28, 1951

(13)

IN THE PRIVY COUNCIL.

Council Chamber,
Whitehall, S. W. 1.

Wednesday, 11th July, 1951.

Present:

LORD PORTER
LORD NORMAND
LORD OAKSEY
LORD REID
LORD ASQUITH.

ON APPEAL FROM THE SUPREME COURT OF CANADA

Between:

THE CITY OF MONTREAL

and

SUN LIFE ASSURANCE COMPANY OF CANADA

To Judicial Committee of Privy Council,
H.M. Patent Office, &c., &c.

MARTEN, MEREDITH & Co.,

Shorthand Writers,
11 New Court,
Carey Street, W.C.2
(Midland Circuit and Leeds Assizes)

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Between:

THE CITY OF MONTREAL (Appellant)

and

SUN LIFE ASSURANCE COMPANY OF CANADA. (Respondent)

(Transcript of the Shorthand Notes of Marten, Meredith & Co., 11, New Court, Carey Street, London, W.C.2).

MR. L.E. BEAULIEU, K.C., MR. HONORE PARENT, K.C., MR. R.N. SEGUIN, K.C. (of the Canadian Bar) and MR. FRANK GAHAN, instructed by Messrs. Blake & Redden, appeared for the Appellant.

MR. F.P. BRAIS, K.C., MR. HAZEN HANSARD, K.C., MR. R.D. TAYLOR, K.C. (of the Canadian Bar) and MR. G.D. SQUIBB, instructed by Messrs. Lawrence Jones & Co., appeared for the Respondent.

MR. A.M. WEST, K.C. (of the Canadian Bar) held a watching brief on behalf of an interested party.

THIRTEENTH DAY.

MR. BRAIS: My Lords, we were at page 1124, line 30, volume 5, if I may just re-state this short paragraph, because it is from there that Mr. Justice Casey leads on to his whole argument, because he leaves the seller at this moment when he says: "It may be that in the two cases immediately above referred to the 'willing seller -- willing buyer' definition of 'actual value' was confused with the method by which such value must be determined. If that be the meaning of the passages which I have quoted, I have nothing further to say. If however, the meaning be that one may use this yardstick only with respect to certain types of property, then I must disagree. For purposes of taxation 'actual value' can only have one meaning, and the soundness of this principle is in no way affected by the fact that in certain cases it may be

necessary to use a method of calculation different from that employed in others."

LORD PORTER: Your explanation of the cases which he is explaining in that way is by saying in those cases the only evidence offered was the evidence of replacement?

MR. BRAIS: Yes.

LORD PORTER: And, therefore, the cases are not authority for dealing with those matters in which there is more than one type of evidence?

MR. BRAIS: Precisely, and I did add to that only this, that the Manual itself warns the assessors and the public against misinterpreting the Canada Cement case, because, when it is read properly it is seen it cannot be anauthority, because there was nothing else to go on and because the owners of the building even refused to offer any other evidence and shifted the burden of proof to the City.

LORD ASQUITH: I am not quite sure how much authority you attribute to the Manual. Either the Manual reflects the law or it does not. If it does not, it is a waste of time.

MR. BRAIS: If it does not it is a waste of time. There are some good things in the Manual and in some passages it reflects the law. In other passages, where it harps on replacement value as to an extent of being a necessary ingredient instead of a useful ingredient, then I say it goes beyond the law; but I do say it was completely disregarded even as it stands by the assessors in preparing this assessment.

Then we find he says: "True, it may be more difficult to determine what the willing buyer will pay in a particular case than to justify the general rule that what he is prepared to offer for a property is that property's actual value." I have cited this paragraph at line 30 because the learned Judge leaves the seller there and takes him into account. He takes him as a willing seller not obliged to sell and then takes one to the other side of the picture which is more important: who is going to buy. The difficult question is who is going to buy when the willing seller we have established is willing to sell?

Then he applies himself to the most difficult part of the problem: Who is the buyer, because if you have a market, you want a buyer, because properties remain on the market for years and years and nothing happens. Who is the buyer? "True, it may be more difficult to determine what the willing buyer will pay in a particular case than to justify the general rule that what he is prepared to offer for a property is that property's actual value. In attacking the problem however, we find assistance in the 'Prudent Investor' theory which emerges from other decisions on this question". He is not alone and has not invented the prudent investor theory, because he quotes the case of Pearse v The City of Calgary, which my learned friends quoted, and quotes Mr. Justice Iddington on page 1125, where Mr. Justice Iddington says: "Confessedly there is no ready market in sight at the present moment. How can we then determine the fair actual value which has to be determined?"

LORD PORTER: We have had this.

MR. BRAIS: We have.

LORD PORTER: Beginning at line 28 it gives you your point.

MR. BRAIS: "I take it that the 'fair actual value' meant by the

statute quoted above is, when no present market is in sight and no such ordinary means available of determining thereby the value, what some such man would be likely to pay or agree to pay in way of investment for such lands."

The investment doctrine in this case was looked into very carefully by Mr. Surveyer who is an investment specialist, chairman of an investment company and Mr. Lobley and Mr. Simpson, who have gone very carefully into the jurisprudence on the "prudent investor' theory.

Then he takes exception to what the Board of Revision says there when they say at the bottom of the page: "There is no proof of the existence of such a willing buyer". You do not need that proof. It is the imaginary buyer and we have been told without a shadow of doubt not only have they suggested a buyer, but even potential buyers and certain persons who may be buyers.

Then I come to line 10 on page 1126.

LORD OAKSEY: There was proof, was there not, certainly of the possibility of willing buyers both by Mr. Lobley and other witnesses?

MR. BRAIS: There was proof by ~~xxxxxxx~~ Perrault, Lobley, Simpson and MacRosie.

LORD OAKSEY: Not necessarily prudent investors. They could easily imagine an imaginary market.

MR. BRAIS: Quite. I think I might say this. In contemplating the imaginary market they looked at the prudent investor looking at the future, looking to the present conditions and to the future. Lobley and Simpson were considering strictly on the basis prudent investor and MacRosie and others were considering it on possibly a slightly broader basis.

LORD OAKSEY: I thought Colonel Lobley said he could imagine several big companies in the United States who would be willing to buy the property not only as a prudent investor.

MR. BRAIS: When he stated the price they would pay for it it was predicated on the rental return of the building.

LORD OAKSEY: I did not remember he said anything about price. It was put to him in cross-examination, I think, that there was nobody who would buy it, and he said: Oh yes, I can easily imagine somebody who would buy it.

LORD PORTER: "I can imagine him".

MR. BRAIS: Yes. I respectfully submit it is not possible to segregate that answer from the totality of his evidence, where he said the judgment of the buyer would follow the rentals, what the return would be. If we take that question alone, he did not particularise further; but his evidence is solely on the basis and, the reproach made to him is that his evidence is solely on the basis, that any buyer would buy on the return of the property. He is asked: Do you know any buyers? and he says: Yes, I know people who might buy the property; but he does not suggest that buyer would go into the historical value to fix the value. He says there is one thing and that is the proper returns on the rents.

LORD OAKSEY: I do not think he excluded the possibility of some

company buying the property partly to let off some of it and partly to occupy the rest of it.

MR. BRAIS: Quite.

LORD PORTER: You are putting two propositions. These witnesses say an imaginary buyer quite easily, and the other says one buyer may be a prudent investor, but they do not confine themselves to prudent investor.

MR. BRAIS: No; but they say: When the other type of buyer considers the price he will pay me, that would be on the basis of the return of this property, both considering his occupancy and the occupancy of the rentals. That would be the position as I see it.

LORD OAKSEY: I only interrupt for the purpose of emphasising what seems the importance of showing there may be competitors of the Sun Life in the imaginary market who might want property for their own occupation as well as for the occupation of tenants. If, on the other hand, there had been no such evidence and there had been a possibility there were no other people who wanted it for their own occupation, except the Sun Life, then it would be true to say the Sun Life would probably give very little more if they were in the market than the other people who wanted it as the prudent investor.

MR. BRAIS. I deeply appreciate that observation by my Lord Oaksey, because it allows me to say that the whole evidence of the City of Montreal negatives fundamentally that there can ever be a buyer for a building. And that is why the Chairman of the Board of Revision says in a most startling fashion: I cannot possibly conceive a buyer of this building, from the beginning of this case, just like a church, city hall or Windsor Station. The whole evidence of the City is predicated on a complete denial of the possibility of anybody ever wanting to buy that building.

LORD ASQUITH: And that assumes nobody ever would?

MR. BRAIS: That assumes nobody ever would.

LORD ASQUITH: What I find so difficult is to find where to divest our minds of reality and imagine such a state of affairs, and imagine somebody is such an unwilling buyer actually. You have to assume he is a willing buyer. Supposing there are no willing buyers -- you have to assume there are some I should have thought -- in the case of a thing like a church, which has no exchange value at all and to which commercial considerations do not apply. Have you not to take a completely imaginary seller and a completely imaginary buyer and not stop to imagine whether the existing seller would sell or the existing buyer would buy?

MR. BRAIS: That is a very fundamental basis of the theory which was evolved for these very cases, where you have to come to an actual value, a correct value, and the courts have evolved this formula, which it is not for me to pass upon now. It is the formula applicable to all cases.

LORD PORTER: What one wants to get at, of course, is what is the principle that lies at the back of the whole thing. I do not know how far you put it when you are considering willing buyer and willing seller. You say: I assume a reasonable owner who is willing to sell, not the actual owner but a reasonable owner, and I assume a reasonable buyer who wants to buy, and get at it that way I have never seen that said anywhere and I do not know whether you put the proposition when you are considering willing buyer

and willing seller that you add the word "reasonable".

MR. BRAIS: My Lord, I may only say this, that the learned judge uses the term "reasonable man" as we come further to it, and that obviously is a necessary part of the criterian, the reasonable man.

LORD NORMAND: You cannot make much advance in an argument if you assume an unreasonable buyer and an unreasonable seller.

MR. BRAIS: I am so much in agreement that I was trying to see where I had failed to express it to this Court.

LORD REID: There is one part. Do you agree that in this imaginary market you must imagine the present owner as a potential buyer?

MR. BRAIS: I have said it was under some of the authorities ----

LORD PORTER: Never mind about some of the authorities. What is your proposition?

MR. BRAIS: I am prepared to say it cannot be the present owner, but somebody exactly in the position of the present owner. That is what is meant; so call him the present owner. It is difficult to imagine the present owner wanting to sell and then wanting to buy back, that is the position, to come to exactly the same result. You imagine somebody in exactly the same position as the present owner with the same requirements and so forth, who would be willing to buy, and I think that is what they have in mind when they say "the present owner", it is to be somebody with exactly the same requirements and the same desires and so forth.

LORD REID: Imagine somebody who likes granite cobbles and would be willing to pay for them.

MR. BRAIS: That would be the position. I find difficulty in considering a willing seller as being at the same time the buyer. There is a conflict there. Take the position of somebody in exactly the same situation. It is more easy to conceive that situation under the English system, where it operates under the rents, where the person is in there and he has built, and it is more easy to conceive of him and his requirements; but as between willing buyers and sellers the opposition is so complete. I think we have to extend it to somebody who had the same requirements and could derive the same benefits and so forth. In the English rating law, of course, and as we know has arisen ----

LORD ASQUITH: Is that Ryde on Rating?

MR. BRAIS: Yes.

LORD PORTER: Who edited that last volume?

MR. BRAIS: Michael Rowe, my Lord.

LORD PORTER: What edition is it?

MR. BRAIS: The 9th Edition, page 226, paragraph 217. I have to read the heading: "The actual occupier regarded as a possible tenant". There, of course, it is easier to confuse the two, but for the sale, as I say, I put myself in the same position, by taking somebody in the same position.

LORD ASQUITH: If you take a simpler case than that, my difficulty is to discover how far you are to think away the particular state of mind of the actual potential seller and actual potential buyer

Supposing you get somebody who has a house which has been in the family for five hundred years and would not in fact be a willing seller under any conditions, still that house may have an exchange value, may it not, and, for the purpose of ascertaining it, you have to imagine that he is willing to sell, and that he is not so inflamed with prejudice against doing so; he would never do it under any other conditions.

LORD OAKSEY: Also whether there is anybody else who would compete with him with similar ideas in mind.

MR. BRAIS: He is not a willing seller.

LORD ASQUITH: You have to think the facts away.

MR. BRAIS: Yes, you have to think the facts away, otherwise you would never get to it.

LORD ASQUITH: You would never get to your hypothetical market.

MR. BRAIS: The home of the average home owner. You are installed and there are children growing up there and nobody can buy your home; but, when the children are all married and you do not need ----

LORD OAKSEY: I do not appreciate the difficulty. Assume the person who had the house in his family for five hundred years, and assume there is a willing seller of that house and a willing buyer, and, among the willing buyers, the owner of the house is to be counted. If he is the only person with those ideas in mind, the love of the house, he will not give the price to which he would go in the imaginary market unless there are competitors?

MR. BRAIS: That is quite right.

LORD OAKSEY: If there are competitors with similar ideas in their minds. It may be it would be impossible there could be, because if he was in possession for five hundred years, there could not be anybody else in possession for five hundred years, and, therefore, there could not be a competitor with those ideas in mind; but, if there were, they have to be counted in the imaginary market?

LORD ASQUITH: I suppose you may have competitors without that state of mind who have no particular affection for the place on historical grounds and probably bid about a quarter of what the owner would; but then the owner would over-bid them by bidding a penny more.

LORD NORMAND: Usually you must not take into account association values in mind. If you have a house of Sir Walter Raleigh in mind, there would be a great many people prepared to pay the price, because it was the house of Sir Walter Raleigh; but for taxation you do not take that into account at all.

MR. BRAIS: When you start doing that you go outside the principles of association.

LORD NORMAND: Is it not a matter of economic fact? If you are going to take into account association values, you have to give up the problem.

LORD PORTER: I want to see all sides. I am not sure if you advertise a house lived in by Sir Walter Raleigh that the purchasers would not give a higher price in order to live in a house owned by Sir Walter Raleigh than they would for a house not lived in by Sir Walter Raleigh, and that in itself is not an association, because the

purchaser has not been living there for five hundred years, yet that asset might greatly increase the price of the house.

MR. BRAIS: It might increase the price, but this would be one of the cases of rare exception.

LORD PORTER: That is what we are discussing now.

LORD OAKSEY: In answer to what has been said by my Lord Normand, it is a matter of economic fact, because, if people will pay the price, that is economics, not sentiment.

MR. BRAIS: That is where we are warned against in particular cases using even the market price. There are cases where you are warned you cannot use the market price because the market price will not show the correct value for assessment purposes, and, when we come to the authorities, I will have to indicate that to the Court. The Sir Walter Raleigh project has nothing to do with the Sun Life building but I would say this on that proposition, that the extra value given to that property owing to the fact that it had belonged to Sir Walter Raleigh could not be taken into account in assessing that property.

LORD PORTER: Why not?

MR. BRAIS: Because it is extraneous. It is special.

LORD PORTER: Surely we are trying to find out what people would give and trying not to give an unfair value to that; but suppose a house had not been lived in by Sir Walter Raleigh and people would give £10,000 for it, and suppose because Sir Walter Raleigh had lived in it they would give £15,000, is not that as much a economic question as any other? Sentiment has got to come in in the sense that if sentiment influences price, sentiment must be considered?

LORD OAKSEY: Every architectural feature is a question of sentiment.

MR. BRAIS: As regards the Sir Walter Raleigh situation, the house, I can only say on the authroties I am warned against using market price in special and particular cases, and this may be one of them.

LORD ASQUITH: There is slight confusion between two things, is there not? There is no doubt whatever that the history of an object might objectively affect its value. Lord Wellington's boots, which are at Deal Castle, would sell for more than an ordinary person's, because they were the Duke of Wellington's; but it is a rather different question, the fact that a particular family had lived in a house for a very long time and attached a good deal of sentimental value to it for that reason, whether that should be taken into account at all. It is not the same question.

MR. BRAIS: It is not the same question. May I give an example which would interest your Lordships on this question which is in the Statutes of the Province of Quebec. During the war they were building an aluminium plant at Arvida, and it was so rare that they did not want to take aluminium or copper or bronze for bus-bars which carried this load of electricity. The United States Treasury at Fort Knox moved into the Province of Quebec billions of silver which they melted into bus-bars to carry the electricity. A statute was passed to say that could not be considered in the taxation of the plant of the aluminium company. That is rather interesting. Billions of silver was used for the bus-bars during the war. Everybody agreed it was not necessary, but the Canadian Government were asked to pass this statute to say that the silver would (a) be returned and (b) it would not be taxed. That is an

exaggerated example of what we have been trying to discuss.

LORD REID: Does it come to this? If it can be proved there are two people who for whatever reason would give up to a certain price, that price at least will be the valuation? If there is only one person who proposed to go up there, that is another matter.

LORD OAKSEY: If there is only one person, what that person gives may be considered to be a blackmailing price, but, if there are two, it is not the blackmailing price, it is the actual price?

MR. BRAIS: If there is only one, the word "blackmail" as it is in the Judgment, is used in the other sense. It is what the owner would be prepared to take before he would sell. That is what is called the blackmail argument.

LORD OAKSEY: Then you get the actual owner into the imaginary market and there is nobody competing with him, he can only be held up for the price he would be prepared to give by a dishonest auctioneer. That is the nature of the blackmail?

MR. BRAIS: Yes; we can only consider a reasonable man and a reasonable auctioneer, if we do go to an auctioneer. I am not applying my mind to that and I do not think this Court is either.

