of lands taken ought to be the  
 “ *primâ facie* basis of valuation in awarding com-  
 “ pensation for land expropriated. The compen-  
 “ sation, 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.”

I think a careful analysis of the authorities as a whole will show that the above is an accurate and concise statement of the law that should govern.

In *Brown v. The King*, (2), I had occasion to collect the various statutes relating to the assessment of compensation by the Exchequer Court. In a very admirable judgment, if I may be permitted to say so, in *Paradis v. The Queen*, (3) the late Sir Elzear Taschereau collected and commented upon most of the cases determined up to date.

In *The Queen v. Barry*, (4), there is also a valuable review of the authorities.

There is also a valuable collection of the authorities in the case of the *National Trust Company v. The Canadian Pacific Railway* (5).

*Arnold on Damages* (6) states:

“ That where lands are taken the owner should be compensated for loss of business and good-will.

(1) 38 S. C. R. 155.

(2) 12 Ex. C. R. 472.

(3) 1 Ex. C. R. 191.

(4) 2 Ex. C. R. 33.

(5) 29 O.L.R. 462.

(6) Ed. 1913, at p. 229.

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The compensation must cover all losses directly sustained."

*Cripps on Compensation*, (1) says that the question is, what will the owner lose? At page 106 he states: "The loss to the owner includes not only the actual value of such lands, but all damages directly consequent. Compensation in practice is allowed for the profits of trade. They are bound to compensate him for all the loss by reason of the expulsion. At page 117, he states the owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return."

In the late case of the *Cedar Rapids Co. v. Lacoste* (2), it is stated, that the value to the owner consists in all advantages which the land possesses at present or future, but it is the present value alone of such advantages that falls to be determined.

In the *Cedar Rapids* case the judgment of Mr. Justice Moulton in the *Lucas Case*, (3), was commented upon with approval. Mr. Justice Moulton puts it as follows:

"The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money."

At page 30, he states:

"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 the 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) 5th ed. p. 102.

(2) 30 T. L. R. 294.

(3) 1909 1 K. B. 29.

The question of law governing these particular cases is not difficult. The difficulty is the application of the facts in regard to what should be found as the true market value.

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I may say that since the trials I have gone very carefully through the evidence and have minutely analysed the same. If I have erred in my appreciation of the evidence it is not from lack of desire to arrive at the correct conclusion. In trials of this nature the evidence of the various experts produced on behalf of the owner of the land on one side, and on behalf of the Crown on the other, varies so much that it is often difficult to arrive at the correct result.

Before dealing with each case separately, I may say that in reference to all the properties; the language of the late Chief Justice Hagarty quoted by Sir Glenholme Falconbridge, C.J., K.B., in the case of *The Queen v. Fowlds* <sup>(1)</sup> is very pertinent to the cases before me. The learned Chief Justice stated that "the demand has been most languid if not *wholly non-existent*."

In the present case the expropriation plan was filed on the 14th April, 1913. The property is situate on the north side of Adelaide Street. It is immediately adjoining the present post office on the west. The point of commencement is 86 feet 3½ inches east from the east side of Victoria Street. It has a frontage of 40 feet 11 inches on the north side of Adelaide Street running to the present post office. It then runs north a depth of 87 feet 10 inches, then west 41 feet 5½ inches, and south to the point of commencement 87 feet 8½ inches,—this may be only 87 and one-half feet.) There seems to be some doubt under the evidence. It is of no materiality. Upon the property

(1) 4 Ex. C. R. 1.

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in question are buildings valued as at cost price, not having regard to the market value, by G. W. Gouinlock at \$39,633; and by H. B. Gordon another architect, produced on behalf of the Crown, at \$29,464.

These valuations of the buildings are arrived at by the architects by estimating what it would cost to erect buildings of the character of those in question at the present time, and allowing for depreciation, wear and tear, etc. Several of the witnesses placed no value whatever upon the buildings, their ideas being that the value of the land is so great that to make it productive the building would have to be demolished and a new building of modern style erected in its place. I will have to deal with this later on.

The property in question was owned prior to the sale to Holland, by the trustees of the late Sir David Macpherson. They represented a wealthy estate and were under no obligation or necessity to sell. They had apparently been holding the property for some years at the sum of \$100,000; the trustees apparently agreeing that when this price was reached the property would be sold.

