IN THE MATTER OF THE ESTATE OF ARTHUR GILL WITHYCOMBE, DECEASED 1944 *Oct. 23, 24

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA... APPELLANT; 1945 *Feb. 6

AND

THE ROYAL TRUST COMPANY, THE ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ARTHUR GILL WITHYCOMBE, DECEASED..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Succession duty—Valuation of property for—Land with theatre building thereon—Leased for term of years—Factors and considerations in determining value—Capitalization of revenue method in valuing land —Whether wrong principle applied in the circumstances—Amount determined by Commissioner, reduced by Court of Appeal, restored by this Court.

The dispute was as to the value of certain land in Edmonton, Alberta, for purpose of succession duty. The owner died in 1942. He had granted a lease of the land in 1918 for 35 years, at fixed rentals, which increased by $937.50 every five years, starting at $5,625 per annum and ending at $11,250 per annum. The lessees were to erect and furnish, at approximate costs respectively of $48,000 and $20,000, a theatre building on the land, to insure it, keep it in repair, and pay taxes, and had the right at end of the term to remove all fixtures (repairing any damage thus caused). On assignment to an assignee who assumed liability under the lease, the lessees were to be discharged from liability. The building had been erected and the rent paid. Alterations had been made in the building in 1928 and 1939 at costs, respectively, of about $128,000 and from $80,000 to $90,000.

A Commissioner appointed under s. 28 of *The Succession Duty Act,* R.S.A. 1942, c. 57, determined the value at $108,300. On appeal on behalf of the owner's estate, the Supreme Court of Alberta, Appellate Division, by a majority, fixed the value at $65,000 ([1944] 1 W.W.R. 385). On appeal by the Attorney General of Alberta, this Court now restored the amount determined by the Commissioner.

Principles to be applied and factors to be considered in determining the value of such property under the circumstances, discussed, and authorities cited.

Per the Chief Justice and Rand J.: It may be that the true basis of valuation is the "exchange value" (what could be got in the open market), but this can only be so when such "exchange value" can be ascertained, and in this case it could not be obtained; there was no real evidence of any such value. The Commissioner had to value the

*PRESENT:—Rinfret C.J. and Hudson, Taschereau, Rand and Estey JJ.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

land and the building *qua* theatre as it was at the time of the owner's death, and he had to take the conditions as he found them as of that date. It was proper for him to take into consideration the revenue-producing qualities of the property, and the value of the lease in effect at the date of the owner's death. The capitalization of revenue method (using 8 per cent. as an interest factor, and allowing a discount for contingencies) used by him in determining the land value should not be held to be a wrong principle, in the circumstances with which he was faced as a result of the evidence before him. As it could not be said that he had acted on any wrong principle of law, and as his valuation was supported by evidence, his finding should not have been disturbed.

Per Hudson and Taschereau JJ.: In the circumstances of this case, the capital value must in large measure be determined by reference to revenue-producing capacity of the property. Factors tending to reduce the value attributable to the lease were taken into account by the Commissioner and a generous allowance made in respect thereof. Agreement was expressed with his finding.

Per Estey J.: The Commissioner did not adopt a wrong principle in arriving at his valuation. He would seem to have appreciated that he had to determine the market or exchange value. He had to determine the market value, and when, as in this case, no market existed, it was his task (a difficult one) so far as possible to construct a normal market and determine the value by taking into account all the factors which would exist in an actual normal market (one not disturbed by factors similar to either boom or depression and where vendors, ready but not too anxious to sell, meet with purchasers ready and able to purchase). A perusal of his report indicated that he had exhaustively studied the evidence and carefully examined the factors and had reached a reasonable conclusion, which should be sustained. (Opinion expressed that the Commissioner was in error in considering "fixtures", which the lessees had right to remove at end of the term, to mean furnishings; which error would lead to placing a slightly higher valuation on the building; but, as there was no evidence as to what the fixtures were, or were worth, and as so much of the valuations were and must be approximations, the error did not justify any revision).

APPEAL by the Attorney General of Alberta from the judgment of the Supreme Court of Alberta, Appellate Division (1), rendered upon an appeal to it from the report of a Commissioner appointed under s. 28 of *The Succession Duty Act*, R.S.A. 1942, c. 57, to determine the value of certain property in Edmonton, Alberta, for succession duty purposes. Under said s. 28 (subss. 8 and 9, and amendment in 1944, c. 29), the Commissioner's report, on being filed in the Supreme Court of Alberta, became a judgment of that Court, and subject to appeal. The Commissioner determined the value of the property at $108,300. On appeal, taken by the present respon-

(1) [1944] 1 W.W.R. 385; [1944] 2 D.L.R. 189.

dent, the administrator with will annexed of the estate in question in Alberta, the Appellate Division fixed the value at $65,000 (Harvey C.J.A. and Lunney J.A., dissenting, would have dismissed the appeal). From that judgment the Attorney General of Alberta appealed to this Court (having obtained leave to do so from the Appellate Division, Alta., "in so far as special leave to appeal is necessary and this Court has jurisdiction to grant the order"). (A motion to quash the appeal to this Court for want of jurisdiction was dismissed by a previous judgment in this Court (1)).

