1946

Jan. 22 to 25, 28 to 31. Feb. 1, & 4 to 6.

May 20.

BETWEEN:

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

AND

THE CORPORATION OF THE CITY OF TORONTO, AND THE TORONTO TERMINALS RAILWAY COMPANY, } DEFENDANTS

Expropriation—Expropriation Act R.S.C. 1927, c. 64, ss. 3, 9, 11, 12, 23—Exchequer Court Act R.S.C. 1927, c. 34, s. 47—Expropriation of land already in use and occupation of the Crown—Leasehold interest—"Power to expropriate"—Good faith of Minister not open to review by the Court—Filing of plan by Minister indicates that in his judgment the land is necessary for a public work.

The building housing Postal Station "A" forming the east wing of the Union Station in the City of Toronto is owned by the Plaintiff, the site on which it is erected is owned by defendant City and is held under lease from it by defendant Company which in turn leased it to the Plaintiff in perpetuity. The Crown expropriated the land on which is erected Postal Station "A" together with the "right-of-way in common with all others entitled thereto . . . . . along and over"

certain "drives, roadways, courts, entrances and exits in and about the Union Station reasonably necessary . . . . . ". The action is to have determined the amount of compensation money to be paid each defendant. Defendant Company contends that the Crown has no right of expropriation of the land in question.

Held: That s. 11 of the Expropriation Act confers a power to expropriate land already in the occupation and possession of the Crown and used for the purposes of any public work quite independent of the power contained in s. 3(b) of the Act.

2. That under s. 12 of the Act the filing of the plan is deemed to indicate that in the Minister's judgment the land is necessary for the purpose of a public work. The Minister having so acted cannot be said not to have acted in good faith and his judgment is not open to review by the Court.

3. That the owner of expropriated property is to be compensated for the loss of the value of such property resulting from its expropriation by receiving its equivalent value in money. *The King* v. *W. D. Morris Realty Limited* (1943) Ex. C.R. 140, followed.

4. That where property is rented for the use to which it is best adapted, the actual rent received, capitalized at the rate which local custom adopts for the purpose, may be considered as a basis to calculate the value of the land to the owner.

5. That when land subject to a lease is expropriated the value of the tenancy is considered to be the present value of the difference between the rental paid by the tenant, and the rental that the property is worth, for the unexpired portion of the lease, and the value of the right of renewal is not to be considered.

INFORMATION exhibited by the Attorney-General of Canada to have the amount of compensation money to be paid for certain expropriated property in the City of Toronto determined by the Court.

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

J. W. Pickup, K.C. and *W. R. Jackett* for plaintiff.

C. F. H. Carson, K.C., J. P. Pratt, K.C. and *W. G. Gray* for defendant Toronto Terminals Railway Company.

G. W. Mason, K.C. and *F. A. A. Campbell, K.C.* for defendant City of Toronto.

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

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O'Connor J. now (May 20, 1946) delivered the following judgment:

The Information filed on the 15th day of February, 1945, exhibited by the Attorney-General herein shows that the property described in the Information was taken under the provisions and authority of the Expropriation Act, 1927, R.S.C., chapter 64, for the purposes of the public works of Canada, and that a plan and description thereof were deposited of record in the office of the Registrar for Deeds for the Registry Division of the City of Toronto, in the County of York, in the Province of Ontario, on the 27th day of September, 1939.

An amended description and plan were filed on the 12th day of January, 1946, wherein the words "the lessor and" were deleted from the description of the right-of-way expropriated.

Under section 23 of the same Act the compensation money, adjudged for the expropriated property, stands in the stead of such property and any claim to such land is converted into a claim to such compensation money.

By the Information the plaintiff offered to pay to the defendant, The Corporation of the City of Toronto, herein referred to as the City, the sum of $275,000.00, and to the defendant, The Toronto Terminals Railway Company, herein referred to as the Company, $39,912.00 in full satisfaction and discharge of all claims by the defendants. In the Statement of Defence the defendant City claimed as damages the sum of $450,196.00, and during the trial, pursuant to leave, this was amended to $550,196.00, together with a sum for compulsory taking and a sum for interest. The defendant Company claims the sum of $121,172.00 for its interest in the land acquired by reason of certain capital expenditures, and the value of its leasehold interest in the said land, estimated by its witness at $74,096.00, together with a sum for compulsory taking and interest.

The defendant Company denied that the plaintiff was entitled to take the lands under the provisions of the Expropriation Act.

