[HIGH COURT OF AUSTRALIA.]

MACDERMOTT . . . . . APPELLANT;
DEFENDANT,

AND

CORRIE AND ANOTHER, TRUSTEES OF THE ACCLIMATIZATION SOCIETY OF QUEENSLAND } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 23, 24; *May* 2.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Crown grants—Restrictions on alienation and user of land—Resumption for public purposes—Value of land—Basis of valuation—Arbitration—Award.

The Acclimatization Society of Queensland were the grantees of land subject to conditions and reservations and to extensive restrictions on the use and the alienation of it, and a right in the Crown to resume the land or any part of it which might be required at any time for any public purpose—the value of the land resumed to be paid to the party entitled thereto at a valuation to be fixed by arbitration.

Held (*Powers* J. dissenting), that the value to be so fixed and paid on the resumption of the land by the Crown under the grant was the value to the Society of their interest in the land and not its value to the Crown or to those for whom the Crown was acquiring the land; and that in ascertaining such value the conditions, reservations and restrictions should be taken into consideration as affecting the Society's market.

Stebbing v. *Metropolitan Board of Works*, L.R. 6. Q.B., 37, followed.

Judgment of the Supreme Court of Queensland: *In re The King and the Acclimatization Society of Queensland*; *Corrie and Vidgen* v. *MacDermott*, (1913) S.R. (Qd.), 10, reversed.

APPEAL from the Supreme Court of Queensland.

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In an action commenced on 16th October 1912, in the Supreme Court of Queensland, the plaintiffs, Leslie Gordon Corrie and James Grahame Vidgen, claimed as trustees of the Acclimatization Society of Queensland against P. J. MacDermott, the nominal defendant appointed to represent the Crown under the *Claims against Government Act*, a declaration that they were entitled to be paid the sum of £3,655, being the balance of the value of a certain piece of land resumed by the Governor in Council in accordance with the deed of grant relating to the same, and payment of the said sum. A special case was stated in the matter, by consent, under Order XXXVIII., r. 1, of the *Rules of the Supreme Court* (Qd.).

The special case set out (*inter alia*) the following facts:—By deed of grant dated 17th June 1892 certain lands in the deed of grant more particularly described were vested in trustees upon the trusts and for the purposes therein mentioned (which, so far as material, are stated in the judgments hereunder). The plaintiffs are the present trustees under the said deed of grant and the registered proprietors of the lands therein set forth. Certain negotiations took place between the Chief Secretary's Department of the State of Queensland and the said trustees, and the said trustees were informed it was the desire of the Government to resume a part of the said land in accordance with the powers in the said deed of grant set forth, and they were requested to waive and agreed to waive the twelve months' notice mentioned in the said deed of grant. His Excellency the Governor, with the advice of the Executive Council, duly appointed Mr. Thomas A. Ryan on behalf of the Government, and the plaintiffs appointed Mr. James Love, to ascertain the value of the land in the said deed of grant which it was proposed to resume, and they elected the Honourable Thomas Murray Hall, a member of the Legislative Council, as the umpire in accordance with the provisions of the said deed of grant. The said Thomas A. Ryan and James Love differed as to the value of the said land, and gave notice of such difference to the umpire, whose determination is set out below. By arrangements between the parties, the plaintiffs have given possession of the said land so resumed to the said Government and the Government have paid the plaintiffs the sum of

£3,835 (the amount awarded by the umpire), this arrangement being without prejudice to the rights of the respective parties.

The following was the determination of the umpire (which he called his "Umpirage and Award"):—

1. I find that the value of the total area of the land proposed to be resumed as aforesaid, as set out in the said schedule hereto, on the basis of freehold land unrestricted in any way and as land held in fee simple, is the sum of £7,490.

2. I find that there is no building on the said land.

3. I find that the value of the total area of the said land proposed to be resumed as aforesaid, as set out in the said schedule hereto, being required for a public purpose (namely, an exhibition ground), in accordance with the said deed of grant and reference, is the sum of £3,835.

4. I find that the value of the benefit to accrue to the said trustees from the said public purpose by way of set off is *nil*.

I award and determine that the valuation of the said land described in the schedule hereto, in accordance with the said deed of grant and reference, is the sum of £3,835, which amount is the amount I award and adjudge to be paid by the Government to the said trustees, being the party entitled thereto.

The questions for the Court are:

(1) What are the rights of the parties under the said determination?

(2) Is the said Society entitled to the said sum of £7,490 mentioned in the said determination?

If the Court is of opinion that the sum of £7,490, in the said determination mentioned, is the amount payable by the defendant to the plaintiffs, judgment is to be entered for the plaintiffs for the sum of £3,655; but if the Court is not of opinion that the said sum of £7,490 is the amount payable, the plaintiffs are to accept the sum of £3,835 already paid in full satisfaction of their claim, and judgment is to be entered for the defendant accordingly.

The Full Court of Queensland answered the questions as follows:—To the first question—that the valuation as set out in the first finding of the umpire is estimated on the basis that ought to guide the arbitrators and umpire in ascertaining the

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value of the land resumed, and, upon the sum so found being paid by the Government to the persons entitled thereto, the resumption became effectual; to the second question—that the said Society is entitled to the said sum of £7,490 mentioned in the first finding of the umpire's determination in substitution for the land resumed; and the Court accordingly ordered that judgment be entered for the plaintiffs for the further sum of £3,655: *In re The King and the Acclimatization Society of Queensland*; *Corrie and Vidgen* v. *MacDermott* (1).

The defendant, as representing the Crown, now appealed to the High Court from that decision.

O'Sullivan A.G. for Queensland, *Blair* and *Graham*, for the appellant. The first question raises two points: (1) Is the unrestricted value the correct basis of valuation? and (2) assuming that it is the correct basis, is the determination the award or the valuation? The title is subject to various limitations. The land is only to be used for special purposes, and the Crown may resume it at any moment. [They referred to the *Unoccupied Crown Lands Act of* 1860, sec. 16; *Crown Lands Act of* 1863, sec. 43; *Public Parks Act of* 1854; *Trustees of Public Lands Act of* 1869]. There was no power to sell; only a restricted right to lease and mortgage. These grants were in force in 1877; and in that year an Act called the *Bowen Park Lease Act of* 1877 was passed, which gave restricted powers of leasing; then came the *Acclimatization Society and National Agricultural and Industrial Association Act of* 1890. This is the Act under which the present lease has been granted. All these enactments are cited to show how the value of the land must be calculated. The market price of land in the district is not the value of this land, as the power of sale in the Society was restricted. It could only be sold to the Government or the Association.

The principle of compensation is laid down in *Browne and Allan on Law of Compensation*, 2nd ed., p. 96. Compensation is such amount as will make up the owner's loss. *Stebbing* v. *Metropolitan Board of Works* (2) lays down that compensation is to be the amount of loss sustained by the plaintiff, and not the

(1) (1913) S.R. (Qd.), 10.

(2) L.R. 6 Q.B., 37.

amount of the value to the defendant. There are such restrictions imposed as to render the land not worth £7,490, and these restrictions are imposed by Statute. *In re Morgan and London and North-Western Railway Co.* (1) does not impeach *Stebbing's Case* (2), but simply distinguishes it. [They also referred to *Manmatha Nath Mitter* v. *Secretary of State for India* (3); *In re City and South London Railway Co. and Rector of St. Mary Woolnoth and St. Mary Woolchurch Haw* (4); *American and English Encyclopædia of Laws*, 2nd ed., vol. x., p. 1151.] The trustees say that they are not going to accept either the value to the purchaser or to the vendor, but want an ideal value for a particular purpose to a third party: *Municipality of Brisbane* v. *Brisbane Tramways Co.* (5). As to restriction on interests for rating purposes, see *Disney* v. *Mayor &c. of Williamstown* (6). The Crown could only resume for public purposes, and could not go outside such purposes: *Trustees of the Royal Agricultural Society* v. *Mayor &c. of Essendon* (7). All these cases practically follow the case of *Corporation of Worcester* v. *Droitwich Assessment Committee* (8).

Feez K.C. and *Hobbs*, for the respondents. During all the time that this case has been before the Courts, this is the first time it has been suggested that the trustees are only entitled to compensation. The contentions originally put before the Court were (1) as to the value of the land to the National Society, and (2) as to what amount the Society could have asked as a fair price if they had gone into the market to sell either to the local authority or to the Crown as freehold land free of restrictions.