H. J. Wilson K.C. for the appellant.

C. Robinson for the respondent.

(*S. Quigg K.C.* held watching brief for the Taxation Division of the Department of National Revenue).

The judgment of the Chief Justice and Rand J. was delivered by

THE CHIEF JUSTICE—Arthur Gill Withycombe, of Bournemouth, England, died on or about the 23rd of January, 1942. Probate of his will was granted to Lloyds Bank, Limited, of Salisbury, on the 18th of May, 1942.

At the time of his death the deceased owned property in Edmonton, Alberta, and on the 28th of January, 1943, letters of administration with the will annexed were granted by the District Court of Northern Alberta, to the Royal Trust Company, attorney for Lloyds Bank, Limited.

Inventory "A" to the succession duty affidavit filed by the Royal Trust Company with its application for letters of administration with the will, disclosed some real property situate in Edmonton and a value of $61,300 was placed thereon by the Royal Trust Company.

A question having arisen as to the value of such real property, the Attorney General of Alberta appointed Mr. G. M. Blackstock, K.C., as a Commissioner to determine the value of this property. The appointment was made pursuant to the provisions of section 28 of *The Succession Duty Act* (R.S.A. 1942, c. 57).

(1) [1944] S.C.R. 243.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA v. ROYAL TRUST COMPANY

Rinfret C.J.

Mr. Blackstock, after hearing the evidence, made a report to the Attorney General, in which he determined the value of the real estate to be $108,300. His report was filed with the Supreme Court of Alberta and, under *The Succession Duty Act,* section 28, subsections 8 and 9, on being so filed the report of the Commissioner became a judgment of the said Supreme Court, subject to appeal as of any judgment.

An appeal was taken to the Court of Appeal of Alberta, which reversed, by a majority, the decision of the Commissioner and fixed the value of the real estate at $65,000, the Chief Justice and Mr. Justice Lunney dissenting.

Following this judgment, the Attorney General of Alberta applied to the Court of Appeal for an order for special leave to appeal to the Supreme Court of Canada, and also applied to dispense with security for costs on the ground that this is an appeal by or on behalf of the Crown.

On the 16th day of March, 1944, the Court of Appeal of Alberta ordered that, in so far as special leave was necessary and that Court had jurisdiction to grant the order, the special leave prayed for should be granted and the Attorney General should be allowed to lodge his appeal without security, pursuant to section 70, subsection 2, of the *Supreme Court Act* (ch. 35, R.S.C. 1927).

The respondent moved to quash, but his motion was dismissed (1), and this Court then heard the appeal on the merits.

As would be expected, the case turns on a question of fact: whether the special Commissioner correctly appreciated the value of the property disclosed in the inventory, within the meaning of subs. 7 of sec. 28 of the Act.

The Commissioner, in the present case, made an elaborate report, going minutely into the details and circumstances and weighing very conscientiously the evidence adduced before him.

It appears that by lease dated the 8th of June, 1918, the deceased granted this property to Allen Brothers for a term of thirty-five years from the 2nd day of November, 1918, the principal material terms of the lease being:—

(1) [1944] S.C.R. 243.

The rents reserved were:

	per anuum
(1) from 2nd Nov. 1918 to 1st Nov. 1923....	$ 5,625.00
(2) from 2nd Nov. 1923 to 1st Nov. 1928....	6,562.50
(3) from 2nd Nov. 1928 to 1st Nov. 1933....	7,500.00
(4) from 2nd Nov. 1933 to 1st Nov. 1938....	8,437.50
(5) from 2nd Nov. 1938 to 1st Nov. 1943....	9,375.00
(6) from 2nd Nov. 1943 to 1st Nov. 1948....	10,312.50
(7) from 2nd Nov. 1948 to 1st Nov. 1953....	11,250.00

It will be noted that the total rent payable under the lease for the whole term of thirty-five years is $295,312.50, representing an average annual rental of $8,438 per annum.

The lessees agreed to erect a theatre building on the property at an approximate cost of $48,000 and thereafter to furnish the same at an approximate cost of $20,000. They had to insure the property against loss by fire and to pay the premiums therefor; and, at the expiration of the term, the lessees had the right to remove their fixtures, repairing any damage caused by such removal. They were to keep the building in repair.

A special clause is to the effect that, if any assignee agrees to assume liability under the lease, the lessees shall be discharged of all liability in respect of the lease, "save and except such liability as is assumed by them in connection therewith under an indenture bearing even date herewith, and made between the Lessor of the one part and the Lessees of the other part." The indenture was not produced in the record and we have no knowledge of its provisions.

The lease was assigned to Famous Players Canadian Corporation, Limited, and this company is now the holder of a leasehold title.

A theatre building was erected in accordance with the terms of the lease and in 1928 alterations were made at a cost of approximately $128,000, and again in 1939 alterations were made at a cost from $80,000 to $90,000.