The property expropriated in question is the site of Postal Station "A," which forms the east wing of the Union

Station in the City of Toronto, and a right-of-way described in the corrected plan and description and as amended at trial as follows:—

Together with the free and uninterrupted right-of-way in common with all others entitled thereto for persons, animals and vehicles through, along and over such of the courts and driveways between the lands hereinbefore described and Bay and Front streets, respectively, and of the carriage drives, roadways, courts, entrances and exits in and about the new Union Station as may be reasonably necessary for the full enjoyment of the lands hereinbefore described.

The lands on which the Union Station is situated lie between Bay and York streets and south of Front street. The driveways were created by locating the building approximately forty-eight feet back from each of these three streets so that they are between the building and Bay street on the east, Front street on the north and York street on the west. The entrance to the carriage drive is on Bay street and the exit on York street. Both these streets and the land slope from the north to the south. The driveways at the north of the building are fifteen feet below the Front street level and access from Front street to the Postal Station is by a bridge approximately forty feet in width over the driveway. A strip, twenty-five feet in width, extends between Bay and York streets, between the southern boundary of Front street and the northern boundary of the driveway, and forms part of Front street. This was not included in the valuations by any of the witnesses. The plan, Exhibit "M", shows the site of Postal Station "A" coloured red; the driveways coloured green and blue, and the twenty-five foot strip, coloured brown. Photographs, Exhibits 18 and 19, show the entrance to the driveways from Bay street.

By an Order of the Board of Railway Commissioners for Canada No. 358, dated February 23, 1905, Exhibit "A" the Grand Trunk Railway was authorized to expropriate the lands shown in pink on plan, Exhibit "B", to be used only as a Union Station and yard. The Order provided that the Grand Trunk Railway should expend $1,000,000.00 on the building of the Station and pay all compensation to the owners or parties interested in the land expropriated.

Before the Grand Trunk Railway expropriated the land, an agreement dated April 22, 1905, Exhibit "C", was entered into between the Grand Trunk Railway and the

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defendant City, wherein the defendant City agreed that upon the Grand Trunk Railway acquiring the interest of the tenants in the land to be leased, the defendant City would enter into a lease with the Grand Trunk Railway for twenty-one years, renewable in perpetuity. The lease was to bear the date February 23, 1905, and the annual rental for the first term of twenty-one years was fixed at $14,000.00 and at $20,000.00 for the second term of twenty-one years, and thereafter for terms of twenty-one years from time to time forever at such annual rental as "may be agreed upon" or determined by arbitration. The defendant City agreed to make a fixed assessment at $500,000.00 for a period of ten years on the lands and improvements and to close the streets coloured brown on plan, Exhibit "B". The Grand Trunk Railway agreed to indemnify the defendant City from any claims arising from the closing of the streets and from all claims of the lessees, and to take charge of and adjust such claims at its own expense.

The defendant City closed the streets and the Grand Trunk Railway acquired the interest of the tenants.

The defendant City, pursuant to the said agreement, then entered into a lease dated May 31, 1915, with the Grand Trunk Railway, Exhibit "I", for a term of twenty-one years from February 23, 1905, on the terms and conditions contained in the agreement.

The defendant Company was incorporated by an Act of Parliament in 1906; the Grand Trunk Railway and the Canadian Pacific Railway, each, subscribing for one-half the shares in the Company.

By an agreement dated March 5, 1914, Exhibit Z5, between the defendant Company, the Canadian Pacific Railway and the Grand Trunk Railway, the Grand Trunk Railway agreed that upon the request of the defendant Company, it would sell, assign, transfer and convey to the defendant Company all right, title and interest of the Grand Trunk Railway in the lands, property and facilities in and to the Union Station for the sum of $1,375,658.10.

The defendant Company paid the Grand Trunk Railway $984,714.32, particulars of which are contained in Exhibits Z11, Z12 and Z17, and are summarized on plan, Exhibit Z16.

By an assignment dated May 31, 1915, Exhibit "J", the Grand Trunk Railway assigned the lease from the defendant City, Exhibit "I", to the defendant Company.

By an indenture dated September 15, 1915, Exhibit "L", the defendant Company leased the land and right-of-way, the subject matter of these proceedings, to the plaintiff for a term of twenty-one years, from the 1st September, 1915, at an annual rental of $17,000.00; and the plaintiff covenanted to pay all taxes assessed against the property during the term of the lease. The lease was renewable for further periods of twenty-one years in perpetuity, and the plaintiff covenanted to take a new term of the premises for a further term of twenty-one years, and the lessor covenanted to grant such renewals at such rental per annum as the premises shall then be worth, exclusive of any buildings placed thereon by the lessee. It was further provided that such rental, if not agreed upon, was to be determined in accordance with the provisions of the Arbitration Act of the Province of Ontario, by the award of three arbitrators.