May I continue at page 1126? Mr. Justice Casey then applies his mind to what Mr. Justice MacKinnon had to say about the imaginary market, and your Lordships will recall the respondent could not agree with what Mr. Justice MacKinnon said. This is important at line 40. He refers to the learned Justice of the Superior Court and quotes Mr. Justice MacKinnon as follows: "In order to apply the willing buyer -- willing seller formula in valuing the Sun Life building one would have to imagine a hypothetical sale. This has been the main approach adopted by the Sun Life and its experts in making their valuations. They have based these on prices which would probably attract the prospective purchaser but have failed to consider the price which the Sun Life would have been willing to accept. The court cannot ignore the fact that the Sun Life carried this property at a price almost double the value given it by its own experts."

Then Mr. Justice Casey says this at page 1127: "I cannot agree that the willing seller formula is intended to cover merely one of the elements which must be considered in determining the property's value. This formula, as I understand it is designed to limit the discussion to a particular type of person who is willing to buy in a known market. It makes no attempt to specify or indicate what reasoning he will follow in arriving at the sum he is prepared to pay. It gives to us but two elements -- the person and the market. For the balance we must look elsewhere. Nor do I find it repugnant that in seeking an answer we must, to some extent at least, deal with the hypothetical, and close one's eyes to the fact that the company's buildings are not for sale, and perhaps could not be sold at any price." I submit respectfully to your Lordships that that is the jurisprudence and that is the governing principle of the law.

LORD ASQUITH: How do you fit into that formula? I should like to and could say exchange value is the only thing that matters; but how does one fit the church into that? I do not see how the churches fit into Mr. Justice Casey's general principles. It seems to me his principle does not cover them.

MR. BRAIS: It is suggested to me that churches are not ratable. Certainly they are not ratable in our Province; but, if they

were ratable, all I can say to that is clearly he has not applied his mind in speaking here. He is not considering churches at all.

LORD ASQUITH: I know, but he has to find a formula of universal application. He thinks he has found such a formula in the form of exchange value. The difficulty on that -- I leave churches aside -- are buildings which are taxable anyhow which have no exchange value, because they are never the subject of exchange and cannot be. How does he deal with them, or does he just leave them out?

LORD PORTER: He deals with them in the Minnesota case.

MR. BRAIS: He applies himself to a situation similar to the one he has before him in this case. I think that is his thinking and he may be a little laconic in not specifying the other examples.

LORD ASQUITH: We are coming to the Minnesota case.

MR. BRAIS: "Why should we, who daily project our 'bon pere de famille'" -- that is, as your Lordships know, a reasonable man.

LORD ASQUITH: De generis paterfamilias.

MR. BRAIS: He is the French Civil Law counterpart to the reasonable man in common law. "Why should we, who daily project our 'bon pere de famille' into hypothetical situations for the purpose of testing and accepting his reactions, refuse to repeat the process when we come to the valuation of real estate?" That is what I told my Lord Porter I thought I would be able to show had been considered. "And since the determining factor in establishing the market price, real or imaginary is what the buyer will pay, why should we be concerned with what the company would be willing to accept for its buildings? This puts us right back into the field of subjective value, with which for purposes of taxation, we are not concerned. On the whole, I am of the opinion" etc. Then he comes to the Minnesota case.

LORD PORTER: We have had the facts of the Minnesota case, and, to save a good deal of reading, I thought we might go to page 1129(1), unless you want to read something in between.

MR. BRAIS: Except that I beg permission to reiterate that very simple little formula in the Minnesota case that there was 2 per cent. depreciation given and 25 per cent. additional, which would be something corresponding to Mr. Justice MacKinnon's 14 per cent.

LORD PORTER: You get that in Mr. Justice MacKinnon's Judgment, and he goes on to say what he says about it, which was what my Lord Asquith was asking about, at page 1129(1).

MR. BRAIS: Yes. There in so far as the Minnesota case has gone I agree with it; but Mr. Justice Casey makes some distinctions. However, I do not abandon the Minnesota case; far from that.

LORD PORTER: I do not think we are abandoning it. I think you are getting an explanation of it which my Lord was asking for given by Mr. Justice Casey.

MR. BRAIS: Quite. He continues on page 1129, line 15: "On this judgment I make the following comments: (1). There is no similarity between the single purpose fortress-like construction of the Bank and the Head Office of the company; (2). There is some difference between the wording of the City's Charter and

the Statute with which the District Court of Minnesota was concerned. If one however, can assume that under that Statute it was the duty of the assessor to find the actual value of the building as that term is used in the City's Charter, then the Bank's experts were in error in assuming the building to be vacant and in estimating the annual rental that might be obtained from some presumed use. As I understand the authorities the building must be taken as it is at the time of the valuation and the willing buyer or the prudent investor must so regard it in order to determine what the building should produce. For this reason, any special features incorporated into the building for the particular use of an occupant, whether such occupant be a tenant or the owner, must be taken into consideration, for such features will be reflected in the rental which such occupant should pay." We have on that point abundant evidence in the record that such of the beauty and features of the Sun Life building which are useful commercially are reflected in the rentals which are paid by the tenants.

"(3) In substance, this judgment holds that the assessor had attempted to proceed scientifically and fairly and that his determination should not be disturbed in the absence of proof that his valuation was clearly too high."

Then he refers to the Phillipps Estate decision, which we have already had and discussed, and then at line 28 on the next page he says: "There can be no doubt but that all factors above indicated must be considered, but it is equally clear that they cannot all be given the same weight and importance. What we are here seeking is the building's objective exchange value and I cannot admit that to arrive at this result one may blend the elements that play a part in finding the object's subjective value with those that go to make up its objective value." That has been my submission since the beginning. They are to be considered and weighed, but not blended, because to blend them you apply a formula.

LORD ASQUITH: I do not understand that myself. I do not understand the difference between blending and weighing.

MR. BRAIS: If you blend, as my learned friend would have it and the memorandum would have it, you give yourself a formula, a percentage.

LORD ASQUITH: You mean fixed percentage?

MR. BRAIS: Yes.

LORD PORTER: I am not sure about that on your argument. I think your argument is this; The whole matter of values at large; you always have to take into consideration both the original cost, at any rate the appraisal, and the commercial value, but it may be in some buildings the original cost or appraisal value has no weight at all. It may be in others it has the whole weight; but; if you once get to talking about blending, you then assume that in every case you have got to give some weight to the appraisal value. Is not that your argument?

MR. BRAIS: Yes, my Lord. Blending is a mathematical operation; weighing is the result of the processes of the mind, and in weighing and using the processes of one's judgment as a reasonable man, you may find that you entirely to discard one element; but you must weigh it and consider it where it exists, and if you tell the Court you have not done that, the result is wrong, even if the figures are right; but, if you weigh it you have considered or weighed the available information, and so, having done that, you find using the commercial or replace-

ment value, that you do arrive at the exchangeable value, the market value and willing buyer and willing seller value. Once you have said that and come before the Court, the Court will admit your assessment has been properly done, because you have applied the correct elements.

LORD ASQUITH: I find this blending very difficult. You have two criteria which singly are assumed to be wrong. Supposing you have two clocks, both assumed to be wrong, one at 2.30 and one at 3 o'clock, is it right to assume that a quarter to three is the right time?

MR. BRAIS: That was being done.

LORD ASQUITH: That is what the memorandum says really. It seems a non sequiter.

MR. BRAIS: And if it is an owner-owned building, to carry the simile further, if it is fully occupied by the owner it is midnight no matter what time of day it is. That is what happens there.

LORD NORMAND: If, further, you are entitled to take into account, not only the cost of the building in one form or another and the letting value in one form or another, but other considerations as well, blending in a mathematical sense comes something beyond what I am able to contemplate at all?

LORD PORTER: One must be as fair as one can to the theory. Being fair to the theory, I think what is said is this. In most cases you cannot get a correct result by one factor only, and, therefore, you have to use two, and in most cases that means blending in some proportion. Your only complaint really is it assumes as a universal rule something which is a general rule?

MR. BRAIS: I object to blending as a directive. I have not the slightest objection to something which amounts to blending, but not on the basis of a proportion.

LORD NORMAND: At the end of the day a wise assessor may say: In fact I have blended them in a certain proportion, but that was not how I arrived at my result. I arrived at my result

in giving my own mind what I considered a just weight to

each element as well as I could.

LORD ASQUITH: What you get to is a directive blending in cast iron proportions.

MR. BRAIS: That is right.

LORD OAKSEY: It is really what my noble and learned friend Lord Porter said, that you cannot blend zero.

LORD PORTER: I have taken this down as your argument and you can tell me if I am wrong: blending assumes that in all cases a proportion must be attributed to both factors, whereas in certain cases one or other may prevail.

LORD OAKSEY: May I say this, that it does not seem right to say that you can lay down any exact principles for valuers and say to them that they may not adopt some mathematical formula in calculation in order to arrive at the way in which they weigh. You cannot say to them that they cannot use percentages or anything of that sort.

MR. BRAIS: I am in agreement with your Lordship.

LORD OAKSEY: As long as they are not fixed.

MR. BRAIS: I am in agreement with your Lordship and the more you are dealing with a special building to assess, the more you must keep away from any directed formula. I will say this. You will have in Montreal a number of persons who have built buildings; they have employed the same architects and the same contractors; they have built the same type of building with a thin veneer of stone outside and they are all of the same value for the blending direction, and if the same formula is applied you will arrive at the proper result, not because you apply the same formula and not because you have blended them the same way, but because they happen to have arrived at the same figure. That is what occurred to the other buildings on this formula.

LORD ASQUITH: Would this be right, what my noble and learned friend Lord Porter was putting to you just now as your argument was that the blending theory, which you criticise, assumes that you must in all cases combine two or more factors, whereas in some cases one factor may be determinative of the whole thing, and even where two or more are combined it is wrong that the assessor should be compelled or directed to apply a cast iron formula as to the proportions in which they are to be blended?

MR. BRAIS: Yes.

LORD NORMAND: Does that not need a little qualification? It may be true that one factor appears to be determinative of the result, but would it not be the duty of the assessor to consider all the available elements going to valuation and to allow them such weight, it may be only in a particular case, as he thinks fit before selecting any of the elements?

MR. BRAIS: Yes, my Lord; that is precisely my argument.

LORD NORMAND: It would surely be wrong to approach a case, even take the case where the building was in the fullest sense commercial and had been erected for the purpose of letting out apartments as offices, which was entirely let out at rack rents as to which you can, by a well known local multiplier, arrive at the capital value, but even in that case it would be appropriate for the assessor to consider whether the element of permanence, which is much more present in a Canadian assessment than an assessment, which is a capital

assessment, in this country where the valuations are upon the basis of annual rents, and the cost of construction ought not to play some part.

MR. BRAIS: He has to consider that.

LORD NORMAND: He must consider that at least.

MR. BRAIS: He must consider that, and I will give one example which will show that he must consider that. We will take a building which is very profitably rented. There has been a new development and everybody is clamouring for rooms or stores and so forth at very high prices. On the commercial value he will reach a very high figure and he will be obliged to look at the replacement value then because the replacement value will be much lower. He cannot assess that building at a higher price than it would cost that person to rebuild the same building.

LORD PORTER: Will you say that again? I am not sure I follow it. This is a three year assessment. Suppose you had a building which was let at an amount which would bring you a great deal more than the investment value of your capital. You would assess it there upon the rental value for the three years, paying little or no attention to the replacement cost.

MR. BRAIS: I have taken it, my Lord, on that point, that the cost of replacement which would permit the construction of a new building on the same site or a neighbouring site would be the highest price.

LORD PORTER: I am not sure you have not to take into consideration that [illegible] is going to take some time to erect your other building, to find a site and so on.

MR. BRAIS: That may be. I am not prepared to argue strongly upon that. That is where the replacement factor has to be taken into account as against the assessment value.

LORD PORTER: We had got to the bottom of page 1130.

LORD OAKSEY: Ought you not to consider the last line and a half of page 1130? Is that right?

MR. BRAIS: He says: "The amenities incorporated into the building by the owner for its own use and the other features, which so far as the owner is concerned, place the building in a class by itself will be reflected in the rental". There is evidence to that effect by all the witnesses. "This rental will not necessarily be that which the owner charges itself". Now we come to this: "The fact of owner-occupancy, however, can never justify a blending of two opposed values". I respectfully submit that that is a proper consideration, because, except in the memorandum, it has never been suggested that occupancy can have any bearing.

LORD PORTER: I do not know what that means. I do not know what he means by: "The fact of owner-occupancy, however, can never justify blending of two opposed values".

MR. BRAIS: The fact of owner-occupancy <u>per se</u>.

LORD PORTER: The replacement value with the rental value.

MR. BRAIS: In so far as you can generally blend, I say blend, weigh the two values, you can for the owner-occupant, but it is not because you are owner-occupant that you can apply

that to the owner-occupant because he is the owner-occupant. That is what his Lordship is saying here.

LORD NORMAND: Is there not a fallacy in using the words "opposed values"? I agree two clocks at different times may be said to be opposed clocks, but I do not think that two values are necessarily opposed values, they are just different.

LORD ASQUITH: I think the opposition in the learned judge's mind is between what he calls subjective and objective values, and he, under the first head, says: The values in use to the owner of the thing. He says you have to think that away. Does he mean more than that?

MR. BRAIS: In this case the memorandum very clearly says that you have to take the value in use to the owner, how he intends to use it, the advertising value, the prestige and so forth. That is probably what he has in mind.

LORD OAKSEY: If the owner is to be taken as a possible buyer in an imaginary market, then you have to take those factors into account, because they affect him, provided that there is somebody competing with him.

MR. BRAIS: Yes, but that would not bring him up to what he spent on the building.

LORD OAKSEY: No.

LORD PORTER: I think we are getting a little too much into the refinements of a phrase in one of the learned judges' judgments in a case which brings in much wider considerations.

MR. BRAIS: I am not prepared to say, under the willing buyer and willing seller theory, that we have to take somebody of the same type in considering requirements. We consider him having some requirement but that would not be the advertising value.

Then at line 10 on page 1131 he says: "These factors having been eliminated, our willing buyer, who at the same time is a prudent investor, has but to consider the building's net revenue, its replacement cost as that term is used in this case, and finally, the cost to him of erecting a new building comparable with that which he proposes to buy. Since the last factor was not discussed, I limit myself to the building's net revenue and to its replacement cost and I again state that since we are dealing with the building's objective exchange value, these two factors cannot play the same role".

Then he says: "The prudent investor is interested in a reasonable return on his money and he will not pay more than the sum which the building's net revenue represents as a reasonable return. He will obviously be interested in the building's replacement cost as that term is here used, for this figure will serve to test the offer which he proposes to make. He would, I imagine, be more interested in the cost of erecting a comparable building, for if he finds that it can be replaced for a sum less than the capitalised net revenue, he may not pay the greater figure. By the same token, if he finds that the cost of replacing the building exceeds the capitalised revenue, he will not make a gift of the excess". Then we come to the finding of net revenue given by Mr. Vernot, Mr. Lobley and Mr. Simpson.

LORD PORTER: You do not want that because this is common ground.

MR. BRAIS: That is common ground, my Lord. He goes through

those figures but he arrives in the process at another figure.

LORD PORTER: He has a bigger figure as his capital value.

MR. BRAIS: Yes. Then at the bottom of page 1133 he makes an independent weighing of his own of these other figures of rental. In the paragraph immediately before that he refers to Mr. Lobley's 50,000 dollars "to enable the willing buyer to make provision, in his own words for the cost of keeping abreast of the times". He throws that out and then says: "At this point then the figures reached read as follows: Gross rental 1,261,287 dollars". He is taking the company's space and the non-company's space. He makes a deduction and he arrives at a net rental before taxes of 728,985 dollars.

"There must now be deducted the item of taxes, and if they be calculated at 2.9 per cent on the value of 10,207,877 dollars found by the Superior Court, they will amount to 296,028 dollars. This will leave a net rental revenue of 432,957 dollars.

"On the question as to what the investment should yield there is some divergence of opinion.

"Mr. Vernot states that the return should be 3 per cent for an owner-occupied building and 4½ per cent for one that is tenant occupied. Mr. Lobley and Mr. Simpson feel that a yield of 5 per cent is indicated, and Mr. MacRosie seems to share their view".

Then he gives Mr. Lobley's story of what money is worth or was worth at that time. He then says: "In the light of the foregoing, it is interesting to note that a net rental of 432,957 dollars represents a yield of approximately 4.2 per cent on the figure found by the Superior Court". That is just below the 5 per cent which seems to be the average.

"As was stated at the outset, the City's Charter requires that the property's actual value be shown on the roll" etc. He then says that "the Superior Court, who 'must proceed with the revision of the valuation submitted to him'" etc. Finally there is an appeal to this court.

LORD PORTER: I think you might read this next bit.

MR. BRAIS: "I agree that on an appeal to the Superior Court the judge should not intervene for the sole purpose of substituting his opinion for that of the Board of Revision or of the assessors. But, if the judge of the Superior Court comes to the conclusion that for one reason or another the Board of Revision has arrived at a figure grossly out of line with the property's actual value as that term is used in the Charter, then he must intervene and make the necessary correction.

"It may be possible to arrive at that value by employing any one of several methods. But since, in my opinion at least, the revenue approach as used in this case leads irresistibly to the correct answer, any other method must, if it is to be considered, produce approximately the same result.

"The assessors have employed certain rules which they themselves have arbitrarily fixed. I do not deny their right to formulate their own rules of thumb, but in applying

these rules they must, as stated by Mr. Hulse, always bear in mind that they are seeking the actual value of the immovable.

"If then in applying their own rules they arrive at the wrong answer it must be because their rules are improper, or because their application of them is faulty, or because they have erred in their calculation. It is no answer that all taxpayers have been submitted to the same treatment". At least we have that said, my Lords. "It may be that the same rules have been employed in making all valuations, but from this one cannot conclude that the same errors were committed in all cases or, that if they were, that this imports ratification.

"Applying the tests which I think should be applied to this case I find that the value found by the Superior Court, on the information available, represents the property's actual value as that term is used in the City's Charter, Since there is a substantial difference between that figure and the answer arrived at by the Board of Revision, the learned Justice of the Superior Court acted properly in intervening and in fixing the value of the Company's property, land and buildings at 10,207,877 dollars".