It is common ground that the rent had been paid regularly up until the death of Mr. Withycombe.

The property is assessed by the City at $85,750 for the land and $100,000 (full value) for the building, making a total assessed value of $185,750.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

The Commissioner stated that, in order to determine the fair value of the property as at the date of death of Mr. Withycombe, he had to deal with the land and the buildings separately, as different considerations applied to each of them.

He also stated that the usual rate for physical depreciation was not the proper rate to apply to a building of this type for the purposes of his enquiry and under the conditions there present, since alterations had been made twice in the past fifteen years at a total cost of approximately $200,000, indicating a high degree of obsolescence in theatre buildings.

He considered that, in view of the original cost of $48,000 and the amount expended in the intervening years, the 1939 City assessment of $100,000 for the building appeared to him to be fair and reasonable and could be adopted as a starting point.

He referred to the evidence of one of the witnesses, Mr. Teasdale, who used the cube method with a 30c. factor, and who came to the conclusion that the replacement value was $100,674. The Commissioner said that, although he did not consider that the cube method could be scientifically accurate, it confirmed his opinion that $100,000 was fair and reasonable. His view was that the combined depreciation and obsolescence factor should not be less than four per cent. per annum and should be applied from the year 1939, when the last assessment was made.

Using that factor, he thought the value of the building in 1953, when the lease expires, would be $40,000, and, on the basis of eight per cent., he placed the present worth of the building to the estate at $15,884.

In determining the land value, he used the capitalization of revenue method, which, as appears from the evidence, was also used by all the witnesses. However, he disregarded the different factors used by them in arriving at their final figures, stating that, when revenue is definitely known or can be predicted with reasonable accuracy, capitalization is considered to be a preferred method.

He remarked that of the witnesses heard, Mr. Teasdale used six per cent. as his interest factor; Mr. Lloyd used eight per cent., and Mr. Watson used twelve per cent.

Both Mr. Lloyd and Mr. Teasdale were heard for the Attorney General and Mr. Watson for the Withycombe estate. He then stated that, in dealing with a property of this class, he considered that six per cent was too conservative, but that twelve per cent. was too generous, and that the proper factor in the circumstances was eight per cent.

He then goes on to say that the term of years unexpired at the date of death was eleven years and nine months; but that the lease was assignable without leave and the lessee can be discharged of liability thereunder, which imports some element of hazard, a hazard which might very well be increased if a new theatre should be built on the adjoining site—of which contingency some evidence was adduced before the Commissioner. He provided for this and all other contingencies by allowing a discount of thirty per cent., which, in his opinion, was ample.

The total rent payable from the date of death to the expiry of the lease is $124,218.75, yielding an average annual rent of $10,560. This amount, capitalized at eight per cent., gives a valuation of $132,000 and, after applying the discount aforesaid, leaves a net value of $92,400.

No evidence was given before the Commissioner as to any available present market; but, the property being a productive one, there were some known proven factors which the Commissioner could take as a guide and, having arrived at a basic value of $40,000 for the building, after applying what he thought a generous depreciation and obsolescence factor by taking the present worth of that sum, and by allowing a liberal discount of thirty per cent. on the capitalized value of the future rents, he felt that he had applied the prudent investor rule in arriving at his determination of the value of the property, which he determined at the sum of $108,300.

To reach that conclusion he relied on certain principles, accepted and applied and in particular in *Pearce* v. *City of Calgary* (1), which case concerned the assessment for taxation of subdivided land on the outskirts of the City of Calgary; in *Bishop of Victoria* v. *City of Victoria* (2), and in *Forman and Fowkes* v. *Minister of Finance* (3).

(1) (1915) 9 W.W.R. 668.
(2) [1933] 3 W.W.R. 332.
(3) [1937] 2 W.W.R. 428.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

The Supreme Court of Alberta (Appellate Division), Mr. Justices Ford, Ewing and Howson forming the majority, allowed the appeal and fixed the value of the property at $65,000, with costs of the appeal against the Attorney General. Ford J.A. was of the opinion that the learned Commissioner had, throughout (what he called) "his carefully reasoned judgment", used the wrong "method of approach" to the problem before him; that he had applied inaccurately the principle by which, in England, compensation to the owner of land is determined when it is compulsorily taken from him under the authority of an expropriation Act, rather than the standard which must be applied in fixing the value of land for purposes of succession duty. In the former, he said, the value of the land is the value of the land to the owner, while, in the latter, the value "must necessarily be the price which it will command in the open market"; the price it will bring "when opposed to the test of competition"; the "exchange value". He referred to *Pearce* v. *City of Calgary, supra; Grierson* v. *City of Edmonton* (1); *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (2); *Pastoral Finance Ass'n. Ltd.* v. *The Minister* (3).

In his opinion, the Commissioner had paid too much attention to the revenue anticipated to be derived from the lease; and these prospective profits could only be considered in so far as they furnish material for estimating what was the real value of the land to the estate, which, in his view, was a very different thing from saying that the capitalized value of this prospective revenue was the true value, even to the estate.

