BETWEEN:

THE QUEEN on the Information of the Attorney General of Canada .. PLAINTIFF;

AND

PETER BOYD COWPER, ALFRED ABRAHAM LESSOR and ETHEL LESSOR, wife of ISIDORE LESLIE WEINER, and LEOPOLD PARE ..... DEFENDANTS.

1951
June 11-15
18, 19, 25-27
Aug. 13-16,
20-23

1953
Mar. 6

*Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 9, 23—Claim to compensation assignable without acquiescence of the Crown.*

The plaintiff expropriated property on University Street in Montreal. The action was taken to have the amount of compensation payable to the owner determined by the Court.

*Held:* That a claim to compensation for land taken under the Expropriation Act may validly be assigned, without the acquiescence of the Crown and that when notice of the assignment has been duly given to the Crown the assignee is the person entitled to recover the compensation. *Chipman* v. *The King* (1934) Ex. C.R. 152 at 161 not followed.

(1) (1880) 5 A.C. 214.

(2) [1891] A.C. 666.

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INFORMATION by the Crown to have the amount of compensation money payable to the owner of expropriated property determined by the Court.

The action was tried before the President of the Court at Montreal.

*J. A. Prud'homme Q.C.* for plaintiff.

*A. Forget* for defendants Cowper, Lessor and Weiner.

*J. Martineau Q.C.* and *L. P. Gagnon* for defendant Pare.

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

The PRESIDENT now (March 6, 1953) delivered the following judgment.

The information exhibited herein shows that the land described in paragraph 2 thereof was taken by His late Majesty the King under the Expropriation Act, R.S.C. 1927, chapter 64, for the purpose of a public work, namely, a postal station, and that the expropriation was completed by depositing a plan and description of the land of record in the office of the Registrar of Deeds for the Registration Division of Montreal in the City of Montreal, in which the land is situate, on May 26, 1947, pursuant to section 9 of the Act. Thereupon the land became vested in His late Majesty and the defendants ceased to have any right, title or interest therein or thereto.

The parties have been unable to agree upon the amount of compensation money to which the defendants are respectively entitled and these proceedings are brought for an adjudication thereof. The parties are far apart. By the information the plaintiff offered the defendants the sum of $159,146.04 without apportioning it among them. By his amended statement of defence the defendant Cowper claimed $298,980 as the value of his interest and estate in the expropriated property and $133,100 as damages making a total claim of $432,080. The claim of the defendants Lessor and Weiner or of the defendant Pare was finally put at $95,930.44 as either that of the defendant Pare under an assignment from the defendants Lessor and Weiner or that of the defendants Lessor and Weiner if it should be held that the assignment was not binding. Thus

the claims of the defendants come to a total of $528,010.44 for a property which the defendant Cowper purchased on May 16, 1944, for only $80,000.

The expropriated property is on the west side of University Street in Montreal just a short distance south of St. Catherine Street. It has a frontage of 42.95 feet on University Street and a depth of 94.6 feet, giving it a total area of 4,024 square feet. Immediately north of it there is a 15-foot lane and to the west of it a 10-foot lane. On the property there was a 3-storey building known as the Oxford Hotel. This had been converted from an old private residence built in 1881. The front of the first storey was of stone and the rest of brick construction. In the north-west corner of the ground floor there was a tavern 17 feet by 66 feet, known as the Oxford Tavern, and on the rest of it a dining room, grill and bar. On the second floor there were two private dining rooms. On the rest of the floor and on the third floor there were rooms. The roof was flat and of tar and gravel finish. Under the building there was a basement and a stone foundation.

At the date of the expropriation the property, carrying municipal numbers 1250 and 1254 University Street, stood in the name of the defendant Cowper subject to certain mortgages and arrears of taxes and subject to a lease of the Oxford Tavern to the defendants Lessor and Weiner.

I shall deal first with the claim of the defendant Cowper. He purchased the property on May 16, 1944, from Patrick W. Rafferty for $80,000, of which $20,000 was payable in cash, the balance of $60,000 representing charges and liens the payment of which he assumed, namely, $45,000 to the Estate of William J. Rafferty, $6,000 to John P. Nugent and $9,000 of consolidated taxes to the City of Montreal. On the same date he bought from the Oxford Hotel Company Limited the whole of its business for $10,000 in cash. This was carried on under the names of The Oxford Hotel, the Oxford Grill and the Oxford Tavern. The purchase included the good will of the business, the right to operate the Company's licences, including the tavern licence, and all the furniture and furnishings on the premises. The story of how the defendant Cowper, who was a real estate agent, came to make these purchases is an unusual one. He knew Mr. Rafferty, the owner of the property and the

