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Jan. 14, 16-18, 21-23, 25.

Feb. 20-22, 26.

Mar. 26.

BETWEEN

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

AND

GORDON C. EDWARDS ..... DEFENDANT.

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, s. 9—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (a), 47—Compensation money to be measured by value of the land—Fair market value to be estimated on value for most advantageous use—Evidence of sales of other property useful if property comparable and proper account taken of change in value—Court must value property as a whole—Value to owner is realizable money value—Limited market does not justify departure from valuation on basis of market value—Where property has higher value as a site for other than residential use purposes than for such purposes buildings have no economic value—Award of compensation on basis of generosity erroneous—Owner has no separate claim for damages for disturbance—No claim for additional compensation where value of property for other than residential use purposes exceeds value for such purposes by more than owner's loss by disturbance—Owner left in possession not entitled to interest.

Plaintiff expropriated certain property, in the City of Ottawa, on which there was a large private residence. The action is taken to have the amount of the owner's compensation determined by the Court.

Held: That the standard for measuring the amount of compensation money to be paid to the owner of expropriated property has been set by section 47 of the Exchequer Court Act as the value of the land at the time when it was taken.

2. That such value is its fair market value estimated on its value for its most advantageous use.

3. That evidence of sales of property near the expropriated property affords an excellent basis for arriving at its market value provided the sales are of property comparable with it and were made at a time near the date of expropriation, and there has been no change in value in the interval. Evidence of sales made at one time under certain conditions cannot be proof of value at a different time when the conditions are not similar. *The King* v. *Halin* (1944) S.C.R. 119 followed. Evidence of sales reasonably near the date of expropriation is not without probative value provided proper account is taken of changes in conditions and any intervening changes in value.

4. That the Court should not estimate the value of the land and buildings separately but must estimate the market value of the property as a whole. *The King* v. *Manuel* (1915) 15 Ex. C.R. 381 followed.

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5. That the value of expropriated property to the owner is not an imaginary value in the mind of the owner or its intrinsic value but its realizable money value and cannot be disassociated from or exceed the price which a possible purchaser would be willing to pay for it. *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1914) A.C. 569 and *Pastoral Finance Association, Limited* v. *The Minister* (1914) A.C. 1083 followed.

6. That there is no justification in departing from these principles in the case of a property with a large residence on it, such as that of the defendant, because of the limited market for such a property. *The King* v. *Spencer* (1939) Ex. C.R. 340 disapproved.

7. That where a property on which there is a residence has a higher value as a site for other than residential use purposes than it has for such purposes, the buildings on it, since they are no longer an adequate development of the property or well adapted to the land and its location, having regard to its higher value for other purposes, do not enhance the value of the land or the property as a whole for such other purposes and have no economic value.

8. That the Court has no right to be generous to the former owner of expropriated property. *The King* v. *Larivée* (1918) 56 Can. S.C.R. 376 followed. It is the duty of the Court to be fair and measure the owner's compensation by the standard set by Parliament—the value of the land taken, no less but no more.

9. That the owner of expropriated property has no separate claim for damages for disturbance and where the value of the property for other than residential use purposes exceeds its value for such purposes by more than the amount of the owner's loss by disturbance of his residential use the owner is not entitled to any additional compensation for such loss. *Horn* v. *Sunderland Corporation* (1941) 2 K.B. 26 followed.

11. That where the owner of expropriated property has been left in undisturbed possession of it since the date of its expropriation he is not entitled to any allowance of interest. *The King* v. *Manuel* (1915) 15 Ex. C.R. 381 followed.

INFORMATION by the Crown to have the amount of compensation money to be paid for certain expropriated property in the City of Ottawa determined by the Court.

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

Lee A. Kelley K.C. and H. C. Kingstone for plaintiff.

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

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

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The President now (March 26, 1946) delivered the following judgment:—

The Information shows that the land described in paragraph 2 was taken under the Expropriation Act, R.S.C. 1927, chap. 64, for the purpose of the public works of Canada. The expropriation was completed pursuant to section 9 by the deposit of the necessary plan and description in the office of the registrar of deeds for the registration division of the City of Ottawa, in which the land is situate, on June 12, 1943. On such deposit the land became vested in His Majesty and the defendant ceased to have any right, title or interest therein.

The expropriated property is at the extreme north east end of Sussex Street and lies between it on the south, the French Embassy property on the west, and the Ottawa River. It has a depth on the west of 409 feet to the high water mark of the river, a frontage of 563·8 feet on Sussex Street, and a river frontage of approximately 720 feet. It is triangular in shape, coming almost to a point at its extreme north east end. It is about 40 feet above the river, with a sharp slope down to it, and has a total area of 3·98 acres, of which approximately one acre is taken up by the slope. There are four buildings on the land, a very large stone residence, No. 24 Sussex Street, set back approximately 195 feet from the street, a stone garage and tool house, west of the residence, and two stone buildings facing on Sussex Street, one at the east end, No. 10 Sussex Street, formerly a coach and stable building but now converted into a dwelling, and the other at the west end, No. 26 Sussex Street, formerly a gate house but now also occupied as living quarters. There is a low stone wall along the frontage on Sussex Street. Driveways from two entrances lead to the residence. There are many fine large trees on the property, and the well kept grounds have been landscaped with hedges and shrubs.

The parties have been unable to agree as to the amount of compensation money to which the defendant is entitled and these proceedings are taken to have such amount fixed by the Court. By the Information the plaintiff offers the sum of $125,000 in full satisfaction of the defendant's

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rights. By his amended statement of defence the defendant claimed the sum of $261,190, of which $233,500 was said to represent the value of the land and buildings taken, and $27,690 the damage caused by the said taking to the household goods contained in the premises. During the trial, pursuant to leave, the statement of defence was further amended, whereby the defendant claimed $261,190 in one amount as loss and damage caused by the taking, leaving his claim as first stated as an alternative one. The divergence between the parties is very great, but that is not unusual in proceedings of this kind.

