BETWEEN: 1948

HIS MAJESTY THE KING..... PLAINTIFF; May 4 Sept. 14

AND

THE TORONTO TERMINALS RAILWAY COMPANY..... DEFENDANT

Crown—Action to recover money paid by the Crown beyond that authorized by contract—Payments made under a mistake of fact—Lack of evidence—Crown officer cannot bind the Crown to pay money beyond that authorized by contract—Lease sole authority for payment of money—Authority to pay cannot be widened by Crown officer—Order in Council required to widen authority to pay—Payments made after termination of contract or in excess of those authorized by it illegal, ultra vires—Principle underlying provision of the Assessment Act of Ontario, R.S.O. 1927, c. 272, s. 14 (1), (2) applicable in apportioning the assessed value of the properties.

Under a lease duly authorized and dated September 15, 1915, defendant leased to plaintiff, for the purposes of constructing thereon Postal Station A in Toronto, a parcel of land containing by admeasurement 43,811·958 square feet for a term of 21 years from September 1, 1915, renewable in perpetuity, "together with the free and uninterrupted right-of-way * * * through, along, over such of the courts * * * between the lands hereby demised and Bay and Front Streets, and of the carriage drives * * * for the purposes intended of the premises demised." In addition to the rent plaintiff convenanted to pay "all taxes * * * upon or in respect of the demised premises".

(1) (1927) Ex. C.R. 207.

1948

THE KING
v.
THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

The parcel of land being part of a block of land which is bounded by Bay, Front and York Streets and had been leased by defendant from the City of Toronto and by the latter assessed as a whole and at a bulk sum, it was necessary to determine what proportion of taxes plaintiff should pay to defendant. This was done through some correspondence but in a rather obscure way, with the result that from 1916 to 1939 plaintiff paid taxes not only levied on the site, but also taxes levied on the lands between the site and Front Street which were subject to the right-of-way. On September 27, 1939, the property was expropriated by plaintiff and the latter paid, after the termination of the lease, the taxes levied in 1940 on both the site and the lands between the site and Front Street. The present action is to recover the money paid in excess of the amount the Crown covenanted to pay under the lease, on the ground that, prior to 1940, it was paid under a mistake of fact and under a mistake of fact and law for the year 1940, and also because the payments were not authorized payments and therefore recoverable.

Held: That the evidence does not establish the payments were made under a mistake of fact.

2. That a Crown officer had no authority to bind the Crown to pay taxes beyond those authorized by the lease.

3. That the lease was the only authority for the payment of taxes; that authority cannot be widened by a Crown officer. It would require an order-in-council.

4. That the payment made by the Crown in 1940, after the termination of the lease was not authorized, was illegal and ultra vires and so were the payments made from 1916 to 1939 that were in excess of those authorized by the lease.

5. That the principle underlying the provisions of the Assessment Act of Ontario, R.S.O., 1937, c. 272, s. 14(1), (2) is applicable in apportioning the assessed value of the property leased and the lands in front thereof which are subject to the right-of-way.

INFORMATION exhibited by the Attorney-General of Canada to recover money paid in excess of the amount the Crown covenanted to pay under a lease.

The action was tried before the Honourable Mr. Justice O'Connor at Toronto.

J. W. Pickup, K.C. for plaintiff.

A. D. McDonald, K.C. for defendant.

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

O'CONNOR J. now (September 14, 1948) delivered the following judgment:

Under an Information exhibited by the Attorney-General of Canada, as amended at the trial, the

1948

THE KING v. THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

plaintiff claims payment by the defendant of (*a*) the sum of $31,074.53, being the difference between the amount actually paid by the plaintiff to the defendant in respect of municipal taxes for the years 1916 to 1939 inclusive, and the amount which the plaintiff alleges should have been paid to the defendant in respect of such taxes pursuant to a Lease of the site of Postal Station A which forms the east wing of the Union Station in the city of Toronto; and, (*b*) the sum of $12,914.62 paid by the plaintiff to the defendant in respect of municipal taxes for the year 1940.

The claim in respect to (*a*) is put first on the ground that the money was paid under a mistake of fact and in respect to (*b*) on the ground that the money was paid under a mistake of fact and of law; and secondly, in respect to both (*a*) and (*b*) that these payments were not authorized payments and therefore recoverable.