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shares in the Company, and kept after him to sell. The condition of the property was poor and the business was not doing well. Finally, Mr. Rafferty who was not anxious to sell gave him an option to buy. This was not exclusive to him. In that sense it was a listing for sale as well as an option to buy. The defendant Cowper tried to find a purchaser but was unable to do so, but the more he considered the property the more favorable it looked to him and he decided to buy it himself. But he did not have the necessary cash. The idea of selling the tavern business and renting the tavern premises to finance the purchase of the property and the hotel business then occurred to him. He got in touch with Mr. Maurice Audette, who dealt in the sale and purchase of taverns, and asked him to find a buyer. Mr. Audette introduced the defendant Lessor to him. After an examination of the tavern beer quotas the defendants Lessor and Weiner agreed to pay $43,000 for the tavern business, including the licence, and a rental of $250 per month for the tavern premises. Thereupon on May 16, 1944, the defendant Cowper sold the tavern business, including the licence, to them for $43,000, of which $30,000 was payable in cash and $13,000 in notes. On the same date he executed a lease of the tavern premises to them at a rental of $3,000 per year, payable at $250 per month, for a period of 5 years from May 17, 1944, with the lessees having the privilege of continuing the lease for a further period of 5 years from May 1, 1949. With the $30,000 cash thus obtained the defendant Cowper was able to make the cash payments of $20,000 to Mr. P. W. Rafferty for the property and $10,000 to the Oxford Hotel Company Limited for the hotel business, including the tavern licence. All four transactions went through on the same day. On their conclusion the defendant Cowper found himself the owner of the property, subject to the charges and liens assumed by him and the lease of the tavern premises, the owner of the hotel business, less the tavern business, the landlord of the tavern premises and the payee of $13,000 in notes, without having put up any cash of his own.

Then, although he had never been in the hotel business previously he began to operate the Oxford Hotel. This business consisted of renting rooms on the two upper floors, 28 in number, and running a dining room and grill. In

connection with this he acquired a cafe licence, which authorized him to sell beer, wines and liquors with meals, although the consumption of meals was not insisted on. The acquisition of this licence cost him $3,500, which came out of the proceeds of notes from the defendants Lessor and Weiner. As he realized the notes and took in receipts from the hotel business he renovated the premises and made certain alterations and repairs, to which further reference will be made later, and bought additional furniture, furnishings, equipment and supplies. All the money for these purposes came from the proceeds of the notes and the receipts of the business.

In addition to running the hotel the defendant Cowper also operated as a real estate broker. He incorporated Montreal Realties Limited and ran it from one of the rooms on the second floor of the hotel, which he used as his business office. The hotel business was not a profitable one. The annual statements show that the hotel was operated at a loss in every year except one. The defendant Cowper sought to explain this as due to the need for extensive alterations and repairs because of its run down condition. But against this there is the fact that there was no charge in the accounts for the costs of management.

The defendant Cowper was advised of the expropriation by a letter dated June 2, 1947, and made some enquiries with a view to re-locating himself but was unable to do so. He remained in occupation of the property and continued to run the hotel business and collect the rent from the tavern until the end of December, 1948. On December 6, 1948, he sold his cafe licence for $30,000 cash. Then he closed the hotel business but remained in occupation of the property until February 3, 1949.

The plaintiff has paid the defendant Cowper the sum of $110,000 on account of his claim in two payments, one of $60,364.27 on May 20, 1948, made up of $7,364.27 to himself and the City of Montreal in payment of the outstanding consolidated taxes and $53,000 to himself, and the other of $49,635.73 on May 26, 1948, made up of $39,021.37 to himself and the Estate of William J. Rafferty and $10,614.36 to himself. As I understand it, the charges against the property in favour of the Rafferty Estate and in favour of the City of Montreal for taxes have been paid

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leaving the defendant Cowper entitled to whatever compensation is awarded to him for his interest and estate in the property, less the sum of $110,000 already paid to him.

The fact that the defendant Cowper was able to finance his purchases of the property and the hotel business in the manner described must not be allowed to influence the Court in determining the amount of compensation money to which he is entitled. If he got a bargain, as he said he did, he is entitled to the benefit of it. He has the right to receive the value of the property to him as at the date of is expropriation.

It is, of course, well established that in estimating such value the Court must consider the most advantageous use, both present and prospective, to which the property could be put but it is only the present value as at the date of the expropriation of its prospective advantages that is to be determined: *The King* v. *Elgin Realty Limited* (1).

There is no doubt that the expropriated property was well located and that its site was a valuable one. It was near the centre of the city and close to the big retail stores on St. Catherine Street. Moreover, University Street was becoming a commercial street. But there was a difference of opinion on whether the best use was being made of the site. The defendant Cowper and his witnesses thought it was an excellent location for a hotel business such as had been carried on there. Mr. H. Frappier of the La Salle Hotel did not think that it could really be said that the building was a hotel. It was rather a cafe with rooms on the upper floors. And Mr. Therien considered that the site was too small for a hotel and that its best use would have been for a first-class restaurant with rooms above. Mr. Pitt was also critical of the use made of the property. Originally it was a good location for a small hotel but now the property could have been put to better use, with offices on the upper floors.

Opinion evidence of the value of the property was given for the defendant Cowper by the defendant himself and his experts, Mr. J. H. Hand, Mr. C. S. W. Baker and Mr. R. D. Towle, and for the plaintiff by Mr. E. Therien and Mr. J. Pitt.

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

[The President then reviewed the evidence of the value of the property given by the above witnesses and the evidence of damage by disturbance and held.]

On the evidence as a whole, I have come to the conclusion that an award of $150,000 would be ample compensation to the defendant Cowper for his estate and interest in the expropriated property. This will amply cover every factor of value of it to him that could properly be taken into account including his claim for disturbance. I, therefore, estimate the value of his estate and interest in the property accordingly.