The Expropriation Act does not itself provide any basis upon which the compensation money for expropriated property should be fixed. This Court derives its jurisdiction to deal with the matter from section 19(*a*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, which provides:—

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*a*) Every claim against the Crown for property taken for any public purpose;

and section 47 of the same Act lays down the rule which the Court must follow in determining the amount to be paid:—

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

The standard for measuring the amount of compensation money has thus been set by Parliament as the value of the land at the time when it was taken. The Court must, therefore, estimate the value of the expropriated property as at June 12, 1943, the date of its expropriation.

The general principles for determining the value of expropriated property are well established. This Court dealt with them in *The King* v. *W. D. Morris Realty Limited* (1), and, at page 147, I summarized the effect of the authorities as follows:—

> The owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money, such equivalent value to be

(1) (1943) Ex. C.R. 140 at 145-149.

estimated on the value of the property to him and not on its value to the expropriating party, subject to the rule that the value of the property to the owner must be measured by its fair market value as it stood at the date of its expropriation.

The value to be estimated is a money value; the Court must not allow itself to be influenced by any consideration of personal or sentimental attachment of the owner towards his former property.

Market value has been defined by Nichols on Eminent Domain, 2nd edition, p. 658, as follows:—

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

This definition serves as the basis for another general principle, also dealt with in the *W. D. Morris Realty Limited* case (*supra*), at pp. 152-154, namely, that the owner of expropriated property is entitled to have its market value estimated on its value for its most advantageous use. The best statement of this principle, frequently enunciated in this Court, is contained in Nichols on Eminent Domain, 2nd edition, p. 665, where the author says:—

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

This broad statement assumes a price that a purchaser, having carefully considered the advantages and possible uses of the property, would be willing to pay in order to obtain it. It must not be forgotten, however, that, while consideration may be given not only to the present use of the property but also to its prospective advantages, it is only the present value, as at the date of expropriation, of such prospective advantages, that falls to be determined: *vide The King v. Elgin Realty Company Limited* (1).

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

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The value of the expropriated property must be considered in the light of the conditions existing as at June 12, 1943. The general trend of real estate values in the Ottawa district may be outlined briefly. The stock market crash in 1929 did not cause a break in real estate values until about 1931. They were then substantially depressed until about 1935. Vacant land lay dormant. There was little, if any, demand for large houses. They were a "drug on the market". This continued to be the case even after a general increase in values, commencing in 1937, which by about 1939 or 1940 had almost reached the high levels of 1930. There has been an increase in real estate values since 1940 and by 1942 they were somewhat higher than in 1930. There was a great demand for low and medium priced houses, with some market for large ones. Evidence was given of some sales of such houses on Sandy Hill, once a fine residential district, in 1941 and 1942, all at prices less than the assessed value of the properties. Since 1942 improved properties have brought substantially increased prices, but in nearly every case there has been a proviso for immediate possession and the increase in price has really been a premium for such immediate possession. Also, the number of vacant lots has become smaller. Two factors, in 1942 and afterwards, contributed to the increased market for large houses. The Department of National Defence was looking for barrack accommodation for members of the forces serving in the Ottawa area and was willing to pay prices not in excess of the cost of constructing barrack buildings; it was able to buy large houses at such prices from willing vendors without resort to expropriation proceedings. This was a temporary demand for a number of large houses but such demand was at low prices. The other contributing factor was the coming to Ottawa of representatives of other governments in increasing numbers. In 1940, nine countries were represented by High Commissioners or Ministers; this number had grown to 11 in 1941, and 18 in 1942; 1943 saw the first ambassador in Ottawa, and by the end of 1944 there were 23 Ambassadors, High Commissioners or Ministers representing their respective countries. These required adequate space for their official residential requirements.

This likewise created a market for large houses in the Ottawa district which did not previously exist. The witnesses for the defendant laid great stress on this new market value factor.

In the light of these conditions the Court must now consider "the uses to which the land was adapted and might in reason be applied". The outstanding feature of the expropriated property is its location and the view which it affords. It is on a cliff rising sharply 40 feet above the Ottawa River. It is right at the easterly limit of the City, but is convenient to the centre. On the west there is the French State property with its fine expensive embassy building on well landscaped grounds; to the south it faces the South African legation and overlooks the well treed grounds of Rideau Hall; the remaining boundary is the Ottawa River. This gives the site a commanding and magnificent view; from the north-east across Governor's Bay towards Rockcliffe Public Park; from the north across a wide stretch of the river towards the picturesque village of Gatineau Point at the mouth of the Gatineau River and the Laurentian Hills in the distance; and from the north-west across and up the river with a wide sweep of the hills in the background. There is no industrial development to mar the view in any direction. Mr. Hazelgrove described the site as the finest site for a residence in the City of Ottawa. The only comparable sites in the City, not owned by the Crown, are those of Earnscliffe and the French Embassy. To find other comparable fine views from residential properties it is necessary to go to the residence of the United States Ambassador and the other fine residences along the cliff overlooking the river in the adjoining Village of Rockcliffe Park. The view from the expropriated property is one of great charm and beauty and makes the site a most desirable one.