He expressed the view that the evidence for the estate showed there was a market for the Jasper Avenue property (where the present one is situated) and it was this value that it was the Commissioner's duty to find.

Further, Ford J.A. agreed with Ewing J.A. that the judgment of the Commissioner was not to be treated as the award of an arbitrator and that the municipal assessment was not a true starting point as to the land.

Ewing J.A. observed that there was no evidence that the Commissioner inspected the property in question here, nor did he base his findings in any way on any inspec-

(1) (1917) 58 Can. S.C.R. 13.
(2) [1935] S.C.R. 304.
(3) [1914] A.C. 1083.

tion made by him. He referred to what was said by Sir Lyman Duff, then Chief Justice of Canada, in *Canadian Northern Railway Co.* v. *Billings* (1), and in *Montreal Island Power Co.* v. *The Town of Laval des Rapides, supra,* where the Chief Justice quoted with approval a passage from the judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (2).

He remarked that the Commissioner did not place any reliance on the sales of property in the neighbourhood, as disclosed in the evidence of Mr. Bagley (the other witness heard on behalf of the estate), because, in the Commissioner's opinion, it was difficult to find any basis upon which a proper comparison could be made with the Capitol Theatre (the property with which we are now concerned).

Ewing J.A. thought the capitalization of revenue method used by the learned Commissioner was wrong, and that the proper method was to estimate, in the words of Lord MacLaren, quoted by Chief Justice Duff, in *Lord Advocate* v. *Earl of Home supra*:—"only the price which the property will bring when exposed to competition."

He then criticized the use made by the Commissioner of the municipal assessment as a very unsatisfactory basis of value; and, although there was no evidence to that effect, he thought it was notorious that the municipal assessment often bears little relation to the value of the property.

Then he went on to say that the operation of a theatre is a highly specialized business and that, in his view, the Commissioner had proceeded on a wrong principle in the meaning which he attributed to the term "fixtures".

As a result of his consideration of the case, he thought the value of the property could not be determined by a mere mathematical calculation based upon existing rentals; and, again referring to the evidence of Mr. Bagley, who spoke of a well-built three-storey brick building across the street from the property in question and which was sold in 1939 for $40,000, Ewing J.A. referred to the opinion expressed by Mr. Bagley that the property thus sold was more valuable than the property now in question.

(1) (1916) 19 C.R.C. 193.

(2) (1891) 28 Sc. L.R. 289, at 293.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

Then he pointed to what he called the "infirmities of the lease" and said that, in his view, whenever it would be in the interests of Famous Players Corporation to abandon the lease, the lease would be abandoned. If that should happen, or when the lease expired, the property would revert in value to something approximating the neighbouring property which, with buildings, was stated to have been recently sold for $17,000 (so, making the necessary adjustment for additional frontage, this would be about $25,500).

In conclusion, he expressed the view that the very large rentals payable under the lease, to which the taxes paid by the lessee ought to be added, led him to think that Mr. Bagley had not made sufficient allowance for the value of the lease. The amount to be allowed was highly speculative, according to him, just as the deduction of thirty per cent. made by the Commissioner in respect of hazards and contingencies was highly speculative, and he would place the total value of the property at the date of the decease at $65,000.

Howson J.A. agreed, as already mentioned, with Ford J.A. and Ewing J.A.

As for the dissenting judgments. The Chief Justice thought the most cogent evidence that could be produced was the revenue producing quality of the property as evidenced by the terms of the lease.

He pointed to the fact that the Administrator had a valuation made on which he based the amount of $61,300 as the valuation for the purpose of administration and succession duty, but that in doing so the valuator who gave this valuation, and who testified before the Commissioner, had considered only the past revenue and disregarded the prospective revenue and considered the building of no value.

Then the only other witness for the Administrator, who put the value of $50,000, disregarded the lease and the revenue from it entirely.

On the other hand, the witnesses called by the Attorney General arrived at their conclusion of $125,000 and $162,411 by, what the learned Chief Justice considered, a somewhat involved capitalization of the rentals for the

whole term and the present worth of the building which would become the property of the estate at the expiration of the term.

It was not, said the Chief Justice, the Court's duty to ascertain the real value but merely to decide whether it could be said that the Commissioner was clearly wrong in the conclusion he reached. It seemed to him quite impossible to hold that he was clearly wrong, as he had ample evidence to support a conclusion of even a higher amount, since the risks that were taken into account by the Commissioner, and for which he made certain allowances, appeared to have been much magnified. It was not on remote possibilities but on reasonable probabilities that one should make one's calculations for the future. The fact that the lease could be assigned and the lessees could free themselves from further liability might, in some cases, depreciate the value of the lease, but, in the premises, Famous Players, who took over the lease from the original lessees, has spent nearly $300,000 in building and equipment and has paid the rent regularly. The other fact, that another moving picture concern was contemplating building a theatre next door and this event would depreciate the value of the Withycombe property, seemed to him impossible to understand. If the other concern proposed to build alongside the present theatre, it must be because it thought it a desirable site, even next door to an established theatre, and he failed to see why it should make the present one less desirable. In the opinion of the Chief Justice, there was no ground for interfering with the judgment of the Commissioner.