It was further provided that the defendant Company at the cost and charges of the plaintiff would erect a building to be used by the plaintiff for postal and other governmental purposes, and that such building should form the eastern wing of the Union Station. The building would be the property of the plaintiff.

Pursuant to the terms of this lease, the plaintiff and the defendant Company entered into a building contract, dated September 15, 1915, Exhibit Z26, and the defendant Company constructed the eastern wing of the Union Station for the plaintiff and the plaintiff took possession and has remained in occupation thereof. The position of the buildings on the land is outlined in red as shown on plan, Exhibit "Q". A canopy extends eight feet two inches over the driveway on the east side of the building, and a cornice projects beyond the face of the wall over the driveways on both the north and east sides of the building.

On March 31, 1930, the defendant City entered into the first renewal of the lease with the defendant Company, Exhibit "O", pursuant to the provisions of the original lease, Exhibit "I", and of the original agreement. This

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lease was for a term of twenty-one years from February 23, 1926, and terminating on February 22, 1947. The annual rental was fixed at $20,000.00 and the lease provided for renewal in accordance with the terms of the original agreement.

The lease from the defendant Company to the plaintiff, Exhibit "L", ended on August 31, 1935, and negotiations took place as to the rental in the renewal lease and these negotiations continued for a number of years.

After August 31, 1935, the defendant Company sent accounts to the plaintiff for the rental on an increased basis. The plaintiff continued to pay and the defendant Company to accept such payments on the basis of $17,000.00 per annum, plus taxes, and this continued up until the date of the expropriation on September 27, 1939, which was authorized by Order in Council P.C. 1908, dated July 15, 1939, Exhibit "R".

It was admitted by counsel that the defendant Company had paid the full rent due under its lease from the defendant City up to February 22, 1940.

The defendant Company by its Statement of Defence denies that the plaintiff was entitled to take or that the lands in question were taken under the provisions of the Expropriation Act, 1927, R.S.C., chapter 64. This is based on the contention that the power to expropriate is contained in the sections, which are headed "Power to take land etc.," commencing at section 3. And that there is no power to expropriate in section 11, which is in the group commencing at section 9 headed "Expropriation", because these contain the machinery for expropriation and not the power to expropriate:—

> 11. A plan and description of any land at any time in the occupation or possession of His Majesty, and used for the purposes of any public work, may be deposited at any time in like manner and with like effect as herein provided, saving always the lawful claims to compensation of any person interested therein.

Counsel cited the judgment delivered by Viscount Dunedin in *Boland* v. *C.N.R.* (1), in support of his contention that those sections, commencing with section 3, under the heading "Power to take land etc.," contained

(1) (1927) A.C. 198 at 201.

the power to expropriate and that the second group, commencing with section 9, under the heading "Expropriation", contained the machinery.

Based on this, counsel contended that the Minister would have to go to section 3 and specifically 3(b) to get the power to expropriate:—

> 3. The minister may by himself, his engineers, superintendents, agents, workmen and servants,
>
> (*a*) . . . . . .
>
> (*b*) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto.

And that under 3(b) the Minister would have to exercise his judgment and find that the appropriation of the land in question was necessary for the use, construction, etc., of the public work.

And that as the planitiff had the fullest use and possession of the land in question under the lease from the defendant Company, Exhibit "L", which was renewable in perpetuity, there were no facts upon which the Minister could find the appropriation necessary.

And that the judgment of the Minister was open to review because it was not made in good faith, i.e., that there was an ulterior purpose in making the judgment, in that the Crown was endeavouring to end a bargain which it found was not profitable.

Counsel cited the judgment of Viscount Maugham in *Liversidge* v. *Sir John Anderson* (1), in support of his contention that in the absence of "good faith" the judgment of the Minister was open to review.

Section 12 provides that the deposit of the plan and description shall be deemed and taken to have been deposited by the direction and authority of the Minister, and indicating that in his judgment the land therein described is necessary for the purposes of the public work, and that the said plan and description shall not be called in question except by the Minister.

I have considered Mr. Carson's very able argument, but I reach the conclusion that section 11 confers a power to

(1) (1942) A.C. 206 at 210.

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expropriate land in the occupation and possession of the Crown and used for the purposes of any public work quite independent of the powers contained in section 3(b).

The decision in the *Boland* case is not, in my opinion, authority for the submission that those sections, commencing at section 9, contain only the machinery and not the power to expropriate.

There is, of course, underlying section 11, a limitation on the power of the Minister that the land must be required for the purposes of a public work.