On the 9th April, 1913, five days prior to the registration of the plan, the defendant Holland entered into an agreement with the trustees of the estate for the purchase of the property, the purchase price being agreed upon, as follows, namely: \$25,000 on the 1st June, 1913; \$5,000 on the 1st December, 1913; \$5,000 on the 1st days of June and December in the years 1914, 1915, 1916 and 1917; and the balance of \$30,000 on the 1st day of June, 1918. Interest five and one-half per cent, payable half-yearly.

It would appear from the evidence that negotiations were in progress between Holland and the trustees for a few days previous to the 9th April. Two of the

trustees were in Europe, and it necessitated numerous cablegrams passing to and fro between the agent in Canada and these trustees, the chief point of controversy being the rate of interest to be allowed on the mortgage.

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It appears that Holland himself had no interest in the purchase, but in reality it was bought for Mrs. Holland, his wife, and Mr. McPhillips, to whom he apparently gave deeds acknowledging the trust.

By consent Mrs. Holland and Mr. McPhillips were added as defendants to this action, and are bound by the proceedings.

Apparently Mr. McPhillips and Mrs. Holland each raised the sum of one thousand dollars, and that two thousand dollars was advanced to the trustees as an earnest of good faith.

Prior to the payment of the \$25,000 due on the 1st June, 1913, the Dominion Government came to the relief of the purchasers and advanced the sum of \$25,000 on account of the moneys to be paid in order to meet the payments due on the 1st June, and thereupon the \$1,000 was repaid to Mrs. Holland and the other \$1,000 to Mr. McPhillips. I emphasize these facts as they may have an important bearing later on when dealing with the question of the ten per cent. alleged bonus for compulsory expropriation. The two purchasers were out of pocket each one thousand dollars for a period of less than two months.

The extraordinary avidity with which this property and other properties expropriated were sought to be acquired at or about the time when it was definitely understood that the new post office was to be erected on the present site, is shown by a perusal of the evidence of Hill, who offered to purchase this particular property for the sum of \$120,000 on behalf of two clients, Mr.

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Miller and Mr. Orpen, examined as witnesses before me.

Mr. Miller seems to have got word before the plan was registered that the new post office was to be erected on the present site, and thereupon he lost no time in endeavouring to obtain an offer for the property. He telephoned Mr. Orpen, pointing out to him, to use his own graphic language, that there was an opportunity of milking the Government, and asking him to share with him a part of the cost and derive the benefit of part of the milk. This laudable desire was frustrated by an announcement in the morning paper before the deal was carried through, that the Government had expropriated the properties.

I have to find on the evidence that at the time Holland purchased, neither he nor Mr. McPhillips were aware that the Government intended to locate the new building on the present site. I was a good deal pressed by Mr. DuVernet to conclude that their purchase was entered into with knowledge of the proposed intention of the Government, and that the real object in entering into the agreement was with a view to obtain what they believed they would have been entitled to, namely ten per cent for the compulsory expropriation. In the face of the sworn testimony of both Mr. Holland and Mr. McPhillips to the contrary, I think it would hardly be just to disbelieve the statements of these gentlemen, and to find contrary to their sworn testimony that they had this knowledge.

Mr. Holland, it appears, is the manager of a company called the Dominion Permanent Loan Co. In 1910, the Dominion Permanent Loan Co. contemplated moving from their offices on King street, and were looking out for a new site. It appears from Mr.



Holland's statement that after investigating numerous properties, he strongly recommended to his directors that they should purchase the Imperial Chambers. According to his statement, at this time the directors rejected the suggestion, preferring to remain on King Street as being more suitable for their business. This occurred in 1910. Mr. Holland states, towards the fore part of 1913, he felt quite sure his company would be compelled to move to the Imperial Chambers and he again urged the directors to purchase the property. They again declined—and his statement is, that believing that sooner or later they would be forced to move to the Imperial Chambers, he and Mr. McPhillips concluded to purchase the property for themselves, and subsequently when his company required it to sell to them at an advance. It is difficult to see why after the peremptory refusal on two occasions of the directors to move from King Street, that they should have entertained the idea that they would subsequently relent. Moreover, apparently he had no personal interest in the property in question, the property being owned, as I have stated by Mrs. Holland and by Mr. McPhillips, and they being under no obligation as far as the evidence before me discloses to sell to the company.

Mr. Defries, one of the trustees, states in his evidence as follows:

“ Q. Then you had some negotiations with Mr.

“ Long of the Crédit Foncier I think you said?

“ A. Yes.

“ Q. And when you got this offer (referring to “ the Holland offer) you gave him the option of “ making a bid on it?