Counsel for the defendant Cowper urged that the Court should grant an additional allowance of 10 per cent for forcible taking. I dealt with this vexatious question at length in *The Queen* v. *Sisters of Charity of Providence* (1). There I reviewed the cases and came to the conclusion that the leading Canadian case on the subject was *The King* v. *Lavoie* (December 18, 1950, unreported). In that case Taschereau J., delivering the unanimous judgment of the Supreme Court of Canada, laid down the following rule:

> Le contre-appellant soumet en second lieu, qu'il a droit à un montant supplémentaire de 10 pour cent de la compensation accordée pour dépossession forcée. Ce montant additionnel de 10 pour cent n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter à l'indemnité (*Irving Oil Co.* v. *The King* (1946) S.C.R. 551; *Diggon Hibben Ltd.* v. *The King* (1949) S.C.R. 712). Ici, on ne rencontre pas les circonstances qui existaient dans les deux causes que je viens de citer et qui alors ont justifié l'application de la règle. Il n'a pas été demontré qu'il existait des éventualités inappréciables et incertaines, impossibles à évaluer au moment du procès.

While the term "certaines incertitudes" is not precise, it seems clear that the uncertainties which Taschereau J. had in mind were those of the kind that existed in the *Irving Oil Co.* and *Diggon-Hibben Ltd.* cases, in both of which there was disturbance. In my judgment, this case falls within the class of cases mentioned and I award the 10 per cent additional allowance accordingly. In doing so I repeat the opinion that I have expressed in many cases that, when the Court has made an adequate award of compensation to the former owner of expropriated property

(1) [1952] Ex. C.R. 113 at 131.

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after taking into account all the factors of its value to him that ought to be considered, as has been done in the present case, the award of an additional allowance for compulsory taking is an unwarranted bonus. Under the circumstances, I stress the fact that I grant the additional allowance only because of the decisions of the Supreme Court of Canada that I have mentioned. This brings the total amount of the award to the defendant Cowper up to $165,000, of which $110,000 has already been paid to him, leaving $55,000 as the amount of compensation money to which he is still entitled.

There remains the question of interest. The defendant Cowper remained in undisturbed possession of the expropriated property until February 3, 1949, and continued to collect the monthly rent for the tavern premises until then, first from the defendants Lessor and Weiner and then from the defendant Pare. In accordance with the established practice of the Court he is not entitled to any interest up to that date but from February 3, 1949, and up to this date he will be allowed interest on $55,000 at the rate of 5 per cent per annum.

Although the defendant Cowper put his claim for compensation at $432,090, an excessive amount, no serious attempt was made to establish it at such an amount and it did not unduly prolong the trial. Thus, I see no reason for denying him any costs. He will, therefore, be entitled to costs to be taxed in the usual way.

I now come to the alternative claim of the other defendants. But before I deal with it I should set out certain facts relating to them and outline the circumstances under which the defendant Pare became a party to the proceedings. The defendants Lessor and Weiner went into occupation of the Oxford Tavern premises almost immediately after May 16, 1944, the date of their purchase of the business and the lease. They made certain alterations, to which further reference will be made later, and carried on the business with increasing profits, as the beer quotas were successively increased in 1945 and 1946, until a short time after they sold it to the defendant Pare on July 29, 1947.

The defendant Lessor first heard of the expropriation a day or so after June 2, 1947, when the defendant Cowper showed him the letter of that date to which reference has

been made. He knew then that it was only a matter of time until he would be called upon to vacate the premises and find another place to which to transfer the tavern licence. After he heard of the expropriation he made only one enquiry about other premises, namely, the cafe known as the Blue Bird, just a short distance south of the Oxford Tavern. He did not try to rent any other place. Nor did he think of selling the Oxford Tavern until Mr. Audette, to whom reference has already been made, brought him an offer from the defendant Pare, dated July 21, 1947, to buy the business, including the tavern licence, the unexpired portion of the lease and the movables for $90,000, and asked him whether he was interested in selling. He studied the offer for three days and decided to accept it. It is clear that he had made no move to sell his business. It was the defendant Pare who was looking for a tavern and got in touch with Mr. Audette. Then under a deed of sale, dated July 29, 1947, and passed before Notary Herschorn, the defendants Lessor and Weiner sold the business to the defendant Pare for $90,000. The sale covered the business carried on under the name and style of the Oxford Tavern, comprising the good will of the business, the rights to the tavern licence and the furniture, furnishings and equipment, and also the rights of the defendants Lessor and Weiner to the lease of the tavern premises and the privilege of its renewal. The defendants Lessor and Weiner undertook to obtain a consent from the defendant Cowper to the transfer of the lease and it was a condition of the sale that the Quebec Liquor Commission should consent to the transfer of the tavern licence.

When the parties to the deed of sale appeared before Notary Herschorn the defendant Pare signed a memorandum in which he declared that he was "aware of a possibility of an expropriation by the Dominion Government of the buildings of which the Oxford Tavern forms part". On the day after the deed of sale, namely, July 30, 1947, the defendant Pare went with the defendant Lessor to see the defendant Cowper to obtain his consent to the transfer of the lease. He told them that the property had been expropriated, telephoned his solicitor, and then, in their presence, dictated a letter addressed to the defendants

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Lessor and Weiner in which he consented to transfer of the lease to the defendant Pare with the following proviso, namely:

> that Mr. Pare, the purchaser of your business, is aware of the fact that I have been given notice of expropriation by the Department of Public Works of the property situated at 1250-1254 University Street, and there shall not be any guarantee that he can remain on the premises, for the reason that the site is vested in His Majesty the King at the present time.