3(b) gives the Minister power to enter upon and occupy land, (not then occupied by the Crown and used for the purposes of a public work) the appropriation of which is, in his opinion, necessary for the use etc., of any public work. Section 11, in the group of sections headed "Expropriation", (the action of the state in taking the property rights of individuals on the exercise of its sovereignty), provides both the power and the machinery for expropriating land *already* occupied by the Crown and used for the purposes of a public work.

Land, which was not owned by the Crown, would only be occupied and used for a public work if it were held under a lease or tenancy of some kind. So that Parliament must have intended to give the Minister power to do just what he has done in this case, i.e., expropriate land held by the Crown under a lease.

Then under Section 12, the filing of the plan shall be deemed to indicate that in the Minister's judgment the land is necessary for the purpose of a public work.

Having done what he was expressly authorized to do by Parliament, it cannot be said that he did not act in good faith. That being so his judgment is not open to review by the Court by reason of Section 12.

For these reasons I hold that the plaintiff was entitled to take, and the lands and property have been taken under the provisions of the Expropriation Act.

Section 19(a) of the Exchequer Court Act, 1927, R.S.C., chapter 34, gives this Court jurisdiction to determine every

claim against the Crown for property taken for any public purpose, and under the heading "Rules for Adjudicating upon Claims", Section 47 provides:—

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 general principles for determining the value of expropriated property are well established.

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. *The King* v. *W. D. Morris Realty Limited* (1).

(1) The value to be paid for is the value to the owner as it existed as at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that fall to be determined. *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (2).

But it is not the intrinsic value of the property to the owner, but its market value that must be ascertained. The value of the property to the owner has been aptly described as its "realizable money value" by Thorson, P., in *The King* v. *Edwards* (3):—

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,* (1914) A.C. 569 at 576, 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,* (1914) A.C. 1083 at 1088.

From these authorities it is clear that the owner is entitled to receive the equivalent value in money of the value to the owner and not to the taker of the property

(1) (1943) Ex. C.R., 140 at 147.
(2) (1914) A.C. 569 at 576.
(3) (1946) Ex. C.R., 311 at 327.

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expropriated, with all the advantages present and future which the land possesses. It is the present value, however, of the future advantages that is to be determined.

But the value of the property to the owner means its "realizable money value". It cannot in this case exceed the sum a prudent man in the owner's position would be willing to give for the land sooner than fail to obtain it.

The Order of the Board of Railway Commissioners, Exhibit "A", which authorized the Grand Trunk Railway to expropriate, directed:—

> 2. That the lands taken are to be used only as a passenger station and passenger station yards therefor, and for such purposes as are necessarily or usually connected therewith.

The agreement between the Grand Trunk Railway and the defendant City, Exhibit "C", provided that the terms and provisions of the agreement were to be read and considered as additional to the terms and provisions contained in the Order, Exhibit "A", and a copy of the Order was attached to the agreement.

The agreement was an alternative method of carrying out the Order of the Board of Railway Commissioners.

The lands were, therefore, at the time of the expropriation definitely committted to this user.

The use, however, is undoubtedly a high use.

The opinions expressed as to the market conditions prevailing over a period of years vary greatly. After considering them all, I reach the conclusion that the depression which started in 1929 definitely affected this market by 1931. The real estate market from 1931 to 1936 was inactive. In the area in question the properties were apparently firmly held and the offerings were limited. There was no demand for this type of property during this period, and the only purchases were made by tenants or adjoining owners. No real market existed until 1936, but commencing at that time the market developed. The improvement, however, was a very gradual one up until 1942, when the war caused a sharp demand for certain types of property. There never was a sharp demand for property in the area in question, but the area reflected to some extent the improvement in other areas. While the market very

gradually and very slowly improved, there was not much difference between the conditions that existed in 1936 and those existing in 1939.

The conditions existing in 1939, however, were not similar to those existing in 1927 and 1928.

The assessment of the property expropriated is of no value. First because assessment is not proof of value to the owner, although it may afford some check against high valuations and claims, and secondly there was no assessment of the site and of the rights-of-way expropriated as such until after the property had been expropriated. The assessment up to the time of the expropriation had, of course, been of the various parcels of land, one forming the site and another of the lands which are now subject to the right-of-way.

The assessment of the whole area of the Station lands contained in the lease from the defendant City to the defendant Company was under the original agreement fixed at $500,000.00 from 1905 to 1916. In 1916 for 1917 this was increased to $1,207,485.00 and remained at that amount until 1931 when it was increased to $1,707,085.00. In 1937 it was reduced on appeal to $1,651,345.00 and remained at that amount until the expropriation.

