[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF LAND TAX . APPELLANT;

AND

NATHAN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1913.

BRISBANE, *April* 21, 22; *May* 2.

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

Land Tax—Assessment—Taxable value—Unimproved value—Improved value—Value of improvements—Mode of ascertainment—Land used as racecourse—Most suitable purpose to which property can be applied—Deduction—Evidence—Land Tax Assessment Act 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *secs.* 3, 15, 17, 18, 23 (1), 46, 48.

The term "value of improvements" in the *Land Tax Assessment Act* 1910-1911, as defined by sec. 3, means the added value which the existing improvements give to the land at the date of valuation irrespective of the cost of the improvements—not the value which they gave from their creation up to that date, nor the value which past improvements have given.

To arrive at the "unimproved value" of land for the purposes of the Act, the improvements existing at the time of valuation upon the land itself or legally incident to its enjoyment are to be assumed as not made; but the existence of past improvements, and the effect which they or their use have had in bringing the land up to its then value, are not to be ignored.

The ordinary principle of ascertaining the value of land on a given date, stated by *Isaacs* J. in his judgment in *Spencer* v. *The Commonwealth*, 5 C.L.R., 418, at p. 441, applies to the ascertainment of the value of land at that date for the purposes of the *Land Tax Assessment Act* 1910-1911.

Land, which in its original state was of the unimproved value of less than £4,800, was improved for certain purposes which did not turn out to be successful. It was subsequently purchased and equipped and used as a racecourse, for which purpose it was peculiarly adapted; and after being used as such was sold for £31,000. The value of the land as a racecourse depended

upon its registration by licence from the Queensland Turf Club, which had already for some years granted the same to the owner for the time being of the land.

Held, (1) that for the purpose of ascertaining the taxable value under the *Land Tax Assessment Act* 1910-11, the land must be valued as a registered racecourse, and, in the circumstances, with the likelihood of the registration not being refused in the future, and as such the evidence showed it to be of an improved value of £31,000; (2) that to ascertain the unimproved value it was only necessary to deduct the value of the improvements, which were to be valued according to the sense given to the term "value of improvements" by the definition in sec. 3 of the Act.

Decision of the Supreme Court of Queensland (*Cooper* C.J.): *Nathan* v. *Commissioner of Land Tax*, (1912) S.R. (Qd.), 191, reversed.

APPEAL from the Supreme Court of Queensland.

Certain land, now known as the Albion Park Racecourse, which was originally a swamp, was purchased by a syndicate who filled it in at a cost of about £7,000 for the purpose of forming a sports ground. This venture did not prove successful, and the land was mortgaged to a bank which subsequently took possession. Some time after the year 1894 the land was leased to different persons and used by them as a racecourse. It was for a time carried on as an unregistered club, but was found to be unprofitable. Registration was sought and obtained from the Queensland Turf Club, the rules of which provided for the registration of all clubs in Queensland desiring to hold their race meetings under and subject to the rules, which are in the opinion of the Committee of the Turf Club desirable clubs for registration. In 1909 the bank sold the land to a Mr. Castles for £30,000, and he in the following year sold it to the respondent, Arthur Nathan, for £31,000. The Queensland Turf Club allowed the registration licence to be transferred in each case with the land.

The Commissioner of Land Tax assessed the unimproved value of the land at £16,935—this being the last sale price, less deductions. The respondent appealed to the Supreme Court against this assessment on the ground that it was excessive.

The Supreme Court (*Cooper* C.J.) allowed the appeal: *Nathan* v. *Commissioner of Land Tax* (1).

(1) (1912) S.R. (Qd.), 191.

H. C. OF A. 1913.

COMMISSIONER OF LAND TAX v. NATHAN.

Further material facts appear in the judgment hereunder. The Commissioner now appealed from that decision.