Then we have the figures on page 1136 and he concludes: "In conclusion, what must be determined is the extent to which the learned Justice of the Court below succeeded in placing a true objective exchange value on the property. Whether in so doing he followed one method rather than another is of relative unimportance. This result is what counts, and this too is true of the assessors and the Board of Revision.

"The Superior Court found 10,207,877 dollars and on this the net revenue, as I calculate it, represents a yield of slightly more than 4 per cent, or as it is calculated by Mr. Lobley (362,000 dollars) and by Mr. Simpson (373,967 dollars), a yield of about 3 per cent. Anywhere in this field is approximately correct, since the elements which might, as the record discloses, indicate a higher yield on some investments, do not play too serious a role in this case.

"Had the figure reached by the Board of Revision been within striking distance of that established by the judgment a quo, the Superior Court would have been justified in refusing to interfere. But it was not, and as the amount fixed by that Court more closely approaches the actual value of the property than does either the figure of the Board of Revision or that suggested by the Company, it must stand".

LORD PORTER: You need not read any more.

MR. BRAIS: I must say at that time the company had itself appealed from the judgment of Mr. Justice MacKinnon.

LORD ASQUITH: I think he really arrived at a similar figure to that of the Superior Court by an entirely difference course of reasoning.

MR. BRAIS: He has taken a different course of reasoning to test the figure and he has tested it in a very conservative fashion. He puts the money at 4.3 which is the lowest that one can conceive for real estate. I am speaking of in Canada, my Lord, where rental money has always been much higher than in England.

LORD OAKSEY: The gross rental for the company is based upon the same cubic figures as the non-company's space, the figure of 768,265 dollars. It is the gross rental for the company. How is that arrived at?

MR. BRAIS: May I keep that question for the adjournment? I just want to be able to answer with precision and with the reference.

LORD PORTER: That finishes that.

MR. BRAIS: Now we come to the Minnesota case, my Lord. Do your Lordships wish me to go back into the Minnesota case?

LORD PORTER: No.

MR. BRAIS: I have said what I wanted to say about the Minnesota case.

LORD PORTER: We are familiar with it.

MR. BRAIS: I do not always agree with what the judges have said, but I have no quarrel with the Minnesota case.

LORD PORTER: You can now go straight through to the Supreme Court.

MR. BRAIS: Which takes us to page 1157.

LORD PORTER: That is so.

MR. BRAIS: At line 8 Chief Justice Rinfret says: "I only want to emphasise that, in the case of an appeal, the judge of the Superior Court shall render 'such judgment as to law and justice shall appertain'".

LORD PORTER: Actually the Chief Justice founds himself almost entirely upon that phrase. In effect he says you can neglect what the assessors and the Board of Revision have found; a judge under that phraseology has to go into the matter and make up his own mind not seriously influenced by the opinions below. Therein he differs completely from the majority of the Court of King's Bench who have said on the contrary that you ought not, unless there is gross injustice, to interfere.

MR. BRAIS: I think I submitted yesterday my views upon what the distinction was.

LORD PORTER: You do not go quite so far as the Chief Justice, but you strongly deprecate the attitude of the King's Bench.

MR. BRAIS: I need only say this, that if my submission as to the memorandum and as to the blending and so forth is correct, it does not make any difference whether you take as gross injustice or in law, I would be entitled on any formula, that of the Chief Justice, that applicable to the Citizen Towns Act, and so forth.

Then his Lordship continues with the same doctrine on page 1157, and at the top of 1158 we come to the important pronouncement in his judgment: "I need not insist on the point that a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes". I think we are on common ground there. "One main ground why such a course should not be followed", then he gives reasons for it. He then says: "The rule was laid down by Lord Parmoor in Great Western and Metropolitan

Railway Company v. Kensington Assessment Committee that in such a case 'the hereditament should be valued as it stands and as used and occupied when the assessment is made'". There, again, is the principle that we are strongly stressing, that this building must be assessed as of 1941 and not as of the day when the Sun Life may have the pleasure and glory of saying that they occupy it with 10,000 to 11,000 people.

"In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the present case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change.

"The Sun Life property, as it stood at the time of the valuation now in question, was occupied about 60 per cent by the company itself for its own purposes and about 40 per cent by tenants". There, again, the same error is repeated from the previous judgments.

LORD REID: I do not understand this idea that you must look at the property as you find it. If you have to imagine a market in which there is a potential buyer, surely the potential buyer will say to himself not only what is the thing being used for at present but what can I get out of it. Now why is it illegitimate to allow the potential buyer to consider that fact?

MR. BRAIS: Save to the extent that the potential buyer cannot contemplate a much better use can be made of it than is being made at that time. That is a hard and fast rule that the property must be considered as it stands. It applies itself to the suggestion that the Sun Life Company itself, and that is not looking at the potential buyer, might be able to make an entirely different use of the building than it is making, that is to say, arrive at the fulfilment of its original plan fully to occupy the building when there would be no vacant spaces and when there would not be the problem of finding tenants.

LORD REID: I fully appreciate that you say that the owner is not to be charged a value which is peculiar to himself, whether that value be a value today or a potential value because he can change the use, but why if there is something staring you in the face and all potential buyers will see it, and many of them will be anxious to buy it and say: Well, now, if I have this property I can make a lot of money out of it by doing this, that and the other thing with it. Why should your potential buyer not be allowed to tender that full sum which he would tender in the potential market, in the imaginary market?

MR. BRAIS: My Lord, I am seeking correctly to understand the basic judgment which I have here, but I do not think that at that point his Lordship was applying himself to that portion of his considerations which bear upon the willing buyer and willing seller. Your Lordship may be right. What I think he has in mind, and it has been followed clearly by all the judges, is that you cannot, when you are considering your assessment, be it on the actual buyer or potential buyer or in regard to the speculative market, speculate on things which are only potential. You cannot say that that building may some day, if the City of Montreal decides, for example, to put in another street; or open a street beyond the corner,

have a great deal more value. You cannot put in speculative matters to consider in arriving at that. You must consider your building as it stands with all its present worth and, of course, its potential worth within the figuring of today.

LORD PORTER: If you will substitute the word "speculative" for the word "potential" -----

LORD REID: I follow that.

LORD PORTER: I am in complete agreement, but if you talk about potential that means a real value; speculative means merely guessing what the value is. I think he means speculative and not potential.

LORD REID: I think he does, but even so I have some difficulty in reconciling it with a prudent investor who seems to be extremely speculative, but that is another matter.

MR. BRAIS: He has to wait a long time and he must weigh both ways.

LORD ASQUITH: Then he said that you must not look more than three years ahead.

LORD PORTER: Is that right when you are dealing with the buyer and seller? It is quite right when you are dealing with the commercial value, but if you are dealing with a possible buyer and seller they may be looking ten years ahead.

LORD ASQUITH: For expropriation purposes he agrees that that is so, you look at the whole future. He is really starting with that.

LORD REID: There is the case of a vacant plot where there was no possibility of anybody buying it for a long time. He would notice the plot and say to himself: Some day that will be worth a lot of money and, therefore, today it will pay me to put down so much money for it. That is the basis of that case with which I gather you are not quarreling.

LORD NORMAND: A vacant plot in a building area is worth a great deal more than a vacant plot in the middle of the prairie and surely that must be taken into account although it is truly potential.

MR. BRAIS: That was taken into account in those cases. So far as this building is concerned, and so far as the evidence goes, it is quite clear that there is no indication that at any future time -----

LORD PORTER: He says that later.

MR. BRAIS: The evidence is to the effect in this case, and this is of some importance, that at no future time do witnesses on behalf of the company contemplate that there will ever be any more considerable use.

LORD PORTER: He says: "In particular, in the present case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change".

MR. BRAIS: That is the evidence and that is just what I had in mind. The evidence clearly is here that the building could

not at any future time have any greater use or be put to any better advantage than it was then. Mr. Lobley was very clear upon that, and the other witnesses too.

I think we have the admissions, my Lords, then the values and then many experts were heard and so forth. Then page 1159, line 8: "Some speak of market value, but there is a general consensus of opinion in the circumstances that this cannot form the basis of valuation here". I must respectfully say, as regards the views of the Chief Justice, that he is entirely wrong because every witness heard for the Respondent Archambault, Simpson, Lobley, MacRosie, Perrault said there was a market value.

LORD NORMAND: Does not what the Chief Justice mean that there has been no actual market?

MR. BRAIS: No.

LORD NORMAND: Because if you read on he says there is no comparison between it and any other building. In that sense you cannot test it by market value.

MR. BRAIS: In so far as he is considering the actual market, that is correct. Then the Chief Justice dismisses the Minnesota case as having no bearing because we are not aware of the special conditions in the Minnesota case.

Then at line 28, on page 1159, he says: "The court really does not know anything about those buildings in that respect, more particularly because the owners of such buildings have not been heard in this case. At all events, the evidence is clearly to the effect that there is no building in Montreal comparable to that of the appellant". He looks to the Grampian Realties case. "Moreover, if there is one basis upon which we should be clear as to the method which should be followed for municipal valuation purposes, it is the one which is recognised by the assessors themselves in the memorandum prepared by them on the assessment of large properties. It states: 'Each property will have to be considered on its merits within the limits outlined above'".

I am sorry to have to say that I think the Chief Justice entirely misapplies that last sentence because if it is right it is either applicable to the 50 per cent or it is applicable to the other.

Then at line 38 he says: "The Board of Revision expresses the same view as follows". Then he goes back to the limits outlined above on page 1160, at line 8: "The 'limits outlined above', referred to in the memorandum", then he sets it forth, "proceed to divide the properties such as office buildings" - I do not follow this very much. It says: "The 'limits outlined above', referred to in the memorandum of the assessors, (Exhibit D.5) proceed to divide the properties such as office buildings, apartment houses" etc. I do not have to stress this, and I prefer not to, but I feel that his Lordship has misapplied his mind in regard to what the limits outlined above were.

LORD PORTER: I do not think he does. What he is suggesting, as I follows, is the statement of the Board in the earlier portion of page 1160 where they say that the law "does not in any way put any limit to the assessor's discretion in considering all the elements he thinks it advisable to consider in exercising his judgment and arriving at a decision'". Then he points out what the memorandum says, and then he goes on to point out that the memorandum does stipulate that you must

take 50 for replacement value.

MR. BRAIS: If one looks at the memorandum on page 696 one sees the limits outlined above.

LORD PORTER: Between 50 and 100; he says the whole thing on page 1160.

MR. BRAIS: I do not have to quarrel with that in any event. Then we come to line 38: "Admittedly such were the rules and the guiding principles followed by the assessors in the present case, and it is to that memorandum that we owe the idea embodied in the assessment herein of a certain percentage attributed to the replacement factor and another percentage attributed to the commercial value factor. In this instance, the Board of Revision came to the conclusion, after a very complicated calculation, that the ratio of importance to be given to the net replacement cost should be 82.3 per cent and the ratio of the commercial value 17.7 per cent. Counsel for the respondent, in the course of the argument, was asked if a calculation of that kind for municipal valuation purposes was ever accepted in any Court of the province of Quebec and, of course, he could not point to any authority to that effect. Nevertheless, that was the yardstick applied to the Sun Life property for its valuation by the Board of Revision.

"I do not think that it is the function of this Court, acting as third Appeal Court, to proceed to a detailed calculation of what the valuation should be. In that view I am fully in accord with the reasons for judgment of Mr. Justice Casey in the Court of King's Bench (Appeal Side), and I adopt his reasons. Like him, I think that 'the learned Justice of the Superior Court acted properly in intervening and in fixing the value of the Company's property, land and buildings at 10,207,877 dollars!. I think the learned judge of the Superior Court succeeded in placing a true objective exchange value on the property and that the result he arrived at should be affirmed. As was said by Mr. Justice Casey the amount fixed by that Court more closely approaches the actual value of the property, as prescribed by the charter of the City of Montreal, and it should be allowed to stand".

LORD ASQUITH: It was not what the judge of the Superior Court thought he was doing, was it, placing a true objective exchange value on the property?

MR. BRAIS: No; it is not what the judge of the Superior Court thought he was doing.

LORD ASQUITH: It is said in effect that that is what he did do to arrive at a proper figure.

MR. BRAIS: To take the position in our case we said effectively test it by all the formulae and all the figures and all the percentages that have gone into this record, all that Mr. Justice MacKinnon has done is to arrive in effect at a value which would represent the higgling of the market, and that figure is equal to or in excess of any other figure that you arrive at by applying the various formulae which I have suggested or which I will suggest.

LORD NORMAND: Is the basis of the Chief Justice's judgment really in agreement with Mr. Justice Casey?

MR. BRAIS: It is, my Lord.

LORD NORMAND: He goes on to support the judgment of the Supreme Court by saying: Well, it is near enough.

LORD ASQUITH: I think it must be that.

MR. BRAIS: That is what it is.

LORD ASQUITH: Because his reasoning differs from that of Mr. Justice MacKinnon.

MR. BRAIS: Quite. I have to say to this court that the respondent itself has not been able to agree with the decision of Mr. Justice MacKinnon and it did appeal from the judgment of Mr. Justice MacKinnon principally on the question of amount, but the amount being maintained it then took the view it would not appeal further to the Supreme Court but would suggest to the Superior Court what principles it had enunciated and that it would be prepared to abide by the figure. We are obviously in the same position before this court, but we do not say to this court that the principles of valuation as enunciated by Mr. Justice MacKinnon should be the principles which we think should be enunciated by this court.

LORD PORTER: Then you come to Mr. Justice Kerwin. He gives his test at line 37.

MR. BRAIS: Yes, my Lord. At line 35 he says: "The rule applicable in determining compensation in expropriation cases is not that to be followed in municipal assessment cases where the land and buildings are to be assessed at their value, or real value, or actual value. The test is an objective one which in many cases may be applied by seeking the exchange value or the value in a competitive market. If there is no such market, then one may ask what would a prudent investor pay for the subject of taxation, bearing in mind the return that might be expected upon the money invested.

"The differences between the assessors and the Board of Revision need not be set out since the latter confirmed the amount of the assessment set by the former. Both, however, proceeded in the following manner: Taking the actual rents received by the Company and estimating the rents from other parts of the building available for tenants, and adding to that an estimate of what the Company should pay for the space occupied by itself, and deducting therefrom the operating expenses, gives a net revenue which when capitalised result in a commercial value which may be taken as 7,028,623 dollars. The assessors and the Board then proceeded to fix the replacement cost of the buildings, which may be put at 13,387,131 dollars 80 cents. Holding the view that there was no market and that both the replacement value and commercial value should be taken into consideration". Ido not think I need read it all.

Then we have Mr. Vernot's story further on. If I may just refer to line 25 we see there again "In the case of the Sun Life it was 40 per cent occupied in 1941 and 60 per cent owner-occupied. The occupied space".

LORD PORTER: It ought to be 20 and 30 below instead of 20 and 60.

MR. BRAIS: Yes, my Lord. Then he continues on that basis. What I am drawing your Lordships' attention to is that the 60 and 40 was only occupied space. That agrees with the other evidence which has been put in by the company's witnesses as to what is the proportion of available space.

Then he proceeds to narrate the judgment of the Court of King's Bench and then at line 38 we come to his

considerations: "Mr. Justice Casey decided that the commercial value was the proper method of approach and that the net rental revenue at which he arrived, 432,957 dollars, would represent a yield of approximately 4.2 per per cent on the figure found by the Superior Court. He considered that in view of the evidence of Mr. Vernot that the rate should be 3 per cent for an owner occupied building and 4½ per cent for one that is tenant occupied, while Mr. Lobley and Mr. Simpson, for the Company, felt that a yield of 5 per cent was indicated, the figure of 4.2 per cent would not be far out of line. With those reasons and the result, I agree.

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While the company sought to obtain a lower valuation on the basis of the evidence of its experts as to a possible purdhaser, that evidence is not of such a character as to warrant it prevailing against the almost unanimous evidence of the commercial value.

"I have not overlooked the fact that in the company's annual general statements and in its returns to the Superintendent of Insurance for Canada for the years 1914 to 1941 inclusing sums of a like amount appeared under the headings 'book value' and 'market value', which represented actual cost less depreciation. Much was made by the respondent of this fact. Whatever bearing the figures might have when related either to the annual statements or the returns to the Superintendent of Insurance, they cannot, I think, affect the duty of the assessors and of the Board and of the Courts in fixing the value of the company's immovables for the purposes of municipal taxation.

"There remains the city's contention that the assessors and the Board of Revision proceeded in accordance with a memorandum adopted by the assessors at a meeting held at the suggestion of the Board, and that failure to adhere to that memorandum would result in discrimination. The assessors must, of course, proceed so as to cause no discrimination, but it is also their duty to see that every ratepayer is assessed for its immovables at their actual value. Where it is demonstrated, as in the case here, that, by attempting to use the formula of the memorandum, the result arrived at is not such value, then the formula must be disregarded."

Then as to the second point in the appeal, we do not have to consider that.

Then we come to the judgment of Mr. Justice Taschereau.

LORD JUSTICE ASQUITH: Mr. Justice Kerwin appears to agree almost entirely with Chief Justice Rinfret, does he not?

MR. BRAIS: Yes, my Lord.

LORD OAKSEY: And with Mr. Justice Casey?

MR. BRAIS: Yes, my Lord. They both agree with Mr. Justice Casey, but he has used the other approach and has arrived at the result by putting a very conservative figure on the result of the rental position.

LORD ASQUITH: They both think that the test is objective, the prudent investor is the standard, blending is wrong and that the memorandum is not binding so far as itpmescribes blending?

MR. BRAIS: Yes, my Lord; and they have considered that Mr. Justice Mackinnon has taken into account the commercial approach and the other approach. They do not disagree with the result at which he has arrived. Then test it by their own formula of the prudent investor, and find that he has arrived at approximately the same result, so they say that by his method he has come to the correct result.