There is thus no doubt that on July 30, 1947, if not on the day before, the defendant Pare knew that the property had been expropriated and that his occupancy of the premises would be only a permissive and precarious one. Nevertheless, after obtaining the defendant Cowper's consent to the transfer of the lease with the proviso mentioned, he and the defendant Lessor went to the Montreal office of the Quebec Liquor Commission to arrange for the transfer of the tavern licence. There they saw Mr. L. Mouillard, the Chief of the Permits Division, presented to him the deed of sale of July 29, 1947, the original lease to the defendants Lessor and Weiner and the consent to its transfer, and applied for a transfer of the tavern licence to the name of the defendant Pare. Mr. Mouillard then showed the defendants Lessor and Pare a letter from Mr. J. Sommerville, the secretary of the Department of Public Works, to the general manager of the Quebec Liquor Commission, dated July 19, 1947, calling his attention to the fact that the premises, bearing Civic No. 1250 University Street, Montreal had been expropriated by the Crown on May 26, 1947, and that "the present tenants will be allowed to continue in occupation until April 30th next, after which date the Department does not desire that any further licences be issued in the aforesaid premises".

This information did not deter the defendant Pare. Although he knew that the property had been expropriated and now belonged to the Crown and that he could not expect to be permitted to occupy the premises after April 30, 1948, he signed the application for the tavern licence. On August 19, 1947, he was notified that his application had been approved and that a licence up to April 30, 1948, would be issued to him. Thereupon, on August 25, 1947, he took possession of the Oxford Tavern. The defendant Lessor paid the rent for it up to the end of August, 1947, and thereafter the defendant Pare paid it.

After the defendant Pare went into possession of the tavern premises the defendant Lessor temporarily gave up his occupation as a tavern keeper and went into the grocery business for about a year. Then he began to look around for another tavern and, on March 21, 1949, located himself in a tavern on Stanley Street for which he paid a rental of $500 per month.

The defendant Pare remained in occupation of the Oxford Tavern and paid rent to the defendant Cowper until the end of January, 1949. But sometime in 1948 he became dissatisfied with his position and consulted his solicitor, the late Mr. R. Dufresne. Mr. Dufresne then called the defendant Lessor to his office, complained that when he sold the tavern business he had no right to do so and threatened him with proceedings to rescind the sale. The defendant Lessor then consulted his solicitors and left it to them to negotiate an agreement with the defendant Pare's solicitor. The result of the negotiations was an agreement in writing between the defendants Lessor and Weiner and the defendant Pare, dated January 22, 1949, whereby the defendants Lessor and Weiner transferred, ceded and abandoned to the defendant Pare all their right, title and interest in and to an indemnity due by His Majesty the King to the defendants Lessor and Weiner because of the expropriation. It was also agreed that the defendants Lessor and Weiner would use their best efforts to have the defendant Pare added as a party to these proceedings.

Pursuant to this agreement a motion was made on behalf of the defendants Lessor and Weiner before Angers J. to have the defendant Pare joined as a defendant in this action and to have the defendants Lessor and Weiner placed out of Court. This motion was made at the request of the defendant Pare. It was heard on January 28, 1949, and on February 16, 1949, Angers J. ordered that the defendant Pare be joined as a defendant. An appeal from this order was taken to the Supreme Court of Canada. There a motion to quash the appeal for want of jurisdiction was granted by the Supreme Court of Canada on April 12, 1949, but by consent of the parties it was declared "that no res judicata attaches to the order of the Exchequer Court, beyond the terms of the formal order."

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On March 25, 1948, counsel for the plaintiff, represented by the Minister of Public Works, addressed a letter to all the defendants herein requesting under section 26 of the Expropriation Act "a true statement showing the particulars of any estate and interest and every charge, lien or encumbrance to which the same is subject" which each defendant might have or claim to have in the expropriated property. The letter also requested that "the above statements should also show the claim made by any of you in respect of the estate or interest therein described."

I have already referred to the reply made on behalf of the defendant Cowper to this request in which he put his claim for the land and building at $180,000. The defendants Lessor and Weiner replied to the request on March 29, 1948, as follows:

> With reference to your letter of March 25th signed by Mr. Prud'homme in connection with the expropriation of the Oxford Hotel property by His Majesty's Government, I wish to advise that Mrs. Isidore L. Weiner and the undersigned sold the Oxford Tavern on August 20, 1947, to Mr. Leopold Pare who is the present owner of the Tavern only and holds the lease which was given to me in 1944 for a period of ten years. This lease was transferred by Mr. Peter Boyd Cowper to Mr. Pare at the time the sale was made.
>
> We hold no lien on said property but there is a balance of sale of approximately $15,000 in connection with the sale of said Tavern owing to Mrs. (Ethel) I. L. Weiner and myself by Mr. Leopold Pare.