Macgregor and *Graham*, for the appellant. The land must be valued as a racecourse. The case of *Municipality of Brisbane* v. *Brisbane Tramways Co. Ltd.* (1) lays down that the value is to be calculated on the basis of what the land may reasonably be used for. *Borough of Glebe* v. *Lukey (Australian Gaslight Co.)* (2) shows that what the land is used for must be taken into consideration. This is a unique property, and, consequently, the value of surrounding properties is immaterial: *Mersey Docks and Harbour Board* v. *Overseers of the Poor of the Parish of Liverpool* (3). The fact that it is most suitable for a racecourse may, and should, be regarded in assessing its value: *Dodds* v. *Assessment Committee of the Poor Law Union of South Shields* (4). *Cartwright* v. *Guardians of the Poor of the Sculcoates Union in Kingston-upon-Hull* (5) shows that where there are not the ordinary means of comparison with surrounding properties other circumstances, such as position and suitableness for a particular purpose, may be taken into consideration. To arrive at the unimproved value, the present value of the land with the improvements on it must be ascertained, and then the cost of erecting those improvements deducted: *Australian Gaslight Co.* v. *Commissioners of Taxation* (6).

Macrossan and *Murphy*, for the respondent. The appellant's contention is that the sale of this property for £31,000 was a sale of the earth and buildings thereon and nothing else, whereas the factor which produced this value was the existence of a state of things which might cease at any moment. The land ought to be valued at the ordinary price of land in the district, and not at its value as a racecourse. It must not be valued as a racecourse, as the licence, which may be called a goodwill, constitutes the major portion of the value, and in valuing land the goodwill must be disassociated: *Sebastian on the Law of Trade Marks*, 5th ed., p. 338.

(1) 9 Q.L.J., 67, at p. 71.
(2) 1 C.L.R., 158, at pp. 162, 178, 179.
(3) L.R. 9 Q.B., 84, at p. 97.
(4) (1895) 2 Q.B., 133.
(5) (1900) A.C., 150.
(6) 19 N.S.W.L.R., 360.

In valuing land the Local Authority had to apply the provisions of the *Valuation and Rating Act of* 1890 (Qd.) (54 Vict. No. 24). The evidence shows that the value of this land, on the basis of the Local Authority valuation, would not be more than £4,800.

Leaving out the question of the goodwill, the principle laid down in *Spencer* v. *The Commonwealth* (1) for assessing the value of land would apply here. The *Land Tax Assessment Act* 1910-1911 is a taxing Act, and must be construed strictly. It is an Act for taxing land only. In ascertaining the value of the improvements, what goes with the buildings must be taken into consideration; the licence to race could not have been obtained unless the buildings had been there.

[They also referred to *Maxwell on Statutes*, 5th ed., p. 463, and *Golden Horseshoe Estates Co. Ltd.* v. *The Crown* (2).]

Macgregor, in reply.

Cur. adv. vult.

The judgment of the Court was read by

May 2.

ISAACS J. This is an appeal to this Court in its appellate jurisdiction under sec. 46, sub-sec. (4), of the *Land Tax Assessment Act* 1910-1911, from an order of *Cooper* C.J., made under sub-sec. (1) of that section. The learned Chief Justice of Queensland found that the land had no taxable value, because he reduced the assessment to a sum less than £5,000—unimproved value.

Nothing turns on the veracity or demeanour of the witnesses who were orally examined before the learned Chief Justice. The accuracy of his Honor's conclusion depends entirely upon the effect of the evidence as it appears in the transcript, when the proper rule of law is applied to it.

By sec. 17 of the *Land Tax Assessment Act* 1910-1911, the Commissioner is empowered to make valuations of land. He is also empowered, but not bound, to obtain and use State valuations. Sec. 18 says that from these and from returns, and from any other information in his possession, or from any one or more of

(1) 5 C.L.R., 418. (2) (1911) A.C., 480, at p. 488.

H. C. OF A. 1913.

COMMISSIONER OF LAND TAX v. NATHAN.

these sources, he shall cause assessments to be made for the purpose of ascertaining the amount upon which land tax is to be levied.

On an appeal by a taxpayer from the Commissioner's assessment, the production of that assessment is made *primâ facie* evidence that the amount and all the particulars are correct: Sec. 23, sub-sec. (1), paragraph (b).

The respondent's own return states that the land was, on 30th October 1909, sold by the Royal Bank of Queensland, as mortgagee, to Castles for £30,000, and, on 13th January 1910, was sold by Castles to Nathan for £31,000—payable £1,000 on signing contract, and balance by yearly instalments of £5,000 each, annually. It is not unimportant to observe, that according to these terms the respondent was only £1,000 out of pocket for the first year of his purchase.

The same return claims a deduction in respect of "present added value in consequence of the land having been filled up by previous owner at a cost of £7,000," and the deduction claimed for that is only £4,000.