LORD NORMAND: Does not Mr. Justice Taschereau agree, one might say, in omnibus with the learned judge of the Superior Court without adding very much to what he said?

MR. BRAIS: Yes, my Lord.

LORD PORTER: He takes the extra 14 per cent?

MR. BRAIS: He takes the extra 14 per cent., which has to be put somewhere if you are going to arrive at some result on this building, or else you take another formula, with regard to the proportions.

My Lords, I will be bried with Mr. Justice Taschereau. I refer to the bottom of page 1164: "At the time of the 1941 assessment, which is now in issue, approximately 14 per cent. of the rentable space in the building was still unfinished and, therefore, unoccupied." He is one of the few who actually take that situation into account.

Then he continues on page 1165 by setting out the facts, which I think your Lordships will wish me to pass over. On page 1166 he refers to the weighing set forth in the memorandum. Then he proceeds to show what Mr. Vernot did.

Then at the bottom of the page he comes to the birthplace of the memorandum, when he cites Mr. Vernot, who says: "We decided that in the large buildings in our wards", and so on. Then Mr. Vernot is cross-examined on why he took the proportions of 90 and 10 and why not something else. He refers to the occupied space.

Then he refers to the Board of Revision on page 1167, and then on page 1168 to Mr. Justice Mackinnon. I think I may take it up at line 26 on page 1168: "The court held that, for the proper determination of the real value of the immovables, one must take into account one point of the indicia of the market"; we have had that. I think I can pass that.

LORD ASQUITH: He goes into the authorities more elaborately than anybody else?

MR. BRAIS: He goes into the authorities very elaborately and very carefully, and, if I may say so, objectively.

LORD PORTER: You need not bother about page 1169, where he is discussing the difference between expropriation and assessment. He does that for some distance. Then he comes on page 1171 to the phraseology which appears throughout the case, "willing buyer and willing seller."

MR. BRAIS: Except that I should like to call attention to page 1170, line 27, where Lord Advocate v. Earl of Home is referred to. That is the standard basic test as apparently first enunciated.

LORD PORTER: I am not sure about that.

MR. BRAIS: It might have been before. I am subject to correction.

LORD PORTER: You have in French Mr. Justice Pelletier on page 1171. That is what I was looking at. He says, "willing buyer, willing seller."

MR. BRAIS: Yes, my Lord. That is the same jurisprudence which we have had throughout in the Province of Quebec. There is no exception to that anywhere, except the two cases I referred to, which are quite anomalous.

LORD PORTER: You say that you have no other jurisprudence?

MR. BRAIS: That is so; and there is a warning in the manual against taking that case as meaning anything except as proving the rule by the exception.

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Now may I read at line 28 on page 1171: "In order to find the 'actual value' it is, of course, as Mr. Justice Mackinnon and the Court of Appeal have said, quite in order for the assessor to consider various elements as recent free sales of identical or comparable properties, the depreciated replacement cost, the economic value of the property itself." The respondents subscribe to that. "The first of these approaches cannot be considered in this case; the Sun Life building being in a class by itself, no sales of identical or comparable buildings have taken place, and I therefore agree with the courts below that the two last approaches only can help to come to a proper conclusion.

"Dealing first of all with the replacement value, I think there are considerations that have to be kept in mind, and which apply particularly in this present case. Although this method of valuation for municipal purposes is of frequent use, there are cases where it would be dangerous to attach to it too much importance, in view of the particular circumstances which may arise. I do not disagree with the method recommended in the memorandum, when of course no other indicia are available, but the rule must not be too rigid." That is the part of Mr. Justice Taschereau's judgment to which I feel I cannot subscribe. In the result he comes out, but I do not think that any method such as the memorandum suggests can find its application as an accepted formula for the assessment of immovables. "It must have enough flexibility so that it may be applied to certain exceptional cases, as for instance the one with which we are now dealing." If it is flexible it is not the memorandum, because the memorandum is inflexible. "Otherwise a manifest injustice would be the inevitable result. It is not always, although it might happen, that the 'market value' or the 'exchangeable value' of a building is represented by the amount of the investment made by the owner, less depreciation. Some investments are good, some others are not, and certain features of an expensive building may contribute considerable to reduce its 'market value'.

"What I have said previously of the Sun Life building as to its most expensive construction, is sufficient, I believe, to show that its 'replacement value' placed in the books of the company at 16,258,050 dollars in 1941, is not the figure that a 'prudent investor' would consider in trying to determine its 'real value'. He would obviously disregard many of its amenities and luxuries, thinking rightly that they are superfluous and not productive of a proportionate return.

"This amount of 16,258,050 dollars which the company showed in its books as being the value of the property, and which in the relevant year appeared in its annual statement furnished to the Superintendent of Insurance, does not represent the 'real value' of the property for 'assessment purposes'. It merely shows the amount of money spent in the circumstances already mentioned, with the ordinary annual depreciation. It indicates to the shareholders and to the Superintendent of Insurance how the funds of the company were invested, but it surely does not reveal all the elements of the 'replacement value', which has to be considered with the 'economic value'.

"The proper method to be followed in order to determine the replacement value of a building is first of all to ascertain the cost of construction, to adjust that cost to the index figure of the year when the valuation is made, then to deduct a reasonable amount for depreciation, and in certain exceptional cases a further amount on account of the special features of the building, keeping always in mind that the 'replacement value' is

one of the important factors that must be considered in the determination of the 'real' or 'market value'. Expressing in a different form what I have said previously, it would be quite impossible to determine what the building will command in terms of money, if too expensive materials, sumptuous decorations and luxuries are valued at their cost price. There must necessarily be an allowance for those spedial items, the value of which is not commensurate with their cost." Then we have the detail which Mr. Justice Mackinnon has given for his 14 per cent.

At line 43 he says: "By doing so, he followed the judgment delivered by the United States District Court of Minnesota in Federal Reserve Bank v. The State of Minnesota. This case, of course, is not a binding authority, but an expression of opinion with which I entirely agree. The judgment, after referring to the building of the Federal Reserve Bank, as a 'fortress' said: ' .... in substantiation of his estimate of the true market as contemplated by the statute he figured the reproduction cost of the building as of May 1st, 1936, to be 2,600,000 dollars. He allowed 25 per cent. depreciation, being approximately two per cent. per year for the life of the building, and by reason of the apparent difference of opinion as to the effect of the distinctive architecture on its market value both artistically and as a utilitarian structure, he allowed an additional 25 per cent. for depreciation. Therefore a total of 50 per cent. depreciation is to be found in the assessor's computation.'"

LORD OAKSEY: What he says at line 44 on page 1172 is not exactly accurate, is it, because he did not follow the judgment delivered by the court in the Minnesota case, because that was a case in which they had not applied anything but replacement value?

LORD PORTER: Is he not here dealing first of all with the replacement value? Then he goes on to economic value later?

LORD OAKSEY: But the point for which the city were contending and what the Board of Revision had pointed out was that it was wrong to charge a second depreciation of 14 per cent., because you are bringing into account the very same considerations when you apply the commercial value to blend or to weigh against the replacement value, and the Minnesota case did not include that consideration at all. The Minnesota case was based entirely upon replacement value?

LORD ASQUITH: There was no rental at all there.

LORD PORTER: I do not think that the learned judge means to be dealing with economic value at all. He is merely saying that the double 14 per cent. in this case is comparable with the double 25 per cent. in the Minnesota case?

MR. BRAIS: There are two points that I should ~~wxxik~~ like to be allowed to make on that. First of all, in the Minnesota case to all intents and purposes the object was to arrive at a replacement value, because there was no economic value to be taken into account. In so doing they took off the useless material.

LORD ASQUITH: He is dealing with it in compartments?

MR. BRAIS: With reference to the Minnesota case, the formula used there to arrive at replacement is the identical formula used by Archambault and Perrault, who looked at the building independently. They did not consider the rental, but they considered what was valueless in the building, and one arrived at 8,500,000 dollars and the other at 8,800,000 dollars. It is suggested that they made double use of the fact that there was

no space to rent where there should have been some and bad space to rent where there should not have been any space to rent, but that is not so, because they did not take into account rental values in any shape or form.

LORD PORTER: I was only considering what the learned judge was dealing with. He starts at line 23 on page 1172 and says: What is the proper method of discovering what the replacement value is? He then deals with replacement value from line 23 on page 1172 to line 20 on page 1173. Having discussed replacement value in that form, he then goes on to commercial value in the next part.

MR. BRAIS : Then may I do likewise and go to line 21 on page 1173: "Turning now to the commercial value of the property, it is necessary to consider its gross revenue and its operating expenses. The Board of Revision and Mr. Justice Mackinnon both accept the same figures, namely, total gross revenue 1,189,055 dollars and operating expenses 436,992 dollars, leaving a net revenue of 752,062 dollars. After having capitalised this net revenue, they all came to the conclusion that the commercial value of the building, at the relevant date, was 7,028,623 dollars, and I find no satisfactory reason why this amount should be changed.

"The 'replacement value' and the 'economic value' having been ascertained, it now remains to determine what consideration should be given to each element. The assessors thought that 90 per cent. and 10 per cent. were the right figures, while the Board was of the opinion that 82.3 per cent. and 17.7 per factor an equal importance of 50 per cent. It is not an easy task to reach mathematically the exact figure in such a matter, but I have no hesitation in reaching the conclusion that the assessors and the Board have given too much weight to the replacement factor. Having in mind that the test of 'real or actual value' lies in the exchangeability of the property, I believe that the prudent investor would particularly be concerned with the 'economic value' of the building, in order to get a fair return of his money". He qualifies it there by using the words "particularly be concerned." He is not taking the prudent investor alone.

"The real value is the market value or the value in exchange, and in order to ascertain it one must necessarily, even if there has been no sale of the building, try and find what would be the price of the building in an open market. The rule is not that because there is no buyer and no seller, as in the present case, the well known theory of 'willing buyer and willing seller' does not apply. We must ask ourselves this question: What would occur if there was a buyer and a seller? In Lacoste v. Cedar Rapids Lord Warrington, speaking for the Judicial Committee, said at page 285:'But the proper amount to be awarded in such a case cannot be fixed with mathematical certainty but must be largely a matter of conjecture. It is the price likely to be obtained at an imaginary sale, the bidders at which are assumed to ignore the fact that a definite scheme of exploitation has been formed and compulsory powers obtained for carrying it into effect." That was, of course, an expropriation case. There this Board did not want to allow the speculative possibilities to be carried too far into the future or to take for granted that the powers had been given.

"I do not agree with the Board of Revision when it says that this case does not apply. True, this was an expropriation

case, but the principle of an imaginary sale may as well help to determine the real value of a building, as it does when the courts have to value the future advantages of a water power. Moreover, several witnesses heard before the Board are clearly of opinion that it is quite possible to imagine a market for the property, and that it is a commercial building. (Simpson, MacRosie, Archambault, Lobley)." I have already given those references to your Lordships, and I will not give them again.

"Under the circumstances, I am satisfied that the assessors and the Board have considerably undervalued the 'economic factor' which, in a very large measure, would guide the prudent investor or the willing buyer, always anxious to obtain value in exchange for his money. I believe that a proportion of at least 50 per cent. should be attributed to it, although the replacement value has already been reduced by 14 per cent. As I do not think that there has been any substantial error in the valuation of the boiler-house, the figures should not be altered."
Then I think I can leave it.

LORD PORTER: The only thing that needs reading in the next paragraph is the last two lines: "This amount is 2,207,877 dollars higher than the valuation given to the same premises in 1931-32, by the respondent's board of assessors", from which I think he is saying that, if that was a reasonable value in 1931-32, 2,000,000 dollars more is a reasonable value in 1941. That is what he has at the back of his mind?

MR. BRAIS: We had discontinued our appeal then.

"In coming to this conclusion, I have kept in mind that it is not the function of a court of appeal to disturb the valuations made by assessors. But in certain cases it is its duty to do so, particularly when the assessors have proceeded on a wrong principle, and when there is a manifest injustice. Here in refusing to allow an additional 14 per cent. for extra unnecessary costs, and in giving a disproportionate consideration to the replacement value, they justified this court to interfere."

That takes care of the essential parts there.

My Lords, we then come to the judgment of Mr. Justice Rand, who has also considered the situation objectively, but with a somewhat different approach. He has rather the approach of Lord Iddington, of which we have heard a lot, the balancing in the speculator's mind, and he ~~finds himself~~ confines himself to the problem rather, if I may respectfully suggest it, as my Lord Reid did this morning.

LORD REID: Am I right in thinking that there were really two points of importance, summing up Mr. Justice Rand's view? At line 6 on page 1177 he says: "The error of the assessment made lies in the fact that actual value has been virtually identified with value to the owner." Then he says, at the bottom of that page, that he thinks that the percentage method is right, but he would take 55, and that is five more than Mr. Justice Mackinnon took?

MR. BRAIS: Yes, my Lord. There is one place where he weighs the thinking of a purchaser. At the bottom of pabe 1176 there is a paragraph I should like to draw to your Lordships' attention, because there he gives the basis of his thinking. He previously has considered the values and percentages and returns. He refers to the memorandum, and he says: "For the purchase of the building as an investment for business offices, the price would admittedly range between 7,500,000 and 8,000,000 dollars." That is the evidence, and that is correct.

Then he applies himself to the other considerations to which their Lordships have been applying themselves. "Although the latter would be the most likely object of purchase, the appellant does not ask us to take it alone as the determinant of exchange value. There are always the possible purchases for owner purposes, on the chance of which, rather than a sale solely on an income basis, the company would no doubt put a not inconsiderable value. The gradation of increasing possibilities of purchasers with lessening degress of interest would extend to the purely investment basis; and the crux of the problem would be in estimating the present value of these possibilities." I think that puts rather precisely what has been the thinking on the matter.

"The error of the assessment made lies in the fact that actual value has been virtually identified with value to the owner." That is correct. It is in the Board's decision in practically so many words. "That is clear from the influence on the percentage applied to construction cost of the special features as owner interests. Although the rule in expropriation would take their peculiar value to the owner into account as the assessor has done, that rule has no place in assessment." Then he gives the authority. "For the purposes here, those values must be subjected to the competitive test.

"On the foregoing basis and taking the reproduction cost accepted by the Superior Court at 14,453,729, there would be deducted from it what is dead value for any purpose, such as differences in cost between marble and terazzo flooring, between marble and plaster walls, and excessive decorative and ornamental work, which as adjusted by Mr. Justice Mackinnon is 2,352,932 dollars."

LORD PORTER: He takes a different line. He follows Mr. Justice Mackinnon in deducting certain dollars from the price which anyone would pay.

LORD NORMAND: He accepts the deduction arrived at by Mr. Justice Mackinnon.

LORD PORTER: That is a rather different approach?

MR. BRAIS: It is a different approach. He accepts it as being dead value on the replacement value.

LORD NORMAND: Mr. Justice Taschereau had accepted a deduction of 14 per cent., which is this figure?

MR. BRAIS: Yes, my Lord. The 14 per cent. and this figure are the same thing.

LORD NORMAND: Exactly.

MR. BRAIS: They are both applying their minds to exactly the same thing. "To the remainder there would be added 730,000 dollars, the value of the land, and 535,735 dollars, the value of the heating plant; a total of 13,367,131 dollars. Placing the commercial value at the sum of 7,750,000 dollars" ----------

LORD PORTER: He puts it higher?

MR. BRAIS: He has taken a higher figure there instead of 7,200,000 dollars - I do not know by what oversight. "There remain the percentages to be applied to these two amounts."

LORD ASQUITH: Why, if he thinks that the other ought to be left

out altogether, does he deal with reproduction costs at all?

LORD PORTER: I think he tests it with two 14 per cents.

LORD NORMAND: At the foot of page 1176 he passes from one to the other, does he not?

LORD ASQUITH: I suppose that, if a person is going to buy a thing, he does not have his mind affected by what is in the mind of the seller and whether it is subject to depreciation or not?

MR. BRAIS: He says that an investor would pay between 7,000,000 and 8,000,000 dollars. He says that there can be purchasers who might have a special requirement, which special requirement would be completely fulfilled by a building of this type, and those special purchasers would, in considering the value of the building, also take into account the replacement cost. He is applying a very critical formula which goes as far as has been suggested by the possibilities which are placed before us by our learned friends. He says that there are some people. What would those special purchasers do? They would look at the building cost. They would take in things that were completely useless in considering the replacement cost. Then the more you come to the special purchaser the less the special purchasers that you would have exist; and he is using this formula to try to work out what the price to be paid would be.

LORD ASQUITH: Is this right? Mf. Justice Rand takes into account pure investment value, commercial value, and he takes into account value to a potential owner-occupier, if there was another, coming along, and under the latter head he takes into account production costs minus depreciation?

MR. BRAIS: Yes, my Lord - what these highly specialised people would take into account, in putting his top price. That raises him about 2,000,000 dollars. He explains how it works out. He says at line 2 on page 1177: "The gradation of increasing possibilities of purchasers with lessening degrees of interest would extend to the purely investment basis." He starts from the highest potential purchaser who might exist and goes down to the investor, of whom there would be a number.

LORD OAKSEY: Speaking for myself, I quite agree with the principle as stated at the top of page 1177 for the moment; but, when you get to line 15, I cannot agree that it is completely dead in value in the opinion of everybody because the floor is made of marble instead of terrazzo, and the walls made of marble instead of plaster. I entirely deny that as a matter of fact, to say that nobody would take any account of that.

MR. BRAIS: They certainly would not pay extra because there was thicker granite.

LORD OAKSEY: I am not sure of that.