The claim of the defendant City, as presented, is:—

(1) for damages based on the fact that it will not now be able to lease to the defendant Company that which it leased before the expropriation, and the defendant Company will, therefore, be entitled to a reduction in rent, and

(2) that the defendant City is entitled to the value not only of the site with the right-of-way expropriated, but also to the value of the lands adjoining the site which are subject to the right-of-way as an equivalent for the damages which the defendant City suffered by the expropriation.

The plaintiff's offer is to pay the value of the expropriated lands and property on the basis that the value of the right-of-way is reflected in the value of the site.

In my opinion the defendant City, as the owner in reversion receiving a present income from its land, is

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entitled to the value to it of the lands and property expropriated, calculated by either of the methods set out in *Cripps on Compensation*, 8th ed., page 188.

The plaintiff has expropriated a right-of-way in common with all others entitled thereto, over such of the driveways etc., in and about the new Union Station as may be reasonably necessary for the full enjoyment of the lands described.

The lease, under which the plaintiff has been in possession of the property for many years, contained the same description of the right-of-way, that is, a right-of-way reasonably necessary.

The user of the right-of-way, which has taken place over a long period of years, is the best guide in determining what has been expropriated, i.e., a right-of-way reasonably necessary. The construction to be placed on the words "reasonably necessary" can be determined by the past user in the same way that the construction of "used and enjoyed" is determined by the facts existing at the time of the conveyance which contains these words.

The facts as shown by the evidence were these: The past user, over many years, of the courts and driveways had been almost exclusively that of the general public in going to and from the Station, and the plaintiff's user had been almost entirely limited to an exclusive use of the 6,548 square feet marked "Post Office teamway" on Exhibit 3, and of the bridge over the northern driveway by which access to the building is obtained on the Front street level.

The right-of-way reasonably necessary is clearly indicated by this past user.

Consideration must also be given to all the circumstances in connection with the right-of-way in attempting to ascertain the value of the property expropriated.

The lands were committed by the Order of the Board of Railway Commissioners No. 358 to the use *only* of a Union Station. The defendant Company prepared the plans and the location by which the driveways were created. The plans and location were approved by the Board of Railway Commissioners on the application of the Grand Trunk Railway upon notice and in the presence of all interested parties, including those of the defendant

Company. It is true that the defendant City did not give formal approval to the location, but it must have been then, and certainly should be now, a matter, in the language of Mr. Carson, counsel for the defendant Company, "of great satisfaction to the defendant City".

The plan of the lower level of the building, Exhibit Z53, shows that this lower level has been expressly designed for these driveways. The design of the lower level and the driveways, in conjunction, greatly facilitate the operation of the Station.

The driveways were created during a horse and buggy age, and in a motor car age it would be extremely difficult, if not impossible, to properly operate a Union Station serving a very large city without these driveways.

The evidence of the experts showed that their valuations were based on the contentions of the parties. The experts, on behalf of the defendant City, who gave evidence, included in their valuations not only the site but the lands adjoining thereto which are subject to the right-of-way. Mr. Bosley, who gave evidence on behalf of the plaintiff, and Mr. Poucher, who gave evidence on behalf of the defendant Company, gave the value of the site with the value of the right-of-ways reflected therein. Mr. McLaughlin, who gave evidence on behalf of the plaintiff, valued the site and then added 10% for the right-of-way. The wide divergence is shown by the following tabulation:—

For the defendant City	
Mr. Edwards	$522,896 00
Mr. Walker	522,896 00
For the defendant Company	
Mr. Poucher	350,000 00
For the plaintiff	
Mr. McLaughlin	320,000 00
Mr. Bosley	310,000 00

These valuations were based primarily on the experience and knowledge of the witnesses and there is no question that each of them is fully qualified, and has had long years of experience in real estate in the City of Toronto. Their valuations were well prepared and their opinions are

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entitled to careful consideration. Their opinions were also based in part on the sales of nearby properties. While their methods of valuing and what they valued differed, and while some of them considered all the sales and others only a few, four of them arrived at a value of $8.00 per square foot for the area, but after reaching that figure they separated.

Messrs. Edwards and Walker then applied that value to the site and the lands adjacent to the site subject to the right-of-way. This is in support of the contention of the defendant City.

Mr. Poucher applied it only to the site with the value of the right-of-way reflected therein, and at $8.00 per square foot valued the property in round figures at $350,000.00.

Mr. Bosley arrived at $8.00 per square foot on the same basis, i.e., the value of the right-of-way reflected in the value of the site, and came within $3,000.00 of the amount fixed by Mr. Poucher. Mr. Bosley then reduced this amount by 10% on the ground that the site would only have access on the Front street level by a bridge over the driveway, and, also, because the land and Bay street slope from the north to the south.