“ A. We had been discussing it with him and “ told him that before we actually accepted it we

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“ would let him know so his company might have a  
 “ chance of buying.

“ Q. You kept faith with the company and gave  
 “ them a chance before accepting the other?

“ A. Yes. They had been tenants for a number  
 “ of years.”

Mr. Long declined to purchase.

Before analysing the evidence in detail, I would refer to a statement made by Mr. Frederick James Smith, one of the main witnesses for the defendants. After giving evidence based upon certain sales and ground rents fixed for other properties in the neighborhood, he is asked this question:

“ Q. But do you not know of any sales which  
 “ would justify a larger price than \$100,000 at that  
 “ time?

“ A. No, and that is how it is a hard matter to go  
 “ to work and arrive at a value, and it is only by  
 “ working it out and by analysis that you are able  
 “ to arrive at a value.”

I fully share Mr. Smith's difficulty.

One Armstrong was called, and he gives evidence as to a property on the south west corner of Toronto and Adelaide Street. This property contained a frontage on Adelaide Street of 64 feet, with a depth on Toronto Street of 83 feet. It was conveyed to Mr. Fasken by deed bearing date the 30th August, 1913. The purchase price was \$210,000. I do not think there is evidence in either this case or in that of the Dovercourt Land Company's case as to how this purchase came about. The fact is that it was shown in a later case that Mr. Fasken was the President of the Excelsior Life Insurance Company. The building owned by them was expropriated at the same time as the other properties for the purpose of obtaining land for the erection

of the new post office, and this particular lot was required in order that the Excelsior Life Co. might erect a building thereon for their business. It also appeared that the property to the south, which is known I think as the Union Loan Building, was in reality purchased by Mr. Fasken and not by Mr. Gooderham. It was purchased for the purpose of using part of the building as a temporary office during the construction of their proposed building on the corner of Adelaide and Toronto Street. The question of particular titles to these two properties has no bearing on this particular case, but it is well that the facts should be accurately stated. The real importance of the purchase is the fact that the property on the southwest corner of Toronto and Adelaide Street with the dimensions mentioned, was sold on the 30th August, 1913, for the sum of \$210,000. In the first place this sale and purchase was made after it was publicly known that a new post office was to be erected on the lands at present occupied by the old post office, together with the additional lands expropriated for the purposes of the new building

It is said that the Minister of Public Works represented in Toronto that the new post office is to be a very handsome building, and one that would cost a very large amount of money. The fact of this knowledge unquestionably had a tendency to raise the values of adjacent property. Moreover, this lot on the southwest corner of Toronto and Adelaide streets, had advantages not possessed by the Imperial Chambers. It had 64 feet on Adelaide street with corresponding light, and 83 feet on Toronto street, well lighted, and in my judgment very much better situate for office purposes than the Imperial Chambers.

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Mr. Seitz is President of the United Typewriter Company. He refers to a property situate on the east side of Victoria Street 99 feet and 1 inch north of Queen Street and running northerly 40 feet. It is a vacant property. This was sold on the 5th August, 1913, for \$1,800 per foot frontage. It had the advantage of being vacant property. It is too far away from the premises in question to afford much value as a comparison. He refers to another property on the south side of Adelaide street 117 feet and 7 inches, east of Yonge street. It is leasehold property with a frontage on Adelaide street of 35 feet, running easterly on Adelaide street from this point 117 feet, 7 inches, east of Yonge street. It has a depth of 96 feet and three-quarter inches to a lane. On it is a five storey building. This leasehold was sold on the 15th July, 1913, for the sum of \$100,000. The lease had from 14 to 15 years to run. The ground rent was \$825 per annum. The buildings were to be paid for. This property was purchased for a hotel site, and the evidence shows that the license for the hotel had been transferred. It was a valuable site having regard to the purposes to which the purchaser intended to put it. It was near Yonge street, a matter of very considerable moment for that class of business. It is needless to say that the Imperial Chambers in question could not be put to any such purposes.

Another property also leasehold is referred to by Malcolm S. Mercer in his evidence. It is a property containing 93 feet and 11 inches on the west side of Victoria street, and 110 feet 10 inches on the south side of Richmond street. A lease was granted for 21 years from the 1st April, 1913; and the ground rent was \$18,000 per annum—\$9,000 of the first year's rent being remitted. At the same time, or about the same

time, the property to the south, namely, 29 feet and 9¾ inches, on the west side of Victoria street, with a depth of 107 feet 11 inches was leased by some parties, so as to form one property with the property on Victoria and Richmond streets. The leasehold was at a ground rent of \$3,600 a year from the 1st April, 1913, with the right of renewal for three different periods. Immediately opposite the property in question and on the southeast side of Victoria and Richmond streets is situate Shea's Theatre. These two properties were leased by Myles with the view of the erection of an opposition theatre, and were extremely well situate for the purposes to which he intended to put them. They were close to Yonge street with the attendant street car service.