The *ratio decidendi* in the case of *Hilcoat* v. *Archbishops of Canterbury and York* (9) is absolutely applicable to the present case. [They also referred to *In re City and South London Railway Co. and Rector of St. Mary Woolnoth and St. Mary Woolchurch Haw* (10); *Lord Advocate* v. *Earl of Home* (11).]

(1) (1896) 2 Q.B., 469, at p. 475.
(2) L.R. 6 Q.B., 37.
(3) L.R. 24 I.A., 177.
(4) (1903) 2 K.B., 728.
(5) 9 Q.L.J., 67, at pp. 72 and 73.
(6) 15 V.L.R., 59.
(7) 18 V.L.R., 85; 13 A.L.T., 242.
(8) 2 Ex. D., 49.
(9) 10 C.B., 327.
(10) (1903) 2 K.B., 728, at p. 736.
(11) 28 Sc. L.R., 289.

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The fact that there were only a limited number of purchasers could not affect the value of the land. On the analogy of *Hilcoat's Case* it is submitted that the judgment must stand.

O'Sullivan A.G., in reply. The Court should suggest the basis on which the valuation should be made.

Cur. adv. vult.

May 2.

BARTON A.C.J. read the following judgment:—

This appeal is from the judgment of the Supreme Court of Queensland in favour of the plaintiffs, upon a special case stated in an action. The plaintiffs, who are the present trustees of the Acclimatization Society of Queensland, which I will call "the Society," claimed as such trustees a declaration against the appellant, a nominal defendant representing the Crown, that they were entitled to be paid the sum of £3,655, as the balance of the value of land resumed by the Governor in Council by virtue of a power reserved to him in the grant to the trustees of the Society. The plaintiffs also claimed payment of the sum mentioned.

The following facts appear from the special case and the annexures, in connection with the Statutes cited:—

The land, the subject of the proceedings, is part of an area of over 40 acres originally held by the Society under two grants made to trustees in 1863 and 1866. In 1877 the *Bowen Park Lease Act* gave the trustees power to grant a lease of any part of the land to the trustees of the National Agricultural and Industrial Association of Queensland, which I will call "the National Association," for a term not to exceed 99 years. Under this Act the Society, in April 1882, let 23 acres 1 rood 31½ perches, part of the original holding, to the National Association for a term of 50 years, from 1st January 1879. In 1890 the *Acclimatization Society and National Agricultural and Industrial Association Act* (54 Vict. No. 13), was passed. Under its provisions and those of an amending Act of 1891 (correcting an error in the Act of 1890) the Society and the Association surrendered the whole of the lands to the Crown by arrangement, and there were issued

two new grants—one, dated 17th June 1892, to the Society, comprising 17 acres 0 roods 28 perches called "the Acclimatization lands," the other to the National Association, comprising the 23 acres 1 rood 32½ perches previously leased to them, called "the Exhibition lands." The grant to the Association was subject to an annual rent charge of £750 payable for 20 years, now expired, to the Society. The Act of 1890, sec. 3, prescribed that the grant of the Acclimatization lands should be "to the uses upon the trusts and subject to the powers and provisions in and by" the original grants "contained and declared concerning the lands thereby granted." These were, in the original grants and in that of 17th June 1892, to the trustees and their successors to hold to them and their successors, "upon trust for the appropriation thereof to the use and for the grounds of the Acclimatization Society . . . and for no other purpose whatsoever," on condition that the trustees for the time being should construct proper drains as required; reservation to the Crown of all the mines of gold, silver, and coal; reservation of power for the Crown or for the Governor in Council "to resume and take possession of all, or any part of the said land which may be required at any time or times hereafter for any public purpose whatsoever," upon twelve months' notice being given, "and the value of the said land or of so much thereof as shall be so required being paid by the Government to the party entitled thereto, at a valuation fixed by arbitration;" reservation to the Crown of power to make through the land public drains or sewers upon notice; declaration that "in every case of arbitration" which should arise under the grant, one arbitrator should be chosen by the Governor in Council and one by the trustees, the two arbitrators to select an umpire, who should determine any disagreement between them; proviso for forfeiture on breach of condition, reservation &c. by the trustees, with power to re-enter.

At this time the trustees do not appear to have had any power to sell any of the land they retained, and the *Bowen Park Lease Act* was probably spent. But by the *Acclimatization Society Act of* 1907, which repealed the *Bowen Park Lease Act*, they acquired certain restricted powers of sale and lease. Sec. 4 empowered the trustees to sell or lease the land or any part of it to the local authority of the area in which it is situate, or to the

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National Association. In any lease there was to be reserved the best rent that could be obtained (sec. 5). Thus the Society had no power to sell to any purchaser other than the local authority or the Association, and, if neither of them offered a fair price, it could not hope to obtain one by sale.

It was stated, and in effect admitted, that the Association had been for some time endeavouring to buy from the Society the part of their grant now in question, and that the two sets of trustees had been unable to agree upon a price. Then the Government, desiring to acquire the same part for the Association, began to negotiate with the Society, and the end of it was that the Government exercised its power of resumption under the grant, the Society agreeing to waive the twelve months' notice. The Executive and the Society each appointed a person to ascertain the value of the land, and those two gentlemen appointed an umpire. They heard evidence together. The "arbitrators" could not agree, and the umpire made and published his determination in writing, which he termed his "Umpirage and Award." The Crown urges that under the terms of the grant this is a mere valuation. The respondent trustees maintain that it is an arbitral award. For the purposes of this judgment it does not matter which contention is right. The material parts of the document for present purposes are the first and third "findings," and the final paragraph stating the sum "adjudged" to be due.

In the first paragraph the umpire found that "the value of the total area of the land proposed to be resumed . . . on the basis of freehold land unrestricted in any way, and as land held in fee simple, is the sum of £7,490."

The second paragraph and its findings are not now material.

In the third paragraph he found that "the value of the said land . . . being required for a public purpose (namely an exhibition ground) in accordance with the said deed of grant and reference is the sum of £3,835."

In the final paragraph he said :—"I award and determine that the valuation of the said land . . . in accordance with the said deed of grant and reference is the said sum of £3,835, which . . . I award and adjudge to be paid by the Govern-

ment to the said trustees, being the party entitled thereto."

Without prejudice to their respective rights the respondent trustees have given the Government possession and the Government have paid them £3,835.

The questions put to the Court are: "(1) What are the rights of the parties under the said determination? (2) Is the said Society entitled to the sum of £7,490 mentioned in the said determination?"

By the terms of the case, if the Court answers question 2 in the affirmative, judgment is to be entered for the plaintiffs (the respondent trustees) for £3,655, the balance of the £7,490; but, if question 2 is answered in the negative, judgment is to be entered for the nominal defendant, that is, for the Crown.

Question 1 has not been argued except in its relation to question 2.

The Crown contended that the final paragraph showed that the umpire had adopted the basis of valuation described in the third finding, and that he had therefore declared the Society entitled to no more than the £3,835 since paid them. There was a strong basis for this contention in the literal construction of the determination. The Society contended that the document left open the question whether the basis of the first finding or that of the third was the correct one. But the Crown very fairly and properly did not—at any rate for the purposes of the special case—press its contention in this regard. What the parties really meant when they went to law was to obtain a judgment which would determine the right basis of valuation. But, unfortunately, we are not specifically asked in the special case to declare what that basis is. Both sides seem to have thought that the question was merely whether finding 1 or finding 3 was the right one, but they have realized during the argument that there may be, as I think there is, a true basis which is not contained in either finding. If that is so, the umpire's determination does not decide the question which came before him.

In these circumstances it is, nevertheless, our duty to give judgment on the strict terms of the special case, as the Crown indeed asks us to do. We are asked also to indicate what is the true basis of valuation. Fortunately, it is not possible to point out

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where the two findings depart from the right principle without showing what that principle is. Beyond that, however, we cannot go. The Attorney-General stated in Court that, if judgment passed for the defendant, he would, if the true basis of valuation could be gathered from our opinions, take steps to have the whole question of value remitted in order to obtain a determination on that basis, on certain conditions which need not be mentioned here.

The meaning of the first finding is evidently that the umpire values the land, but only for the purposes of that finding, on the assumption that there are no restrictions on its tenure, and that it is open to sale under circumstances of unrestricted competition. In other words, he says that if the land could be sold as a simple untrammelled freehold in the open market, with liberty to everyone to make bids or offers, he thinks it ought to realize £7,490.