The defendant held a Lease from the city of Toronto of the block of land bounded on the north by Front Street, on the east by Bay Street, and on the west by York Street, together with certain other lands lying south of this block. The defendant offered to lease to the plaintiff a site required for Postal Station A and to construct, at the cost of the Crown, a building thereon which would form the eastern wing of the proposed Union Station. The building would be built at the same distance from the street line and be of the same style of architecture as the said station. The offer was accepted and the Lease and Contract were authorized by P.C. 2057, dated September 1, 1915 (Exhibit 2).

Under the Lease (Exhibit 1), dated September 15, 1915, the defendant leased to the plaintiff a parcel of land containing by admeasurement 43,811·958 square feet for a term of 21 years from September 1, 1915, renewable in perpetuity. The property is described in the Lease as commencing at a point 63′ 8¾″ from the southerly limit of Front street measured at right angles thereto and distant 48′ 8¾″ from the westerly limit of Bay street, measured on a line parellel to the southerly limit of Front street. The description from there on is a lengthy one because of certain jogs on the north and west side, but for the purposes here it

1948

THE KING v. THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

is sufficient to say that it describes a rectangular area approximately 246′ 2″ on the north; 178′ 1″ on the west; 239′ 11″ on the south, and 182′ 11″ on the east.

The description in the Lease ends as follows:—

* * * (182′ 11″) to the place of beginning and containing by admeasurement an area of 43,811·958 sq. ft. be the same more or less, and as shown on the plan hereto attached; together with the free and uninterrupted right of way in common with the Lessor and all others entitled thereto for persons, animals and vehicles through, along and over such of the courts and driveways between the lands hereby demised and Bay and Front streets respectively, and of the carriage drives, roadways, courts, entrances and exits in and about the new Union Station premises as may be reasonably necessary for the full enjoyment for the purposes intended of the premises demised. To have and to hold all and singular the premises hereby demised or intended so to be and every part thereof, their and every of their appurtenances unto the said Lessee, His Successors and assigns, for, during and unto the full end and term of twenty-one years to be computed from the first day of September, 1915, and from thenceforth next ensuing and fully to be complete and ended.

Following the covenant to pay the rent the Lease provides:—

* * * and also will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, including the municipal taxes for local improvements and works assessed upon the property benefited thereby, which now are or hereafter shall during the continuance of the said term be charged upon or payable in respect of the said demised premises, whether the same be rated or assessed on the said premises or on the landlord or tenant thereof. Provided that this covenant is not to be taken as an admission that the interest of the Crown in said property is subject directly or indirectly to taxation, the intention being that the covenant extends only to taxes, rates, etc., lawfully imposed and based upon the interest of the Lessor in said land.

And pursuant to the Contract authorized by P.C. 2057 (Exhibit 2), the defendant erected Postal Station A on the site described in the Lease (Exhibit 1).

The whole building, consisting of the Union Station and Postal Station A, was set back 63′ 8¾″ from Front street. Of this 63′ 8¾″ strip, 7′ in width adjoining the southern boundary of Front street formed part of the roadway (Front street), the next 25′ a concrete sidewalk, and on the next 32′ approximately, a depressed driveway (below the Front street level) was created. The building was also set back 48′ 8¾″ from Bay street on the east, and from York street on the west and these two areas were converted into drive-

ways (marked respectively carriage entrance and carriage exit on plan Exhibit 5), which joined the depressed driveway running in front of the building.

On the 13th December, 1915, W. G. Thurston, Esq., Barrister of Toronto, who was acting for the Crown, wrote the Deputy Minister of Public Works (Exhibit 4) in part as follows:—

The matter arose by way of an Appeal by the Toronto Terminals Company from the Assessment of the City of Toronto upon the property, a portion of which the Department of Public Works have leased from the Terminal Company. The block of land which is bounded by Bay, Front, the Esplanade and York street which has been leased by the City to the Terminals Company, was assessed as a whole, this block together with some other outlying portions being assessed at a bulk sum. Upon Appeal this was divided and the assessment on that portion of the land which is leased by your Department was confirmed as follows:—

the 48 feet 8¾ inches by 221 feet deep on the corner of Bay and Front streets being assessed at $1,350 a foot and the remaining 246 feet 2 inches running west on Front street by 178 feet deep at $850 00.