MR. BRAIS: I have stated before that I would be much more comfortable if, instead of using this computation from Mr. Perry, their Lordships had used the much more precise and sensible computation given by Mr. Perrault and Mr. Auchambault, which are much higher than about 14 per cent. I do not have to rest on this 14 per cent., because there is 28 per cent. given by Mr. Perrault and 18 per cent. given by Mr. Auchambault for dead space, dead value, lost space, apart from the reduction in rent. When we are looking at Mr. Justice Mackinnon's 14 per cent., I must draw your Lordships' attention to the fact that the figure is much less than the figures arrived at by these two other

witnesses, and whether you take it on the 14 per cent. or on the 28 per cent. or on the 18 per cent. you arrive at the same result .

LORD OAKSEY: As far as I remember, according to your figures you deduct some of it at 25 per cent. and the rest at 18 per cent., whereas as a matter of fact 1,600,000 dollars worth was built in the years to which 18 per cent. would apply that would be far too high, according to the depreciation tables. I was excluding those very big figures, and even after the expenditure of those very big figures you get a figure of 1,600,000 dollars, which was all built in years to which a figure of 18 per cent. depreciation is totally inapplicable on the depreciation tables.

MR. BRAIS: I am sorry, my Lord, but we are not thinking of the same thing. There is the physical depreciation, which we discussed yesterday, the Vernot figures, the Perrault figures and the Auchambault figures; but what we are applying out minds to is this extra 14 per cent. depreciation for waste material in one instance.

LORD OAKSEY: All I was saying was that I did not agree with the statement of fact in the learned judge's judgment at page 1177 that it is dead value for the purposes of anybody who would not distinguish between marble and terrazzo flooring and things of that sort?

MR. BRAIS: What I want to draw to your Lordships' attention is that in the course of our discussion on that we have gone away from the special depreciation into the physical depreciation, which was discussed yesterday. At the present time this special depreciation of 14 per cent., which is the same figure given by Mr. Justice Mackinnon for physical depreciation, is much less than the special depreciation given by Perrault and Auchambault for dead and useless space, and when you call it dead and useless space we can have no quarrel with it. I agree with my Lord Oaksay that, as it is applied by Mr. Justice Mackinnon, there is more subject for criticism of what he has put into his 14 per cent. than there is in the much higher figures arrived at by the other two witnesses for admittedly dead or useless space, or high space where you should have floors. This Board is entitled to, and I respectfully submit bound to, if the formula for 14 per cent. taken by Mr. Justice Mackinnon is not one which finds complete favour with them, to reconsider the matter; and I submit that the Board has complete leeway to take in the much clearer expose of what should have gone over for a larger amount under this heading of "dead waste."

LORD PORTER: If I understand Mr. Justice Mackinnon rightly, he did not go into details at all, but he said: I find in the Minnesota case 25 per cent. and 25 per cent. allowed. I have to consider what I should allow here. 14 per cent. is the right amount for depreciation and 14 per cent. is the right amount for dead value?

MR. BRAIS: We would have been happier if, instead of looking at Perry's figures on terrazo and marble, he had looked at Perrault and Auchambault, which is uncontroversial dead space which is completely lost - elevator space not used, 24 storeys where there should be 27 storeys, waste washrooms and waste which is due to the improperly conceived planning of the building. That would be called dead value, as is said by Mr. Justice Rand, and should be allowed a much higher amount than the very conservative 14 per cent. arrived at by Mr. Justice Mackinnon.

LORD REID: Mr. Justice Mackinnon's 14 per cent. was an exact valuation of all the unnecessary features?

MR. BRAIS: It is not an exact valuation.

LORD REID: After discounting them?

MR. BRAIS: No, my Lord. My learned friends have called it an exact valuation. It is not. It is 3,500,000 dollars, which goes down to 2,600,000 dollars. If it is 2,600,000 dollars it comes down to 2,900,000 dollars. If it is of interest to the Board, I will give it. I have had it computed. First of all he reduces the 600,000 to 200,000 for extra decoration. Then, when you have taken deductions of that figure, my information is that it comes to 2,900,000, so he has taken 14 per cent., which is 2,600,000 dollars, because it is the same figure as the physical depreciation.

LORD REID: He really starts from saying that 3,275,000 dollars represents additional costs, and then he brings that down, by a process which is not very clear, to the 14 per cent.?

MR. BRAIS: He brings that down, and then he picks 14 per cent. arbitrarily.

LORD ASQUITH: Why does he fix 14 per cent., because the physical depreciation is 14 per cent.? They have nothing to do with each other, have they?

MR. BRAIS: No, my Lord. Every assessor does it in that way. This is a rule of thumb which he applied.

LORD ASQUITH: The question of how much space is wasted has nothing whatever to do with how old the building is?

LORD PORTER: I thought that he said that 14 per cent. was the right amount for physical depreciation. Now I have to find out what I have to take off because the building is not what it should be for this purpose. I find that there are all sorts of decoration, which comes to 3,500,000 dollars. I reduce that, because I have taken depreciation off the whole lot, and I am told that depreciation had to come off this in order to get a correct figure, and I get as the correct figure 2,600,000 dollars?

MR. BRAIS: I think it is 2,900,000 dollars, my Lord.

LORD PORTER: 2,600,000 or 2,900,000 dollars: I am subject to correction. Then I thought that he said that 2,600,000 is 14 per cent., or somewhere in the neighbourhood of 14 per cent., and therefore you take off 14 per cent. I have the impression at the back of my mind that, just as in the Minnesota case they took two 25 per cents., so in this case he took two 12 per cents., not as a calculation but as a rough and ready estimate.

MR. BRAIS: I think so, my Lord. I think that the figure that he arrived at came within 31,000 dollars of the 14 per cent. already calculated, and he said: I will call it 14 per cent. That is the way assessments are carried out, when you are within reasonable range.

Then I draw to your Lordships' attention the fact that he takes the commercial value at 7,750,000 dollars. He criticises the proportions. Then at line 31 on page 1177 he says: "Having regard to the whole group of possible purchasers, the weight to be attributed to the one or other primary basis of price must depend upon the likelihood of their appearance as bidders. A heavy demand from prospective owners and few commercial investors would call for a correspondingly small percentage to be referred to the latter basis; when these

proportions are reversed, as here, a like reversal of percentages becomes necessary." Your specialised purchaser is much less than the prudent investor at 7,000,000 dollars or 8,000,000 dollars.

"Mr. Justice Mackinnon was of the opinion that an equal percentage should be applied to each factor, but even with the deduction of surplus expenditure that does not seem to me to reflect sufficiently the relative possibilities. Taking into consideration all special elements such as functional depreciation and obsolescence" - now we are back to the functional depreciation of Perrault and Auchambault - "and the comparative chances of sale, I should say that not less than 55 per cent. should be related to the commercial figure and 45 per cent. to that of reproduction cost. The former yields 4,262,500 dollars and the latter 6,015,208 dollars, a total of 10,277,708 dollars. As this is substantially the amount found by Mr. Justice Mackinnon, I accept his figure as the proper valuation. In agreement with him I would allow the assessment of the power-house."

Then the rest is the conclusions. The only thing I need to note is that, in arriving at his commercial value, he has taken into account instead of 7,200,000 dollars 7,250,000 dollars. That gives a few dollars more.

LORD PORTER: I think you must take the swings with the roundabouts, must you not?

MR. BRAIS: Yes, my Lord. Therefore on these figures, and in spite of the error of 500,000 dollars in the commercial value, we come to approximately the same figure, and that error of 500,000 dollars is one of those things that, when you come to the end, is to be wiped out one way or the other.

LORD ASQUITH: Really Mr. Justice Rand has affirmed Mr. Justice Mackinnon, subject to altering the proportions 55 to 45?

MR. BRAIS: Yes, my Lord. He has taken an entirely different approach. He has definitely taken and weighed the willing buyer-willing seller from all those angles, so far as that imaginary buyer and imaginary seller can have anything to do with this building, on the broadest formula that can be applied under any of the jurisprudence.

LORD OAKSEY: He has inferentially disregarded the memorandum, has he not?

MR. BRAIS: Yes, my Lord - quite.

LORD ASQUITH: But he has already taken into account the reproduction cost as an element which might enter into the other item in the calculation, namely what a rival buyer would pay?

MR. BRAIS: Yes, my Lord. He has taken the most highly specialised buyer, and that, of course, would be a person in the identical position as the owner.

I can conceive this situation arising, and it has in fact happened in a large number of American states. Supposing by law the insurance companies were ordered to divest themselves of their direct ownership of buildings. Supposing the Sun Life had to divest itself and did divest itself, and subsequently for some reason or another the law was changed and the purchasers wanted to sell, they would be in there trying to buy back their own building, competing, as Mr. Justice Rand has indicated and in the manner in which he has indicated. That is going as

far as I can possibly go, because nobody can reasonably conceive that it would happen in this particular case. I am sure that if we were told to go out of our building we should go out and build a better building for a lesser price.

Now we come to the judgment of Mr. Justice Estey. On page 1178 he sets forth the facts that we know. Then he goes through the jurisprudence.

LORD PORTER: I think you can go to the top of page 1179.

MR. BRAIS: Yes, my Lord. "The term 'actual value' is not defined in the charter. The legislature therefore in imposing upon the assessors the duty of determining actual value, without defining that term, intended that the assessors should accept the meaning of that phrase as it has been interpreted by the courts in decisions respecting assessments."

LORD PORTER: You need not read the next: I only wanted to get his principle.

MR. BRAIS: Although Mr. Justice Rand has considered replacement value, there is no law anywhere that says that replacement value should be considered - at any rate any law operating for 1937.

LORD PORTER: But here he is talking about actual value, and he says that that has to be construed as it has been construed in the courts of Canada, because, when you get a phrase which has already been construed and finally is put in an Act of Parliament, you construe it as it has been construed. Then he quotes.

MR. BRAIS: Yes, my Lord. That is from the judgments that we have had.

LORD PORTER: You might pick it up on page 1180, line 16.

MR. BRAIS: "Actual value, as above defined, determined upon a consideration of so many factors, is unavoidably a matter upon which, in respect to many properties, men of experience and capacity will entertain different opinions. The legislature in recognition of this fact provides that actual value as determined by the assessors in the exercise of their own judgment shall be accepted for assessment purposes."

LORD PORTER: Now he puts his criticism upon that on page 1181, line 18.

MR. BRAIS: "The fixing of a flat rate over a large acreage throughout which values vary has been held to be invalid." May I submit that I do not think that that is a criticism to what he has said.

LORD PORTER: It is not a criticism of what he has said; it is a criticism of the other method.

MR. BRAIS: Yes, my Lord. At line 21 he says: "These authorities illustrate the personal responsibility of assessors whose duty it is to determine actual value. It is in recognition of this responsibility so placed upon assessors by the legislators that courts have refused to interfere with assessments unless they involve some error in principle or substantial injustice.

"That the assessors in the city of Montreal should confer with respect to the factors that enter into the making of assessments is to be commended. They may adopt rules and standards which they believe to be of assistance in the more accurate

determination of actual value and in the attainment of uniformity in the distribution of the tax burden. In so far, however, as such rules, formulae or plans interfere with, restrict or eliminate the discharge of the assessors' statutory duty, to that extent they cannot be upheld."

LORD PORTER: That is part of your argument?

MR. BRAIS: Yes, my Lord. "A real estate valuation manual prepared for and used by the assessors in the city of Montreal contains the following in its foreword." I have read that before. Then we come to the memorandum.

LORD PORTER: You need not read the memorandum again.

MR. BRAIS: No, my Lord.

At line 36 on page 1182 Mr. Justice Estey says: "The foregoing indicates that the assessors followed the provisions of the memorandum in determining the assessment of the Sun Life building, notwithstanding that the assessor who did the greater part, if not all, of the work in arriving at the amount of the assessment stated 'There is no other building in the city to compare with the Sun Life'. This statement, founded upon the size and particular architectural features of the building, emphasises what the authorities insist upon and the charter of the city of Montreal requires, that every building should be assessed upon the judgment of the assessor after considering all the relevant factors. These same authorities indicate that there is an inherent danger in grouping buildings, variously used and located, according to their size. Such is no doubt the paramount reason for the absence in the charter of the city of Montreal of any rules or other aids or guides to assist in determining actual value.

"The Sun Life building is an office building, and in following the provisions of the memorandum the assessors, because its offices were in part occupied by the owner and in part by tenants, were required to accept in the apportionment this factor that eventually leads to the apportionment of 90 per cent. replacement and 10 per cent. commercial valuation. Counsel for the appellant stressed occupancy as between owner and tenant is not a determining factor in the determination of actual value of a building. He illustrated his contention by pointing out the mere fact that the tenants move out and owners move in and occupy the premises does not, without more, affect actual value, and there is support for this contention in Regina v. Wells. In any event, it appears that it has been given an importance in the determination of the actual value of this building that cannot, in the circumstances, be justified.

"The assessors themselves computed the commercial value of the land and building at 7,918,000 dollars and the replacement value at 14,404,578 dollars. Even if it be granted that these valuations include all relevant factors, the charter of the city of Montreal contemplates that the assessors shall consider the difference between these valuations, give to the factors that make for that difference such importance as the circumstances warrant and in the exercise of their own judgment determine the actual value. This is far different from their proceeding as they have under the direction of the memorandum that fixes the apportionment largely upon the basis of occupancy. In fact, as stated above, proceeding upon this basis they arrived at an apportionment of 80 per cent. and 20 per cent., and then as 'the revenue of this building received no competition' it was decided that a 90 per cent. and a 10 per cent apportionment 'would pay for the amenities and benefits received by the owners of the building.'"

LORD PORTER: The next paragraph deals with the two questions: 16,000,000 dollars in the books of the company, 8,000,000 dollars as the previous assessment; and you set those against one another You can take them both into consideration, but you must take them into consideration?

MR. BRAIS: Yes, my Lord. Then may I pass that.

LORD PORTER: Then there is a quotation from the American and English Encyclopaedia: "There exists in fact no rigid rule for the valuation, which is affected by the multitude of circumstances which no rule can foresee or provide for."

MR. BRAIS: Yes, my Lord. Then the learned judge continues: "Notwithstanding the desirability, if, indeed, not the necessity of the assessors conferring for the purpose, as already mentioned, in a city the size of Montreal, it does seem that, having regard to the admittedly unique, distinct and different character of this building that, in the main, it has been assessed as any 'large property' within the terms of the memorandum. In these circumstances, notwithstanding the judgment exercised by the assessors in fixing the percentages, there has not been that assessment of this building contemplated by the statute.

"The second contention raises issues as to what ought to be made by way of allowances and deductions. The assessors allowed a deduction for the fact that the building was built in three completed buildings, the first in 1918, the second in 1925 and the third in 1930. A further deduction for structural depreciation and an allowance to adjust the cost figure to that of 1941. Mr. Justice Mackinnon allowed a further deduction of 14 per cent. for extra unnecessary costs of construction. The appellant, however, contends that there should be a further allowance for functional depreciation, that 'the Sun Life building suffers from a very serious functional disability resulting from the inherent design of the building.' This, it is pointed out, involves a large amount of waste space which cannot be utilised, as well as additional space which is undesirable because it is either inadequately lighted or altogether dark." There Mr. Justice Estey groups the two disabilities, the functional disability and the disability owing to the poor quality of the space; but he does consider the functional disability, which we stress. "The contention is 'this waste space and this excessive undesirable space detract from the value of the building whether to a prospective purchaser or to the Sun Life company itself.' It is a very largebuilding occupying an entire city block, rising 25 storeys above the ground" ----------

LORD PORTER: We have had the description.

MR. BRAIS: Yes, my Lord.

Then, after considering the functional depreciation, to which I have referred, he goes to Mr. Justice Mackinnon's 14 per cent. depreciation. He substantiates either that 14 per cent. or the functional disability. I wish to group them now, because we think they go together.

Then I ought to read at the top of page 1185: "It was there contended that, because the building was constructed for and solely occupied by the bank, it had 'considerable waste space even in its present use', and as its maintenance was excessive, it was unsuitable as a business property. The assessor determined the cost of reproduction in the year in question and then allowed 25 per cent. for physical depreciation and a further 25 per cent. to cover 'the effect of the distinctive architecture on its market value, both artistically and as a utilitarian

structure.' The court affirmed the assessment at this valuation."

Then we come to the rather important phrase: "The phrase 'both artistically and as a utilitarian structure' would seem to include both that which Mr. Justice Mackinnon allowed 'for extra unnecessary costs' as well as an allowance for what the appellant terms 'functional depreciation." In other words, he has not been prepared to follow Mr. Justice Mackinnon fully on the marble and terrazzo, and has brought into account the 14 per cent., what the other witnesses have more appropriately placed before the court, that is the functional inadaptability due to the fact that there was dead and waste space, and where I stand in a more comfortable position. Mr. Justice Estey has taken those matters into account.

Then we have this: "Messrs. Perrault and Archambault, whose valuations were respectively 8,625,200 dollars and 9,001,983 dollars (the lowest replacement valuations deposed to)" — they were strictly replacement valuations - "included an allowance for 'functional depreciation.' The Board of Revision disallowed this item but stated 'that in making allowances for "functional" depreciation and obsolescence, on top of the physical depreciation, they (Perrault and Archambault) have overstepped the field of the replacement to encroach on the one of the economic value. The deficiencies, if they exist, are reflected in the rental value on which is based the commercial value; so that Messrs. Perrault and Archambault are making double use of the same allowances.'" That is a quotation from the Board's decision.

"On principle, it would appear that such non-productive features of a building, in so far as they do not add to its actual value (as already defined) ought not to be included among items in the determination of that value. In so far as such items do not enter into or form a part of the actual value and yet are included in the computation ~~thereof~~ thereof the taxpayer is called upon to pay an annual tax thereon which ought not, within the accepted definition of 'actual value', to be included. When, therefore, these factors are established the assessors ought to make such fair and reasonable allowances as the particular circumstances may justify."

LORD PORTER: You can leave out the next paragraph.

MR. BRAIS: Before doing that, may I have your Lordships' permission to add a word?

LORD PORTER: I thought that merely dealt with something that is admitted?