But the defendant Pare replied on April 15, 1948, giving particulars of his interest under the deed of sale of July 29, 1947, and of his claim by reason of the expropriation, amounting to $170,212.69. This claim was based on a report made to him by his real estate adviser and expert, Mr. G. Desaulniers, dated April 14, 1948, (Exhibit 40). He estimated the amount of the damages caused to the defendant Pare by the expropriation at this amount. After making this claim the defendant Pare remained in occupation of the Oxford Tavern premises and paid rent for them to the defendant Cowper up to the end of January 1949. Subsequently, namely, on January 25, 1950, he filed an amended claim, dated January 18, 1950, for $96,553.34, which was made on the following basis:

> Réclamation amendée de M. Léopold Paré, No. 746 Avenue Allard, Verdun, par suite de l'expropriation de la propriété connue comme étant l'Hotel Oxford et située aux Nos. 1250 et 1254 de la rue Université, à Montréal, laquelle a entraîné la fermeture du commerce de taverne appartenant à M. Léopold Paré et exercé audit No. 1254, et connu sous

le nom de "Oxford Tavern", la perte du droit du bail desdits lieux qui se terminait le premier mai 1954 et l'obligation de déménager et de réaménager de nouveau le dit commerce dans un autre local.

The claim was put on this basis notwithstanding the assignment of January 22, 1949. Finally, he amended his claim to $60,337.02 as the value of the lease and $21,480.75 by way of damages, together with $12,512.67 for forcible taking, making a total of $95,930.44.

In view of the facts which I have outlined it is obvious that the defendant Pare has no independent claim of his own against the Crown. On May 26, 1947, the date of the expropriation, the defendants Lessor and Weiner ceased to have any interest in the lease of the tavern premises and the defendant Pare could not acquire any interest from them. Therefore, there is no support for his claim for damages due to the expropriation. It was completed almost two months before he offered to buy the tavern business. As I view the evidence, it seems manifest that the defendant Pare was primarily interested in the tavern licence. There is support for this inference in the fact that when he was in the notary's office on July 29, 1947, he declared in writing that he knew that the property might be expropriated. Then on the following day he knew definitely from the defendant Cowper that it had already been expropriated and that the defendants Lessor and Weiner had no unexpired term to sell. And on the same day he knew from Mr. Mouillard that he would not be permitted to stay on the premises after April 30, 1948. Yet, although he knew these facts, he made no attempt to rescind his contract of sale but, on the contrary, approved it. In my opinion, he was willing to take a chance on finding another location to which he could transfer his valuable tavern licence. It was not until later in 1948 that he began to be nervous about finding another location and his solicitor threatened the defendant Lessor with recission proceedings, which resulted in the assignment of January 22, 1949.

Thus, the position of the defendant Pare is that if he has any claim against the Crown it can only be by virtue of the assignment to him of the rights of the defendants Lessor and Weiner. He cannot have any greater right than they had. He has no independent right of his own. It was not until after the trial had proceeded for several days

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that his became clear and was conceded by counsel on his behalf. Up to this time, there was a great deal of evidence that was irrelevant to the real issue, namely, the amount of compensation to which the defendants Lessor and Weiner were entitled by reason of the expropriation of their leasehold interest in the tavern premises. Therefore, as I see it, all the evidence of the defendant Pare's course of action is irrelevant. What he did has no bearing on the rights of the defendants Lessor and Weiner. His acts cannot in any way affect the amount of their entitlement. The Court is, therefore, not concerned with his efforts to find a new location. Nor is it concerned with the amount of rent he had to pay for his new premises on Phillips Square or whether he could have found a better location or whether it was a better or worse location than the one on University Street. And there is no relevancy in the evidence relating to his expenditures in his new premises or the amount of the profits of his business there as compared with those on University Street. Nor can the fact that counsel for the defendants Lessor and Weiner applied to have the evidence adduced on behalf of the defendant Pare considered as evidence on behalf of the defendants Lessor and Weiner affect the matter. The quantum of compensation to which the defendants Lessor and Weiner became entitled on May 26, 1947, when their leasehold interest was taken from them, cannot be affected by anything that the defendant Pare did.

That being so, his claim must be confined to such rights as he may have under the assignment of January 22, 1949, and cannot exceed the amount of compensation to which the defendants Lessor and Weiner were entitled. This raises an important question of law. It was contended for the plaintiff that the assignment from the defendants Lessor and Weiner to the defendant Pare, while valid as between them, is not binding on the Crown and that the defendant Pare has no status as a party to these proceedings, notwithstanding the order made by Angers J. I must say that when this submission was first made I was inclined to agree with it but after further consideration I have reached a different conclusion.

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The question whether a right to compensation for land taken under the Expropriation Act is assignable and, if so, whether the assignment is binding on the Crown is not free from difficulty. Counsel for the plaintiff submitted that the answer to it must be in the negative. He relied upon the decision of this Court in *Chipman* v. *The King* (1) where Angers J. held that "on grounds of public policy a claim against the Crown, in the absence of acquiescence, is not assignable". This opinion was based on several authorities, one of which was the statement of Burbidge J. in *The Queen* v. *McCurdy* (2). There the Court gave effect to the assignment of a claim for compensation for the general benefit of creditors where all the parties were before the Court and the Crown raised no objection to the assignment. At page 319, Burbidge J. said:

> In Canada the practice of the Crown is, so far as I know, against the recognition of the assignment by one person to another of a claim against it. By the third rule of the rules prescribed by the Treasury Board (February 1, 1870), under sanction of His Excellency-in-Council, it is provided in reference to the mode of acquittal of warrants for the payment of money that no power of attorney which partakes of the character of an assignment of the moneys to another party, or purports to be irrevocable or in any respect qualified, will be received by the Government for the payment of money. At the same time the practice has always been, I think, to give effect to transfers by operation of law, or by will, of claims against the Crown, and, although I do not recall any case in point, I have no doubt that the same course would be followed in respect of a voluntary assignment for the general benefit of creditors. It is, I think, free from objection and eminently fair and just that effect should be given to such assignments, but that perhaps is not conclusive. In *Flarty* v. *Odlum* 3 T.R. 681, Buller, J., while concurring with the other members of the Court that, on grounds of public policy, the half-pay of an officer is not saleable and cannot be assigned, expresses the view that salary accrued due might be assigned; and in the *Queen* v. *Smith et al* 10 Can. S.C.R. 66, Mr. Justice Strong says, that had it appeared from the proof in that case that there had been an equitable assignment to the suppliants of the payments to arise from the performance of the work by the original contractors, the former would have been undoubtedly entitled to recover in respect of work actually performed by the latter; for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts.

Another decision on which Angers J. relied was that of Burbidge J. in *Powell* v. *The King* (3) where he held that on grounds of public policy the salary of a public officer was

(1) [1934] Ex. C.R. 152 at 161. (2) (1891) 2 Ex. C.R. 311.
(3) (1905) 9 Ex. C.R. 364.

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not assignable by him and that neither the Librarian of Parliament nor the Auditor-General of Canada had power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the Library of Parliament and also expressed the opinion that even if the Judicature Act of Ontario gave an assignee of certain *choses in action* a right to sue in his own name such an Act could not bind the Crown in right of Canada.

In my view the statement of Angers J. in the *Chipman* case (*supra*) is too wide. The general statement that it is against public policy that claims against the Crown should be assignable, unless there is acquiescence by the Crown, cannot be supported on grounds of reason. There is no doubt that it is contrary to public policy to allow public officers to assign their salaries: *vide Flarty* v. *Odlum* (1); *Arbuckle et al* v. *Cowtan* (2); *Powell* v. *The King* (3). But there are other classes of claims against the Crown where there are no considerations of public policy requiring a ban against their assignment. In such cases it makes no difference to the Crown whether they are assigned or not and the only question to be considered is whether the assignment is valid under the law of the province in which it was made. The dictum of Strong J. of the Supreme Court of Canada in *The Queen* v. *Smith et al* (4) to which Burbidge referred in the *McCurdy* case (*supra*) recognizes this.

In the United Kingdom there are several cases which show that there is nothing to prevent the assignees of certain *choses in action* from having the same right to present a petition of right against the Crown as the assignors themselves would have had. They are referred to by Robertson on Civil Proceedings by and against the Crown in the following statement, at page 366:

> As to assignees, in *re Rolt* (1859), 4 De G. & J. 44, was a petition of right by one of the assignees of a bankrupt contractor, on a contract of his completed by them by arrangement with the Admiralty (compare the similar case of *Broadbent & Co.* v. *R.* (1900), not reported), and in *Grays Chalk Quarries Co., Ltd.* v. *R.* (1900), not reported, we find a petition of right presented, without objection, by the mere assignees of a debt alleged to be due from the Admiralty to a contractor. *Imperial Supply and Cold*

(1) (1790) 3 T.R. 681.
(2) (1803) 3 B. & P. 321.
(3) (1905) 9 Ex. C.R. 364.
(4) (1883) 10 Can. S.C.R. 1 at 66.

*Storage Co., Ltd.* v. *R.* (1904), not reported, was a petition of right for damages for breach of a contract alleged to have been assigned to the suppliants with the consent of the War Department.

And it was settled by the Court of Appeal in *Dawson* v. *Great Northern and City Railway Company* (1) that a claim under section 68 of the Lands Clauses Consolidated Act, 1845 for compensation in respect of an interest in land that had been injuriously affected within the meaning of the section was not a claim for damages for a wrongful act but a claim of a right to compensation for damage which might be done in the lawful exercise of statutory powers. It was thus a legal *chose in action* within the meaning of section 25 of the Judicature Act and, therefore, capable of assignment so that the assignee could sue in his own name. The assignment was not a transfer of a mere right of litigation but was essentially a transfer of a right of property. It would follow, *a fortiori,* that a claim for compensation for land taken under section 68 is assignable.

Likewise, in Australia, there is no objection to the assignment of a claim against the Crown where no considerations of public policy are involved. In *Ex parte Patience; Makinson* v. *The Minister* (2) Jordan C.J. said:

> It is clear that moneys receivable from the Crown are assignable: *Alexander* v. *Duke of Wellington* 2 Russ & M. 35 at 64: unless they are inalienable upon some ground of public policy. If a plaintiff who had recovered against the Crown a judgment for the payment of money assigned his interest, I have no doubt that the assignment would be effectual to vest in the assignee rights to the money which would be enforceable against the Crown by the use of the appropriate procedure.

And later, at page 107, he followed the decision in *Dawson* v. *Great Northern and City Railway Company* (*supra*), saying:

> Rights to receive compensation moneys are alienable, and the authority liable to pay them cannot ignore alienations of which it has notice.

A similar view was taken in this Court by Audette J. in *The King* v. *Picard* (3). There he expressed the opinion that an assignment of compensation money under the Expropriation Act was good and valid. And in *The King* v. *Hye* (4), the validity and binding effect of an assignment of a right to compensation under the Expropriation Act

(1) [1905] 1 K.B. 260.
(2) (1940) 40 N.S.W. (S.R.) 96 at 103.
(3) (1916) 17 Ex. C.R. 452 at 454.
(4) (1921) 21 Ex. C.R. 76.