So far as the assessment itself is concerned, I think this is proper and it was in the interests of your Department to have the question of what this portion of land should be assessed at settled, otherwise the question was bound to have arisen between your Department and the Toronto Terminals under your covenant in the lease to your Department contained by which your Department covenants to pay the taxes assessed upon these lands. So far therefore as settling of the Assessment is concerned, I think that it has been to your advantage to have this done at this time and the Assessment is undoubtedly a fair one because the Judge inquired into the Assessments of all the surrounding properties and especially the assessments on the north side of Front street and the assessment of your leased property is quite in accordance with the Assessments and also with the value of the surrounding properties and in my opinion is not too high.

* * *

I do not see since the Crown has given the covenant that it can escape payment of taxes in respect of this property. As between the Toronto Terminals and the Crown however my opinion is following my conferences with Mr. H. H. Williams and hearing his views and analyzing the information which he has so kindly given me that the Crown should at least object to pay the taxes on the 48 feet 8¾ inches at the corner of Bay and Front streets which is assessed at $1,350 00 a foot. This is in reality a right of way and will be used by the Public and the liability of the Crown to pay taxes thereon may very well be open to question. This however is a matter between the Terminal Company and the Crown itself in respect of the covenant in the lease contained.

On March 16, 1916, W. C. Chisholm, Esq., General Solicitor for the defendant Company wrote to the Deputy Minister of Public Works (Exhibit 6) in part, as follows:—

You will remember the appeal which was taken from the City's assessment of this property to the County Judge and I presume Mr. Thurston

1948

THE KING
v.
THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

wrote you advising of the result. While the matter is fresh in our minds I think it would be well to have defined what proportion of the taxes the Government should pay to the Terminals Company under the provisions of the lease. The revised assessment was arrived at by putting a rate of $850 00 a foot on the land on the south side of Front street and in talking to Mr. H. H. Williams I agreed that it would be fair that the Government should pay at that rate upon its actual frontage, although the Terminals Co. has to pay at a higher rate upon the vacant land between the east wing and Bay street. If you agree, please write me so that I may advise the Secretary of the Company.

In reply on the 31st March, 1916, the Deputy Minister of Public Works wrote to Mr. Chisholm (Exhibit 7) as follows:—

The Crown holds under a lease from the Toronto Railway Terminal Company a parcel of land situated, approximately, 68′ south of the southerly limit of Front street and 48′ 8¼″ west of the westerly limit of Bay street in the City of Toronto, having a frontage of 246′ 2″ paralleling Front street and a depth of, approximately, 182′ 11″ paralleling Bay street, and containing an area of 43,811·958 square feet. Upon an appeal by the said Company from the assessment of the City of Toronto upon the said demised lands and other premises, His Honour Judge Winchester confirmed the assessment upon the said demised lands at $850 00 per front foot of the Front street frontage of 246′ 2″ by a depth equal to the depth of the said demised lands.

I have to inform you that the Government accepts the decision of His Honour Judge Winchester, confirming the assessment at the amount above mentioned, and, pursuant to the terms of the lease, will pay, or refund to the Lessor, all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, including the municipal taxes for local improvements and works assessed upon the property benefited thereby, which now or hereafter shall, during the continuance of the term of the said lease, be charged upon or payable in respect of the said demised premises, upon an assessment of $850 00 per front foot of the Front street frontage of 246′ 2″ by a depth equal to the depth of the demised premises

On April 5, 1916 (Exhibit 8) Mr. Chisholm in a letter in reply said:—

I have your letter of the 31st ultimo agreeing to the suggestion contained in my letter of the 16th ultimo that the Crown should pay taxes on the frontage leased to it at the rate of $850.00 a foot.

He then goes on to point out that the assessment was made for the year 1917 and the four years following.

On the 7th April, Mr. Hunter replied to Mr. Chisholm's letter (Exhibit 9) stating that he was under the impression that $850.00 a foot was a fixed assessment but he now understood it was for the year 1917 and the four following years. He goes on to state:—

The Government accepts the assessment and will pay all taxes pursuant of the terms of the lease, but, of course, the Government reserves the right to appeal against the next assessment if it should be deemed advisable to do so.