As for Mr. Justice Lunney, he was of opinion that the valuation arrived at by the Commissioner was a fair and reasonable one, and he agreed with his findings.

I have arrived at the conclusion that even if the reasons given by the Commissioner were not altogether to be commended, yet the amount at which he estimated the value of the property for succession duty purposes ought to be confirmed. Perhaps what was called the "exchange value" may be the true basis of the valuation which must be arrived at in a case like the present one, but this can only be so when such "exchange value" can be ascertained, and in this case it could not be obtained.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

The Commissioner had to value this land and the building *qua* theatre as it was at the time of the death of Mr. Withycombe. He had to take the conditions as he found them as of that date. The lease had several years to run and there was no justification in assuming that the present lessees were going to assign it to a straw lessee. Indeed, that might well be held as a fraud upon the lessor.

The method adopted by the Commissioner was equally adopted by the witnesses heard in this case and, among them, Mr. Watson, the witness for the respondent; and, while the majority of the Appellate Division maintained the appeal on the ground that capitalization was a wrong method, yet it was the method put forward by the respondent himself in the evidence adduced before the Commissioner.

Even taking into consideration the rental at an average of $7,036 per annum, as Watson did, and comparing it with the true average of $10,000 between the date of death and the expiration of the lease, this would give a total of $88,000, to which $15,000 should be added for the value of the reversion, bringing it to a total of $103,000.

The rentals were net, since the lessees paid the taxes and insurance premiums over and above them. They undoubtedly would represent much more than a capital of $65,000.

Large amounts were expended on alterations and improvements since the present lessees have been in possession, and, even if you conceded that some of these amounts may have been invested in an unsound way, they certainly cannot be altogether disregarded and a large portion of them ought to be taken into consideration.

The "exchange value" referred to what the vendor would get in the open market, but there was no real evidence of any such value. Whatever there was of it offered in testimony was that of Bagley, who himself stated, in the course of his evidence, that, although he took into consideration for the purposes of his valuation his knowledge of sale values of property on Jasper Avenue, the only value he placed upon the lease was a "gambler's value", and that he had not attempted to work out any actual monetary value of the lease—that he "did not go into it that far".

There was no evidence before the Commissioner that the locality was being abandoned, or that there was any likelihood that the lease would be given up; and the witnesses heard on behalf of the estate seemed to have assumed either such abandonment, or the obligation for the lessor, after reversion of the property, to create out of their building a new utility.

There was no evidence that the Administrator ever offered the property for sale. As to this point, in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1) *supra,* at p. 306, Chief Justice Duff stated:—

> Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

The *Montreal Island Power* case, of course, was a case of the assessment of a property for taxation purposes; and the majority of the Appellate Division in the present case alluded to what they said was "notorious", that municipal valuation was rarely to be relied upon as representing the fair or true value of a property.

In the case at bar there was no evidence that the property in question had ever been offered for sale and the Commissioner had to rely on the other indicia, referred to by Chief Justice Duff in the passage of his judgment above quoted. He very properly took into consideration what seems to me the most important indicia, to wit: the revenue producing qualities of the property. An examination of the evidence of Mr. Bagley shows that he entirely disregarded that factor (but his method of valuation appears to have been accepted by all the members of the Appellate Division who delivered the majority judgment), thus failing to adequately take into account the revenue producing quality of the property and to give consideration to the value of the lease in effect at the date of the death of Mr. Withycombe.

(1) [1935] S.C.R. 304.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Rinfret C.J.

With due respect, it seems to me that the majority of the Appellate Division were in error in holding that the lease was of very little value because it could be assigned, or because, according to them, the revenue resulted from a "highly specialized business and is subject to a dangerous flaw."

We would agree with the learned Chief Justice of the Appellate Division where he says that the risks spoken of appeared to have been much magnified and that the Court should not enter into the realm of speculation as to what future action may be taken by the lessee.

In Wooley, "Death Duties", 4th Edit., the author, in giving illustrations of the method of valuation used by the Commissioners in England, states at page 79:—

> In the case of reversions to houses, let at a ground rent on the usual terms, with a long period of the term unexpired, the valuation is simply a matter of arithmetic.

See also *Ashby's Cobham Brewery Company* (1), at pp. 761 *et seq.*, where the valuation of licensed premises is based on the capitalization of the annual revenue.

Cozens-Hardy, M.R., in *Inland Revenue Commissioners* v. *Earl Fitzwilliam* (2), a judgment of the Court of Appeal of England, took rental value as a method of reaching the true value of a property and as a test under the Finance Act. The judgment in that case was that in estimating the total value of land for the purpose of assessing the reversion duty payable under sec. 13 of the Finance Act, on the determination of a lease, the fact that premises on the land are licensed for the sale of intoxicating liquor, and that the value of the land is thereby enhanced, is an element to be taken into consideration. See also Webb, "Valuation of Real Property", p. 13, and Dymond on "Death Duties", 9th Edit., p. 207.