For the defendant it was urged that the most advantageous use to which the property could be put would be for private, or embassy, legation or other official residential purposes. Mr. A. H. Fitzsimmons, the main expert for the defendant, an experienced real estate broker in Ottawa, gave an elaborate description of the buildings and expressed the opinion that the main residence was splendidly

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adapted for home purposes and entertainment on a large scale, that the ground floor plan was ideal for such entertainment, that the rooms were large and so arranged as to permit the free circulation of a large number of guests, that the house was fully equipped with adequate kitchen and other arrangements, that the ground floor arrangements were capable of extension and rearrangement, for example, that the drawing room could be enlarged, that the large picture gallery could be used as a reception or ball room or converted into a large dining room or library and study and that, if it were turned into a dining room, the present dining room could be converted into a library and study, that the rooms upstairs were large and commodious with ample bath room arrangements, that there was plenty of room for household staff and employees in the main residence and that the two buildings, No. 10 and No. 26 Sussex Street, were also useful for housing such staff. The witnesses for the defendant drew a very attractive picture of the premises for the uses suggested by them.

As might be expected, the witnesses for the plaintiff emphasized what they considered defects in the residence that would strike a prospective purchaser adversely. Their opinion was that the main residence had not been placed on the site so as to make the best use of the fine view, that this was likewise true of the arrangement of the rooms on the ground floor, for example, that the drawing room windows did not give the view that might be expected, that there were no views from the picture gallery except from the north end of it, and that the kitchen and servant quarters took up the north-east part of the building and prevented full use of the view from that direction, that there was no ground floor library or study, that there was no verandah, sun-room or outside terrace, that the house was not modern in its arrangements, for example, that the ceilings were too high, that there was no access from the kitchen and servants' quarters to the front door without going through other rooms, and that there was no ground floor cloakroom and washroom, that the garage was not attached to the house, that the presence of street car tracks on Sussex Street was not desirable, that the

buildings on it to the south-east were old and low class and that the approach to the property was not a good one. There was very little, if anything, in the way of possible defects in the premises that escaped their attention.

Other possible uses of the property were suggested. Mr. Fitzsimmons thought it could be sold for a high class office building such as an insurance company's headquarters. Mr. Bosley, a real estate broker from Toronto, was strongly of the opinion that it could be put to more advantageous use than for either private or official residential purposes. He agreed that it would be suitable for a high-class insurance office building, and thought that it was also adaptable for an institutional or public building, such as the National Research Council building, or for a high class apartment block.

The possible uses of the property having been thus outlined, it is necessary to consider the evidence as to sales of other properties.

In *The King* v. *Eastern Trust Company* (1) I held that evidence of sales of property near the expropriated property affords an excellent basis for arriving at its market value provided the sales are of property comparable with it and were made at a time near the date of expropriation. This statement requires qualification in view of the decision of the Supreme Court of Canada in *The King* v. *Halin* (2). In that case Taschereau J., speaking also for Rinfret J., as he then was, and Rand J., at page 126, rejected the evidence of sales of property made in certain years as proof of the value of the expropriated property at the date of its expropriation on the ground that the conditions which existed during such years had disappeared at the time of expropriation. He also, at page 125, expressed serious doubts as to the legality of proof of sales made after the date of expropriation, although, later on the same page, he spoke of sales made about such date. His doubts are at variance with the opinion expressed by Anglin J. of the same Court in *Toronto Suburban Railway Company* v. *Everson* (3), in whose judgment the Chief Justice, Sir Charles Fitzpatrick, concurred, that evidence

(1) (1945) Ex. C.R. 115 at 121. (2) (1944) S.C.R. 119.
(3) (1917) 54 Can. S.C.R. 395 at 411.

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of bona fide sales within a short time after an expropriation accompanied by proof that there had been no change in value in the interval was relevant and admissible. Duff J. appears to have had a similar opinion. While these two cases leave the question of the admissibility of evidence of sales made subsequently to the date of an expropriation not entirely free from doubt, they are in agreement that the Court must keep in mind any change in value in the interval between the time of the sales and the expropriation date. This is, I think, of greater importance than the mere element of nearness in point of time. Trends and changes in market values must always be considered. Evidence of sales made at one time under certain conditions cannot be proof of market value at a different time when the conditions are not similar. Obviously, the nearer the sales are to the date of expropriation, the less likelihood there is of an intervening change of value. It is not always, however, possible to give evidence of sales very near the date of expropriation and, while the nearer sales are to such date the greater is the weight to be attached to evidence of them, evidence of other sales reasonably near such date having regard to the activity in the district is not without probative value, provided that proper account is taken of the conditions under which they were made as compared with those existing at the date of the expropriation and any intervening changes in value.

Evidence was given of sales of properties in the vicinity of the expropriated property, in Sandy Hill, in the Village of Rockcliffe Park and in other residential districts in the Ottawa area. Many of these were of non-comparable properties and evidence of them has no bearing on the value of the expropriated property. The most relevant sales are those of the Earnscliffe property to the United Kingdom, the Blackburn and Lemay properties to the French State, the Soper Estate property in Rockcliffe to the United States, and the other fine properties on the cliff in Rockcliffe.

The property known as Earnscliffe is on the Ottawa River just west of the National Research Council building. It was formerly the property of Sir John A. Macdonald

and then passed into the hands of Charles Harriss. On June 21, 1930, it was sold by the Harriss Estate to the United Kingdom for $90,000 and was bought as a residence for the British High Commissioner. The area of the property is 2·38 acres.

The Blackburn property was at the corner of John Street and Sussex Street, with a frontage of 260 feet on Sussex, and a total area of 2·33 acres. It was sold to the French State on December 31, 1931, for $80,000. On it there was a house assessed at $15,000. The Lemay property lay between the Blackburn property and the defendant's. It had a frontage of 86·4 feet on Sussex Street and extended back to the river with an area of ·81 acres. The defendant bought it in 1928 for $20,700 to protect the west side of his property from improper development, but when this danger disappeared with the proposal to build the French Embassy, he sold it to the French State on December 20, 1937, for $25,000. On it there was a building assessed at $6,900. It is quite clear that these properties were bought as a site, for the existing buildings were immediately demolished and the present French Embassy building erected, for which a building permit of $475,000 was taken out. On this basis, which is the only one to be considered, the price paid for the Blackburn property works out at $34,334 per acre, for the Lemay property at $30,864 and for the two combined at $33,439.