Again on 22nd April, 1916 (Exhibit 11) Mr. Hunter in a letter to Mr. Chisholm states:—

The Government accepts the assessment and will pay all taxes pursuant to the terms of the lease.

The lands leased by the defendant from the City of Toronto were assessed as follows:—(Exhibit 20)—

Years 1916 to 1918 inclusive:		
Front and Bay Sts. 48′ 8¾″ x 246′ @ $1,350.00 per foot		65,785
Front Street West 752′ 8″ x 246′ @ 850.00 per foot		639,770
Front and York Sts. 48′ 8¾″ x 350′		Nil
Union Station rear lands Station Street closed Part Lots 41 and 42 Esplanade between Yonge and Bay Sts.	5·577 acres @ $90,000 per acre....	501,930
		$1,207,485

The site of Postal Station A is included in that portion of the assessment shown as Front Street west 752′ 8″ by 246′. This particular piece was assessed at $850.00 per front foot from 1916 to 1930, inclusive, and at $1,500.00 per front foot from 1931 to 1940.

In August, 1916, the defendant Company sent an account (Exhibit 3) to the Department of Public Works as follows:—

For your proportion of City of Toronto taxes for the year 1916 on the New Union Station property. Assessment based on frontage of 246′ 2″ @ $850 00.....			$ 209,241.67
General Rate.....	15M	$ 3,138.62	
War Tax.....	1M	209.24	
School Rate.....	6½M	1,360.07	
Propn. cost snow cleaning.....		2.50	
		$ 4,710.43	
Less discount.....		45.53	$ 4,664.90

Each year thereafter from 1917 to 1939 an account was sent to the Department of Public Works in the same terms, —"For your proportion of City of Toronto taxes for the year * * * on the New Union Station property. Assessment based on frontage of 246′ 2″ at $850.00," (and after 1931 at $1,500.00). Payment was made each year by the plaintiff to the defendant of the sum set out in the annual

1948

THE KING
v.
THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

account. Each account was supplied to the resident architect in Toronto, examined by a representative of the Chief Architect's Branch in Ottawa, and then audited by the Chief Accountant or the Treasury Office.

In the years 1916 to 1939, both inclusive, the plaintiff paid to the defendant a total of $208,582.54.

On the 27th September, 1939, the property was expropriated by the plaintiff. In the year 1940 the defendant paid to the City of Toronto the municipal taxes charged against all of the lands leased by it from the City of Toronto, including the area leased to the plaintiff and which had been expropriated in 1939, and in the year 1940, forwarded to the Department of Public Works a statement in the following form:—

For City of Toronto 1940 taxes payable on land occupied by Postal Station "A".		
Assessment based on frontage of 246' 2" @ $1,500 00 per foot—$369,250.00.		
General @ 23·70 mills	$ 8,751.23	
Public School @ 11·45m	4,227.91	
	$12,979.14	
Less ¼ of 1% discount off 2nd and 3rd instalments $8,602.91	64.52	$12,914.62

The plaintiff paid the defendant the said sum of $12,914.62.

As the lands occupied by Postal Station A had been expropriated in 1939, there were no municipal taxes payable thereon in the year 1940.

The Crown covenanted to pay "all taxes * * * which now are or hereafter shall during the continuance of the said term be charged upon or payable in respect of the said demised premises whether the same be rated or assessed on the said premises or on the landlord or tenant thereof."

It is clear from the Lease that the "demised premises" consist only of the site described in the Lease. In addition to the site the plaintiff was given:—"together with the free and uninterrupted right-of-way in common with the Lessor and all others entitled thereto for persons, animals and vehicles through, along and over such of the courts and driveways *between the lands hereby demised and Bay and Front streets,* respectively, and of the carriage drives, road-

ways * * * in and about the new Union Station premises as may be reasonably necessary for the full enjoyment for the purposes intended of the premises demised."

The Crown did not covenant to pay taxes on the right-of-way and no taxes were levied on the easement itself. Nor did the Crown covenant to pay taxes on the lands which were subject to the easement. But the Crown did in fact pay "during the continuance of the said term" the taxes levied not only on the demised premises, i.e., the site, but in addition the taxes levied on the lands between the site and Front street which were subject to the easement. And paid, after the termination of Lease, the taxes levied in 1940, on both the site which for convenience will be referred to as "A" and the lands between the site and Front street which will be referred to as "B".