MR. BRAIS: I wish to restate here that the Perrault and Archambault valuations are strictly on replacement value; they do not take into account the return from the building, so there has been no double use. They use it only once.in arriving at their figures. I should like to feel that I had made myself clear on that point.

"The errors in principle involved in the foregoing determination of actual value would, in the ordinary course, justify a reference back to the assessors. However, at the hearing the parties intimated that they would prefer, should we find such errors, a direction fixing actual value as determined by Mr. Justice Mackinnon. In compliance with that suggestion, the appeal will therefore be allowed and the judgment varied to fix the actual value of the Sun Life building at 10,207,877 dollars."

(Adjourned for a short time)

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MR. BRAIS: My Lords, we come now to what I would like to treat as rapidly as possible; that is, the jurisprudence applicable. All these decisions on assessments vary between one question and the other and I have tried to place them by subject matter, but I have found that they just overlap so much that I have placed them in chronological order.

LORD PORTER: Perhaps you will let us hear the propositions first Before we come to the cases, I would like to know what they are going to deal with.

MR. BRAIS: They are going to deal, first of all, with the principles of valuation and on what basis valuation is arrived at. They consider what matters are to be taken into account and what matters should not be taken into account.

LORD PORTER: Let us deal with that, first.

MR. BRAIS: The difficulty about trying to segregate these judgments by principles is that they overlap.

LORD PORTER: If that is so, tells us the principles which you have to consider, because then the same case may be useful for two or more principles.

MR. BRAIS: Some other cases refer to the matters which are not to be taken into account.

LORD PORTER: That is (a) what to take into account and (b) what not to take into account.

MR. BRAIS: And,last of all, what is the duty or the prerogatives on appeal and when an appellate tribunal should intervene.

LORD PORTER: The position of a judge as opposed to the Board of Revision. That is really what it is?

MR. BRAIS: The first case and the oldest case which I have is Squire qui tam v. Wilson, which is reported in 15 Upper Canada (Common Pleas), page 284.

LORD PORTER: What is the date of that?

MR. BRAIS: This is 1865. It is only here because it has been mentioned in one of the judgments and I just have it. I will be very brief in dealing with it. The head note says: "In a qui tam action against defendant for acting as a Justice of the Peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises, on which defendant qualified, was vague, speculative and inconclusive, one of the witnesses, in fact, having afterwards recalled his testimony as to the value of a portion of the premises and placed a higher estimate upon it; while the evidence tendered by the defendant was positive, and based upon tangible data" -- it simply says that, if you have something tangible, it is better than speculative evidence. I mention that case because it is referred to in one of the decisions.

LORD PORTER: I should not bother to go into a case unless you want really to use it, because there must be an immense number of them.

MR. BRAIS: There is an immense number of them. An immense number of them are referred to and quoted. I will quote from them very briefly.

LORD PORTER: I am not worrying about it. I do not want to have a

case like this, which really we are not going to use at all.

MR. BRAIS: Then I will leave The Queen v. Wells.

The third case is Lord Advocate v. Earl of Home, which we have already had. I think that it has been cited often.

LORD ASQUITH: You have given us a photostat of the material passage.

MR. BRAIS: Yes, my Lord. I regret to say that the photostat should have been of the whole case, and I must apologise for not having here the whole passage. I hardly think that I need read that again.

LORD PORTER: No. Just give us the reference.

MR. BRAIS: 18 Rettie (Court of Session), page 397.

LORD ASQUITH: That is the case which says that the value is what the thing will fetch in the competitive market?

MR. BRAIS: Exchangeable value. I draw your Lordships' attention to the judgment of Lord M'Laren, at pages 402 and 403.

LORD NORMAND: That was a case of a contract, I think, and not of a valuation.

LORD REID: It says in this excerpt that Lord Douglas agreed that the buildings to be erected should be valued at the end of the term and the proprietor should then pay one half of the appraised value. It is that phrase that Lord M'Laren is interpreting. That is at the top of page 403.

MR. BRAIS: Yes, my Lord. Then he continues as to what the word "value" means. We have seen other statutes, some of the Western cases, where the buildings were to be a certain percentage of the actual value - on farms, for example.

LORD NORMAN: Appraised value has nothing to do with assessment; it is simply actual.

MR. BRAIS: Yes. Lord M'Laren says that "the proprietor should then pay one-half of the appraised value. Now, the word 'value' may have different meanings". This judgment is cited in all assessment cases and that is why I place it before your Lordships.

The next case is Cassils v. City of Montreal, reported in 14 Quebec Judicial Reports (Superior Court), page 269.

LORD OAKSEY: What is the date?

MR. BRAIS: 22nd June, 1898. There we have the same principle. The head note says: "The words 'actual value' in Article 92 of the Charter, which settles the method of valuation of immovable property for the purpose of raising taxes and assessments, s'entendement de la valeur venale" - the sale value - "that is to say, the value which the proprietor could obtain for his property if he had a purchaser who needed it."

LORD ASQUITH: Market value?

MR. BRAIS: Market value. It is the willing buyer and willing seller in its pristine form.

LORD REID: Was that a case where the subjects were in fact marketable?

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MR. BRAIS: Yes; land and building.

LORD REID: So that there was no difficulty in finding a market price, if you wanted to do so.

MR. BRAIS: I should not think so, my Lord. It was a valuable piece of property - 200,000 dollars in those days.

LORD PORTER: What was the dispute?

MR. BRAIS: On the value.

LORD PORTER: Was it a dispute merely as to quantum or was there any dispute as to principle?

MR. BRAIS: There seems to have been a dispute as to principle, which is not stated, because they describe what the valeur venale is. They said: "After having considered the proof made in this matter and the decision of the assessors and the Recorder, we are of opinion that the actual value of the property of the plaintiff does not exceed the sum of 200,000 dollars and the valuation made by the assessors of the City of Montreal of the property is reduced to the sum of 200,000 dollars."

The next case is Cartwright v. Sculcoates Union, reported in 69 Law Journal (Queen's Bench), page 403.

LORD PORTER: What is the year?

MR. BRAIS: 1900, my Lord. It is also reported in 1900 Appeal Cases, page 150. Lord Macnaghten says at page 404: "Notwithstanding the able argument on the part of the appellants, I think this is a very simple case."

LORD PORTER: The head note in the Law Reports is rather important as putting the principle. It says: "In assessing the value of a licensed public house for the poor rate the existence of the licence and the amount of the trade which can be and has actually been carried on there are elements to be considered in order to arrive at the rent at which the house may reasonably be expected to let. Evidence of these facts is always admissible, and may be necessary where the ordinary evidence of market value by comparison with other public houses is not to be had. Evidence of profits made is also admissible, but an inquiry into profits should be avoided where possible, because it is regarded as inquisitorial and oppressive. These are not rules of law but matters of practice and common sense, and it is not expedient to lay down rules about them."

MR. BRAIS: That is, of course, on a rental basis and I cannot make use of that one way or the other; but I would wish to draw your Lordships' attention in this particular case to the second paragraph of the speech of Lord Morris. He says: "The Act of Parliament states very concisely that the question to be solved is: what would it be reasonably expected that the premises would let for to a tenant? That has been paraphrased (and personally I do not object to it) into: what would a hypothetical tenant pay? Now these does not appear to me to be any law at all in that question. I am told that two great divisions have been made by those who have built a superstructure of law upon that rather simple line in the Act of Parliament - into what are called "exceptional cases" and "ordinary cases", but I can find no ~~fix~~ such distinction in the Act of Parliament. The Act of Parliament leaves it general."

Of course, I apply that to the fact that we have special buildings here that are segregated in the memorandum and I submit that there is a further re-segregation of the Sun Life; but his Lordship said that there is no such thing as special cases.

LORD PORTER: What Lord Morris said really is, if you come to the point, that, where, as here, the Act of Parliament is general, "The tribunal that has to assess is to decide what the premises would be reasonably expected to be let for. That may in certain cases, like railways, gas companies, docks, etc., be most difficult to ascertain, because there is no probability -- I might almost say no possibility -- of considering that there a tenant would ever arise to take it. Therefore, in that case the tribunal is obliged to resort to a discussion as to the amount of profits that have been made" and so forth.

MR. BRAIS: That part I cannot make use of one way or the other here, because it is not a matter of rental or a matter of profit, so far as this building is concerned. We have had both valuations.

LORD PORTER: No; but that shows the necessity of taking every matter into consideration and, as in this case certain matters are ruled out, taking the rest.

LORD ASQUITH: What you seek to use it for is to discredit the memorandum in this case, in so far as it segregates special cases?

MR. BRAIS: That is all.

LORD ASQUITH: Just as the Act of Parliament in this case was held not to warrant separate treatment of different cases, because it did not do so, so here there is nothing to warrant the memorandum meting out special treatment to large buildings?

MR. BRAIS: That is the only use that I make of it. In the other case you have a special case and special circumstances. I am not trying to make any comparison between what occurred there and what is happening in this case.

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I now come to the case of The Mersey Docks and Harbour Board v. The Assessment Committee of the Birkenhead Union and Others, which is well known case, oft referred to, and which is reported in 1901 Appeal Cases, page 175. The head note says: "In estimating for the purposes of a poor rate assessment the rent at which premises may be reasonably expected to let, the circumstances of the actual occupation are matters to be considered, including the receipts and expenses of the business carried on there; although (as in the case of the Mersey Docks and Harbour Board) the occupiers cannot make profits for their own benefit, but are required by statute to apply them to specific purposes." That applies the problem at stake there and, of course, I cannot make use of it.

Lord Halsbury, however, says in a general way at page 179: "My Lords, in this case it appears to me, for the reasons which have been given by the Court of Appeal, and having regard to the subsequent explanation of the learned recorder, that this appeal ought to be dismissed with costs.

"I cannot help thinking that a great deal of the hesitation and confusion which has arisen upon the subject matter which your Lordships have heard debated now on the part of the appellants has arisen from the advisory character of the judgments which have been given from time to time by the various courts before whom this rating question has come. The thing that the legislature has called upon the overseers to do is to solve a simple question of fact and, although it may be by no means simple as regards the mode in which they are to arrive at it, the question of fact is simple enough as stated - that is to say, they are to make the rate 'upon an estimate of the net annual value of the several hereditaments rated thereunto - that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent charge, if any, and deducting therefrom the probable average cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent'."

Then at page 181 he says: "You are not rating the income; you are rating the premises; so that, where you have premises of a similar character with equal facilities for carrying on trade, you have a very facile mode of coming to the conclusion what sum would reasonably be given by any tenant from year to year for such premises. But if, instead of doing that, you choose to go into elaborate calculations of how much the building cost to erect and, when erected, what would be the value of it, you are only elaborating and making more complex and difficult the simple proposition which the legislature has put before the overseers to answer."

There are rather useful references at page 182 and 183.

LORD ASQUITH: I have this marked. I think that we had this cited to us about three or four weeks ago.

MR. BRAIS: It was cited by my learned friend, and I do not disagree with any of the decisions which were cited.

At page 183 Lord Halsbury says: "Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included. The question is a question of fact, and the only way in which you get in a question of law at all is with regard to the mode

in which the question of fact has been dealt with."

Then at page 184 we see that their Lordships had before them in that case solely a question of law and, if they did not intervene in that case, it was because they were not called upon to intervene because upon the statement of fact the question of law did not arise; and that explains the conclusions of the judgment.

I refer to that because it was read by my learned friend, and I have to draw your Lordships' attention to the fact that in that case the question of fact could not come into account.

I then pass to the case of Great Central Railway Company v. Banbury Union, reported in 1909 Appeal Cases, page 78.

LORD NORMAND: Is this a case which we have had?

MR. BRAIS: It has been referred to.

LORD ASQUITH: I think that the citation that we had before was at page 94. That is the passage which Mr. Beaulieu read.

LORD NORMAND: I think that you have cited this case already.

MR. BRAIS: Yes; I may have done so in opening. I cite it on this point of the argument of the value to the owner. At page 95 Lord Dunedin says: "You may spoil the ship for want of a pennyworth of tar." A little later he cites what was said by Mr. Justice Mellor in the Llantrissant case: "Some difficulties have been introduced by confusing the hypothetical tenant with the actual tenant; it is not because a particular tenant will give a large sum as rent that that is any criterion of the rateable value."

That just about gives the gist of what I want to submit on this judgment. It is there that we have reference to the value to the tenant being called the blackmail argument. Lord Dunedin says at page 94: "Where, however, there is no extrinsic evidence available and the assessors have nothing to go by except the actual occupant's own experience, how is the inquiry to be conducted? We have been told what is called the ordinary way, which has been described by the Lord Chancellor. I confess that, if there is no other evidence, the matter seems to me here to end. I entirely agree with the remarks of the Lord Chancellor in this matter. The assessing authority cannot, I think, be heard to say: 'All your Great Western through traffic is dependent on this piece of line; therefore it has an enhanced value, because you could not do without it.' The same might be said as regards each and every isolated mile of line over which the through traffic goes. It is really what Lord Halsbury in one of the cases calls the blackmailing argument. You may spoil the ship for want of a pennyworth of tar. A prudent shipowner would pay a great deal not to spoil the ship. Yet to the hypothetical buyer the value of the tar still remains a penny."

LORD REID: Did he tell us how we should value it? You are not to value it by value to the owner. It has no exchange value, because it is of no use to anybody else. So how do you value it?

MR. BRAIS: In this case what the assessors were trying to do was to say that the Great Central Railway had spent a tremendous amount of money to buy the land to build this railroad. They said: To you, for rental purposes, the simple method of fixing

a value is the interest on the money that you have put into the line. The House of Lords said: That is not a proper way; you must value that line qua railroad and assess it on the same basis as you would any other mile of railroad.

LORD REID: What did the House say ultimately was the right way? Perhaps they did not say.

MR. BRAIS: They did, my Lord.

LORD PORTER: If you look at page 84, you will find that a lot is said about the methods usually adopted. (Handing report).

LORD REID: It is all on the revenue principle?

LORD PORTER: Yes. There is nothing else about the railway.

LORD REID: If it is the revenue principle, I understand.

MR. BRAIS: They put it on the revenue principle and they refused to put it on the cost.

Now we come to two cases from Quebec, which have often been referred to: Cedar Rapids Manufacturing and Power Company v. Lacoste.

LORD ASQUITH: They are expropriation cases, are they not?

MR. BRAIS: They are expropriation cases, but your Lordships will recall that they have been often referred to by the courts and the parties. The first decision of this Board is reported in 16 Dominion Law Reports, page 168, and in 1914 Appeal Cases, page 569; and the second decision is reported in 47 Quebec (King's Bench), page 271.

LORD PORTER: What is the second decision? Is that another case?

MR. BRAIS: It is the same case, which came back here again as Lacoste v. Cedar Rapids.

LORD PORTER: Was that ever reported in the Law Reports here?

MR. BRAIS: I am told that it was not, my Lord.

LORD ASQUITH: That did not get any further? It did not come back to the Privy Council?

MR. BRAIS: Not for a third time. It came twice.

LORD PORTER: 47 Quebec (King's Bench) is a report of the case before the Privy Council?

MR. BRAIS: It is a report of the decision of the Privy Council.

That case is of interest, first of all, because, in spite of the very grave difficulties in the case, the Privy Council instructed that the case should go back for assessment before the arbitrators and laid down the rules, which we find in the headnote of the report in 1914, which is the first decision: "The value to be paid for on the compulsory expropriation is the value to the owner as it existed at the date of the taking, not the value to the taker.

"The value to the owner which the taker must pay on a compulsory expropriation, consists in all advantages which the land possesses, present or future, but it is the present value

alone of such advantages that falls to be determined.

"On a compulsory expropriation under statutory powers, if the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in its adaptability for a certain undertaking which necessarily would include other properties, the value to be assessed by the arbitrators is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending undertakers would give; and that price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility."

The case went back with those instructions and we see that, after going before the arbitrators de novo, it came again before the Board in 1928. In the second decision which I have cited, I should like to read from page 283.

LORD PORTER: What was the page from which you were just reading?

MR. BRAIS: I was reading from the Dominion Law Reports, my Lord.

LORD PORTER: You are now coming to the report at page 271?

MR. BRAIS: The case came back and the appellant complained that the arbitrators did not give enough money.

At page 283 Lord Warrington said: "In the present case" -- it sets forth in great detail what the various conflicting submissions were -- "it appears on the face of the awards that the arbitrators had in mind and intended to apply the two main principles laid down in the previous judgment of this Board. The paragraphs following the references to these principles, except so far as they are findings of fact, are all founded on judicial utterance as to the application of those principles to be found either in the judgment of the Board or in those of the Lord Chief Justice in re Lucas and Chesterfield Gas and Water Board, or in other reported cases. No one has suggested that any of these paragraphs discloses a manifest error either of fact or of law on the part of the arbitrators; in fact, they are accepted as correct by those judges in the Court of King's Bench who were in favour of the respondents. The good faith of the arbitrators is not impugned. Moreover, it is not now disputed that the subjects in question in fact possessed special advantages proper to be taken into consideration in assessing the amount of compensation.

"The question of amount is one peculiarly for the arbitrators.

"The main ground of attack on the awards is expressed in the contention that the same vice as was apparent in the case of the previous award is apparent in these also, to wit, that there is no evidence on which arbitrators acting in accordance with correct principles could have fixed the amount they in fact fixed.

"In their Lordships' opinion this contention fails. From the numerous citations from the evidence made by counsel for the appellants, it appears that there was an abundance of estimates" -- I am thinking of this case also -- "formed on a correct view of the question to be determined. Counsel for the respondents have pointed to a number of passages which

appear to be founded on the fallacious notion already condemned. In other words, the arbitrators had before them evidence both good and bad. They were at liberty to accept and act upon the good and reject the bad. It is impossible to believe that they accepted and acted upon evidence violating principles acknowledged by them as those which ought to guide them in making their estimates.