The respondent paid £31,000 for the land—and for nothing else, so far as appears on the face of his own return, and on the evidence, except the totalisator licence,—and paid it only a few months before his return was made. Nevertheless, he states in that document, that the full improved value of the land is only £8,800 ; and, after deducting the £4,000 for filling, and a further sum of £3,965 for buildings and fences, the unimproved value according to him is only £835. The land was sold and purchased as a racecourse. But the sum of £8,800 is fixed on the basis of some use, other than as a racecourse. No other explanation can account for the disparity.

Mr. Petrie, called for the taxpayer, said he thought the outside price it would fetch as a whole would be about £4,000 or £5,000—adding, "I give this valuation apart from any consideration of racing." This at once vitiates the force of the testimony, because the amount which a seller would put upon it, and which a willing buyer would give, is its value for the best purpose to which it can in the circumstances be applied.

Mr. Charlton took the municipal valuation, £4,835, and,

obviously, not as the basis of a racecourse, as he considered that a gamble simply. He thought the success of the venture depended on the promoters being able to gain and keep the goodwill of the Queensland Turf Club Committee, together with their ability to please the public, and went as high as £20,000 improved value as a registered racecourse for speculative purposes, and this, as he says, was exclusive of buildings and fences, for which must be added £3,965 more. He therefore fixed his valuation of £4,835 on the same basis as other lands he holds for sale in that locality. His basis is consequently wrong, because he rejects the test of the Act, which is, "the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a *bonâ fide* seller would require"—that is to say, a *bonâ fide* seller of that particular land.

Now, that particular land, besides its physical adaptability by reason of size, locality and conformation, to the purposes of a racecourse, has one very special characteristic. Mr. Morris, the Chairman of the Queensland Turf Club says:—"The majority of the Queensland Turf Club Committee are not favourably disposed towards proprietary clubs, but in this instance their predecessors had registered clubs for this course for so many years that it appeared unjust to refuse registration of this application." In other words, the Turf Club, from a sense of justice to the owner for the time being of that land as such, does not refuse the owner a licence, but issues one irrespective of his identity; he gets it merely in his quality of owner of that particular parcel of land—of course, supposing no personal disqualification. Such a virtual monopoly, so to speak running with the land, is a real enhancement of its value as a commodity, by increasing the price it will fetch. The expectation that the Queensland Turf Club will not act unjustly is a substantial consideration which may be reckoned upon.

Mr. Crouch valued the land for the Hamilton Town Council at £4,890 in all, but under the *Local Authorities Act*; and he does not say he based that valuation on its suitability as a racecourse, although he admits such suitability.

On the other hand, besides the two circumstances of the *primâ facie* effect under the Statute of the Commissioner's assessment,

H. C. OF A. 1913.

COMMISSIONER OF LAND TAX v. NATHAN.

and the much stronger effect of the respondent's own contract, unexplained, there is the evidence of Mr. Franklyn and Mr. Copeland. The former is one of the Commissioner's staff valuers, and has had some years' experience of land values in Brisbane. He accepts the sale price, £31,000, to begin with; and, considering the use of the land as a racecourse is its most profitable use, valued it as such. He allows for deduction for filling £7,000, which is £3,000 more than claimed by respondent, and he also allows the full £3,965 for buildings and fences, and an additional sum of £3,100 as 10 per cent. interest for one year on the full price £31,000, although, as already stated, the respondent is not required to pay out of pocket more than £1,000 during that year. The allowance is on the assumption that if the statutory fiction of non-existence of the improvements were true, it would take a year to create them. But the fiction is only for a limited purpose, and does not affect, and is not supposed to affect, the price which a business man gives, or his power to use the land immediately. As far as allowances in fact are concerned, nothing can be complained of on the score of liberality. Mr. Copeland—who is also a land valuer attached to the staff, was valuer for several shires, is fairly acquainted with Brisbane values, and has known this property for 40 years—agrees with Mr. Franklyn that its unimproved value is £16,935.

There is really no evidence of any substantiality at all, to oppose to the evidence for the Commissioner. The respondent himself voluntarily gives £31,000 to a vendor who has just given £30,000, and for the land alone—except for the promise of a transfer of the totalisator licence, which costs nothing, and is thrown in. But he gives no personal testimony, nor does he call his vendor, to explain how such a sum is given for land which, he says, is only worth £8,800 gross.