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Heppler, who was called as a witness said that the land was wanted for a theatre.

The evidence of Lang with regard to the assessment to my mind is of no value whatever. It would appear that the property in question, the Imperial Bank Chambers, was assessed in 1913, at the sum of \$56,000. The evidence of this witness was tendered with the view, not of showing that the assessment of \$56,000 was the correct assessment, but with the object of showing the increased assessments from time to time of city properties, and to thereby argue for the advances of property values. It only shows to my mind the assessors were gradually waking up to a sense of their duty, and apparently had not risen to the full notions of what they were called upon to do in the year 1913.

Albert J. Walker, was secretary of the Home Life Company who have a property on the northwest corner of Adelaide and Victoria Street, upon which is erected a large building formerly known as the Freehold Building. This building covers not only the land

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owned in fee by the company, but in addition to that there is a piece of leasehold property comprising 55 feet and 10 inches on Adelaide Street, running west from Victoria Street with a depth of 48½ feet on Victoria Street, the whole depth of this lot on Victoria Street including a piece under leasehold from Griffiths of 48½ feet is 125 feet on Victoria Street. The Griffiths lease ran 21 years from the 1st May, 1910, the rental being the sum of \$3,500 a year. Accepting a four per cent basis as a ground rent, it would be at the rate of four per cent. on about \$1,800 a foot. At a subsequent period, namely December, 1913, a transaction took place between the Sun Life and the Home Life, and these buildings and lands were thrown in at the sum of \$425,000 as part of the business that was conveyed by the Home Life to the Sun Life. The rents from this building make but a very poor showing.

Mr. Small was examined as a witness on the part of the defendants. He values the land per foot frontage at \$3,500 a foot. He includes in this valuation the buildings, which according to his view are of no value whatever, having regard to the high price of land. He considers as others do that they had a temporary value in enabling the purchaser to carry the property by having the taxes paid and a small amount of interest, until such time as the purchaser would be prepared to build. The evidence in the case with which I am dealing, and in that of the Dovercourt Land Company, is to be used in either case; and later on I will have to comment on the evidence of Mr. Small in regard to his method of valuation. Mr. Small has sold nothing in the immediate neighborhood of these lands. He is giving his evidence based upon properties heretofore referred to, most of them renewals of leases. His idea is that on the property in question to make it of any

value a building should be erected, which he places at ten storeys in height, and would cost the purchaser the sum of \$150,000. He figures out that if such a building were erected, the property would be occupied and it would yield a return which would give a ground rent equal to \$3,500 a foot frontage. In fact his figures would show a sum in excess of this. Unquestionably when you come down to properties on King street, Toronto, with figures running from \$7,000 to \$12,000 a foot, frontage, a purchaser paying these enormous prices would necessarily look forward to the erection of suitable buildings so as to get a proper return. I think Mr. Poucher deals with it in his evidence, which I will have to comment upon later on, in what strikes me as a sensible way.

It is curious that for all these past years these properties, such as the Imperial Chambers and the other properties I have to deal with, have been lying dormant, nobody coming forward and being willing to pick up what appears to be a plum and to realize these large figures by the erection of suitable buildings. Capitalists who are prepared to give large prices for land, and at the same time to go to the further expenditure of \$150,000 in the erection of buildings, are few and far between; and they have not been known in this particular locality until the trial of the actions before me, and then we have merely theoretical evidence as to what might or might not happen. It might have turned out that the offices in these large buildings would have remained untenanted. All sorts of contingencies would have to be taken into account. According to Mr. Small there are no modern buildings in that locality.

Mr. Frederick James Smith also places the value of the lands at \$3,500 a foot, including the buildings

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which he values as worthless, except for carrying purposes, and he would place the whole value of the property at \$143,500. He seems to form his conclusions as an inference based upon the transactions which I have referred to. He places property on Yonge street near the Bank of Montreal as of value \$1,000 a foot frontage. He speaks of the property in the southeast corner of Lombard and Victoria streets, which in the spring of 1913 sold for \$115,000. That property had a frontage of 45 feet and 11 inches and averaged \$2,500 a foot including the buildings.