The notice of resumption states that the land is required for a public purpose, namely, an exhibition ground. That is the purpose for which the Association endeavoured to buy from the Society; and both parties to the special case have treated it as a public purpose in the sense in which such a purpose is referred to in the grant. What, then, is the meaning of the words "the value of the said land," as used in that instrument? For the Crown, the Attorney-General argued that it meant the value of the land to the holder, that is, the price he could obtain, and that the restrictions imposed by the grant and the limitation of the Society's market imposed by sec. 4 of the Act of 1907, must be taken into account by a valuer, since they necessarily affect the price at which a sale could be brought about. For the Society, Mr. Feez contended that the word "value" was used in the grant in the sense of the absolute value unaffected by any restriction or limitation whatsoever. He admitted that it could not mean merely the value to a purchaser; indeed, in view of the umpire's third finding, that would have been a dangerous concession. He submitted that it meant more; but he denied that it meant the value to the vendor. He, of course, saw on that side the difficulty that the value to a vendor is what he can get for his land. But if the value is not to be considered in its relation either to the vendor or to the purchaser, what can it be? Is there such a thing

as the value of land compulsorily taken from an owner, apart from that which a buyer would give, or that which a seller would accept? There is a sale—a forced one, it is true. But in every sale a price has to be fixed, and the fixing of it on a forced sale such as this, is left by the law or the parties to someone who puts a "value" on the land taken. How can he arrive at that value without considering what the purchaser would have had to pay had the sale not been compulsory? And what other value is possible? Mr. Feez's argument leaves the value in the air. In my judgment, the word "value" in the grant *primâ facie* means the value to the owner arrived at by the process therein laid down, all the circumstances likely to affect the price upon a voluntary sale being taken into consideration. I do not think that there is any fact in this case which fastens on the word any other than its *primâ facie* meaning. There can be no question that among the circumstances likely to affect the price are the nature of the title, assuming it to be good, with such restrictions as may affect sale value, and any restriction upon alienation, either by the terms of the grant or *aliunde*, or any other circumstance which may limit the number of probable buyers or the price which they may be expected to give. A good example is a set of restrictive building covenants in a lease. A broad rule for ordinary cases of resumption is laid down in *Spencer* v. *The Commonwealth* (1), where it was held that the basis of valuation is the price that a willing purchaser would at the date in question have had to pay for the land to a vendor not unwilling, but not anxious, to sell. That is the value to the owner. But, of course, the valuer must have regard to such circumstances as I have indicated, if they exist.

It was pointed out that *Spencer's Case* was a case of compensation, while here the thing to be ascertained is value. That is true, but it does not alter the basis of value or otherwise help the Society. Mr. *Feez* himself referred us to the *Public Works Lands Resumption Act of* 1878, in force at the date of the grant, which provided a basis of compensation for the resumption of land for public purposes. He urged that by the grant the Crown contracted with the Society for compensation on that basis. The material

(1) 5 C.L.R., 418.

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provisions are in sec. 42, which prescribes that in estimating "the purchase money or compensation to be paid," regard shall be had by the arbitrators, &c., not only to the value of the land purchased or taken but also to the damage (if any) sustained by the owner by reason of severance, or injurious effect upon other lands of the owner, and to certain other circumstances set out. It is perfectly clear from this section, first, that compensation may considerably exceed the value where damage is proved, and, secondly, that the basis of compensation both for value and for damage is that the owner's loss is to be made good to him. We are told that it is the value, not compensation, that is to be awarded. Well and good; that gets rid of the question of damage and confines the matter to value. But it remains that the owner is entitled to be repaid the loss of the value to him, and he is not entitled to any greater value. In the *Public Works Land Resumption Act of* 1906, which repeals the Act of 1878, sec. 19 makes provision substantially identical with that of sec. 42 of the old Act.

In *Stebbing* v. *Metropolitan Board of Works* (1) the plaintiff was the rector of three parishes, in the churchyards of which burials were prohibited by Order in Council. The defendants, having under the *Metropolis Improvement Act* 1863, with which the *Lands Clauses Consolidation Act* is incorporated, power to make a new street or to take and use certain lands for the purpose, duly took the graveyards for that purpose. Before the arbitrator the contention on behalf of the plaintiff was that as the lands were taken for secular purposes declared by Statute and divested of their ecclesiastical character, the arbitrator was bound to ascertain their value as if they were applicable to any purpose to which their owner might apply them. The main contention for the Board of Works was that, the land being consecrated and devoted to the purposes of burial-grounds, their value as such must be ascertained, and that as they were only secularized by the Act which gave power to purchase them, that Act could give no additional value to the lands in the hands of those from whom the Board took them. The questions were raised in a special case, and the Court held that the principle upheld by the defendant Board was the right one.

(1) L.R. 6 Q.B., 37.

The case is so important for the elucidation of that now before us that I propose to make extracts from the judgments delivered. *Cockburn* C.J. said (1):—"When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it. The plaintiff, as rector, could never have parted with those churchyards, and therefore, to him, they were perfectly valueless. The Metropolitan Board, it is true, will be able to apply the land to purposes which will give it an increased value, but that is no loss to the rector. He has lost nothing by the land having been taken, although they may have acquired something which may prove a gain. . . . There can be no reason why the party, in whose hands it was valueless, should be compensated in respect of a supposed loss of a value which, in point of fact, never existed." *Mellor* J. said (2):—"I take it that compensation is to be given only for the loss which a person sustains." *Lush* J. said (3):—"I think it is clear from the language of the Act that the value of the land is to be assessed on the principle of compensation to the owner. The question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him." . . . "If they" (the Board) "had not taken it, it would have remained as it was. The Act did not intend to put the owner of the land in a better position than he would have been in if the land had not been taken from him." And *Hannen* J. said (4):—"The rector was undoubtedly owner of the freehold of these churchyards, but he was the owner of it subject to a restriction, which it was not practically possible for him to remove, and while that restriction lasted it rendered the value of the freehold little or nothing. The Metropolitan Board are empowered by Act of Parliament to purchase the various interests of owners of property, and to make compensation to them for that of which they deprive them. Accordingly, they have to

(1) L.R. 6 Q.B., 37, at p. 42.
(2) L.R. 6 Q.B., 37, at p. 44.
(3) L.R. 6 Q.B., 37, at pp. 45-46.
(4) L.R. 6 Q.B., 37, at p. 46.

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make compensation to the rector for the freehold, subject to this particular restriction, which diminishes its value in his hands. . . . . When the Metropolitan Board have purchased the churchyards, the land will be free in their hands from the restriction to which it was subject in the hands of the rector, but that does not increase the value of that which the rector had to sell; it only increases the value of the thing bought when the Metropolitan Board possess it."

The case of *Hilcoat* v. *Archbishops of Canterbury and York* (1) was much relied on for the Society. It was very strongly pressed upon the Court which decided *Stebbing* v. *Metropolitan Board of Works* (2). The Chief Justice there said of *Hilcoat's Case* (1) that it did not satisfy his mind that its principle ought to be applied to any other case not precisely similar in its circumstances. "If," said he (3), "we were dealing with the same Act of Parliament that case would be binding on us as an authority, but we are dealing with Acts of Parliament of a different character. Not being convinced that the reasoning in that case is applicable to this, I think the rector, having an interest in the land of no value to him, is not entitled to be compensated according to the value which the land may have when transferred to the Board." *Mellor* J. (3) thought *Hilcoat's Case* (1) distinguishable; "its circumstances were very peculiar." He considered himself at liberty to act independently of it. *Lush* J. said (4) there was an essential distinction between the two cases. In *Hilcoat's Case* (1) the question before the Court was whether the Judge who tried the case had misdirected the jury. After stating the direction at length, he said (5):—"In substance, that direction was: Ascertain what is the value, actual or potential, of this land to the plaintiff. The Court held that the direction was right. The jury were therefore directed to take into account all the circumstances, the possibility, or perhaps probability, of the plaintiff in that case being able to make some profit of it hereafter; but if not, then its value, actual or potential. In the present case the arbitrator, by arrangement between the parties, for the pur-

(1) 10 C.B., 327.
(2) L.R. 6 Q.B., 37.
(3) L.R. 6 Q.B., 37, at p. 43.
(4) L.R. 6 Q.B., 37, at p. 44.
(5) L.R. 6 Q.B., 37, at p. 45.

pose of raising the question, has assessed the value of the land at what it would be if the land were divested of its ecclesiastical character, and as if it were applicable to any purpose to which the owner might apply it. That is a very different question from that raised in *Hilcoat* v. *Archbishops of Canterbury and York* (1). I agree that the land in the hands of the present holder, the rector, is of no practical value—no appreciable value whatever. He can never make it of any value." *Hannen* J. (2) thought they were not bound by *Hilcoat's Case* (1), for reasons which his colleagues had given.