It may be further stated that this basis of valuation of land, subject to a ground lease, appears to have been generally accepted by a number of American courts.

As already pointed out, Mr. Watson himself, produced as a witness on behalf of the estate, capitalized the average rent payable under the lease, but he did so only from the

(1) [1906] 2 K.B. 754. (2) [1913] 2 K.B. 593.

commencement of the lease up to the date of death, and for no discernible reason failed to take into account the future revenue to be received under the lease.

Now, if a finding of a Commissioner as to valuation can be supported by evidence and it cannot be shown that he acted on a wrong principle of law, as to my mind is the case here, his findings ought not to have been disturbed by the Appellate Division. *Canadian Northern Railway Co.* v. *Billings* (1), *supra; In re Canadian National Railways Co. and Terwindt* (2); *Montreal Island Power Co.* v. *Town of Laval des Rapides* (3), *supra; Pearce* v. *The City of Calgary* (4) *supra,* where the Chief Justice of this Court stated:—

> In these circumstances, I am satisfied that Judge Carpenter, sitting in appeal from the Court of Revision, with his wide local knowledge and experience in ascertaining the prices of real estate, was in much better position to judge of the value of the property than I can assume to be, and I adopt his conclusion.

For my part, I fail to see why the capitalization method used by the Commissioner in this case should be held a wrong principle, in the circumstances with which the learned Commissioner was faced as a result of the evidence given before him; and I am unable to agree with the majority of the Appellate Division that there was any legal ground on which the assessment and judgment of the Commissioner could be interfered with. There being no principle of law upon which the Commissioner may be stated to have acted wrongly, the Court of Appeal should not have interfered in the amount at which he placed the value of the property. To my mind, the Commissioner acted upon proper principles, he did not misdirect himself on any matter of law, and, the amount arrived at being supported by the evidence, the Appellate Division should not have disturbed his finding (*The King* v. *Elgin Realty Co. Ltd* (5)).

For these reasons, I would allow the appeal and restore the judgment resulting from the filing of the report of Commissioner Blackstock (*The Succession Duty Act,* cap. 57, R.S. Alberta, 1942, subs. 8 of sec. 28), with costs throughout.

(1) (1916) 19 C.R.C. 193.
(2) [1930] 3 W.W.R. 345.
(3) [1935] S.C.R. 304.
(4) (1915) 9 W.W.R. 668.
(5) [1943] S.C.R. 49.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Hudson J.

The judgment of Hudson and Taschereau JJ. was delivered by

HUDSON J.—The Court here is called on to decide the value which should be placed for succession duty purposes on certain real property in the City of Edmonton.

The property was valued by the respondents in their application for letters of administration at $61,300. This valuation was not acceptable to the Minister in charge of the administration of *The Succession Duty Act* (R.S. Alberta, 1942, cap. 57) and under section 28 of that Act he appointed Mr. G. M. Blackstock, K.C., as a Commissioner to determine the value.

The Commissioner, as required by the Act, heard the parties and their witnesses and then gave a carefully considered judgment, finding the value to be $108,300. From this decision the respondent company appealed to the Court of Appeal and that Court, by a majority of three to two, reduced the amount to $65,000.

The property in question is situate on the south side of Jasper Avenue, a short distance easterly from the intersection of the two principal business streets in the city. It has a frontage of seventy-five feet, and a depth of one hundred and fifty feet. It is wholly covered by a theatre building and two stores situate one on each side of the main entrance.

The property is assessed by the City at $85,750 for the land, and $100,000 (full value) for the building, making a total assessed value of $185,750.

No evidence was given of the original price paid for the land by the late Mr. Withycombe, nor was there evidence of any offer to purchase or sell the land. The first dealing of which we are informed is a lease made by Mr. Withycombe to Allen Brothers, Theatre Proprietors, in 1918. From the terms of this lease it would appear that the property possessed special advantages as a site for a theatre or similar place of entertainment because the lease provided for the demolition or removal of the buildings then on the property and the erection of a new building at the expense of the lessees, to cost $48,000. It was for a term of thirty-five years and the initial rental was $5,625 per annum payable monthly, to be increased every five years by an additional annual sum of

$937.50, making the rental for the final five years of the term $11,250 per annum. The rental was to be paid free from all taxes, Dominion, Provincial and municipal, and at the end of the term the property was to be surrendered to the lessor in good repair.

That the faith and judgment of the parties was well founded appears from the fact that the original building at the contemplated cost of $48,000 was duly erected, that in 1928 alterations and improvements were made by the lessees at a cost of $128,000, and that again in 1939 further alterations were made at an additional cost of from $80,000 to $90,000.

The lease was assigned by the original lessee to Famous Players Corporation Limited who now hold the leasehold title. Meanwhile, throughout the years the terms of the lease were carried out by the lessees or their assignees and the rental paid according to the covenant.