The Soper Estate property is in the Village of Rockcliffe Park. It was divided and the division plans registered in September, 1935. On this division the United States bought the northern portion, known as Lornado, in November, 1935. The registered transfer does not show the purchase price, but counsel for the defendant stated it as $225,000, and counsel for the plaintiff accepted this figure. The property was purchased as a residence for the United States Minister, now its ambassador. Its area is 9·2 acres.

Mr. E. N. Rhodes, an Ottawa real estate broker, gave details of sales of properties along the cliff in Rockcliffe extending back to a sale in 1920 of 3½ acres of vacant land for $35,000, of which a specially choice acre was sold in 1922 for $22,000, a sale in 1928 of 5 acres with an old

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house on it, of which only the walls were used in the new building, at $78,000, two sales in 1929 at over $11,000 per acre, one of which was of property back from the cliff, and several sales of land, now included in the Swedish property, at from over $6,000 to over $11,000 per acre. These represent the choicest purely residential lands in the Ottawa district. Mr. Rhodes stated that these sales showed an average of $12,800 per acre for land alone.

Certain other tests as to value that might exist in other cases are not available in this one. It is not possible to value the expropriated property from the point of view of the rent that might be obtained from it, for it is not the kind of property for which an adequate rent could be obtained.

Nor is the assessment proof of its market value. In 1943 the land was assessed at $51,100 and the buildings at $41,400, making a total assessment of $92,500. In the *W. D. Morris Realty Limited* case (*supra*) I held that there may be cases where a municipal assessment might afford some check against an exorbitant claim, but that generally speaking evidence of a municipal assessment is not of itself to be relied upon as evidence of market value. An assessment is not made for the purpose of establishing such value, but for raising municipal taxes. Assessments may vary from ward to ward in the same city and may not be uniform even in the same ward, and they may be higher in the city than in its surrounding suburbs. In the present case the assessment of the expropriated property cannot be accepted as proof of its value.

The valuations put forward may now be considered. It may be said of all the expert witnesses that they are men of experience and good standing, but it seems characteristic of real estate experts, according to my experience, that they tend to become advocates for the parties who call them, and their opinion evidence is subject to discount accordingly. This places an additional responsibility upon the Court.

The defendant's original claim of $233,500 as the value of the expropriated property was based on the valuation made by Mr. A. H. Fitzsimmons. It is broken up into

separate items, the land at $130,026, and the buildings and improvements at $103,586, which was further broken up into the roads at $2,700, the main residence at $91,386, No. 10 Sussex Street at $5,000, No. 26 Sussex Street at $3,500 and the garage and tool house at $1,000, making a total valuation of $233,612. Mr. Fitzsimmons expressed the opinion that the property could have been sold in 1943 for $233,500 within a reasonable time from the date of expropriation.

Mr. Fitzsimmons valued the land on the basis of 173,369 square feet at 75 cents per square foot, or 3·98 acres at $32,670 per acre. He was influenced, *inter alia*, by the sales I have referred to, particularly the sales of the Blackburn and Lemay properties to the French State. He applied his unit figure to the whole area of 3·98 acres, including the acre taken up by the slope down to the river. Mr. N. B. MacRostie, a well known engineer, surveyor and land valuator, worked on the land valuation with Mr. Fitzsimmons and agreed with it.

The defendant's witnesses then valued the buildings separately. Part of the main residence is approximately 70 years old. In 1907 to 1909 it was rebuilt and extended, the old part being made to conform to the new. Since 1923 the defendant has spent $30,000 on improvements. The house is of grey limestone. It is not of any known style of architecture but is related to the chateau type. It rests with heavy stone walls on the rock and shows no signs of sinking or settlement. Its physical condition is excellent. Admittedly some repairs are necessary, for example, new shingling for the roof is required, with necessary repairs to flashings, eavestroughs and pipes; all the outside woodwork needs painting; the greenhouse is not in good condition; the outside wall of the picture gallery shows cracks and should be restuccoed. Inside the house, the heating units need renewing and repairs to piping are required. It was also agreed that the house was subject to some structural depreciation in that a modern house would not be built with such heavy walls and beams; there would be lighter construction and more use made of steel. It was also admitted that there was some obsolescence in the house

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due to its age and the fact that it is not laid out as a modern house would be. The witnesses for the defendant denied any great degree of obsolescence, but, in my judgment, this is its greatest defect—and it is a very serious one. The view which the Court took of the premises, in the presence of counsel, strongly confirms me in this opinion.

Mr. Fitzsimmons took the cubical contents of the main residence from the architect and applied the rate of $1.00 per cubic foot to obtain its reconstruction cost as at the date of expropriation. He used this rate, he said, because of his knowledge of construction costs at the time with their great increase over 1939. This gave him $182,772, to which he applied a depreciation of 50 per cent for the factors mentioned, arriving at a valuation of $91,386. Mr. MacRostie took off the quantities and applied to them the prices he considered fair for materials and labour and arrived at a replacement cost of $192,000. He also applied a depreciation of 50 per cent, and arrived at a valuation of $96,000. In his opinion the value of the land was enhanced by this amount. Mr. A. J. Hazelgrove, an Ottawa architect of great experience and ability, also took off the quantities in detail, estimated the cost of the necessary materials and labour, and arrived at a reconstruction cost in 1943 of $198,360. He also depreciated this by 50 per cent and arrived at his valuation of $99,000. While there is no reason to doubt Mr. Hazelgrove's estimate of reconstruction cost, his opinion that the building added $99,000 to the value of the land cannot be accepted, particularly in view of the fact that he admitted that he was not qualified to give any opinion as to the value of the land or the total value of the property and would express no opinion as to what it could have been sold for at the date of its expropriation.