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came squarely before the Court. There the Crown had expropriated the right to flood certain property which belonged to V. He sold the property to H. together with his right to recover compensation from the Crown for the damage caused by the flooding and the expropriation of the easement to flood. In the proceedings to fix the compensation the Crown made H. the defendant. Counsel for the Crown contended that a claim for flooding of land could not be assigned and relied upon the statement of Fitzpatrick C.J. of the Supreme Court of Canada in *Olmstead* v. *The King* (1) that a claim against the Crown for damages for flooding could not be assigned. But Audette J. was of the view that the case before him did not come within the ambit of *Olmstead* v. *The King* (*supra*) and that the assignment of the claim for compensation from V. to H. was valid and that H. was entitled to the compensation. I agree with this view.

The situation is the same in the province of Quebec as in the common law provinces. Indeed, the ambit of assignability of *choses in action* is wider under Article 1570 of the Civil Code of Quebec than under the various Judicature Acts, or their equivalents, of the common law provinces.

Where property has been expropriated under the Expropriation Act it vests immediately in Her Majesty and all the right, title or interest of the former owner in or to the property is extinguished. But by section 23 of the Act it is converted into a claim to the compensation money which is made to stand in the stead of the property. The claim for compensation is, therefore, essentially a right of property and there is no sound reason why the Crown should have any right to question its assignment, if the assignment is otherwise valid as between the parties to it and due notice of it has been given to the Crown. I am, therefore, of the opinion that a claim to compensation for land taken under the Expropriation Act may validly be assigned, without the acquiescence of the Crown, and that when notice of the assignment has been duly given to the Crown the assignee is the person entitled to recover the compensation.

(1) (1916) 53 Can. S.C.R. 450 at 453.

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In the present case the defendant Pare's solicitors sent a notice of the assignment, dated January 25, 1949, to the Attorney General of Canada. Consequently, in view of what I have said I find that the defendant Pare, being the assignee under the assignment of January 22, 1949, of the amount of compensation money to which the defendants Lessor and Weiner were entitled in respect of the expropriation of their leasehold interest, is the person entitled by law to receive the compensation and was properly made a party to these proceedings.

I now come to consideration of the amount of compensation to which the defendants Lessor and Weiner were entitled. Section 47 of the Exchequer Court Act, R.S.C. 1927, chapter 34, requires that the Court shall estimate the value of the expropriated property at the time when it was taken. This means that it must bring itself back, as far as it is possible for it to do so, to May 26, 1947, and view the situation as if the trial had taken place immediately after that date. The quantum of the owner's entitlement to compensation cannot be increased by reason of a rise in values after that date or decreased by reason of a fall. It cannot depend on either booms or depressions. Thus it seems to me that it would have been better and more consistent with principle if at the trial of this action I had taken a similar course to that which I took recently in the case of *The Queen* v. *Potvin* (1) and excluded all evidence of sales of property or rentals of taverns made subsequently to the date of the expropriation. But this does not mean exclusion of the fact that at the date of the expropriation land values were rising. This must be kept in mind.

It is in the light of these considerations that the value of the unexpired portion of the lease of the Oxford Tavern premises as at May 26, 1947, should be estimated. The site was a good one for a tavern. It was just off St. Catherine Street, near the big retail stores and several large office buildings and convenient to a tramway transfer point where there was a large circulation of people. There was also the advantage of an entrance from the lane. There is no doubt that the location was excellent. Indeed, Mr. Trudeau went so far as to describe it as a golden spot. I

(1) [1952] Ex. C.R. 436 at 442.

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am also satisfied that the rental of $250 per month was low. There was no contrary opinion. The defendant Cowper explained that he had set the rent at this low figure as an inducement to the defendants Lessor and Weiner in order to enable him to finance the purchase of the property and the hotel business.

There is no doubt that the leasehold interest was worth a great deal more than the rent paid for it. Several witnesses gave opinion evidence of this value. The defendant Cowper thought that in May, 1947, he could have got $500 per month for the premises. Mr. Baker also considered that they could have been rented for that amount. The defendant Lessor agreed that the lease was worth more than its actual rental and thought that $400 per month would have been a proper rental. Later, he said that he would have paid up to $600 per month rather than be ejected. Mr. Desaulniers also thought that the premises could have been subleased in 1947 for $400 per month but this would have been for only a short term because of the increases in rental values and the imminent release of rent controls. For the years subsequent to 1947 he put a higher value but admitted that he did so in the light of increases in value that had actually taken place. Mr. Trudeau put the value of the lease at $600 per month for 1947, $700 for 1948 and $800 for 1949 to 1954. For the plaintiff, Mr. Therien said that in May, 1947, the tenants could have sublet for 2 or 3 years at $350 per month but he would have set $400 per month for a lease of 5 years. On the evidence, I put its value at $450 per month for the unexpired portion of the term. This means $200 per month more than the rent for a period of 83 months from the date of the expropriation or 62 months from the time that the defendant Pare gave up possession. Thus it is the present value of $200 per month for 62 months that is to be determined. At 5 per cent this would have come to $10,907.89 and at 3 per cent to $11,473.53. But this does not necessarily mean that the right to the unexpired term could have been sold for that amount for a purchaser might well have taken into account various contingencies such as the possibility of fire, loss of the tavern licence, a business depression or recession or a decrease in general rents and been willing to pay only a smaller amount.