I see no object to be gained in discussing the individual sales which were taken into account by the valuators, because based on these sales four of the experts arrive at a value of $8.00 per square foot for the area in question, subject, of course, to what I have already pointed out as to the differences between them from there on.

I am of the opinion that the sales in 1927 were made under conditions that were not similar to those made in 1939, nor do I think the sales in 1914, or opinion of values that existed at that time are of any help. Even the sales made in 1934, 1938 and 1942, while they were made, by and large, under similar conditions to those existing in 1939, are not individually of much help. The difficulty of comparing sales, of land abutting on a street with the site and right-of-way expropriated, is obvious. Then the area expropriated is a large one and the question arises as to whether an additional amount should be added to the sale prices of those parcels of land to cover the cost of assembly

or plottage. Mr. Bosley added 10%; Messrs. Poucher and McLaughlin made no actual allowance, but I think that both took the question of plottage into consideration.

Then to make some of the parcels sold comparable with the land expropriated because of the difference in depth, an artificial rule known as the Davis Depth Rule was used by some of the valuators, and I think that all of them at least to some extent took it into account. The accuracy of the Rule was not shown, although it appeared to be helpful.

Two of the three sales, Gage and Gordon McKay, were complicated by buildings and the experts agreed that this made the value of the land alone a debatable question. The Gage sale was clearly low and this was probably due to the fact that the property, in the language of one of the witnesses, was "cluttered up with leases", and possibly to the fact that the sale was made by the executors of a will at the request of beneficiaries that the executor liquidate the assets. The Gordon McKay property was also sold by executors of a will at the request of the beneficiaries. The third sale, Crawley McCracken, was of a vacant lot with a comparable depth, but appeared to have a special value by reason of its particular location. As against that it was shown that a creditor of the owner had pressed to have the sale made at a price lower than that desired by the owner.

After hearing the evidence on these sales I agree with Mr. Bosley's statement that estimating value of property from sales of comparable property is not a matter of arithmetic, but is still one of expert opinion.

While the individual sales are not of much assistance, the cumulative effect is helpful and tends to show that the value of the land expropriated, measured by a consideration of the prices that have been obtained for lands in the immediate area, is $8.00 per square foot.

The question then is whether this rate should be applied to both the site and the land subject to the right-of-way adjoining the site, or to the site alone, on the basis that the value of the right-of-way is reflected in the value of the site.

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Having regard to the fact that the property was at the time of the expropriation committed to the use of a Union Station and that use only, and to the fact that the driveways are essential to the operation of the Station and the use made of them by the general public having business in the Union Station, I come to the conclusion that this rate should not be applied to the whole area. The right-of-way furnishes access to the site and the value of the right-of-way can be properly said to be reflected in the value of the site. On this basis Mr. Poucher's figure of $350,000.00 is close to the mark.

This does not, however, take into account the exclusive use by the plaintiff of the area of 6,548 square feet, and consideration must be given as to the additional value that should be added.

Part of the value of the right-of-way over this area, i.e., in providing access, is already included as "reflected" in the value of the site so that an additional sum of $8.00 per square foot would clearly duplicate values.

Mr. Poucher has placed a value of $5.00 per square foot for the whole Station area, consisting of approximately six acres, including both the valuable land in front and that of less value in the rear.

An additional allowance at $5.00 per square foot would not appear to be unreasonable under the circumstances, making a sum of $32,740.00 or a total value on this basis of $382,740.00.

The rental value can be considered as a basis to calculate the value of the land to the owner. *Earl of Eldon* v. *The North-Eastern Railway Company* (1).

Nichols on Eminent Domain, 2nd., ed., page 1172, states that:—

> But as a safe working rule, if property is rented for the use to which it is best adapted, the actual rent reserved, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value . . . . . .

I accept Mr. Poucher's evidence that ground rents in Toronto in 1939 were determined on a basis of 4½%.

In the lease between the plaintiff and the defendant Company entered into in 1915, the rent was fixed at $17,000.00 per year. At the end of twenty-one years in 1936,

(1) (1899) 80 L.T.R., 723.

the use of the right-of-way reasonably necessary for the purpose of the plaintiff, would be well known to both the plaintiff and the defendant Company. When the lease terminated in 1936, negotiations were commenced as to the rental in the renewal lease and extended over a period of years. The defendant Company first requested $22,-155.00 and subsequently reduced the request to $17,600.00. The plaintiff advised the defendant Company that the Government had given very earnest consideration to the proposal but would not pay any increase. On two occasions the plaintiff, in correspondence with the defendant Company, advised the defendant Company of their willingness to renew the lease at $17,000.00, and I think it is a fair assumption that, from this correspondence and from the Order in Council, during the whole period the plaintiff was quite willing to renew at $17,000.00. During the three years from 1936 to 1939, the plaintiff paid at the rate of $17,000.00 a year and the defendant Company accepted the payments although they sent the plaintiff accounts at an increased rental.