The other buildings were not valued by Mr. Fitzsimmons and Mr. MacRostie on the basis of their replacement cost less depreciation, but at an estimate of their value for use for accommodation for employees and staff. No. 10 Sussex Street has been converted into residential quarters and rented at $100 per month. No. 26 Sussex has been rented

for some time at $42.50 per month. Mr. MacRostie agreed with Mr. Fitzsimmons' valuation of them as well as of the garage and roads. Mr. Hazelgrove valued these buildings on the basis of their replacement cost less a higher rate of depreciation than in the case of the main residence and arrived at a valuation of No. 10 Sussex Street of $7,500, of No. 26 Sussex Street of $5,000 and of the garage at $1,800.

The expert witnesses for the plaintiff put their valuations on quite a different basis. They did not make separate valuations of the land and the buildings, but valued the property as a whole. Mr. Rhodes, although his general real estate experience is not as wide as that of Mr. Fitzsimmons, has had a good deal of practical experience in dealing with large houses. His opinion was that the nature of the land value of the expropriated property had changed, after the French Embassy had been built, from value for private residential purposes to value for higher uses. On this premise he valued the property as a site. He took the per acreage price of the Blackburn property, applied this to the acreage of the expropriated property, then expressed his opinion that it was not as good a site as that bought by the French State, and arrived at his conclusion that the highest valuation that could be placed on it was $125,000. In his opinion, if this valuation was placed on the property for its value as a site, then there was no economic value in the buildings.

Mr. Bosley, whose long experience extends across Canada, agreed with Mr. Rhodes' valuation. It was his view that the expropriated property had a much higher value than could be attributed to it on a residential basis. I have already referred to his opinion as to the uses to which the property was adaptable. The realization of such higher value would necessarily involve demolition of the buildings and, consequently, nothing should be added for them. In Mr. Bosley's opinion $35,000 per acre was the top price that could be paid for the purposes mentioned, and if such value was given, there was no commercial value in the buildings; but he reduced this top valuation because of the triangular shape of the property and, in his opinion, its

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lesser capacity for utilization as compared to the French Embassy site, and arrived at the same conclusion as Mr. Rhodes that $125,000 was a fair and reasonable valuation of the property as a whole at the date of its expropriation.

The method of valuation, such as that followed by the defendant's witnesses, of estimating the value of the land separately and adding thereto a valuation of the buildings and improvements based on their reconstruction cost less an allowance for depreciation frequently leads to a valuation of the property as a whole greatly in excess of its fair market or real value. It has unquestionably done so in the present case. The danger of erroneous valuation involved in this method has frequently been pointed out in this Court, for example, by Audette J. in *The King* v. *Loggie* (1), where he was dealing with an old shipyard, and in *The King* v. *Manuel* (2), where he was considering a large private residence. In the latter case he said, at p. 386:—

> the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the lands—although all these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation.

Numerous other decisions to the same effect might be cited. The matter was also discussed in the *W. D. Morris Realty Limited* case (*supra*). At page 151, I held:—

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

Nor is the defect in the method cured by fixing the depreciation at a percentage instead of a fixed or general rate. This does not mean that evidence of the kind given has never any value, for it is frequently convenient and helpful, provided it is considered within the limits indicated in the same case at page 154:—

> where the character of the buildings or improvements is well adapted to the land and its location, their structural value may afford a test of the extent to which the construction of the buildings or improvements has enhanced the market value of the property as a whole.

(1) (1912) 15 Ex. C.R. 80. (2) (1915) 15 Ex. C.R. 381.

The Court is not directed to estimate the value of the component parts of the property separately, "although all these elements must be taken into consideration"—and it should not do so; it must estimate the value of the property as a whole, for it is the whole property, and not its component parts separately, that has been expropriated, and its value as such is indivisible. While, therefore, evidence of the structural value of buildings and improvements may be received, it is not admissible as an independent test of value and calculations based upon its reception must be checked in the light of the value of the property as a whole. And, while the estimate of value must be on the basis of value to the owner, such value means, not an imaginary value in the mind of the owner, but real money value. Nor is it an intrinsic value apart from what the property could possibly be sold for. The value of the property to the owner means its realizable money value, "tested by the imaginary market which would have ruled had the land been exposed for sale", as Lord Dunedin put it in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1), and cannot be disassociated from the price which a possible purchaser would be willing to pay for it, or exceed the amount which a prudent man, in a position similar to that of the owner, "would have been willing to give for the land sooner than fail to obtain it", as Lord Moulton expressed it in *Pastoral Finance Association, Limited* v. *The Minister* (2).

While it might be necessary to deal somewhat differently with the case of a property of an exceptional character, the nature of which need not now be determined, I can see no justification for departing from these principles and the basis of assessment approved by Audette J. in *The King* v. *Manuel* (*supra*), whose judgment was affirmed by the Supreme Court of Canada, in the case of a property with a large residence on it, such as that of the defendant, because of the limited market for such a property, for as Audette J. pointed out, at page 385, "it has nevertheless a commercial value". Indeed, such a departure would be particularly productive of excessive valuations in the case of such properties. We need look no further than the

(1) (1914) A.C. 569 at 576. (2) (1914) A.C. 1083 at 1088.