The claim for payment is first put forward by the Crown on the basis that the payments in excess of the amount which it has covenanted to pay under the Lease were paid under a mistake of fact. There is a division in the submission between the period prior to 1940 and the year 1940, but it is not necessary to deal with this in view of the conclusion which I have reached. The mistake of fact which the Crown alleges is this: that having been advised by its agent, Mr. Thurston, (Exhibit 4):—

> * * * and the assessment on that portion of the land which is leased by your Department was confirmed as follows: the 48' 8¾" by 221' deep on the corner of Bay and Front streets being assessed at $1,350.00 a foot and the remaining 246' 2" running west on Front street by 178' deep at $850.00.

and having received an account from the defendant:—

> For your proportion of City of Toronto taxes for the year 1916 on the New Union Station property. Assessment based on frontage of 246' 2" @ $850.00..... $209,241.67

the Crown, believing that the assessment of $850.00 per foot was to a depth only of 178', and therefore only on the site, made the payments on that basis; whereas, in fact, the assessment of $850.00 per foot was to a depth of 246' (Exhibit 20). And that under that mistake of fact the Crown paid such excess from 1916 to 1939, inclusive.

This contention is supported by Mr. Hunter's letter to Mr. Chisholm (Exhibit 7) in which he set out that upon the appeal the assessment "upon the said demised lands"

1948

THE KING v. THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

was confirmed at $850.00 per front foot on the Front street frontage of 246′ 2″ by "a depth equal to the depth of the said demised lands". Against that contention is the fact that in Mr. Thurston's letter (Exhibit 4) he stated, "an assessment on that portion of the land which is *leased by your Department* was confirmed as follows:—48′ 8¾″ by 221′ deep on the corner of Bay and Front streets * * * and the remaining 246′ 2″ running west on Front street by 178′ deep". Mr. Hunter, when he dictated Exhibit 7 had before him the Lease from the defendant to the Crown, to which was attached a plan of the property leased (Exhibit 1). He sets out in his letter the fact that the Crown holds under a Lease from the Toronto Terminals Railway Company a parcel of land situate approximately 68′ south of the southerly limit of Front street and 48′ 8¾″ west of the westerly limit of Bay street, having a frontage of 246′ 2″ parallelling Front street and a depth of, approximately, 182′ 11″ parallelling Bay street and containing an area of 43,-811·958 square feet. He knew then, that Mr. Thurston's letter was quite incorrect in stating that "an assessment on that portion of the land which is leased by your Department was confirmed as follows:—48′ 8¾″ by 221′ deep on the corner of Bay and Front streets", because that area was not included in the Lease.

Mr. Hunter was then answering Mr. Chisholm's letter (Exhibit 6) which stated "the revised assessment was arrived at by putting a rate of $850.00 a foot *on the land on the south side of Front street* * * *". And he knew because he set out in his letter (Exhibit 7) that the parcel of land was situate approximately 68′ south of the southerly limit of Front street. He was replying to Mr. Chisholm's letter (Exhibit 6) which stated—"While the matter is fresh in our minds I think it would be well to have defined what proportion of the taxes the Government should pay to the Terminals Company under the provisions of the Lease".

It was obvious that this proportion had to be determined in view of the fact that the site of Postal Station A was not assessed separately, but was included in an assessment which also covered the 68′ south of Front street.

What Mr. Chisholm stated was this:—That as the revised assessment put a rate of $850.00 a foot on the land on the

south side of Front street that it would be fair that the Government should pay at that rate upon its actual frontage, although the Terminals Company had to pay at a higher rate upon what Mr. Chisholm termed the vacant land between the east wing and Bay street, a width of 48′ 8¾″.