"It is true that as a mere matter of figures the arbitrators did not accept any of the estimates given in evidence." I pause on that, because we have the same thing here in the percentage. "But the proper amount to be awarded in such a case cannot be fixed with mathematical certainty but must be largely a matter of conjecture. It is the price likely to be obtained at an imaginary sale, the bidders at which are assumed to ignore the fact that a definite scheme of exploitation has been formed and compulsory powers obtained for carrying it into effect.

"On such a question as this the arbitrators were entitled to form their own opinion and were not bound to accept any of the figures put before them in evidence."

LORD ASQUITH: It is like Mr. Justice MacKinnon's fifty-fifty. It was not put before him by any witness.

MR. BRAIS: Mr. Justice MacKinnon's fifty-fifty, Mr. Justice MacKinnon's 14 per cent and the other amounts; the equivalent 14 per cent arrived at by Mr. Justice Rand, and arrived at by Mr. Justice Estey especially when he considers the functional inadaptability. The witness says: A large amount, but Mr. Justice Estey applies 14 per cent on that and on Mr. Justice MacKinnon's 14 per cent.

LORD REID: Am I right in thinking that in the Cedar Rapids case the value to the owner was much less than the value to the taker, and all that they said was: You are not concerned with the value to the taker; you must accept the value to you? Is that right?

MR. BRAIS: That is correct, my Lord. That was an expropriation case. The circumstances there were very particular. The taker had obtained from the Federal Government exclusive rights by charter to exploit the rapids and in that particular instance, which is different from anything that we have here, there was, of course, for him an extraordinary value, because he was the only man in the world who could exploit it and he had the power to make use of the bed of the river, which belongs to the Crown, to exploit and build an hydraulic power plant. The owners there said: That is worth to you something formidable, because you are the only person who can have that power and you have got that power, which is a difficult thing to obtain, of course, from the Federal Government. It was said: You have to consider that nobody has obtained the power; that the bidder, the person trying to buy, would have in contemplation the hope that he might acquire the power - not that he has acquired, as an established fact.

LORD REID: It was an extreme value, in the sense that a purchaser would have the same possibility of getting it?

MR. BRAIS: An ordinary purchaser.

LORD REID: This was not a case of peculiar value to the owner, which you say that the Sun Life is?

MR. BRAIS: There is no peculiar value to the owner. They said:

You must take it away from the peculiar value to the owner or the purchaser; you must not consider the purchaser as being a person who has obtained those statutory powers from the Dominion Government.

LORD REID: Although they said "value to the owner", that was in that case in effect the exchange value of the property if the undertaker had not been there?

MR. BRAIS: As against any other speculative bidder who might have said to himself: Some day I may be able to get powers like that, or the owner himself might have said: It may be that the Government will give me those powers; but these people had the powers and therefore they were in the position of being black-mailed the other way round. It was not the blackmail argument as regards the vendor, but the blackmail argument as regards the purchaser.

The next case my Lords is another case from the Province of Quebec, La Compagnie D'Approvisionnement D'Eau .v. Montmagny. This is before you at this moment. It does not say very much that is new. It will be numbered 4. I have had mine indexed. The reference is 24 Quebec, K.B., page 416. It has been cited in all the judgments, I think. It is a judgment of the year 1915, and it just sets forth the general principle: "The real value is the price at which a vendor who is not obliged to sell and who is not dispossessed against his will, but who desires to sell, succeeds in getting from a purchaser, who is not obliged to purchase, but who desires to purchase." I have given it to the Board, because it has been cited and re-cited.

LORD REID: That seems to be a case where the valuation was less than the sales of comparable properties. Is that so?

LORD NORMAND: The whole of the properties in general, collectively were valued below their true real value, and it was held that that would be annulled by an action "en cassation" before the Superior Court and not by way of appeal.

MR. BRAIS: Yes. I bring these, because they have been referred to and mentioned, and some cited.

LORD PORTER: All this is is exchange value, is it not?

MR. BRAIS: Exchange value.

The next case which I have and which I will refer to very briefly is also before you, my Lords, as No.8 in this afternoon's production, Pearce .v. Calgary, 9 Western Weekly Reporter, page668. It is there we find that quotation which is so often referred of Mr. Justice Iddington of the investor who would be looking towards the future and what he might obtain.

LORD PORTER: This is the prudent investor.

MR. BRAIS: Yes, and, of course, the more you have to think of the future the lesser is your number of individuals who are prepared to do that. It has been cited at great length and referred to, and we have Mr. Justice Iddington's remarks at page 670. These words of Mr. Justice Iddington have been referred to and read quite often. They are referred to in other judgments, and, unless your Lordship's wish to direct my attention to anything in particular there, there was a very particular situation at the time. The land was in bad condition, and he took the prudent investor.

LORD ASQUITH: The prudent investor was invented in Phillipps' case, was it?

MR. BRAIS: I think so. I would not be positive that is where it came out first.

Then we come to Ontario & Minnesota Power Co.Ld, which the Board has before it, which was cited at length by my learned friends.

LORD PORTER: That is the one where there was the swamped land, was it not?

MR. BRAIS: No, the question of the value to be placed on a developed water power. You have the difference here between an undeveloped water power and a developed water power.

It is in 28 Dominion Law Reports, page 30. The holding is: "In assessing land at its 'actual value' within the meaning of Section 40(1) of the Assessment Act, 1914, ch.195, it is proper to take into consideration its special adaptability, such as its use in developing a valuable waterpower, and whether its value as a rown lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power." My learned friend read from this judgment at great length, and we find the water power was there, the persons owned it on both sides and it was in process of being developed.

If we read at page 37, it says: "In none of these cases was the Court called upon to determine the question which is before is, viz, whether in assessing land it is proper to take into consideration its special adaptability to such a use as Water Power Block 2 is being put to - its use in developing a valuable water power which without it could not have been developed. I have no doubt that it was proper, in determining the 'actual value' of the block, to consider whether its value as a town lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power which has been developed" -- there they make the distinction, "The water power which has been developed" -- "and to assess it accordingly." It is part and parcel of the development.

"If the block had been expropriated before being so utilised", and he refers to Cedars Rapids v. Lacoste and Pastoral Finance Association .v. The Minister, both decisions of the Judicial Committee of the Privy Council. "That the same principle must be applied in ascertaining the 'actual value' of land for the purpose of assessment, subject to the qualification that it may be that in expropriation proceedings the fact that the land is taken without the consent of the owner may be considered, is not, I think, open to question. In both cases what is to be determined is the same - the actual value of the land." This is a developed water power. "If in ascertaining the value of land which has not yet been used for the purpose for which it is specially adapted, its adaptability for that use must be considered, it is, I think, an a fortiori case that, where the land is used for that purpose, its enhanced value by reason of its being so used must be taken into account." That appears to be covered by the second of the two propositions stated by Lord Dunedin in the Cedar Rapids case, where he says that the value 'consists in all advantages which the land possesses, present or future." That is the expropriation case, of course.

Then he goes on: "The fact that, before the land could be put to the use for which it was especially adapted, the consent of another person would be needed, is a factor to be considered, and in some cases it might be that it was so improbable that the consent could be obtained that nothing ought to be allowed on account of the special adaptability, but that is a question of fact for consideration in determining the value of the land. In this case no such difficulty exists. Practically the same persons own the land on both sides of the river. The recitals of the agreement seem to indicate that a dam extending beyond the international boundary line was not essential to the development of the water power on the Canadian side."

That, of course, is an entirely different matter. You have the water power being developed, and that case was used against us to show that at some future time, if the Sun Life could make use of this building or would have the space, we should be assessed on those future possibilities, and the case is used to demonstrate that theory. I say on the face of it you have a denial of the very situation which is sought to be applied.

The next case is the case of Lacroix .v. The City of Montreal. Your Lordships have not got that. It is just again the general principles. The reference is 54 Quebec Superior Court, page 130. I am limiting myself to the holding: "The actual value on which the assessors of the City of Montreal are held to value the immovables should mean the exchange, to wit, what the vendor could get for his property, from a purchaser who, without being obliged to purchase, desires to obtain it."

LORD REID: What was the nature of the property?

MR. BRAIS: Six lots of land.

LORD REID: Was this a case of a temporary unsaleable lot?

MR. BRAIS: There is no suggestion of that, I think.

LORD PORTER: How did he come to use this phraseology? What object had the Court in saying you use the exchange value?

MR. BRAIS: The Court if following a line of jurisprudence and using the Montmagny case.

LORD PORTER: What was the argument?

MR. BRAIS: The argument was on the amount. He purchased the lots for 11,200 dollars. He was assessed on 12,000 dollars and requested that be reduced to 7,500 dollars, and then the judgment discusses the facts of the case. The lots are near the tramway line, and it reduces the assessment from 12,000 dollars to 7,500 dollars, because it considers the lots are not worth that much from the evidence. Apparently there are no principles strongly at stake in these little cases.

LORD PORTER: There is one matter you might have to consider, whether this property is of more value because it is near a railway, and the other asset being the trams or something of that kind. Did they take that into account?

MR. BRAIS: May I apologise to this Court for having read this one very rapidly.

LORD PORTER: I do not get any assistance out of the mere statement of a principle which, if it is applicable at all, is universally accepted.

MR. BRAIS: I appreciate that fully, and have just said I am referring to these because they have been referred to in the judgment during the decisions, and some I am not endeavouring to stress beyond stating that they are.

LORD PORTER: I should not bother to state them at all unless they said something.

MR. BRAIS: I would be very happy to follow that guidance. The

only thing I have here is that they are on the north side of the mountain far from the tramways where no streets have been opened.

LORD PORTER: It is non-adaptability.

LORD REID: That case seems to help to this extent. Although the taxpayer had spent 12,000 dollars in buying the thing, he was only rated at 7,000, applying too much, and you want to apply that to your building.

MR. BRAIS: I may be doing the wrong thing here this afternoon, but all these cases are referred to in the judgments and I have just made them available.

Then there is the case of Grierson v. The City of Edmonton. You have not got that. The reference is 58 Federal Supreme Court Reports, page 13. I have here the copy from 45 Dominion Law Reports, page 70. It is a decision of 1919 and I am just referring to this holding, which has in mind the question asked by my Lord Reid this morning as to future prospects.

"Where prospects of future sales or future profitable exploitations of land are considered in estimating the value of such land for taxation purposes under section 321 of the charter of the City of Edmonton (Alberta) it is the present value of such prospects only that are to be taken into account." Then Mr. Justice Duff says: "The cardinal error in the valuation appealed from arises from a failure to observe the fundamental principle that where prospects of future sales or future profitable exploitations are considered in estimating value it is the present value of such prospects only that are to be taken into account. (See judgment of the Judicial Committee in Fraser v. Fraserville, 34 Dominion Law Reports)" -- there are only two paragraphs.

LORD PORTER: I have the Supreme Court of Canada Reports, Volume 58. The Chief Justice says a good deal that you may want; that is to say, he first of all says you naturally go to the judge in those days or the man who made the assessment. Was the judge the tribunal to make the assessment?

MR. BRAIS: I must presume on that, because I do not see it raised. I do draw to your attention, however, that the Statute is quite different from ours in that to a certain extent future values are to be considered.

LORD ASQUITH: From what province is it?

MR. BRAIS: The Province of Alberta.

LORD ASQUITH: The judge was at one time the authority there?

MR. BRAIS: Judge Davies, who comes immediately after the Lord Chief Justice, in the second paragraph cites the Statute, which of course explains the assessment for the future. It reads this way: "Land shall be assessed at its fair actual value. In estimating its value regard shall be had to its situation and the purpose for which it is used or if sold by the present owner it could and would probably be used in the next succeeding twelve months."

LORD PORTER: "In case the value at which any specified land has been assessed appears to be more or less than its true value the amount of the assessment shall nevertheless not be varied

on appeal, unless the difference be gross, if the value at which it is assessed bears a fair and just proportion to the value at which lands in the immediate vicinity of the land in question are assessed." That is a peculiar provision to that particular province?

MR. BRAIS: Then if we read Mr. Justice Anglin's decision, which must be the last page in the Supreme Court Report, and is the penultimate paragraph of the decision, he says: "On the evidence in the record it is abundantly clear that there was no likelihood whatever -- indeed it may be said that there was no possibility of the land here in question being used for anything else than farm or market garden purposes during the twelve months succeeding the assessment. Yet the assessment was obviously based upon the prospective value of the land for purposes of subdivision into building lots, and all the evidence offered in support of it was basedon the assumption that it was properly so treated."

LORD REID: I see here the quotation from that case in which Sir Charles Fitzpatrick, the Chief Justice, is said to have said that the intrinsic value must necessarily be the price which it will command in the open market. Is that made as a general statement?

MR. BRAIS: If it were it may have helped to dispose of the 1937 amendment, my Lord, when "intrinsic or replacement value" was referred to. I have tried to distinguish between replacement value and intrinsic value.

LORD REID: I follow that. The reason I asked that is because Mr. Justice Taschereau quotes a passage from Sir Charles Fitzpatrick in which he quotes intrinsic value as the price it will command in the open market. That seems to be an important statement.

MR. BRAIS: In the 1937 Act if one reads it as I read it, they mean the same thing, intrinsic or replacement value. I have submitted to your Lordships that intrinsic value is just the value of the thing as it is with nothing more, and, when you say "intrinsic value of a property", you say what you can get for it. Your Lordship has been good enough to draw to my attention what Chief Justice Fitzpatrick says in that connection. It would only support what I have sought to formulate as a result of that.

The next decision is Dreifus v. Royds, 61 Supreme Court Reports, page 326. It is a Supreme Court decision of 1920.

LORD PORTER: Is this still the law: "The court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed." Is that Statute law?

MR. BRAIS: That will be the Ontario Assessment Act which is being cited there, my Lord.

LORD PORTER: But what is the assessment? Does that assessment apply to this property?

MR. BRAIS: No, my Lord.

LORD PORTER: Why not?

MR. BRAIS: We have not got the same. I will just refer to the second paragraph of the holding: "Held, that in assessing land under these provisions the governing principle is to ascertain its actual value. Held, further, Mr. Justice Brodeur, dissenting,

that in this case the assessment was made chiefly, if not entirely, on consideration of the value at which adjacent lands were assessed and the actual value was disregarded. The case was, therefore, sent back to the tribunal appealed from to have the land assessed on the proper principle."

LORD NORMAND: What was the proper principle?

MR. BRAIS: Actual value. The Judgment enlarges on that, my Lord, to say that the proper principle is the actual value. It is a long judgment.

LORD ASQUITH: Does it say what the actual value is?

MR. BRAIS: No, I am sure it does not say what the actual value is. It says it has to be assessed on the principles of actual value. They sent it back for valuation.

The next case I have is the case of Canada Cement Co. & St. Lawrence Land Co. v. Montreal Est. May I have your Lordships' permission not to discuss this case de novo? I will give the reference. It is 35 Quebec K.B., page 410, and the warning against it in the Manual is at the bottom of page 46, where it is cited.

Now I come to the case of Starr Manufacturing Company. There is very little in this decision. It is a decision of 1926, reported in 1, Dominion Law Reports, page 212. "Where assessors have made their valuation not upon the principles laid down by statute, their valuation must be set aside." Then we read page 213: "On the hearing before the County Court Judge there was evidence as to the actual cash value of the property in question arrived at in the method pointed out by section 17, rule 2, and on the other hand one of the assessors who had made the original assessment was called to support the valuation he and his co-assessors had placed upon the properties and as I understand his evidence he did not attempt to justify his valuation as being the actual cash value at the time of the assessment but upon grounds inconsistent with the rule laid down in the Statute." Of course, I derive from this that if we adopt the memorandum principles here and the failure, even to consider exchange value, we are in the process of proceeding to ground not laid down in the Statute, and there is no doubt that Vernot did not attempt, nor the Board, to consider exchange value. The next case is the case of Cedar Rapids, coming back to 1928.

The next case is Gouin v. Cite de St. Lambert. The reference is 67 Quebec Superior Court, page 216. It is one of these smaller cases where the same principle was applied. "The real value which is sought by the Statute and by the Act (Article 485) as regards taxable properties in an urban municipality consists in their selling price and exchange value at the period of the execution of the valuation role by the assessors." It is a house, a lot, in a residential village of St. Lambert, where the jurisprudence is cited.

LORD PORTER: All it says is that the real value is the saleable value at the moment when the role is made.

MR. BRAIS: Yes.

Then we come to the case of Grampian Realties Co. v. Montreal East, which we have had in various and numerous ways.

LORD PORTER: You have given us a quotation from that in your little books?

MR. BRAIS: Yes. That is already before your Lordships. It is No. 22.

LORD PORTER: It is 1932, 1 Dominion Law Reports, page 705.

MR. BRAIS: That is correct, my Lord, and it bears No 22 of the brown books. That is where we find the land was sold at much more cheaply than the neighbouring land. I have to say it has no possible application, because the assessment was too low as it was apparently; but there are broad statements made.

That brings us to the Bishop of Victoria v. City of Victoria, which your Lordships already have under booklet No. 23. I have cited from this at considerable length in opening. It is in 1933.

LORD PORTER: This is the one of the college?

MR. BRAIS: Yes and which I strongly urge in favour of the principles that we are submitting to this Board. You cannot reconstitute the building. You cannot make the building do something else than it is doing at the present time, and you must value that building qua building as it is then. You

also have just as Mr. Justine Idington's formula in Pearce v.

Galgary which this cited there.

In opening I went rather exhaustively into this decision in support of our contentions;unless your Lordships wish me to re-iterate, I dom not think I can add anything further of value. It is also cited by my learned friends. I picked up all the judgments my learned friend cited and relied upon principally becausethey were in mylist of authorities, and they were the ones I was relying upon to establish that the valuation in this case had not been made in conformity with established principles.

LORD ASQUITH: You cited it insofar as it said actual value means value in exchange ?