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present case for proof of this fact, for evidence was given of many sales of large residences at prices far below their structural value. To have valued such properties on the basis of the value of the land plus the reconstruction cost of the buildings less the depreciation they have suffered would have been clearly erroneous. Mr. Bosley gave the Court the benefit of his experience that owners of large residences do not, when they wish to sell their properties, get back the reconstruction cost of their buildings less depreciation—but much less. That experience is a common one. I can see no ground of principle why the owner of expropriated property should reasonably expect to get more for it from the Crown than he could possibly get for it from any one else, merely because it was taken from him against his will. The value of the land which Parliament has directed the Court to estimate as the amount of compensation to be paid to him does not depend on whether he was willing to part with it or not. In *The King* v. *Spencer* (1) Angers J. took a different view. The property before him was a large one in Vancouver, consisting of 5·86 acres of land, on which there was a large private residence together with other improvements. He valued the land separately and, because the demands for that type and standard of residential property were very limited, he set the value of the residence at its replacement cost less the depreciation suffered since its erection. He also made separate valuations for the other improvements and to the total of the amounts so computed he added 10 per cent to cover incidental costs and charges (depreciation of contents of house, removal, acquisition of new premises, etc.). In my opinion, the basis and methods of valuation applied in that case run counter to the decision of Audette J. in *The King* v. *Manuel* (*supra*) and other opinions to a like effect frequently expressed in this Court, and are against the weight of authority. Under the circumstances, I have respectfully come to the conclusion that it should not be followed.

Without attempting to pass in detail upon the advantages and disadvantages of the expropriated property for residential purposes, it is enough to say that, while

(1) (1939) Ex. C.R. 340.

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the residence is well built, it is not a modern one and has defects which would weigh heavily with a prospective purchaser.

The market for it for private residential use would be very limited. Only a very wealthy person could afford to acquire and maintain it. The annual cost of upkeep for taxes and water rates, insurance premiums, heating, repairs and maintenance alone is very high, amounting in 1942, the last full year prior to the expropriation, to $4,258.66 (Exhibit 2). The staff required to look after the premises and grounds, according to the defendant, consisted of a cook, two housemaids, one gardener and caretaker and one part time male employee, and the cost of paying and keeping such a staff was estimated by one of the plaintiff's witnesses at approximately $330 per month. Moreover, such a staff would have been very difficult to get at the date of expropriation. Mr. Bosley's evidence knocks the defendant's valuations out of Court. In his opinion, it would not have been possible to sell the property in 1943 for private residential use for $233,000. He stated that he had never heard of any sale of a house for private residential use for such an amount anywhere in Canada; a person with that much to invest would want "a tailor made job", a house built to suit himself; such a person would not be attracted by the property, but would look for a more modern house or build one to suit his own tastes. Mr. Bosley gave several instances of sales of large residences, some very much larger and finer than the defendant's and situated on more spacious grounds, at prices very much lower than even the amount offered by the plaintiff. He did not think it possible to find a private purchaser in Ottawa for the property at the amount claimed, and with this opinion I entirely agree. Even at the amount offered by the plaintiff there would be few, if any, possible purchasers of the property for private residential use.

The possible market for the property for embassy, legation or other official residential purposes was also limited; it was not nearly as great as suggested by the defendant's witnesses. All the larger countries represented at Ottawa, such as the United Kingdom, the United States, France

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and the Soviet Union had already satisfied the residential requirements of their representatives prior to the date of the expropriation and were not likely to make any changes. They were, therefore, not likely purchasers of the property. This left only those who had not then satisfied such requirements. Mr. Rhodes gave evidence of sales of residential properties in the Ottawa district for embassy and legation purposes. Many of these have no direct relevancy to the value of the expropriated property, for the properties involved were not comparable, but his list of sales has considerable significance. It shows that the average price paid by 13 countries for their embassy or legation residences since 1940 has been $33,840. This clearly indicates that they have been able to satisfy their official space requirements in satisfactory large houses without paying high prices for them. There is also an indication that the purchasing countries required adequate floor space rather than spacious grounds. The list includes sales subsequent to the date of expropriation and those countries who had not then bought residences might have been possible purchasers of the defendant's property if it had not been expropriated, such as Belgium, Mexico, the Netherlands, Peru, South Africa, Sweden and some others. None of these countries, however, has purchased a house the size of that on the expropriated property. Even the highest of such subsequent sales, namely, that of the Fauquier Estate property to Sweden at $62,000, was at less than a quarter of the amount claimed by the defendant and less than half that offered by the plaintiff. The residence on this property is not as large as the defendant's, but the land is as great in area, the view from it is very fine, and its location for purely residential purposes is, I think, superior. It may be that the price paid for it was low considering the fine property acquired, but it is a check against the exaggerated importance attached by the defendant's witnesses to the coming to Ottawa of diplomatic representatives as a stimulating real estate value factor. The other countries who have not bought properties but are occupying residences on a rental basis would also have been possible, but not likely, purchasers.

There are two sales of large properties bought for official residential purposes to which further reference should be made, namely, those of Earnscliffe to the United Kingdom in 1930 for $90,000 and of Lornado to the United States in 1935 for $225,000. A detailed comparison between the expropriated property and Earnscliffe need not be made, although much evidence was devoted to such comparison. The United Kingdom bought Earnscliffe on the strength of two valuations, one by Mr. H. G. Legg, senior assistant engineer of the Department of Public Works, who valued the land at $28,000 and the buildings, including the residence, at $64,000, and the other by Mr. A. H. Fitzsimmons who valued the property as a whole at $90,000. Notwithstanding the argument of counsel for the defendant, I am convinced that Mr. Fitzsimmons, in formulating his total valuation, did not ascribe any substantially higher value for the land, than Mr. Legg did. Mr. Legg's land valuation for the residence part of the property was to some extent based on the same Rockcliffe sales as those referred to by Mr. Rhodes, and Mr. Fitzsimmons could have had no other basis at that time for a higher one. While the defendant's total claim, almost three times the purchase price of Earnscliffe, is clearly excessive, there are several reasons why he is entitled to a higher valuation for his property than that upon which Earnscliffe was bought. The land area is greater, 3·98 acres as compared with 2·38; his residence is larger, of better construction, and in better physical condition than the Earnscliffe residence was at the time of its purchase, the United Kingdom having since then spent substantial sums on alterations and improvements.