Postal Station A had been erected under the contract, authorized by P.C. 2057, between the defendant and the plaintiff represented by the Minister of Public Works of Canada. P.C. 2057 and the Lease provides that the building shall be built at the same distance from the street line as the Union Station and to be of the same construction. These were matters with which Mr. Hunter, as Deputy Minister of Public Works, must have been perfectly familiar. Mr. Chisholm's proposal was, in effect, that as the defendant Company was paying the taxes on the area between the demised premises and Bay street, that it would be fair that the Government should pay for the area between Front street and the demised premises, as well as the taxes on the site itself. If Mr. Hunter did not intend to accept that proposal he must have known from the subsequent letters that Mr. Chisholm believed that his proposal had been accepted. Because in his reply Mr. Chisholm (Exhibit 8) stated that he had Mr. Hunter's letter agreeing to the suggestion that the Crown should pay taxes on the frontage leased to it *at the rate of $850.00.* If that was not Mr. Hunter's intention he allowed Mr. Chisholm to rest under that impression.

Moreover, it must have been quite clear to Mr. Hunter that the proportion of the taxes, in view of one assessment, had to be determined, and if he did not intend to accept Mr. Chisholm's proposal, he failed to set out any method by which the proportions could be determined. It is true that he reiterates throughout his letters that the Crown will pay the taxes upon an assessment of $850.00 per front foot on a frontage of 246′ 2″ by "a depth equal to the depth of the demised premises", but in view of Mr. Chisholm's proposal to him, what he meant is not at all clear. In any event the evidence before me does not establish that the payments were made under a mistake of fact and I so find.

1948

THE KING v. THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

I find, however, that Mr. Hunter's letters do not constitute an agreement to pay the taxes on the land between the site and Bay street, as the defendant contends, and in any event Mr. Hunter had no authority to bind the Crown to pay taxes beyond those authorized by the Lease.

The claim of the Crown is put forward on a second basis that whether there was a mistake or not, the payment of any taxes in excess of the liability under the Lease was not authorized by Parliament within the meaning of Section 22 of the Consolidated Revenue and Audit Act, 1931, and was, therefore, illegal and that the Crown is entitled to recover the same.

Section 22 of the Consolidated Revenue and Audit Act, 1931, provides:—

22(1) Subject to the provisions of subsection two of this section, no issue of public moneys out of the Consolidated Revenue Fund shall be made except under the authority of Parliament.

(2) Issues out of the Consolidated Revenue Fund of public moneys received for special purposes or in trust may be made for the express purposes for which such moneys were received without further parliamentary authority than the provisions of this subsection, subject however to the provisions of any particular statute dealing with such special or trust moneys.

(3) The Consolidated Revenue Fund shall be subject to the charges hereinafter mentioned, and in the following order, that is to say:—

First.—The costs, charges, and expenses incident to the collection, management and receipt thereof, subject to be reviewed and audited in such manner as is hereby or is hereafter by law provided.

Second.—The salary of the Governor General.

Third.—The yearly salaries of the judges of the Supreme Court of Canada and of the Exchequer Court of Canada.

(4) The grants payable to the several provinces constituting the Dominion of Canada shall be charged upon the Consolidated Revenue Fund of Canada, and payable out of any unappropriated moneys forming part thereof.

P.C. 2057 (Exhibit 2) authorized the Lease (Exhibit 1) which in turn authorized the payment of the taxes and was the only authority in the evidence for the payment of the taxes.

There were amounts put in the estimates annually to provide for the payment of the rent and taxes in respect of this property. But amounts are put in the estimates and passed on the basis that they are or may be required by the Department during the current year and whatever Parliament sees fit to appropriate, is appropriated for that.

purpose. That is an appropriation for the Crown which is subsequently released to the Crown by an order-in-council. Beyond that in turn there must be authority to pay the money to the person who is entitled to it.

If in this case (B) had been owned by the defendant and situated on the north side of Front street and the Crown paid the taxes on (A) and (B) either by mistake or because an official thought it was fair and equitable for the Crown to do so, the fact that an amount to cover these taxes was put in the estimates and appropriated by Parliament would not authorize the payment of the taxes on (B). What authorized the payment here was the Lease and only the Lease, which in turn was authorized by the P.C. 2057 (Exhibit 2).