Mr. BRAIS: Yes.

LORD ASQUITH: And insofar as it brought in the prudent investor. The other side cited it in so far as it says that other considerations must be taken into account, such as, what the property cost those who own it, and soon. It is a case which cuts both ways.

Mr. BRAIS: It could cut both ways.

LORD ASQUITH: It may mean simply that the exchange value is what a buyer/who would take into account in those other considerations, would pay ?

Mr. BRAIS: Yes. They all ultimately arrive at the necessity of examining exchange value after looking at all the factors that are comparable, and in this case they say:In considering the exchange value you are not allowed to consider what this building would be worth when some owner bought it and used it for considerable revenue production by making it into an apartment house. You have a school; although the assessment is difficulty you have to assess it qua school. In our case we have a building which we are using as indicated, and it must be assessed in that position.

Then we come to the case of In re Phillipps Estate, 1 Western Weekly Reporter. It is a case from the King's Bench of Manitoba where all the principles have been considered quite exhaustively and very fully. As your Lordships will have noted the result has been that it has been cited in a large number of decisions as indicating the governing principles. The ones that I had wished to restate here briefly are found in the head note: "The 'value at the time of assessment' which under section 294 of said charter the assessor is required to ascertain, is that amount which a prudent investor, taking into account all the factors creating value, might reasonably be expected to pay for the property". Then he cites Pearcev. Calgary and Victoria v. Victoria. "In determining such value, every factor past, present future or potential which enables its owner to exchange property for money must be taken into account.

"There is nothing in said charter which authorizes 'uniformity' or equalization of assessments. The assessor is no entitled to consider the assessments of other properties". Then there is a reference to peak points, and so on.

Then we see the essential principles discussed on page 457.

LORD PORTER: Before you get to that, I think we might have the penultimate paragraph on page 449.

Mr. BRAIS: "The system of valuation and assessment adopted by the city, whereby the value of land is based on a graduated scale

of refledtion from the assumed values or assessments of peak points, is illegal since it encourages, if it does not result in, an evasion of section 545 of the charter wherein it is provided that the yearly rate for controllable expenditure shall not exceed 12 mills on the dollar."

LORD PORTER: I wanted you to read it because what in effect it says is that you must not put up rules of hand which are not authorized by the Statute.

LORD ASQUITH: It occurred to me that what my noble and learned friend is saying has application in another connection; if according to established principles of law the valuation ought to be so and so, you ought not to lay down a rule to make it higher or lower in order to preserve stability, which is really all that the memorandum has done.

MR. BRAIS: That is correct.

LORDPORTER: We need not bother about the next, but I think you had better read the first paragraph on page 450.

Mr. BRAIS: "On an appeal to the Court from a decision of said Board on an appeal to it from an assessment the duty imposed up the Court by said charter is to judicially consider and weigh th evidence taken at the hearing before the board and then make up its own mind; if this be different from the decision of the board the Court will pronounce the decision which in its opinion should have been arrived at by the Board".

LORD PORTER: Doyou want to call our attention to any of the points in the judgment ?

Mr. BRAIS: Not particularly, my Lord. We have gone through this before, except at the bottom of page 458 it says: "As I pointed out above there is nothing in the charter authorizing uniformity or equalization of assessments".

LORD PORTER: He said that in the head note too.

Mr. BRAIS: Yes, my Lord. The head note is complete. May I save time by leaving it there ?

The next one is Montreal Island Power v. Town of Laval Des Rapides, 1935 Supreme Court Reports, page 304. That is the swamp land which had been flooded out for the purpose of power development. Mr Justice Duff took exception to the decision arrived at by his colleagues, and set forth in very clear terms that "real value" is "exchangesable value", and refused to modify the conclusion because the amount was so small, de minimis non curat lex. His formula was subsequently approved by the whole Supreme Court of Canada as is so well expressed in the caseof Withycombe Estate v. Royal Trust, to which we will come. I just draw to your Lordships' attention that Mr Justice Duff disagreed with his colleagues, but he did not modify his conclusions.

In the head note it says: Chief Justice Duff, after commenting on the meaning of the words 'actual value' when used for the purpose of defining the valuation of property for taxation purposes, was of the opinion, although not dissenting formallyfrom the judgment of the majority of the Court, that the assessors of the respondent municipality had not performed the act of valuation in respect of the submerged land in conformity with sections 485 and 488 of the Cities and Towns Act, and, consequently, that there was no valid assessment in point of law; and also, that this Court had no material before it by which it was able to perform itself the

act of assessment".

LORD PORTER: I should have thought that the real effect of this case is that the whole court decided that they could not arrive at a result, but one of them, while not differing from the others, said that that was a reason for, I suppose, sending the case back, and the others said: We will just halve it and trust to luck.

MR. BRIAS: Yes. The others said: We will halve the amount and trust to luck. Mr. Justice Duff said: That is completely improper, I refuse to subscribe to that; here are principles which have to be followed; they have not been followed, and we have not the material before us to enable us to follow those principles, and I place myself on record as to what the principles should be, but in view of the fact that you have only a 48 dollar assessment I will just let the 48 dollars go. That is what he says in so many words. Then may I refer your Lordships to the case of in re Withycombe Estate Attorney General of Alberta v. Royal Trust Company, reported in 1945 Supreme Court Reports page 267. That is where the revenue producing capacity of the property was used almost exclusively in establishing the valuation. We will see on page 279 that Chief Justice Rinfret, who was in agreement with Mr. Justice Duff in the previous case to which we have just referred, quotes the pertinent portion and then, of course, applies it. It is applied by the other judge and has been referred to extensively since by all courts and all judges as the proper principle to be followed.

Then we see, on page 284, that Mr. Justice Hudson refers to the quotation of Mr. Justice Duff. The case of Lord Advocate v. Earl of Home is again referred to in this case at page 283. The only thing that I can usefully add in this case is that the value used there was the value resulting from the lease, the rental value.

LORD REID: I was looking through it, and it seemed to me that at the bottom of page 288 Mr. Justice Estey deals in a succinct manner with what you have to do when there is no market, and he tells you how to do it. Do you accept that as a proper statement of the law?

MR. BRAIS: That is what I have been trying to express for these days, that it is entirely improper for the Board of Assessors and it is entirely improper for the Court of Appeal to say that you must not and cannot construct an imaginary market; that when they have done that they have misdirected themselves.

We have had the case of Alliance Nationale v. City of Montreal and the case of Lynch-Staunton v. City of Montreal. Those two cases are already before your Lordships. We have had those before and I do not think there is anything I can add except to say that during this interregnum of 1937 to 1941 the courts applied the law and did not say there was another law or it was the actual value law. The two judgments are identical; they are rendered on the same day by the same judge, one of them in French and the other in English.

LORD PORTER: I do not think we need refer to them any further.

MR. BRAIS: Towards the end of the decision it cites the statute which was in force from 1937 to 1941 where it said "replacement value". That is the only time in any law where you find replacement value with which I quarrel when it is placed before me as being anecessary ingredient of assessment, because the law does not say so. It did say so at

one time and the fact it was deleted and removed gives further force, if I may express myself in that fashion, to my argument that it is no longer a necessary ingredient.

Then I come to the case of McCarthy v. Winnipeg reported in 1940, 1, Dominion Law Reports, page 481. This was cited by my learned friends and strongly relied upon. The headnote says: "An assessment will not be reduced by the Court of Appeal simply because it is in excess of the market value of the property if it is not shown that it will bear more than its proper share of the taxes. Market value of real estate is not the sole criterion of value for assessment purposes".

LORD PORTER: On what is that founded?

MR. BRAIS: I do not know, my Lord. It is in complete contradiction of all the decisions. I bring it up because it was brought up by my learned friends, if I recall correctly.

LORD PORTER: What was the court?

MR. BRAIS: The Manitoba Court of Appeal. I do not recall exactly if it was cited by my learned friends, possibly it was not, but I do cite it because it is one of the Canadian cases and I rather feel it is my responsibility to consider them all. I have not seen it followed in any of the governing decisions. I do not think it is a good decision, it violates all the known principles, but it is a decision of a Canadian court.

LORD REID: Was this a depressed market?

MR. BRAIS: 1940, yes, Winnipeg was the last city in the world. It would be a depressed market.

LORD REID: That is why they would say it was not a proper test?

MR. BRAIS: That is why they would say it was not a proper test. We have seen other decisions somewhat along that line in a particular depressed market.

Then there is the case of Stock Exchange Building Corporation Limited v. Vancouver, reported in 1945, 2, Dominion Law Reports, page 663. The headnote says: "Section 39 of the Vancouver Incorporation Act, 1921, provides that 'all rateable property ..... shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor .....'. Held, the term 'actual cash value' in this section contemplates the value represented by the price obtainable in a sale by a willing vendor to a willing purchaser, both alive to commercial realities, for cash and not upon extended or unsecured terms. It relates to bona fide investment as distinct from speculation. The price represented by the 'actual cash value' of a commercial office building is governed basically by (1) past or present sales and bona fide offers for the property as well as bona fide sales of or offers to purchase surrounding comparable property, and by (2) the revenue producing record of the property over a period of years in terms of net income return upon reasonable investment and after adequate provision for depreciation, and by (3) the present value of future prospects, which for assessment purposes are necessarily limited to one year in the future. When these considerations are absent in whole or in part, other indicia have to be sought".

LORD ASQUITH: What court decided this?

MR. BRAIS: The British Columbia Court of Appeal.

LORD PORTER: A slight modification of a prudent investor, limited to one year.

LORD ASQUITH: No long term investor is taken into account.

LORD PORTER: In that particular case the assessment was for one year; in this case it is for three years.

MR. BRAIS: He says the present prospect of the future, and that is what the present shows of the future.

LORD PORTER: Yes.

MR. BRAIS: The future is taken into account.

LORD PORTER: But only in respect of one year. It is no good saying on that case ten years hence this property will sell for ten times its present value. What you have to say is what would it do today or within one year.

LORD NORMAND: The wording of the statute was very different from the wording in the present case.

MR. BRAIS: Quite. The only interest is that they depart from the wording of the statute to define the words "actual cash value". I am leaving it as it is, my Lords; in that definition there they take into account actual cash value and seem to consider that when it is given by a solvent debtor in settlement of a price and seem to consider that it does not add or subtract. I do not know whether that is correct, but the court seem to have followed that view, my Lords.

Then we come to the case of Lounsbury Company Limited v. Bathurst, reported in 1949, 1, Dominion Law Reports, page 62. This presents something of interest. It is the New Brunswick Court of Appeal.

If I may read from the headnote it says: "It is obvious from the provisions of sections 6 and 35 of the Town of Bathurst Assessment Act, 1929, (N.B) chapter 93, which provide that all real estate is to be assessed by the Board of Assessors 'to the best of their judgment', that the Town Council has no authority under section 99 of the Act to alter any assessment so made. Where the Board having arrived at an assessment according to its best judgment nevertheless increases the figure arrived at on the direction of the council and the taxpayer is thus forced to appeal, the burden of proof is on the town to show why the first valuation should be increased. Held, on the evidence, the altered valuation was too high and there was nothing to show the original valuation was wrong". Then the next paragraph: "Whereas in section 6 of the Town of Bathurst Assessment Act, 1929, (N.B) chapter 93, real estate is to be assessed 'at the true and real value thereof' assessors have the right to consider not only the selling value of the property in question and of similar properties but also the actual cost of construction, replacement cost, depreciation, revenue producing capacity, location and all relevant local circumstances".

Your Lordships will note they have the right to consider this in agreement with what I have been submitting. "Neither a boom price nor a depression price would be the 'real value' but rather a price which a prudent investor under normal circumstances would pay rather than fail to obtain the property".

Then at page 70 we read a reference to the case of the Bishop of Victoria v. Victoria and "all relevant local circumstances were appropriate subjects for consideration".

At no time and in no manner do any of these judgments say you must take one or other or all, and, of course, the word "blend" or "blending" is entirely foreign to any of these judgments.

We then come to the recent case of The King v. Jones reported in 1949, 4, Dominion Law Reports, page 259, and at page 280. The trial judge says: "The thing that the legislature has called upon the overseers to do is to solve a simple question of fact: and although it may be by no means simple in the mode in which they are to arrive at it, the question of fact is simple enough as stated - that is to say, they are to look at the rent at which the several hereditaments might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes", etc. etc. "That is the problem which the parish officers have to solve, and they are to arrive at the value, so far as I know, unfettered by any statute as to the way in which they can do it.

"Now I am not aware of any rule of law or of any statute which has limited them as to the mode in which they shall arrive at it, and it is not a question of law at all - it is a question of fact".

Then in the middle of page 281 it says: "At the meeting of the assessors already referred to, they agreed on certain fixed valuations of personal property; mill machinery was to be assessed at 10 per cent of its real value; tractors at 500 dollars. And there were other fixed amounts not depending upon the value. No such rule can be justified. Evidence was also given to show that a number of houses forming part of the Fleming & Gibson mill properties were undervalued and also that individual farm buildings were not properly assessed. The statute gives this Court on this application no control over such assessments". That is quite correct.

Then in the appeal to the Supreme Court of New Brunswick, which is 1950, Supreme Court Reports, page 286, it says in the headnote: "Held: The question before this Court is whether on the entire proceedings the assessment appears to have been made on a wrong principle. The Judge in appeal considered the assessment de novo in all its aspects. He properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements and potentialities of value as well as of risks, and reducing them all to present worth: Montreal Island Power Co. v. The Town of Laval des Rapides, 1935, Supreme Court Reports, page 304. The conclusion to which he came, therefore, is amply supported by evidence adduced before him".

LORD PORTER: What was it, certiorari or something of that kind? How do you get the King in it?

MR. BRAIS: I have not the faintest idea. It would not apply in the province of Quebec. We would not proceed by certiorari.

LORD ASQUITH: I suppose a man might be prosecuted for not paying his taxes on that valuation.

LORD REID: The competing theory there was some rule evolved by the assessors ?

Mr. BRAIS: Yes. They said that the assessors could not evolve a rule.

The next case is that of Butcher v. Vancouver 1950 1 Dominion Law Reports, page 754. It is a matter of annual rental in the City of Vancouver. I am referring to it because it is one of the Canadian cases.

Mr. Justice O'Halloran says: "The assessor's formula for 'annual rental value' was theoretical and arbitrary. 'Annual rental value' 'fair rental value' should be based on the estimated rental the lessee can afford to pay in view of his estimated business profits and ought not to be determined from the standpoint of the owner lessor. The assessed value" etc. It has very little bearing, but it is one of the Canadian cases and I have tried, insofar as I am capable, of putting them all before you.

The next is the case of C.N.R. v. Vancouver 1950 4 Dominion Law Reports page 807. If I may read from page 811, its says: "Undoubtedly these railway lands have a special and very high value to the trans-continental railway system that owns them. A great deal of money has been spent and is still being spent in reclaiming and maintaining them". They reclaim land from the harbour, hence the termination of the Canadian National railway system.

"Such a railway system must have ample and suitable terminal facilities in Vancouver. Their value to the railway company is subjective and may be described as a necessity value. But that is not a legitimate assessment value, since the latter depends on an objective standard that can be applied with fairly reasonable uniformity to all classes of owners alike". Then we have a reference to the Sculcoates case.

LORD PORTER: And to the Banbury case.

Mr. BRAIS: Yes. "To introduce the peculiar value to the owner as a factor in assessment value is to invoke what Lord Halsbury called the 'blackmail' argument, and see Great Central Railway Co. v. Banbury", and so forth. I dom not need to go further than that; it sets it out clearly.

The last case to which I wish to refer is the case of Canadian National Fire Insurance Co. and Others v. Colonsay Hotel Company , 1923 Supreme Court Reports, page 688. This was a fire insurance case where the wording was identical in the statutory conditions for value.

The head note says: "One of the statutory provisions, made a part of every contract of fire insurance by section 82 of the Saskatchewan Insurance Act, 1920, chapter 84, is that a fire insurance company is not liable for 'loss beyond the actual value destroyed by fire".

"Held reversing the judgment of the Court of Appeal that 'actual value' means the actual value of the property to the insured at the time of the loss and not its replacement value".

LORD PORTER: That is the exact opposite in its full sense, because that means subjective value. I am not sure that that is what it means.

Mr. BRAIS: The head note has to be read in connection with the case because the owner of the building only received what the building was worth. The Province of Saskatchewan had brought in prohibition. The hotel ceased to have any value, and they refused to give the replacement value.

LORD PORTER: What do you mean by replacement value; what he had paid for it ?

Mr. BRAIS: No, that would be the appraisal less physical depreciation.

LORD PORTER: Why should he not have that, if they had not put in any value before for his licence ?

Mr. BRAIS: Because he would be making money. It has no very direct application, but they have held here that replacement value cannot be taken into account in these circumstances, replacement less depreciation.

LORD PORTER: You may be right, but I was looking at the moment at Mr Justice Anglin on page 694, where he says: "I am , with great respect, very clearly of the opinion that 'replacement value' (by which I understand is meant what the replacement in statu quo ante the fire of the insured property destroyed or injured would cost, less a reasonable allowance for depreciation) is not either 'the actual value destroyed by fire' or 'the actual cash value of the property insured'. Both these phrases -- one in a statutory condition, the other on the face of each policy -- I think mean the same thing and that is 'the actual value of the property to the insured at the time of the loss', having regard to all the conditions and circumstances the existing -- not necessarily its market value on the one hand and certainly not, on the other, its 'replacement value'".

Mr. BRAIS: Yes -- "which, while it may sometimes be less than its actual value to the insured, will more often exceed that value and sometimes, as in the present instance, very grossly exceed it. The right of recovery by the insured is limited to the actual value destroyed by fire". In that case the assured was receiving a sum far less than ---

LORD PORTER: Suppose the fact to be that he could have sold it in the open market. No, replacement value does not mean market value; I follow.

(Adjourned till tomorrow morning at 10.30)½