But the contention involved in the defendant's valuations that his property was worth more for official residential purposes than the amount paid by the United States for Lornado in Rockcliffe is absurd. It was worth very much less. The residences on the two properties are comparable in size, that on the Soper Estate property being somewhat larger; it was built about the same time as the one on the expropriated property was reconstructed; while it may be of less expensive construction, it is more modern and much better adapted to official residential purposes. The views from the two properties are comparable in

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beauty, that from the United States residence being wider in extent because of its greater height. But the greatest difference is location: that of the United States residence is much more desirable for residential purposes. It is approached by the Federal District Commission driveway through Rockcliffe Public Park and is situated in private park-like surroundings on 92·2 acres of beautiful grounds in the Village of Rockcliffe Park with its restrictive by-laws and other exclusively residential advantages. The valuation of the expropriated property for official residential purposes falls thus above the price paid for Earnscliffe and below that paid for Lornado.

Moreover, the expropriated property is not really well adapted for such purposes. Before it could be so used, very substantial and expensive alterations in the residence would have to be made. The weight of evidence is against the possibility of substantial alterations, but even if they could be made the result would not be satisfactory. The house would still be an old made-over one and the owner would never have that feeling of satisfaction and pride in his property that he should be entitled to have after such a large expenditure of money.

On the basis of its value for residential use, whether private or official, I can see no justification for ascribing to the land any higher value than the high average of $12,800 per acre, which Mr. Rhodes found for the sales of the choice residential land on the cliff in Rockcliffe. Indeed, for residential purposes it is not as desirable. As for the buildings, if they are to be valued with due regard to the extent to which they enhance the value of the property as a whole for residential use, the defendant's witnesses did not take sufficiently into account the serious factor of obsolescence in the residence with the need for substantial alterations in and the effect this would have on a prospective purchaser. Under all the circumstances, if I had to make an estimate of the value of the expropriated property on the basis of its value for residential use, I could not make it higher than the amount offered by the plaintiff.

But I do not put my estimate of the value of the property on this basis. In my opinion, the defendant is entitled to a valuation on a higher basis. I agree with Mr. Rhodes

that the sales of the Blackburn and Lemay properties to the French State and the erection of the French Embassy building changed the character of its land value. It would be well adapted for a high class office building such as the headquarters of an insurance company, or as a site for a high class apartment block. It would be particularly well suited for a modern public or official building; indeed, it would be difficult to find as fine a site for such a building anywhere in Ottawa. The use of the land for such purposes would be a more appropriate development of the property than the present buildings could be and give it a higher value than could reasonably be ascribed to it for residential use. It is as a site for such purposes that it has its highest value, and I agree with Mr. Rhodes and Mr. Bosley that its valuation should be made on such a basis. I thought they showed a more realistic approach to their valuations than the defendant's witnesses did to theirs. That being so, it is obvious that the present buildings would have to be demolished to enable the site to be put to adequate use. And, since they are no longer an adequate development of the property or well adapted to the land and its location, having regard to its higher value for other purposes, they do not enhance the value of the land or the property as a whole for such purposes, and have, consequently, no economic value. The fallacy in the defendant's valuations lies in the assumption that he was entitled to the value of the land for higher than residential use purposes, and at the same time to the value of the buildings for such purposes. He cannot have it both ways. He is entitled to a valuation based on either the value of his property for residential use or its value for other purposes, but not both. It cannot be put to higher than residential use and at the same time retained for such use. The defendant cannot have his land valued on one basis and his buildings on a different and inconsistent one. If he is to get the higher value of his property for other than residential use, its lesser value for such use must be relinquished. What the defendant's witnesses have done is to add part of such lesser value for residential use to its total higher value for other purposes. This accounts in large measure for their excessive valuations.

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The witnesses were agreed that the sales of the Blackburn and Lemay properties to the French State could fairly be used as a basis of valuation and I concur. Obviously, there cannot be many sales of such properties and I see no reason for assuming that the prices paid by the French State were in excess of the value of the properties acquired. Mr. Rhodes assumed a valuation based on the price paid for the Blackburn property of $34,334 per acre as applied to the 3·98 acres of the expropriated property, and then expressed his opinion that it could not be sold for more than $125,000. Mr. Bosley, using a similar calculation, came to the same conclusion, because of the triangular shape of the property and its lesser capacity for utilization. Both witnesses thus assumed a lesser relative value for it than for the French site. With this assumption I am unable to agree. In my opinion, there are several reasons for giving it a higher value. The site is a most desirable one. Its location is superior to that of the French site, with the dilapidated buildings on John Street to the west, the disused fire-station diagonally opposite, and a number of old buildings on the south side of Sussex Street. The view from the expropriated property is much superior to that from the French site. And I agree with Mr. Fitzsimmons' view that the construction of the French Embassy building increased the value of the expropriated property. Also it was the last site available with frontage on the Ottawa River. Nor do I agree with Mr. Bosley's opinion as to its lesser capacity for utilization; he doubted whether the French Embassy could have been erected on it, but in this he was in error as examination of the map (Exhibit C) will clearly show. And I see no reason for reducing its value because of its triangular shape, for this and its long river frontage might well add distinctiveness to a proper development of it. All these factors give the expropriated property a considerably higher value than the amount paid for the French site, even after making due deduction in respect of the area taken up by the slope.