Parliament provided funds to make lawful payments, i.e., payments authorized by the Lease. That authority cannot be widened by the Department. It would require an order-in-council, or what was referred to in the evidence as a specific appropriation to a particular purpose. Mr. Pickup's contention in this respect is, in my opinion, sound and the principle laid down in *Auckland Harbour Board* v. *The King* (1), which he cites in support of his contention is applicable. The facts there taken from the headnote were:—

An agreement made in 1913 provided (inter alia) that the Minister of Railways of New Zealand (representing the Crown) should pay to the appellants £7,500 when the appellants granted a lease to B. and Co. The making of the agreement had been authorized by an Act of 1912, which empowered the Minister, without further appropriation, to pay to the appellants out of the Public Works Fund such sum as might be payable in accordance with the agreement. Owing to an alteration in the scheme to which the agreement related, the Minister did not require the appellants to grant the lease, and it was not granted. Nevertheless the £7,500 was paid by the Minister of Railways to the appellants in 1914 out of a vote included in the Public Works Schedule to the Appropriation Act for the year, and the Controller and Auditor-General passed the sum as being so payable:—

HELD, that as the lease had not been granted the payment of the £7,500 was not authorized by the Act of 1912, and that it was recoverable by the Government and could be deducted from a larger sum admittedly due to the appellants.

Viscount Haldane said at page 326:—

But it was argued that, as the voucher for this amount had been passed, and the money paid, the transaction could not now be reopened. It was said, and it appears to have been the fact, that the Controller and Auditor-General subsequently passed the sum handed over as having

(1) (1924) A.C. 318

1948

THE KING
v.
THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

been payable out of public moneys appropriated in general terms for railway services by the New Zealand Parliament in 1914. But this is not a sufficient answer to the contention that the payment was not authorized. Sect. 7 of the Act of 1912 provides that the sum which was agreed on at £7,500 was to be payable to the appellants only on a condition—namely, on the granting of the lease, which was to be the consideration. The provision which Parliament thus made was to be in itself a sufficient appropriation, but only operative if the condition was actually satisfied. Their Lordships have not been referred to any appropriation or other Act which altered these terms. If, as must therefore be taken to be the case, it remained operative, the authority given by Parliament is merely the conditional appropriation provided in s. 7, for a condition which was not fulfilled. The payment was accordingly an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced.

The defendant contends that what took place was a mere computation of the taxes for which the Crown was liable, but no computation or division of the taxes as between (A) and (B) was ever made. It is clear, I think, that what has happened is that the Crown paid taxes on both (A) and (B), and to the extent that they paid taxes on (B), such payment was in excess of the payment authorized by the Lease.

First as to the payment made by the Crown in 1940: The parcel (A) was expropriated in 1939 and the expropriation terminated the Lease. The payment, therefore, of $12,914.62 made by the plaintiff to the defendant in 1940 was not authorized in any way and was illegal and ultra vires.

Second, so also were the payments made in 1916 and 1939 that were in excess of those authorized by the Lease. Even if the payments were made with the approval or concurrence of the officials of the Crown, that would not divest them of an illegal character.

The next question then that falls to be determined is what payments were made in excess of those authorized by

the Lease, from 1916 to 1930: (A) the site, and (B) in front of the site, were included in one assessment, at first at $850.00 per front foot and then at $1,500.00 per front foot. In order to ascertain the taxes levied on (A), the assessed value of $850.00 per foot must be proportional between (A) and (B).

The only evidence before me is that of Mr. Bosley, called by the Crown. The defendant did not call any expert witnesses. Mr. Bosley arrived at his valuation on this basis: that if the property was assessed at $850.00 per foot on a depth of 246′ 7″, then on a depth of 182′ 11″ the value would be reduced to $723.00 a front foot, and when assessed at $1,500.00 per front foot on a depth of 246′ 7″, then on a depth of 182′ 11″ the value would be reduced to $1,277.00 per front foot. These figures were arrived at by applying the Davies Depth Rule which, in his opinion, measured fairly accurately the diminishing value of the front foot frontage for varying depth. He stated that the Davies Depth Rule was an application of the 4-3-2-1 rule which was, in effect, that, given a lot 100′ in depth, the first 25′ from the street was worth 40 per cent of the whole, the second 25′ from the street was worth 30 per cent of the whole, the third 25′ 20 per cent and the fourth or back 25′, 10 per cent.

Mr. Bosley computed the taxes that would have been levied on assessments of $723.00 and $1,277.00 per front foot. Column 5 (Exhibit 21). He deducted this amount from the taxes levied on the actual assessment of $850.00 and $1,500.00 (Column 7) leaving a balance which is the amount of the Crown's claim.