The distinction between *Hilcoat's Case* (1) and *Stebbing's Case* (3) thus appears to be, that in the latter the element of potential value was non-existent, while in the former it was not possible to withhold that element entirely from the consideration of the jury.

However that may be, I am strongly of opinion that *Stebbing's Case* (3) correctly lays down the principle on which land taken in similar circumstances to the present ought to be valued. The question is, what is the loss that the Society has sustained by the taking of its land—that question being tested by the value of the land to them, not its probable value to the Government or the Association. They are not to be put in a better position than they would have held if the land had not been taken from them. Hence any restriction or other circumstance which diminishes the value in their hands must be allowed for in arriving at the value.

In adopting the principle of *Stebbing's Case* (3) I do not overlook the fact that in *In re City and South London Railway* (4), which was a case of damage by severance and not of value, *Vaughan Williams* L.J. said (5) that he preferred the decision in *Hilcoat's Case* (1) to that in *Stebbing's Case* (3). He said that in that case "*Cockburn* C.J. put great stress upon the fact that it was a case of public property being transferred to another public body, while *Hannen* J. declined to recognize that as a material fact." From this he deduces that the Judges in *Stebbing's Case* (3)

(1) 10 C.B., 327.
(2) L.R. 6 Q.B., 37, at p. 46.
(3) L.R. 6 Q.B., 37.
(4) (1903) 2 K.B., 728.
(5) (1903) 2 K.B., 728, at p. 736.

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were not agreed as to the principle on which it should be decided. Now, the extracts which I have read show—I say it with profound respect—that the four Judges in the Queen's Bench were completely agreed in principle. *Cockburn* C.J. merely said that if a commercial company had been about to acquire the churchyards there would have been room for a suggestion to the legislature that the company ought to be made to pay the increased value which the land would acquire from the purpose to which it was about to be applied. But if the facts of that case had been brought before the legislature he thought that they would have considered it was only a transfer of land from one public purpose to another. He did not make that in any way the basis of his decision any more than *Hannen* J. did; for they both agreed that the loss was to be tested by the value of the land to the owner, "not by what will be its value to the persons acquiring it." For myself, I am unable to question the reasoning of *Stebbing's Case* (1).

In re City and South London Railway (2) was decided by the Court of Appeal, whose judgment was affirmed in the House of Lords (3). It was a case in which an arbitrator was held entitled to assess compensation under sec. 63 of the *Lands Clauses Consolidation Act* 1845 in respect of the severance or the injurious affecting of other lands, on the basis that although the lands not taken by the railway company were the site of a church, they might at some future time cease to be so by the carrying out of a scheme under the *Union of Benefices Act* 1860, or otherwise, and thus become available for building. It is clear that the decision was based on the factor of potential value, as, indeed, *Mathew* L.J. plainly said in the Court of Appeal (4). That factor was held to be non-existent in *Stebbing's Case* (1), and it does not exist in the present case either.

In re Morgan and London and North Western Railway Co. (5) was a case in which the claimants, having 44 years still to run of a 99 years' lease to them of lands, underlet them for the residue of the term, saving one day, to a corporation at a low rent on con-

(1) L.R. 6 Q.B., 37.
(2) (1903) 2 K.B., 728.
(3) (1905) A.C., 1.
(4) (1903) 2 K.B., 728, at p. 739.
(5) (1896) 2 Q.B., 469.

dition that that body laid out the lands as a public park, and maintained them as such. The underlease to the corporation contained the proviso that if any part of the land should be compulsorily taken under any Act of Parliament it should be lawful for the claimants to re-enter upon and re-possess it. A railway company compulsorily took part of the land under statutory powers. It was held that when the notice to treat was given the effect of it was that the underlease ceased as to the land comprised in the notice, and the claimants alone were entitled to sell, and therefore to treat for, the land, and were entitled to the commercial value of the land as land free from the underlease, and not merely to the capitalized value of the rent which had been payable in terms of the underlease. The Court held the case to be very clearly distinguishable from the case of *Stebbing* v. *Metropolitan Board of Works* (1); and it is no less clearly distinct from the present case.

In *Manmatha Nath Mitter* v. *Secretary of State for India* (2) portions of land which had been used as public roads for more than 50 years were taken for a public purpose—a dock—under the *Land Acquisition Act* 1870. It was held that, assuming the plaintiffs to have made out an absolute title to these lands, they were entitled to compensation for loss, and under secs. 13 and 24 of the Act the market value of the land at the time of awarding compensation was to be taken into consideration; but as the lands used as roads had no market value within the meaning of these three sections, the plaintiffs were not entitled to anything for the loss of it.

Upon consideration of the authorities, I come to the conclusion that the reasoning of the Judges in *Stebbing* v. *Metropolitan Board of Works* (1) establishes the principle that the value of the land, as the term is ordinarily used and as it is used in the grant to the Society, is the value to the Society of its interest in the land, which value is here to be measured by the loss it has sustained in being deprived of its interest therein apart from any question of damage by severance or injurious effect of the taking upon other land of the owner or the like: for such questions do not arise in this case. That being so, neither the value to the

(1) L.R. 6 Q.B., 37.

(2) L.R. 24 I.A., 177.

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Crown, as the authority taking the land, nor the value to the National Association, the body in whose interest it is said to have been taken, are direct factors in this case.

Further, I am of opinion that, in ascertaining the value of the land in the sense which belongs to the term in this case, the right principle for a valuer to follow is that he should consider every circumstance that directly and materially affects or may reasonably be expected to affect the price which, on the basis laid down in *Spencer* v. *The Commonwealth* (1), any probable and capable purchaser would have to pay in order to obtain it. This is so obvious a proposition that it seems at first sight not to require statement. It involves, however, all the factors which arise out of the terms of the grant and the legislative provisions. But I wish to make it clear that, in examining these factors, what I have to say must be taken merely by way of elucidation of the principles I have endeavoured to explain.

First, as to the terms of the grant, apart from the terms of the resumption clause of it, to which sufficient reference has been made.

The trust of the grant is for the appropriation of the land "to the use and for the grounds of the Acclimatization Society of Queensland, and for no other purpose whatsoever." Similar words came under the consideration of this Court, in the case of *Down* v. *Attorney-General of Queensland* (2), decided in 1905. The appellants there were trustees to whom the Crown had granted land in 1905 upon trust "as a reserve for cricket and other athletic sports and for no other purposes whatsoever." They had allowed the use of a part of the land, under an agreement, for pony races and other races, when not otherwise engaged or required by the trustees. It was held that under the terms of the grant the trustees were entitled to permit the use of the land for any lawful purpose not inconsistent with its use when required as a place for holding athletic sports, and in particular for any purpose which, while not interfering with such use, was conducive to the main object of the trust, such as the raising of funds wherewith to pay the principal or interest on a mortgage lawfully made by the trustees, or to keep the

(1) 5 C.L.R., 418. (2) 2 C.L.R., 639.