The value tested on the basis of the rent paid for twenty-one years under the lease and paid by the plaintiff for three subsequent years up to the expropriation of $17,000.00 on a 4½% basis is approximately $378,000.00.

From the evidence given by the witnesses for the three parties as to value, the rental value on the same basis can be ascertained.

Of the witnesses for the plaintiff, Mr. Bosley has valued the property expropriated at $310,000.00, and Mr. McLaughlin at $320,000.00. Calculated on the same basis this would give a rental value at $13,950.00 and $14,400.00, respectively, but this must be discounted by the fact that after leasing the lands for twenty-one years at $17,000.00, the plaintiff offered twice, and was apparently ready during that three-year period, to renew the lease for another twenty-one years at $17,000.00, and actually paid the rent during the three-year period at the rate of $17,000.00 per year after the expiration of the lease.

The evidence of Mr. Poucher on behalf of the defendant Company estimated the value at $350,000.00 and estimated the rental on a 4½% basis at $15,750.00, but this must be

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discounted by the fact that the defendant Company in 1936 demanded $22,155.00 and, although it finally offered to accept $17,600.00, refused during the three-year period to accept $17,000.00 per year because it was not high enough.

The value estimated by the experts on behalf of the defendant City on a 4½% basis would fix the rental value at $23,530.32. In the first place I cannot accept the basis on which the value of the lands, namely $522,896.00, has been arrived at, and secondly the rental value of $23,530.32 is, in my opinion, much too high.

While I hold that the letter from Mr. Farley, Assessment Commissioner of Toronto, Exhibit No. 7, requesting payment of $342,000.00 from the plaintiff as the value of the expropriated property, is admissible, it is not binding on the defendant City and it does not assist me to ascertain the value. Neither does the statement in P.C. 1908, Exhibit "R", in which the Minister of Public Works reports to the Committee of the Privy Council that the figure of $376,-200.00 might be used as a basis for the compensation to be offered, assist me to ascertain the value; neither is proof of value to the owner.

I have already summarized the general principles as laid down by the authorities. Their application to this particular property, under all the circumstances, is not an easy matter.

I have, however, carefully considered the evidence before me and particularly the evidence of the experts, and I find that the value of the expropriated property as at September 27, 1939, was $380,000.00, and that the rental value at the date of the expropriation, September 27, 1939, was $17,100.00.

Counsel for all parties have agreed that the defendant Company is entitled, in any event, to the present value of the difference between the rental value of the property expropriated and the proportionate share of the rent of that property to the rent reserved in the lease for the whole of the property from the defendant City to the defendant Company between the date of the expropriation, September 27, 1939, and the date upon which the existing lease between the defendant City and the defendant

Company falls in, namely February 23, 1947. Counsel for all parties have agreed that the value of the defendant Company's right of renewal is not to be taken into consideration for the reason set out by the Court of Appeal in the Province of Ontario, *City of Toronto* v. *McPhedran*, (1), Riddell, J.,—

> Theoretically, as well as practically, the method of the city is erroneous —theoretically the method of the tenant is wrong in that it fails to take into consideration the value of the tenant's right of renewal. But practically this right may well be neglected: as upon a renewal we must consider that the full rental value will be exacted by the University. The possibility of increase or decrease of rental value after renewal is too remote to be considered in practice.

The method of determining the value, as outlined, is described in *Cripps on Compensation*, 8th ed., page 189, and described by Middleton, J., in the *McPhedran* case at page 92:—

> The true solution of the problem is that indicated in cases where land subject to a lease is expropriated. There the value of the tenancy is always considered to be the present value of the difference between the rental paid by the tenant, and the rental that the property is worth, for the unexpired portion of the lease.

I have already held that the rental value of the property expropriated is $17,100.00 and the rate to be applied is 4½%. The rental between the defendant City and defendant Company for the whole of the property is $20,000.00. This leaves the question of what proportion the rent of the expropriated property bears to this rent. Mr. Poucher estimated the proportion at 20% and Mr. Edwards at 27%. After considering the values and the area and all the factors to be taken into account, I fix the proportion at 22%, and the proportion of the rent is, therefore, $4,400.00. The annual value of the leasehold interest of the defendant Company is $12,700.00, and the present value of $12,700.00 per annum as of September 27, 1939, to February 23, 1947, on a 4½% basis, is $78,606.00.