While the claim is put on the basis that it is the excess of the taxes which the Crown paid over the amount that was levied on (A), it is therefore the tax levied on (B), based on Mr. Bosley's valuation. When Mr. Bosley attributes a value of $723.00 per front foot to (A) of the assessed value of $850.00, he must, by inference, have valued (B) at the difference of $127.00 per front foot. And on an assessed value of $1,500.00 he has valued (B) at $223.00 per front foot.

1948

THE KING
v.
THE TORONTO TERMINALS RAILWAY CO.

O'Connor J.

So that the claim is made therefore on the basis that the taxes should be apportioned in the same ratio that the respective values of (A) and (B) bear to the assessed value of the whole.

The claim is not made on the basis that the taxes should be apportioned in the same ratio that the respective areas of (A) and (B) bear to the whole area. And in my opinion the plaintiff has put the claim forward on the correct basis, because while both (A) and (B) are in one assessment and therefore valued as a whole, the assessed value being the actual value would not be uniform throughout. In arriving at the actual value, the assessors would be bound, for example, to value the area nearest Front street at a higher level than the area at the rear, as shown by the 4-3-2-1 rule. It would be inequitable to divide the taxes on any basis other than that of respective values.

In any event, that is the basis of the claim put forward by the Crown as will be seen from Mr. Bosley's evidence and from Exhibit 20. What remains, therefore, is an examination of the method and factors taken into account by Mr. Bosley in reaching his conclusions. He has arrived at the figures for (A), the site, by applying the depth rule to a diminished depth of 182′, i.e., the depth of (A). If he had applied the rule to the depth of (B), i.e., 63′ $8\frac{3}{4}$″, he would have arrived at a figure for (B) very much greater than either $127.00 or $223.00. And in using this depth rule he has given (B) the same value that would be given land at the rear of (A), because if (A) were increased in depth to 246′, the increase in value would be $127.00 and $223.00, depending on the assessed value.

But while he has given (A) the increased value resulting from the right-of-way over (B), because without the right-of-way he stated that (A) would be landlocked and of little value, he has not taken into account the depreciation in (B) by reason of the fact that it is subject to a right-of-way in perpetuity. Land at the rear of (A) could be built on or used for any purpose. But (B) cannot be built on or used for any purpose because of the right-of-way in perpetuity. The right-of-way prevents any beneficial use of it by the owner.

Section 14 of the Assessment Act of Ontario, R.S.O., 1937, ch. 272, provides:—

14(1). Where an easement is appurtenant to any land it shall be assessed in connection with and as part of such land at the added value it gives to such land as the dominant tenement, and the assessment of the land which as the servient tenement, is subject to the easement shall be reduced accordingly.

(2) Where land is laid out and used as a lane and is subject to such rights-of-way as prevent any beneficial use of it by the owner it shall not be assessed separately, but its value shall be apportioned among the various parcels to which the right-of-way is appurtenant and shall be included in the assessment of such parcels. In such cases the assessor shall return the land so used a "Lane not assessed".

The assessment here was not made on that basis but the principle underlying this provision is applicable here in apportioning the assessed value. An easement adds to the value of the dominant tenement and reduces the value of the servient tenement because it, in the language of sub-section 2, "prevents any beneficial use of it by the owner".

(B) has value, but its value, in my opinion, is very limited. I have before me Mr. Bosley's valuation of (B) at $127.00 and $223.00 per front foot. And the evidence also shows that (B) is subject to the right-of-way. Taking this into consideration, I am of the opinion that the value of (B) is only $12.70 and $22.30 per front foot. In other words, (B) value is in my opinion only 10 per cent of the values given by Mr. Bosley due to the fact that (B) is subject to the right-of-way.

For these reasons I am of the opinion that the Crown is entitled to recover 10 per cent of $31,074.53, viz. $3,107.45 from the defendant as the amount paid to the defendant from 1916 to 1939 in excess of the amount payable by the plaintiff as authorized by the Lease. The plaintiff is also entitled to recover the sum of $12,914.62 paid to the defendant in 1940, which payment was not authorized in any way.

In the circumstances here, the plaintiff is not entitled to interest.

There will, therefore, be judgment for the plaintiff in the sum of $16,022.07, and costs.

Judgment Accordingly.