property in proper repair, or to attain the objects and purposes for which the land was granted. The relator, who was a resident in the locality of the reserve, was held entitled to a declaration that the trustees were not entitled to permit horse racing or pony racing to be carried on in the reserve, except by way of incidental use, and so as not to interfere with the use of the land for the main purposes of the trust. The decision turned upon the terms of the grant and of the agreement referred to, in the light of the authorities, which were closely considered, but two Acts of Parliament were regarded as having an indirect bearing on the case, namely, the New South Wales *Public Parks Act of* 1854 and the *Trustees of Public Lands Act of* 1869. These two Statutes, which I need not cite at length, both forbade the alienation, and the later one forbade also the mortgaging, of trust lands such as these, the Act of 1869 making special provision of this kind as to lands granted "upon certain trusts for public purposes and no other"—words evidently applying to such grants as that held by the Society. That grant however was, as already pointed out, issued under the *Acclimatization Society and National &c. Association Act of* 1890. Then came the *Acclimatization Society Act of* 1907, of which the material provisions have been set out in the early part of this judgment. Finally, the *Public Parks Act* and the *Trustees of Public Lands Act* were both repealed by the *Land Act of* 1910 (sec. 5 and First Schedule). The *Acclimatization Society Act of* 1907 was not repealed. But sec. 185 (1) of the recent *Land Act* prescribes that "notwithstanding anything contained in any Act, the trustees of the land granted in trust or the trustees of a reserve shall not have power to sell, transfer, or mortgage any land under their control." Some question may arise hereafter upon this provision, but the Court is not called upon to answer any such question in the present case. Sub-sec. 2 of the same section gives power to trustees to lease the trust lands, or any part of them, with the Minister's approval, for terms not exceeding twenty-one years, subject to the condition (*inter alia*) that the lessee shall "hold the land so that the same may be used for the public purpose for which it was granted or reserved without undue interruption or obstruction"; and all rents received are to be applied solely for the purposes of the

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trust. No part of this section was cited, nor was the Act of which it is part referred to, by the Attorney-General, and I mention it now merely because the Court cannot affect to be unaware of it.

The relevance of sec. 185 to the consideration of the words of the grant which define this trust is a question to be determined hereafter. Still dealing with the conditions and reservations in the grant, I agree with the learned Judges of the Supreme Court in thinking that the question of value is not appreciably affected by the very usual reservation of gold, silver and coal. It may be that, as the royal metals belong to the Crown, the reservation of these has no positive effect at all. The reservation of coal differs in this, that as the coal would pass to the grantee if the reservation were not made, the making of it will be material if coal be discovered under the land. But we are told that there is no pretence that the land contains any of the minerals reserved. If that is so, the umpire has been right if he has placed no estimate on this reservation as detracting from value.

Then there is the power to the Crown to make all common or public drains or sewers deemed expedient, on giving three months' notice, the Government to pay for all damage done on valuation. This power cannot, I think, practically affect the value, because the Society's loss by its exercise is provided against.

There remains the condition that the grantees and their successors are to construct proper drains through and from the land to the nearest common drains and sewers when required so to do. Does this condition appreciably affect the value of the land in the hands of the trustees ? It is not said that the condition has ever been insisted on ; but the occasion for its enforcement might arise at any time. It may possibly affect the value as a contingency, in the sense of reducing the Society's loss upon a taking, but I think a valuer would find some difficulty in putting a pecuniary estimate upon it by way of deduction from value.

I have already dealt fully with the restrictions on alienation which the Statutes impose, and I have nothing now to add on that head. All of these restrictions, as well as any in the grant that are appreciable, are fit subjects for estimation by a valuer in

deciding whether and how far they diminish, in a pecuniary sense, the value of the lands in the hands of the trustees.

The considerations I have put forward will make it quite clear that I think the umpire's first finding adopts an erroneous basis in not allowing for any restrictions on use or alienation, whether in the grant or arising out of Statute law, and for any other circumstances likely to affect the ordinary saleable value. Holding that view, I am not of opinion that the sum of £7,490 mentioned in the umpire's determination is the amount payable by the defendant to the plaintiffs.

It will also be apparent, from what I have said, that I think the third finding also adopts an erroneous basis, inasmuch as it rests on the value of the land to the National Association, instead of its value to the Acclimatization Society, who lose it.

Further, it cannot but be inferred from what I have said in dealing with the first finding, that apart from that and equally apart from the third finding, I think there is a true basis which the umpire should have adopted. As the special case stands, it is no part of the duty of the Court to define that basis more specifically, but the parties in considering the reasons advanced cannot fail to obtain the guidance for which they have asked.

I do not answer the first question in the special case, but it is, in truth, involved in the second.

Owing to the terms of the case, it becomes necessary to answer the second question in the negative. Judgment will therefore be entered for the defendant.

ISAACS J. read the following judgment:—

The question actually raised by the special case is whether the sum of £7,490 has been arrived at on a proper basis, having regard to the true interpretation to be placed on the Crown grant of 17th June 1892 to the Acclimatization Society.

That instrument recites two former grants to the Society, a lease by it of part of the land to the National Agricultural Association, the Statute of 1890, and the surrender to the Crown by both grantees and lessees. Then, " by virtue of the provisions of the said Act, and of all other powers and authorities . . .

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in this behalf," the Crown grants to the Acclimatization Society "subject to the trusts, conditions, reservations, and provisoes, hereinafter contained," certain land described, "upon trust for the appropriation thereof, to the use and for the grounds of the Acclimatization Society of Queensland and for no other purpose whatsoever."

Power of resumption is reserved, "the value of the land or of so much thereof as shall be so required and of any building standing on the said required land being paid by the Government to the party entitled thereto, at a valuation fixed by arbitrators . . . in which valuation the benefit to accrue to the said party from any such public purpose shall be allowed by way of set off." There is a further power reserved to make drains and sewers through the land, "the damage which any building may sustain thereby being paid for."

Breach of conditions, reservations and provisoes creates liability to forfeiture and reversion.

The Act of 1890 brought back the land to the Crown, as if it had never been parted with, and gives an entirely new start to the title. Sec. 3 directs that the new grant to the Acclimatization Society shall be "to the uses upon the trusts and subject to the powers and provisions in" the two former grants.

In 1907 Act No. 6 was passed reciting the Crown grant, and the appropriation of the land to the use and for the grounds of the Acclimatization Society of Queensland, and for no other purposes whatsoever, and reciting further the expediency of empowering the trustees to sell or lease the lands, to invest the proceeds and apply the income to their trusts. Sec. 4 gave power to sell or lease the land, or any part thereof, to the local authority to be held as a public park or to the National Agricultural Association for its purposes. And by sec. 7 certain powers were given as to investment of proceeds, and application of income. It is clear, therefore, that in 1892 the Crown was in full possession of the land in unqualified ownership, subject only to the statutory requirements of re-granting the land to the Society on the terms authorized by Parliament. It is clear, also, that those terms did not permit of a grant of the absolute and unconditional fee simple, but only of a grant with restrictions.

So far, no sale or lease is permitted to any one except to the persons and for the purposes mentioned in sec. 4 of the Act of 1907. Apart from that, the only alienation possible is by way of the resumption reserved in the grant.

We are not informed as to the date of the notice of resumption, and therefore we are not aware whether it was before or after 1st January 1911.

On that date, as inspection of the Statute book has informed me, the *Land Act of* 1910 (1 Geo. V. No. 15) came into operation, and made a very considerable change in the law relating to that class of land. By sec. 5 it repeals the Acts 18 Vict. No. 33 and 33 Vict. No. 2, both of which formed material factors in the conclusion the Court arrived at in *Down* v. *Attorney-General of Queensland* (1), and it substitutes provisions differing considerably. That circumstance relieves us from considering the effect of the case referred to upon the matter in hand.

Part VII., headed "Special Grants and Leases, Reserves, Roads, and Exchanges," where the substituted provisions are found, contains sec. 185. Sub-sec. (1) of that section provides: "Notwithstanding anything contained in any Act, the trustees of land granted in trust or the trustees of a reserve shall not have power to sell, transfer, or mortgage any land under their control." Sub-sec. (2) gives power of leasing.

We have not to determine, and I have formed no opinion whatever, as to whether these very wide and general terms are intended to affect the provisions of the special Acts; their bearing and effect have not been argued, and I merely draw attention to them for consideration.

There is, however, another section, sec. 190, which has some bearing on the question in this case, and to which reference will be made later.

In any case the range of "public purposes" for which the Crown may resume is very wide, as recognized by the legislature: See sec. 4 of the *Public Works Land Resumption Act of* 1906.

Nevertheless, the law has, with the exceptions mentioned, placed the land *extra commercium*; it has, at all events, made it incapable of being sold or leased by the Society to any person

(1) 2 C.L.R., 639.

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other than the two bodies mentioned or the Crown. It is impossible, therefore, to regard the land as having the attribute of an unrestricted title in fee simple. Unless, therefore, there be found some legislative direction to regard the land for some special purpose in a fictional light, it must be taken to be what it actually is, in fact and in law. The *Erith Case* (1) and the *Sculcoate's Case* (2) are distinct that statutory restrictions upon the profit-earning capacity of land must be considered in arriving at its rental value.