Horton Walker also places the value at \$3,500 a foot.

Frederick Sparling, who is the secretary of the National Life Company, refers to the southeast corner of Adelaide and Toronto streets. This property had a frontage on Toronto street of 59 feet and 5 inches, with a depth of 79 feet on Adelaide street. In the fall of 1911, according to his testimony, \$250,000 was refused for this property. Upon this property is erected a very substantial building.

This, I think, comprises an analysis of all the evidence adduced on the part of the land owners.

On the part of the Crown, certain evidence was adduced, amongst others being Dalton M. Gilpin. He is a broker in the city of Toronto. On the 26th of March, 1913, he was authorized to sell the Equity Chambers, being the northeast corner of Victoria and Adelaide streets one of the properties expropriated, at the sum or price of \$250,000. This offer fell through. It is only fair to say that the offer was for cash.

John Firstbrook refers to property on Lombard street. I don't think that this has very much bearing owing to the difference between Lombard street and Adelaide streets. Lombard street is a street for



factories and possibly warehouses, but it is not a street for offices.

Hammill refers to a purchase on the northeast corner of Victoria and Lombard streets for the sum of \$125,000. There were some old buildings on it. This property has been previously referred to. The property on the southeast corner of Victoria and Adelaide streets being 58 feet and three inches on Adelaide street, by 130 feet on Victoria street, with a lane 14 feet wide east and west, was sold according to Mr. Irving in 1911, for \$60,000, subject to a lease until 1923, at a rental of \$1,747. I don't think this a guide having regard to the nature of the lease.

Mr. Hudson who has had great experience as Manager of the Canada Permanent Loan and Mortgage Company states, that \$2,000 a foot frontage for the Imperial Chambers would be a handsome price, and he would place the buildings at from \$18,000 to \$20,000!

Mr. Poucher also a man of very great experience and the manager for all the real estate business of the National Trust Company puts it at the outside at about \$2,000 a foot, and he would throw in the buildings between \$18,000 and \$20,000.

Both Mr. Hudson and Mr. Poucher are of the opinion that office buildings do not pay. There is a great deal of force in Mr. Poucher's view, that for a loan company or a company of that class, or even for a bank who require a permanent situation, as well as accommodation for their own business, offices above in their building are of value as reducing the charges under which the institution lies.

Upon the whole case, in view of the class of evidence adduced before me, I am inclined to think that the conclusion arrived at by the Court of Appeal in Ontario in the case of *re Fitzpatrick v. Town of New Liskeard*,

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is as far as I know a proper solution of the matter. This case is reported in the Ontario Weekly Reporter, Vol. 13, p. 806. The judgment of the Court of Appeal was given by Garrow, J. In that case the price at which Fitzpatrick purchased, namely for the sum of \$2,700 was accepted as the safest starting point in the enquiry into values. So in this particular case having regard to all the circumstances and the difficulty of arriving at an exact valuation, I should be inclined to take the price at which the trustees sold and at which Holland bought as the correct starting point, namely, \$100,000.

Mr. Williams stated that in advising the Crown as to the amount to be paid, he had added on the usual ten per cent, for compulsory taking. I think that it would have been proper to have started with the \$100,000 which was the sum unquestionably paid—and if ten per cent. were to be added it would have made the sum that should have been offered \$110,000.

It is claimed that Holland is entitled to a ten per cent. advance by reason of the compulsory taking. I am not aware of any law which entitles the owner to add ten per cent. to the market value. It has been usual in most cases to make an allowance of some kind in order to recoup the purchaser for certain contingent items which cannot be taken into account.

Arnold, in his book on *Damages* (1), points out that there is no justification for this ten per cent. allowance.

Cripps on *Compensation*, (2) states, the customary ten per cent. can only be justified as part of the valuation and not as an addition thereto.

Browne and Allen on *Compensation* says (3):—

(1) Ed. 193 at p. 229.

(2) 5th ed. p. 111.

(3) 2nd ed. at p. 97.

“ It should be noticed also that there is no pro-  
 “ vision either in this or in any other section of this  
 “ Act to the effect that anything is to be added in  
 “ respect to compulsory purchase. In practice a  
 “ percentage is regularly [sic] added to the market  
 “ price, and this is usually right, for the sum to be as  
 “ contained is not the market price but the value of  
 “ the land to the owner.”

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I may say that having regard to the decisions in our courts, there seems to be no doubt that the principles enunciated in the cases decided under the *Lands Clauses Compensation Acts* have been adopted by our Courts. I fail to see, however, that any hard and fast rule as to a fixed allowance should be adhered to.