The Court has no right to be generous to the former owner of expropriated property; the Supreme Court of Canada has held that an award of compensation on such a basis is erroneous: *The King* v. *Larivée* (1). It is the

(1) (1918) 56 Can. S.C.R. 376.

duty of the Court to be fair and measure the owner's compensation by the standard set by Parliament—the value of the land taken, no less but no more. While the form of his property may be changed through the taking of his land, its value should remain unchanged, the money value of the land taken replacing the land itself.

After hearing the evidence and arguments of counsel, who presented their cases with their usual care and ability, taking a view of the premises, and considering the matter as carefully as I can, I estimate the value of the expropriated property as at the date of its expropriation at $140,000 and fix this as the amount of compensation money to which the defendant is entitled.

There remains the defendant's claim for $27,690 as damages to his household goods caused by the taking of his property, necessitating their removal and sale with resulting loss. This is a claim for damages for disturbance. I have before me in another case a difficult question whether or to what extent the former owner of expropriated property is entitled to compensation for such items as cost of moving, depreciation in the value of chattels and loss from business disturbance, but the defendant's claim in the present case presents no difficulty. Evidence was given on his behalf that the cost of moving his goods would amount to $3,262, which included $2,000 for packing and crating his pictures and certain storage charges. Then Mr. R. N. Irvine, an interior decorator, furniture manufacturer and antique dealer of Toronto, gave evidence as to the loss he would suffer on the sale of his furniture and household furnishings. He has a good knowledge of the articles in the defendant's residence, having sold most of them to him about 1928 or 1929. His evidence was that many of the articles of furniture, although not certificated antiques, were fine collectors' pieces bought specially for the house, and would lose value if they had to be sold separately and apart from their surroundings; this was also true of much of the other furniture, which was large and adaptable only to the defendant's house or one like it; then there were such furnishings as rugs and carpets specially woven to fit certain rooms or stairs, and drapes and portieres made to fit specific windows and doorways, on which there would be a great loss on their sale. Mr.

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Irvine estimated the defendant's loss at $26,347. (Exhibit Z 1). For the plaintiff, evidence was given by Mr. W. B. Ward-Price, an experienced valuator of used household furniture and furnishings and a large dealer in them by auction and private sale in Toronto. He put the defendant's loss, including a moving cost of $2,000, at the maximum figure of $9,220.50 (Exhibit 51). There was a wide divergence between these two witnesses, each outstanding in his special field. Mr. Irvine had, very naturally, a high opinion of the value of the articles he had acquired for the defendant and the furniture and furnishings he had provided, but I felt that his valuations were too high. Mr. Ward-Price was, I thought, more realistic. Apart from the fine pieces referred to, in which he found defects, he thought the style of furniture in the house was "passé"; the upholstery was worn; some of the rugs were stained and others badly worn; and the drapes and portieres were faded and some stained. This might be expected in view of their long use since 1928. Mr. Ward-Price also thought that a number of the articles in the house were quite adaptable to another house without loss and that the loss in respect of the articles not so adaptable came to only $5,249. Without passing on the merits of this opinion, I am of the view that the defendant's loss on the sale of his household goods would not exceed $9,220.50, the maximum amount estimated by Mr. Ward-Price.

The defendant has, however, no separate claim for such amount. It was for that reason that he further amended his statement of defence, leaving his original claim as an alternative one. Moreover, in view of the value of the expropriated property for higher purposes than its residential use that I have found, nothing should be added for the defendant's disturbance of his residential use of it with its resulting loss on the sale of his household goods. The decision of the English Court of Appeal in *Horn* v. *Sunderland Corporation* (1) supports this disposition of the matter. Sir Wilfrid Greene M.R. pointed out that damages for disturbance suffered by the owner of expropriated property was not a separate head of compensation, but merely one of the elements going to build up the

(1) (1941) 2 K.B. 26.

purchase price to which he was fairly entitled and Scott L.J. was of the same view. The Master of the Rolls also made it clear that where the value of the land as building land exceeded its value for agricultural purposes plus the damages for disturbance, nothing could be added to the building land value for disturbance, for the owner would have to give up his agricultural pursuits and incur the resulting disturbance in order to realize the greater value of the land for building purposes. And Scott L.J., at page 50, put the same view in these terms:—

> Where, by reason of the notice to treat, an owner is enable to effect an immediate realization of prospective building value and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on the top of the realizable building value is, in my opinion, contrary to the statutes.

In this case, the value which I have placed on the expropriated property as a site for other than residential use purposes exceeds its value for such purposes by more than the amount I have fixed as the possible maximum of the defendant's loss by disturbance. In order to realize such higher value the defendant would have to cease residence on the property and suffer the resulting disturbance and loss in value of his household goods. Under the circumstances, he is not entitled to any additional compensation for such loss.

The defendant has been in undisturbed possession of the expropriated property since the date of its expropriation and has collected the rents from the two small buildings on Sussex Street. He is, therefore, not entitled to any allowance of interest: *The King* v. *Manuel* (*supra*).

There will, therefore, be judgment declaring that the property described in paragraph 2 of the Information is vested in His Majesty the King as from June 12, 1943; that the amount of compensation money to which the defendant is entitled, subject to the usual conditions as to all necessary releases and discharges of claims, is the sum of $140,000, without interest; and that the defendant is entitled to costs to be taxed in the usual way.

Judgment accordingly.