The defendants Lessor and Weiner would also have been entitled to compensation for the improvements made in the tavern. The amount of these was put at various sums but was finally agreed upon at $6,500 and Mr. Therien put their present value at $3,700. I accept this figure.

Up to this point there is no difficulty in estimating the value of the leasehold interest of the defendants Lessor and Weiner that was taken from them. But there is serious difficulty in determining the amount of their entitlement for disturbance in view of the fact that they did not suffer any actual loss from disturbance. They had found a willing purchaser of their tavern business in the person of the defendant Pare who went into possession of the premises knowing that he would soon be disturbed. After the sale to him the defendant Lessor was not interested in finding a new location and did not incur any expense at all as the result of the expropriation. Indeed, he had done very well out of the investment he had made in 1944. He explained that when he wrote to counsel for the plaintiff that he had no lien on the property it seemed to him that since he had sold the business to the defendant Pare he had no claim against the Government. This was likewise his reason for saying that he had no monetary interest in these proceedings, his only concern being his obligation under the assignment of January 22, 1949. He was anxious that this should be carried out not only to the letter but also according to its spirit.

But the entitlement of the defendants Lessor and Weiner for disturbance must be dealt with independently of their sale of the tavern business, including the license, to the defendant Pare on the basis of such evidence as exists. The defendant Lessor said that if he had not found a purchaser of the tavern business he would have had to find another place, get a suitable lease and fix the place up. He thought that two months would have been sufficient time for the necessary repairs and alterations in a new place if he had had to make them but that if they were to be attended to by the owner of the new place there would have been little disruption of business. There would be the expense of moving to the new place, the cost of fixing it up, if there was any, the possibility of some duplication of rent and disruption of business and other

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expenses connected with moving. But there is no evidence of the amount of any of these items so far as the defendants Lessor and Weiner are concerned. There is no justification for considering the evidence of the expenses incurred by the defendant Pare under the various heads alleged in the pleadings as proof of the expenses that the defendants Lessor and Weiner would or might have incurred. Thus the Court is left with only a modicum of relevant evidence to assist it. Nevertheless, it must do its best to determine a proper amount.

Under these difficult circumstances I find that the amount of compensation to which the defendant Pare is entitled, as assignee of the defendants Lessor and Weiner, is the sum of $20,000, inclusive of an additional allowance of 10 per cent for forcible taking which I award for the same reason and subject to the same comment as in the case of the defendant Cowper.

On this amount I allow interest at the rate of 5 per cent per annum from February 3, 1949, to this date.

There remains the question of costs. In view of the fact that I have found that because of the assignment of January 22, 1949, the defendant Pare is entitled to the compensation to which the defendants Lessor and Weiner would otherwise have been entitled, the latter have no rights and ought not to have been continued as parties after notice of the assignment. But this was done by the plaintiff and they ought not to be deprived of costs. Since, however, they were represented at the trial by the same counsel as appeared for the defendant Cowper they are not entitled to include counsel fees in their costs. To obviate taxation difficulties I fix their net costs, after deducting costs assessed against them in motions during the trial, at $500, inclusive of disbursements.

The position of the defendant Pare is much more difficult. His original claim for damages, dated April 15, 1948, amounting to $170,212.69 was outrageously excessive and merits sharp censure. When he made it he was still in occupation of the Oxford Tavern premises and had not suffered any loss. Moreover, there could not be any reason for relating it to the expropriation which had occurred two months before the defendant Pare purchased the tavern business. As I understand it, the claim was based

on a report made by Mr. G. Desaulniers, the defendant Pare's chief real estate adviser and expert witness. I put the responsibility for the claim on him. The amended claim for $96,553.34, dated January 18, 1950, while less in amount, was equally objectionable in principle. While, of course, great latitude for the expression of divergent opinions by real estate experts in expropriation cases must be maintained, the Court is entitled to careful and reasonable opinions. The reports presented to the defendant Pare by Mr. Desaulniers did not, in my opinion, measure up to this requirement. Moreover, the defendant Pare's unjustifiable claim might well have interfered with the chances of a settlement. It certainly unduly lengthened the trial. Under the circumstances, I have concluded that while the defendant Pare should not be entirely deprived of his costs he should not be permitted to include any fees for Mr. Desaulniers. It is also my view that he should not be allowed any costs for the days by which his improper claim unduly prolonged the trial and I determine the number of such days as being four. Moreover, in respect of these four days the defendant should pay the costs of the plaintiff, including those payable to the defendant Pare should be set off against those payable to him.

There will, therefore, be judgment declaring that the lands described in paragraph 2 of the Information are vested in Her Majesty the Queen as from May 26, 1947; that the amounts of compensation to which the defendants Cowper and Pare are respectively entitled, subject to the usual conditions as to all necessary releases and discharges of claims, are $55,000 for the defendant Cowper with interest thereon at the rate of 5 per cent per annum from February 3, 1949, to this date and $20,000 for the defendant Pare with interest thereon at the rate of 5 per cent per annum from February 3, 1949, to this date; and that the defendants are respectively entitled to costs as indicated.

*Judgment accordingly.*