Apart from revenue under the terms of the lease the relevant factual evidence of value is meagre. Evidence was given as to the sale of certain properties in the general neighbourhood, but the Commissioner was of the opinion that these did not provide any fair basis of comparison. Opinion evidence was given by witnesses, both for the Attorney General and for the respondent. The learned Commissioner who heard these witnesses cast no reflection upon the integrity of any one of them but at the same time does not accept the conclusions of any.

The principles upon which value should be established in assessment cases cannot be better stated, I think, than was done by Sir Lyman Duff, then Chief Justice, in the case of *Montreal Island Power Company* v. *The Town of Laval des Rapides* (1). At page 305 he quotes from a judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (2):

> Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business comunication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.

(1) [1935] S.C.R. 304.

(2) (1891) 28 Sc. L.R. 289, at 293.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Hudson J.

Continuing, Duff C.J. says:

> When used for the purpose of defining the valuation of property for taxation purposes, the courts have, in this country, and, generally speaking, on this continent, accepted this view of the term "value".

He then proceeds at page 306:

> Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

It appears to me, then, that the capital value must in large measure be determined by reference to revenue-producing capacity of the property. Since the lease was made the property has brought the owners a net annual rental steadily increasing from $5,625 per annum for the first five years to $9,375 per year current at the time of the late Mr. Withycombe's death, and to be increased thereafter to a sum of $11,250 during the final five years. During the term the lessees invested in buildings on the property about $250,000. These buildings have been kept insured and will become the property of the owners at the termination of the lease. There is no suggestion that the land itself has depreciated in value, nor that it has become less attractive as a site for a theatre or other place of entertainment. To minimize the value attributable to the lease, it was pointed out on behalf of the respondent that the term expired in about eleven years from Mr. Withycombe's death and that there was a possibility of the lessees assigning to a straw man before that date and thus evading personal responsibility for the rent; that depreciation and obsolescence were exceptionally high in buildings of this character and that there was a threat of serious competition by another strong motion picture company.

All these factors were taken into account by the Commissioner and what I think to be a generous allowance made in respect of same. The majority of the Court of Appeal, in my opinion and with respect, seemed to have placed far too much weight on the danger of competition. The fact that a new and what was said to be a very strong

company should choose to take a ninety-nine year lease on the adjoining property is confirmatory evidence of the value of the site for theatre purposes, and the tendency of places of entertainment to draw together as cities grow larger is common knowledge. The proximity of another good theatre might well provide a stabilizing factor for the respondent's property as the years go by.

I agree with the finding of the learned Commissioner and would allow the appeal with costs.

ESTEY J.—The valuation for succession duty purposes of a theatre property in the City of Edmonton described as Lot 4 and the west half of Lot 5 in River Lot 6, Plan "F", in the City of Edmonton, constitutes the problem of these proceedings. Mr. G. M. Blackstock, K.C., appointed Commissioner under the provisions of sec. 28 of *The Succession Duty Act* of the Province of Alberta, determined the value of this property after hearing a number of witnesses, at $108,300. An appeal to the Appellate Court of Alberta resulted in the majority of the learned judges of that Court reducing this valuation to $65,000, while the minority supported the finding of the Commissioner.

By an agreement in writing dated June 8th, 1918, the late Mr. A. G. Withycombe as owner leased this property to Allen Brothers for a period of thirty-five years from the 2nd day of November, 1918. This lease provided for an increase in rent at the conclusion of each five-year period. The first five years the rent was fixed at the rate of $5,625 per annum, and in the last five years at the rate of $11,250 per annum; a total rent provided for thirty-five years of $295,312.50, and a balance to be paid from the date of Mr. Withycombe's death of approximately $123,400.

Under the terms of the lease the lessees agreed to erect a theatre building on the property at a cost of about $48,000 and to furnish same at an approximate cost of $20,000. The lessees undertook to keep the building in repair, and at the conclusion of the term to remove their fixtures and repair any damage caused by such removal. It was a term of the lease that the lessees might assign the lease at any time and upon doing so they were re-

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Estey J.

lieved from further liability thereunder. The lessees made substantial alterations in the building in 1928 at a cost approximating $128,000, and again in 1939 at a cost approximating $80,000, or a total expenditure upon the building in excess of $275,000.

At the time of Mr. Withycombe's death, January 23rd, 1942, the lessees' interest was held by the Famous Players Canadian Corporation Limited, and all the covenants and conditions of the lease had been performed as required as of that date. The premises had been equipped and were being used as a moving picture theatre and the lessees had given no intimation of any contemplated change with respect to this use.

The Commissioner, after reviewing the evidence, in which there was a great divergence of views, and applying certain recognized tests, fixed the value of the building at $100,000. He then took into account the nature and purpose of the building, the substantial alterations that had been made from time to time, and after allowing a combined depreciation and obsolescence of four per cent. per annum, fixed the value of the building to the estate at the date of death at $15,884.