In the former case Lord *Herschell* said (3):—"If land is 'struck with sterility in any and everybody's hands' whether by law or by its inherent condition, so that its occupation is, and would be, of no value to anyone, I should quite agree that it cannot be rated to the relief of the poor."

It will be observed that the learned Lord Chancellor makes no distinction between incapacity ensuing from inherent quality and incapacity from Statute.

In the *Sculcoate's Case* (4) partial sterility was taken into account in arriving at the true value.

By parity of reasoning, if obstruction to alienation exists it matters not how it has arisen—though the varying possibilities of removing the obstruction may in different cases variously affect the value.

And restrictions exist both in the hands of the Society and any one of its possible successors in title. The restrictions in each case differ, but some restrictions exist; and as the money value of land includes among its factors the price it would reach on sale, which depends on what amount in the circumstances a purchaser is willing to give, as well as on what a seller is willing to take, and as that in turn is affected by the extent of competition, it necessarily follows that on ordinary principles there is here always a value something short of an unrestricted fee simple title.

But, says Mr. *Feez*, the terms of the grant are precise, and, notwithstanding the actual restriction, the true construction of the phrase, "the value of the land," is its value as if it were held

(1) (1893) A.C., 562, at p. 591.
(2) 71 L.T., 642, at p. 646.
(3) (1893) A.C., 562, at p. 591.
(4) 71 L.T., 642.

by an unconditional fee simple title. But why? "Land," there is the physical substance—so many acres of earth. Its value must depend on the characteristics it possesses, whether these originate naturally or artificially, and whether its artificial characteristics arise from legal enactment or from any other form of human action.

Approaching the matter from the standpoint of justice, why should the Crown be supposed to pay the Society for something it never had, and could not transfer to the Crown?

The surrender by the Society vested the whole unblemished title and dominion over the land in the Crown; the grant to the Society conveyed a portion only of that dominion; if the residue existed anywhere, it remained in the Crown; and when resumption brought back the rights parted with, the whole dominion reunited in the Crown. And on what conceivable principle—short of express and distinct provision in that behalf—can it be imagined the Crown is to pay for what it always had, to a person who never had it?

Does the grant then, when read as a whole, import that the Society is to be paid on that footing? The provision that benefit is to be set off is opposed to it. Benefit is presumably to be set off against loss, that is, the loss arising by being deprived of its rights over the land.

The provision about recoupment of damage to any building by an easement looks in the same direction.

So far, then, from being assisted by the general tenor of the document, the respondents' view is weakened by it, unless there is, as suggested in the respondents' argument, some real distinction between assessing the "value of the land" without the use of the word "compensation," and assessing the value of the land by way of compensation. The suggestion, however, is based on a misapprehension of the meaning of the word "compensation." Its ordinary meaning when used in connection with compulsory taking of property—and whether so used in Acts of Parliament or grants—is not in contradistinction to actual value, but in opposition to non-payment at all, which in some cases is equivalent to confiscation. It simply imports that the exercise of the power of taking, or resumption, or of whatever right is authorized,

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will be accompanied by an equivalent in money of the property taken or resumed, or of the damage occasioned, being returned or given.

Illustrations of this, the inherent meaning of the word, are found in the judgments of *Bramwell* J.A. in *Wells* v. *London &c. Railway Co.* (1), of *Brett* M.R. in *Attorney-General* v. *Horner* (2), of Lord *Blackburn* in *Metropolitan Asylum District* v. *Hill* (3), of Lord *Davey* for the Privy Council in *Commissioner of Public Works* (*Cape Colony*) v. *Logan* (4).

There is, therefore, nothing inherent in the word "compensation" to render inapplicable the principles laid down in the decided cases, and there is nothing in the context to affect the interpretation.

Several authorities have been cited.

Stebbing's Case (5) is a very strong authority in favour of the Crown. The respondents invite the Court to act on *Hilcoat's Case* (6) in preference to *Stebbing's Case* (5). If there be any conflict, I prefer the latter. But in my opinion the two are distinguishable, and on the ground stated at the end of the judgment in *Hilcoat's Case* (6). The owner originally held the full title, and for a specific purpose; and, as the Court held, provided and so long as that purpose continued, he consented to restrict his title. But when the condition ceased, the restriction ceased with it, and he reverted to his full rights, and had to be compensated accordingly.

In the present case the respondents never had, and never can have, the full fee simple title; so long as they hold the land, they hold it with restrictions; when they cease to hold it, it either passes to one of two holders on other parliamentary conditions, or it reverts to the Crown for public purposes. Never at any instant of time do the respondents either possess the full title, or forego a condition—as Hilcoat did—upon which as owner the full title was voluntarily abridged.

Morgan's Case (7) appears to be a case similar in principle to

(1) 5 Ch. Div., 126, at p. 130.
(2) 14 Q.B.D., 245, at p. 257.
(3) 6 A.C., 193, at p. 203.
(4) (1903) A.C., 355, at the end of p. 362.
(5) L.R. 6 Q.B., 37.
(6) 19 L.J.C.P., 376.
(7) (1896) 2 Q.B., 469.

Hilcoat's Case (1), and so was distinguished from *Stebbing's Case* (2).

The *City and South London Railway Case* (3) is further illustrative of the position from the same standpoint as *Hilcoat's Case* (1). The question was whether the arbitrator was bound to assess the value of the lands on the basis—(*a*) that they could never be used for any purpose other than as a church site, or (*b*) that, though at the time a church site, they might under a statutory scheme or otherwise have ceased to be a church site.

The observations of *Vaughan Williams* L.J. are not necessarily opposed to the respondent's view. He expressly says he gives no decision inconsistent with *Stebbing's Case* (2). Then, by analogy to *Hilcoat's Case* (1), he says the difficulty of the rector's limited interest is got over by the interposition of the Ecclesiastical Commissioners, that is a voluntary agreement to release the disqualification.

And the words of the learned Lord Justice may perhaps be read in that light, and, if so read, support the appellant's view.

Stirling L.J. says (4):—"The arbitrator is bound to take into consideration the fact that the land which was taken by the railway company might, under a scheme properly set on foot and carried out under the *Union of Benefices Act* 1860, cease to be the site of a church, and so doing he must arrive at his own conclusion as to when that time would be likely to arrive. That being so, the proper basis for compensation is that denoted by (*b*) in his award."

Mathew L.J. agreed with both the other members of the Court, and says (5) that "the potential value of the land might be taken into account." In other words, the power existing by law to liberate the land from its then present disqualification, by the voluntary act of the parties interested and without any new legislation, was a potentiality of the land, near or distant, probable or improbable, of attainment, but always a potentiality, and therefore to be considered.

The House of Lords affirmed the decision (6).

(1) 19 L.J.C.P., 376.
(2) L.R. 6 Q.B., 37.
(3) (1903) 2 K.B., 728.
(4) (1903) 2 K.B., 728, at p. 738.
(5) (1903) 2 K.B., 728, at p. 739.
(6) (1905) A.C., 1.

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In re Lucas and Chesterfield Gas and Water Board (1) emphasizes the position that possibilities are to be valued. The decisions are then harmonious, and in any case *Stebbing's Case* (2) remains unshaken and is applicable. Not merely is it unshaken, but there is another case of great authority which seems to cover the point contested. It is *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (3).

There the question was whether on the conveyance in a compulsory sale of business premises the sum assessed as compensation for "loss of business" was to be included in the consideration for the sale. That depended on whether it was part of the value of the land. Lord *Halsbury* L.C. said (4):—"What the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the Statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the goodwill' taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation." It was held, accordingly, that the sum in question was part of the value of the land to them.

What is there to alter this rule in the present case? The power of resumption is a common reservation in Australian Crown titles, and supplies a power which in England required parliamentary authority (See, for instance, *Gray* v. *Liverpool and Bury Railway Co.* (5)). Side by side with this power there stand, and have long stood, Lands Acquisition Acts which give a power of a similar nature, with occasional variations as to betterment and so on, but on principle it is the same. That principle is that the Crown reserves the right of protecting future public interests,

(1) (1909) 1 K.B., 16.
(2) L.R. 6 Q.B., 37.
(3) 12 App. Cas., 315.
(4) 12 App. Cas., 315, at p. 321.
(5) 9 Beav., 391, at p. 394.

when necessary, by not allowing the private ownership it creates to stand in the way, but the reservation is accompanied with the equitable consequence of making just compensation to the owner, so that neither State nor individual suffers.