The defendant Company paid the full rental under its lease to the defendant City up to February 22, 1940. After the expropriation the rent should have been apportioned between the defendants. My finding assumes that this will be done and I have not taken into account any arrangements made between the defendants.

(1) (1923) 54 O.L.R. 87 at 91.

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The present value of its land to the defendant City, as the owner of the reversionary interest which is receiving a present benefit, may be calculated in the following method, described in *Cripps on Compensation,* 8th ed., page 188. The present value of an annuity of $4,400.00 a year for the period from the expropriation 27th September 1939 to 23rd February, 1947, on a 4½% basis equals $27,234.00 and to this is added the value of an annuity of $17,100.00 in perpetuity, deferred for the same period 27th September, 1939 to 23rd February, 1947 equals $274,160.00 making a total of $301,394.00.

Counsel for the defendant Company claims a further interest in the land by reason of certain capital expenditures made by the Company. This contention is based on the fact that the Grand Trunk Railway by reason of the expropriation of the various leaseholds that existed in 1905, and its expenditures in connection therewith, acquired an interest in the property which was never lost, and that this interest was transferred to the defendant Company for value, and that the defendant Company is entitled to compensation for such interest in the property expropriated. This claim is in addition to the defendant Company's claim for its interest in the land as lessee under the lease from the defendant City.

Counsel for the defendant Company submitted that the agreement with the defendant City, Exhibit "C", contemplated and recognized the outstanding interest of the tenants and expressly provided for the Grand Trunk Railway to acquire that interest. So that as a result of the expropriation and agreement, the Grand Trunk Railway acquired an interest in the land itself to the extent of its capital payments to the tenants and this created an estate in the land which was never lost. The Grand Trunk Railway in turn transferred this interest to the defendant Company. The cost of acquiring this estate plus rent, interest and taxes to the date of transfer to the defendant Company was approximately $968,000.00, and this was paid by the defendant Company to the Grand Trunk Railway. Mr. Poucher estimated that of this sum, $121,-172.00 was attributable to the site and the lands adjoining the site which are subject to the right-of-way, and it is

this sum that the defendant Company claims as compensation for the interest obtained in this manner in the land.

Pursuant to the agreement, the Grand Trunk Railway acquired the interests of the tenants. It then stood in the place of these tenants in respect to the property.

And after it had acquired the interests of the tenants, the Grand Trunk Railway obtained from the defendant City a new lease for twenty-one years, so that on the argument advanced, the Grand Trunk Railway held and has continued to hold two distinct concurrent leasehold interests in the property at the same time.

I reach the conclusion that the acceptance of the lease from the defendant City to the defendant Company implied a surrender of the existing leasehold interest and operated as a surrender thereof by the act and operation of law.

This is set out and the reasons why it is so in *Woodfall's Law of Landlord and Tenant,* 24th ed., page 897:—

> Surrenders by "act and operation of law", or implied surrenders, are excepted from the requirement of a deed (Law of Property Act, 1925, s. 52). Of this sort are surrenders created by the acceptance of a new lease from the reversioner either to begin presently, or at any time during the continuance of the first lease; for the acceptance of a valid new lease implies a surrender of the existing lease, and operates as a surrender thereof by act and operation of law, but not if the second lease be void or voidable, or if there be a mere agreement for a future lease, and not an actual demise. The reason why such acceptance of a new lease operates as a surrender of the first is, because the lessee, by accepting the new lease, has been party to an act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first.

Therefore, the Grand Trunk Railway held no interest or estate in the land by reason of these expenditures after it obtained the new lease from the defendant City, and there was nothing that it could transfer to the defendant Company.

I hold that the defendant Company is not entitled to compensation for such interest.

This is not, in my opinion, a case where an allowance should be made for compulsory taking.

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There will, therefore, be judgment declaring that the lands and property described in paragraph 2 of the Information as amended, are vested in His Majesty the King, and that subject to the usual conditions as to necessary releases and discharges of claims, the amount of compensation money to which the defendant Company is entitled, is the sum of $78,606.00, and the amount to which the defendant City is entitled is the sum of $301,394.00. As the award in each case is greater than the sum tendered by the plaintiff, I hold the defendants are entitled to interest at the rate of 5% per annum on the respective amounts awarded, from September 27, 1939, to the date of judgment.

Each of the defendants is entitled to its costs.

Judgment accordingly.