The value of the land the Commissioner computed at the sum of $132,000 by capitalizing the revenue from the lease, using an eight per cent factor. He then states as follows:

> The term of years unexpired at the date of death was eleven years and nine months; the lease is assignable without leave and the lessee can be discharged of liability thereunder, which imports some element of hazard, a hazard which might very well be increased if a new theatre should be built upon the adjoining site. To provide for these and all other contingencies, a discount should be allowed, and in my opinion, thirty per cent is ample.

Allowing for this discount, he determined the value of the land to the estate at $92,400, or a total value of land and building of $108,284.

It is suggested that in arriving at this valuation the Commissioner has acted upon a wrong principle, that he has not determined the market or exchange value but rather a value, as that term is used in expropriation proceedings. In such proceedings

> The person whose property is taken is entitled to be compensated for the loss he has suffered by being deprived of his land compulsorily; the value of the land for the purpose of ascertaining such compensation, is the value of the land to him.

Duff, C.J., in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1). It seems to me from a perusal of his report and particularly the quotations which he adopts from the cases he cites, as well as his method of computation, that the Commissioner appreciated that he had to determine the market or exchange value. In his own words, the Commissioner states: "I feel that I have applied the prudent investor rule in arriving at my determination of the value of this property." I am therefore of the opinion, with deference to those of the learned judges who hold to the contrary, that the Commissioner has not adopted a wrong principle in arriving at his valuation.

The authorities are clear that under such statutory provision as we are here concerned with, value means market value as that term is properly understood.

> The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. * * * The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

Mignault J., in *Untermyer Estate* v. *Attorney General for British Columbia* (2). The Commissioner had a difficult task, but an examination of the evidence and his report will indicate how well he has succeeded in the performance of that task.

The evidence with respect to value was most contradictory. Four witnesses were called. Their values were as follows: $50,000; $61,300; $131,396.40; and $162,411. The two factors that appeared to present the greatest difficulties were the provisions that the lessees might assign the lease at any time and thereby relieve themselves of liability, and that the building would become the property of the estate at the expiration of the lease in 1953.

This thirty-five year lease had over eleven years of the term left and if it continued as to the date of death it would return a revenue of about $123,400. The witness who fixed the lowest value stated that this lease had "just a gambler's value." It is true that before actually fixing this valuation he does allow $10,000 for the lease, an

(1) [1935] S.C.R. 304, at 307. (2) [1929] S.C.R. 84, at 91.

1945

In re WITHYCOMBE ESTATE.

ATTORNEY GENERAL OF ALBERTA *v.* ROYAL TRUST COMPANY

Estey J.

amount less than it would return in any one of the last ten years of its existence. The witness who valued the property at $61,300 stated that a purchaser "is not going to consider that lease for one moment."

Then, with respect to the building constructed and twice altered by the lessees at a total cost in excess of $275,000, and which will become the property of the estate in 1953, these two witnesses, because in their opinion the building cannot be utilized for any other purpose than a theatre, ignore the possibility of it being again so leased, and treat the building as of no value if, in fact, not a liability to the estate at the expiration of the lease. These witnesses entirely ignore any possibility favourable to the estate, notwithstanding their own evidence that this is a good theatre section in the City of Edmonton, and that the possibilities of a competing theatre, even granting this can be as disastrous to the theatre in question as they suggest, would not be realized until the competing theatre was constructed, and this would not be permitted until the war regulations are relaxed or repealed. It seems to me that they have construed the contingencies too severely against the estate and completely ignored any possibilities such as this building being again leased or sold for theatre purposes.

It is probably true that the two witnesses who have valued the property at $131,396.40 and $162,411 were too optimistic in their values, and these were not adopted. It is not suggested that the Commissioner has overlooked any factor that ought properly to have been taken into account in determining the value of the property. He had to determine the market value and when, as in this case, no market exists, it is the task of the Commissioner, so far as he can, to construct a normal market and to determine the value by taking into account all the factors which would exist in an actual normal market—a market which is not disturbed by factors similar to either boom or depression, and where vendors, ready but not too anxious to sell, meet with purchasers ready and able to purchase. Such a task is often very difficult, and this case is no exception. A perusal of this report indicates that the Commissioner has exhaustively studied the evi-

dence and carefully examined the factors and has reached a reasonable conclusion, which, in my opinion, should be sustained.

The lease provided that at the expiration of the term the lessees have the right to remove their fixtures. In my opinion, the Commissioner was in error in considering the word "fixtures" to mean furnishings, and this error would lead him to place a slightly higher valuation upon the building than might otherwise be; but there is no evidence as to what the fixtures are nor what they are worth, and, having regard to the fact that so much of the valuations were and must be approximations, I do not think this error justifies a revision of the valuations as fixed by the Commissioner.

In my opinion, this appeal should be allowed with costs, and the judgment (see sec. 28, subs. 8, ch. 57, R.S.A. 1942) of the Commissioner restored.

Appeal allowed with costs.

Solicitor for the appellant: *H. J. Wilson.*

Solicitors for the respondent: *Newell, Lindsay, Emery & Ford.*