In this particular case I would add to the \$100,000 the sum of \$5,000. This will enable the purchasers to pay the commission which apparently they feel bound to pay to Buckland, amounting to \$2,500.

I think, considering the facts of this case that the purchasers were only out of pocket \$2,000 for about a month and a half, they will be amply recompensed by such allowance.

I give judgment for one hundred and five thousand dollars, and such interest as they may be entitled to, and the costs of the litigation.

The interest can be computed and if there is any trouble the question can be spoken to me in Chambers.

I may say that in this case, and in the other cases before me, no proper tender was made before action. It might be well for the solicitors to refer to section 46 of the *Exchequer Court Act*, which shows the manner in which a tender can be made.

[Upon the settlement of the minutes of judgment before the Registrar, the defendants sought to have it declared that the Crown should pay a bonus of interest

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to the mortgagees in addition to paying compensation for lands taken. On the minutes being spoken to before Mr. Justice Cassels in Chambers, he decided the question as follows (June 17, 1914):—

Upon the settlement of the minutes of judgment in this case, a question has arisen, not presented at the trial, where it should have been raised. It is as follows: By the agreement entered into by the trustees of the late Sir David Lewis Macpherson and Mr. Holland, one of the defendant-, there was a provision which enables the mortgagor to pay off the principal money secured by the mortgage at any time on payment of three month's interest by way of bonus. The Crown, through its agent, has paid in full the principal money due on the mortgage. The mortgagees claim that they are entitled to receive the bonus of three month's interest under the terms of their mortgage. I think they are entitled to this bonus. The question, however, arises as between the Crown who expropriated the lands and who paid off the mortgage and the mortgagor. The mortgagor claims that the Crown, having expropriated the lands including the mortgagees' interests and having paid the mortgagees, that the Crown should pay the bonus and that it should not be thrown as a burden on the mortgagor. I think that the contention of the mortgagor is correct. In the *Lands Clauses Consolidation Act* (1845) which is to be found in Browne & Allen's *Law of Compensation*, (1) there is ample provision for securing the rights of the mortgagees. The promoter is obliged to secure the mortgagee against loss. Our statute does not contain any similar provision. Section 22 of *The Expropriation Act* provides that:—

(1) 2nd Ed., p. 242.

“ The compensation money agreed upon or  
 “ adjudged for any land or property acquired or  
 “ taken for or injuriously affected by the con-  
 “ struction of any public work shall stand in the  
 “ stead of such land or property; and any claim to  
 “ or encumbrance upon such land or property shall,  
 “ as respects His 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 His  
 “ Majesty.”

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Section 29 of the same Act provides:—

“ Such proceedings shall, so far as the parties  
 “ thereto are concerned, bar all claims to the com-  
 “ pensation money or any part thereof, including  
 “ any claim in respect of dower, or of dower not  
 “ yet open, as well as in respect of all mortgages,  
 “ hypothecs or encumbrances upon the land and  
 “ property; and the Court shall make such order  
 “ for the distribution, payment or investment of the  
 “ compensation money and for the securing of the  
 “ rights of all persons interested, as to right and  
 “ justice, and according to the provisions of this  
 “ Act, and to law appertain.”

It seems to me that if the Crown chooses to ex-  
 propriate and get rid of the mortgage, the amount  
 which is thrown as a burden on the mortgagor by  
 reason of the expropriation should be added to the  
 compensation allowed. It will be noticed that Sec.  
 22 of *The Expropriation Act* hereinbefore quoted only  
 bars the right as between the Crown and the mortgagee.  
 It leaves the relative rights as between mortgagor and

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the mortgagee as they were at the time of the expropriation. It could not be intended to take away the legal rights of the mortgagees. On the other hand, it would be unjust that the Crown availing itself of the privilege of paying off the mortgage should compel the mortgagor to suffer.

I think, therefore, that the bonus which has to be paid to the mortgagees should, if necessary, be added to the compensation money allowed the mortgagors. There should be no trouble in the parties arriving at an adjustment, if not, the matter can be spoken to before me in Chambers.

I think there should be no costs to any of the parties on this application. It should have been raised at the trial.

*Judgment accordingly.*

Solicitor for the plaintiff: *E. E. A. DuVernet.*

Solicitors for defendants, McPherson, Ridout and Defries: *Allan Cassels & Defries.*

Solicitors for the defendants, Holland and McPhillips: *Blake, Lash, Anglin & Cassels.*

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