The fundamental conception is the same whether the short and simple special provision of the grant is made by way of contract, or the more elaborate and general system is established by Statute. And the matter cannot be better stated than in the words of Lord *Moulton* (then *Fletcher Moulton* L.J.) in *In re Lucas and Chesterfield Gas and Water Board* (1). The learned Lord Justice said:—"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, *i.e.*, that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him."

It is not unworthy of observation, because it is confirmatory of the view above expressed, that the legislature evidently regards the value of land paid on resumption as unquestionably in the nature of compensation. By sec. 190 of the *Land Act of* 1910, it is enacted that in all cases in which grants whenever issued contain reservations of a part of the land for public purposes, and specifying the area, but not the particular part reserved, the Crown may resume possession, and then the section adds:—"And no compensation shall be payable for the value of the land whereof possession has been resumed."

It would be strange, indeed, if either something beyond com-

(1) (1909) 1 K.B., 16, at p. 29.

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pensation were still left to be paid in respect of those grants, or if a different principle of assessment were to be applied where the area of intended resumption was not mentioned.

In my opinion, there is no reason for adopting any other criterion of value in cases such as the present, and the question we have formally to determine should be answered by saying that the basis of unrestricted fee simple title is erroneous.

It follows from what has already been said, that the basis of being required for a public purpose (as an exhibition ground) is also fallacious as a test.

GAVAN DUFFY J. I concur.

POWERS J. read the following judgment:—

I regret that I cannot agree with the conclusions arrived at by my learned brothers. I agree with the findings of the Full Court of the Supreme Court, because I consider the valuation of the land by the umpire of the unrestricted value was the correct valuation under the peculiar circumstances of this case. I propose to give my reasons for coming to that conclusion.

With the principles laid down by my learned brothers on "compensation" generally in ordinary compulsory acquisitions and resumptions under the different Acts I agree; but I regard the circumstances in this case as very special.

The first grant was made to the Acclimatization Society of Queensland, referred to later on as "the Society," on 11th July 1863. The second grant was made to the Society on 4th January 1866. These grants were subject to the trusts that the Society would use the land for the purposes of the Society, and for no other purpose.

In 1877 the *Bowen Park Lease Act of* 1877 was passed. That Act gave power to the Society to lease, with the consent of the Governor in Council, part of its lands to the National Agricultural and Industrial Association, referred to later on as "the Association."

In 1882 a lease was granted by the Society, of part of its lands to the Association for 50 years at a rental of £100 a year, and 5 per cent. of the moneys paid to the Association by visitors for

admission to the Association's exhibitions (See recitals in the Act of 1890).

The *Acclimatization Society and National Agricultural and Industrial Association Act of* 1890 was subsequently passed, under which the trustees of the Society were to surrender the land vested in them by the grants of 1863 and 1866, including the lands leased to the Association, to His Majesty freed and discharged from all trusts, &c., and the trustees of the Association were to join in such surrender so that the lease referred to should be determined and extinguished.

Upon such surrender being made, the Act provided that a new deed of grant should issue to the trustees of the Society for the "Acclimatization lands" and a deed of grant to the Association for the lands formerly leased to it by the Society (subject to a rent charge for 20 years). As to the Acclimatization lands therein described they were to be held by the trustees of the said Society therein named, "to the uses and upon the trusts and subject to the powers and provisions in and by the said two deeds of grant hereinbefore recited respectively contained and declared concerning the lands thereby granted."

Under the authority of that Act, the deed of grant referred to in the special case, dated 17th June 1892, was issued to the trustees of the Society. A copy of that deed is set out in the special case.

The *Acclimatization Society Act of* 1907 was assented to on 19th November 1907. The Society up to the date of resumption held the lands on the trusts set out in that grant.

In the preamble to that Act the following recitals appear:—"And whereas the said Society is desirous of extending the scope of its useful operations and scientific experiments, and the said grounds are not now entirely suitable for such operations and experiments.

"And whereas the said Society are desirous of securing a permanent income for the purposes aforesaid, and such income may be secured by the sale of the said lands and the investment of the trust fund arising from the proceeds of such sale, or by the leasing of the said lands at satisfactory rentals.

"And whereas it is expedient that the said trustees should be

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empowered to deal with the said lands by sale or lease as aforesaid, and should be empowered and required to invest the proceeds of such sale and apply the income therefrom arising or to apply the income arising from every such lease to the same trusts."

Shortly the fee simple of lands had been granted on trust. Then a power of sale *of the fee simple* was to be given subject to the proceeds of the sale being held *on the same trusts.*

By sec. 4 of that Act the trustees were empowered after the passing of the Act "to sell or lease the said land or any part thereof to the local authority of the area in which the same is situate, or to the said National Agricultural and Industrial Association." The clause continued:—"The trustees shall have full power, immediately after the receipt of the purchase money, to convey the same, or any part thereof, to the purchaser to be held by the purchaser, being the local authority, as a reserve for public park purposes, or, being the National Agricultural and Industrial Association, for the purposes of the said Association, subject always to a right in favour of the public to admission free of charge to that part now used as a park on all days other than the days upon which the annual show of the said Association is being held."

It was admitted during the argument that the condition mentioned in sec. 4 as to a right in favour of the public to "admission free of charge to that part now used as a park" did not at the date of resumption apply to any part of the land in question in this case. The Society, therefore, after 19th November 1907, had power to sell the land, free of any trusts contained in the deed of grant of 17th June 1892, to either of two local bodies. That power to sell was limited to one of two possible buyers, and both buyers had to hold the land, if they bought it, for the purposes mentioned in the Act. In nearly all the cases referred to during the argument there was only one buyer who could acquire a title (under some special Act) free from the trusts or restrictions under which the owners held the land, but that fact did not, so far as I can see, weigh in the value to be paid to the owner of the land resumed. The buyer, if a sale had been effected, would have received a title in fee simple, unrestricted by any trust the Society had theretofore held the land subject to. Certainly, the purchaser

would be restricted as to the use he could put the land to, but the value of "compensation" or purchase money is never based on the uses the purchaser can put it to. In my opinion, therefore, the Society was, after 19th November 1907, in a position to voluntarily give a title in fee simple unrestricted in any way by the trusts contained in the Crown grant of 17th June 1892.

Paragraphs 1 and 2 of sec. 7 of the 1907 Act are, I think, of importance:—

"The proceeds of any sale shall be invested by the trustees and many be so invested in any of the securities in which trustees are by law authorized to invest trust moneys, and all income therefrom arising and also all rents received under any lease under this Act shall be applied by the persons authorized to receive the same for the objects and purposes of the Acclimatization Society of Queensland, and for the purpose of carrying on the operations thereof, and for no other purpose whatsoever:

"Provided that every investment of money under this section, shall be subject to the approval of the Governor in Council."

The Society did not sell the land. One of the paragraphs of the special case states:—"Certain negotiations took place between the Chief Secretary's Department of the State of Queensland and the said trustees, and the said trustees were informed it was the desire of the Government to resume a part of the said land in accordance with the powers in the said deed of grant set forth, and they were requested to waive, and agreed to waive, the twelve months' notice mentioned in the said deed of grant."

No copy of any notice of resumption has been submitted to the Court; but I take it that the land in question has now been resumed by the Crown under the following special proviso contained in the Crown grant:—"Provided nevertheless and we do hereby reserve unto us our heirs and successors all mines of gold of silver and of coal and we do further reserve unto us our heirs and successors full power for us or them or for the Governor for the time being of our said Colony with the advice aforesaid to resume and take possession of all or any part of the said land which may be required at any time or times hereafter for any public purpose whatsoever twelve calendar months' notice of its being so required being previously given in the *Government*

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Gazette or otherwise and the value of the said land or of so much thereof as shall be so required and of any building standing on the said required land being paid by the Government to the party entitled thereto at a valuation fixed by arbitrators chosen as hereinafter mentioned in which valuation the benefit to accrue to the said party from any such public purpose shall be allowed by way of set off."

The umpire elected by the arbitrators in accordance with the provisions of the grant to determine "the value of the land" has made what he calls an award, in which he states:—

"1. I find that the value of the total area of the land proposed to be resumed as aforesaid as set in the said schedule hereto on the basis of freehold land unrestricted in any way and as land held in fee simple is the sum of £7,490.

"2. I find there is no building on the said land.

"3. I find that the value of the total area of the said land proposed to be resumed as aforesaid as set in the said schedule hereto being required for a public purpose (namely an exhibition ground) in accordance with the said deed of grant and reference is the sum of £3,835.

"4. I find that the value of the benefit to accrue to the said trustees from the said public purpose by way of set off is *nil.*"

The Court has been asked for its opinion (See special case) as to whether the sum of £7,490 in the said determination mentioned is the amount payable by the defendant to the plaintiffs.

That, of course, depends on what meaning is to be placed on the words "the value of the said land" in the Crown grant.

That value, whatever it is, is to be paid to the Society.

If it is the value of the Society's interests in the land only—subject to the trusts, or subject to any restrictions as to its sale by the Society—then it must be ascertained in accordance with the decisions referred to by my learned brothers; but I hold that the principle laid down in *Hilcoat* v. *Archbishops of Canterbury and York* (1) can and should be applied in this special case, and that the Society is entitled to the full value of the land in the ordinary sense of the term, free of any restrictions.

The judgment in *Hilcoat's Case* (1) was approved of by

(1) 10 C.B., 327.

Vaughan Williams L.J. in 1903, in the *City and South London Railway Co.'s Case* (1).

The Society had at the time of the resumption a right under the Act of 1907 to sell the land free of all trusts under which it had theretofore held it.

In *City and South London Railway and St. Mary Woolnoth* (2) *Vaughan Williams* L.J. said (3):—"When there is an Act of Parliament which says that property may be dealt with independently of its dedication to a special purpose, it seems to me that the payment in respect of its value ought to be estimated independently of the dedication, which has no longer any operation by, in effect, its repeal by the special Act."

Sec. 185 of the *Land Act of* 1910 has been referred to. I do not consider that that section, in a general Act, affects in any way the power of the Society to sell, given by a special Act, such as the one in question in the case.

In *Stebbing's Case* (4), referred to by learned brothers, the resumption was made of lands which were subject to trusts at the time of the resumption, and the holders therefore had no power, *at the time*, to throw off the shackles of their trust by sale. Further, they were only entitled to compensation in accordance with the provisions of the Act under which the land was resumed, and no special contract had been made with them by the authority resuming the land. I do not think it is applicable to this case.

In the many cases referred to in the argument, it is, I think, also clear that the limited use that the buyer can put the land to, cannot affect the amount to be paid to the owner.

It has not been decided definitely in any case I can find, that if land is necessarily transferred from one public purpose to another public purpose, the amount to be paid to the owner is thereby affected. *Hannen* J. in *Stebbing* v. *Metropolitan Board of Works* (5) said:—"I think that the fact that they purchased for the purpose of devoting the land to another public purpose makes no difference in the principle of compensation."

Even if the fact that the Society had the power to sell the

(1) (1903) 2 K.B., 728, at p. 736.
(2) (1903) 2 K.B., 728.
(3) (1903) 2 K.B., 728, at p. 737.
(4) L.R. 6 Q.B., 37.
(5) L.R. 6 Q.B., 37, at p. 46.

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land free of the trusts in the Crown grant, to a limited number of buyers only, and for other public purposes, does not entitle the Society to the full value of the land on the basis of freehold land unrestricted in any way, I hold that the special circumstances of this case, based on the contract in the Crown grant by itself, warrant the Court in finding that the words in the Crown grant, "the value of the land," mean "the value on the basis of freehold land, unrestricted."

Under the *Public Works Land Resumption Act of* 1906, immediately the Crown takes an estate in fee simple the land becomes Crown land and may be dealt with accordingly (sec. 12).

When the deed of grant in question was issued in 1892 the *Public Works Lands Resumption Act of* 1878 was in force and provision was made in that Act for resumptions, payment of compensation and the mode of ascertaining the amount to be paid on the resumption of land under that Act. The Crown in this case, however, decided to specially contract with the Society as authorized by that Act, by agreeing in the grant (*a*) to give longer notice of resumption than was required under the Act; (*b*) by agreeing to pay "the value of the land" instead of "compensation" (generally used in the said Act). The Crown also omitted to include in the conditions of resumption the right of the Society to claim damages caused by severance or otherwise on resumption, and provided a different method of arriving at a valuation from that set out in the Act—prescribing, in its place, a simple method suitable to the valuation of the land as a fee simple free of encumbrances and restrictions.

In the grant the Crown agrees to pay not only the value of the land, but the value of buildings erected thereon. I have no doubt that the value of the buildings did not mean the value to the Society subject to any restrictions, but the value at the time of resumption arrived at by valuation in the ordinary way. If that applied to the buildings, why not to the value of the land also?

Attention has been drawn to the fact that "compensation" must have been intended by the right reserved in the grant to set off the improvement in value (if any) caused by the public purpose for which the land was resumed against the value of the

land when resumed. That fact makes it clearer to me that the value of the land, in the ordinary sense of the word, was to be paid, and that only, independent of any improvement or depreciation by the public purpose for which the land was to be resumed.

If "compensation" or the value of the interest of the Society in the ordinary sense of the word had been intended instead of value of land unrestricted the damages caused by resumption through severance and otherwise, would surely have been allowed to the Society under the special contract. Under the words "value of the land" in the grant in question it could not in my opinion be allowed.

It was reasonable, in my opinion, to make such a special arrangement as I hold was made. 1. The Society held the land in fee simple. 2. The Society had on its hands a piece of land not entirely suitable for the purposes of the Society (See Act of 1907). 3. The Society had to use the moneys received for the land, for public purposes, just in the same way as the Crown. 4. The Society had been deprived of the greater part of its lands by the Act of 1900. 5. It was proposed to provide the Society with an income out of the proceeds of the sale of the land (See Act of 1890).

I agree that the alternative value found by the umpire (No. 4), namely, the value as an exhibition ground, is not correct in either case—for that is only one of the purposes for which the land could at that time have been sold or resumed by the Government.

Have the valuers, appointed to determine the value of the land, to decide what the value is to the Society at the date of resumption limited by its right to sell to one of two buyers only for public purposes, *coupled with* the right it had to payment of "the value of the land," whatever that was, from the Crown if the land was resumed by it? Fifty-four purposes are specially mentioned in the fourth section of the *Public Works Land Resumption Act of* 1906 as purposes for which it could have been resumed. Those purposes include townships (usually resumed for sale), cemeteries, markets, prisons, baths, asylums, easements and right of way, and roads, &c.

I do not think the valuers had to find anything but the value of the land as a fee simple unrestricted.

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For the reasons mentioned I quite agree with that part of the Full Court judgment appealed from where the Court said (1):— "A number of cases have been cited to us upon the question of value to be paid by way of compensation for lands taken to persons whose interests therein are limited and under various statutory authorities. But very little assistance can be derived, as each case is determined by its own particular circumstances—such as the interest of the claimant in the property, &c. Here the property is held for the benefit of the public. It was devoted to the public purpose for which it is held by gift from the Crown. Now, when given, what part of the public estate, estimated in cash, was dedicated—in other words, what was the value of the property so dedicated? At the time the land was parted with by the Crown for the public purpose mentioned, its value could not be less than the sum which the Crown could reasonably expect to receive, and would have received, by the sale of that land, free from all restrictions as to its use, but subject to the reservation as to silver, gold, and coal, which being expressly reserved, the Crown could deal with otherwise than for the benefit of the declared public purpose for which the trustees took it, and the words, 'the value of the said land,' which has to be paid upon resumption must, we think, be measured in the same way, and be, at least, all that sum which, if the land was vested in the Crown, and free from any trust, could be obtained for it by the Crown at the time of resumption, reserving from purchasers, the same interest therein as they reserved in the deed of grant to the trustees—that is to say, gold, silver, and coal. Such a value would be ascertained by including everything which the umpire sets out in his first finding."

RICH J. I concur in the judgments of the majority of the Court.

Appeal allowed.

Solicitor, for the appellant, *T. W. McCawley*, Crown Solicitor, Brisbane.

Solicitors, for the respondents, *Nicol, Robinson, Fox & Edwards*, Brisbane.

N. McG.

(1) (1913) S.R. (Qd.), 10, at pp. 23-24.