True it is that his learned counsel suggests that Mr. Nathan might get a Turf Club licence on personal grounds where another person, though owner of the land, would fail. But not only is there no evidential support of that suggestion, but it is directly contrary to Mr. Morris's testimony referred to; and, in addition, the suggestion, if correct, would be no reason for Castles asking

and Nathan submitting to an increase of £22,200 in the price. The suggestion is simply impossible of acceptance.

Consequently, as far as the facts are concerned, unless there is a new special rule of law introduced by the Statute, by which some artificial standard is set up, the case seems clear. The ordinary principle of ascertaining the value of land on a given date, is stated in *Spencer* v. *The Commonwealth* (1), in these words, from which we see no reason to depart :—" To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property."

The amount of profits or losses which actually at that date are being made does not constitute the test, because into them possibly enters the element of the personal skill or popularity of the present owner, and similar circumstances which cease when his ownership ceases ; but, though not the test, no prudent man would fail to inquire into them, and weigh the fact for himself.

In *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (2) Lord *Halsbury* L.C. states the law to be, in effect, as mentioned.

But, says the respondent, that is not to be the rule here because of certain words in sec. 3 in the definition of " unimproved value." We have already referred to the statutory definition of improved value, and then to get the unimproved value, these words are added—" assuming that the improvements (if any) thereon or appertaining thereto and made or acquired by the owner or his predecessor in title had not been made."

(1) 5 C.L.R. 418, at p. 441. (2) (1901) A.C. 175, at p. 182.

H. C. OF A. 1913.

COMMISSIONER OF LAND TAX v. NATHAN.

These words, it is argued, indicate that for the purpose of arriving at the unimproved value you have to consider that the improvements in fact existing had never been made, and that you are to carry this supposition back logically, and therefore to assume that the land had never been used with them, and therefore also that its present value is to be what it would have been if it had never been so used—an arbitrary and almost impossible problem, set without any apparent reason. If the words of the Statute were clear that that was the problem, the Court would have no duty but that of attempting to solve it by approximation. But not only are the words not clear in that direction, but the suggested interpretation would conflict with other portions of the Act, as well as with the business notion of the matter.

In the first place, the "improved value" is arrived at by taking into account as evidential, but not as ultimate facts, all existing and all past circumstances affecting the land, and these include its past and present use, as well as its present improvements. Improvements existing at the given time, and which are "thereon or appertaining thereto"—meaning actually upon the land itself or legally incident to its enjoyment—are to be assumed as not made. But past improvements, no matter how much their presence or use has enhanced the price, are not to be deemed never to have been made; their prior existence and the effect of them are not to be ignored. So when the "improvements" as still existing are to be ignored, nothing is said as to erasing the effect they or their use have had in bringing the land up to its present value.

The definition of the phrase "value of improvements," is couched in the present tense. It is added value which the improvements give to the land at the date of valuation—not the value which they gave from their creation up to that date, nor the value which past improvements have given.

That definition was inserted in view of the provisions of sec. 48 enabling the Crown to compulsorily acquire land fraudulently undervalued. By that section, broadly speaking, the owner may be taken at his word, but still with just consideration for compulsory taking. He gets the full improved value of the land, made up of the fair value of improvements plus his own asserted

unimproved value and plus ten per centum on the improved value.

It is evident that if the assumption contended for were correct, the owner would receive only as the full improved value, its value based on the present added value given by existing improvements plus the value of the land considered as always having been in its primitive and natural state, with the ten per cent. addition. That would be a clear deprivation of a portion, and, perhaps, the most substantial portion of the real value.

And by the recent amendment of the law No. 37 of 1912 the added value in consequence of improvements has the maximum limit of the present cost of bringing the unimproved value to the improved value, as at the date of assessment. This is understandable in the view the Crown presents, but is unintelligible to us, or at least generally unworkable, if the respondent's contention be adopted.

It is not by any means an unimportant circumstance that, so far as the words now under consideration are concerned, they are the same in substance as the corresponding provision in the New South Wales Act, which has been in force for many years, and from which the Commonwealth provision was adopted. The case of the *Australian Gaslight Co.* v. *Commissioners of Taxation* (1) placed a judicial interpretation upon the enactment, and from this interpretation no departure has ever been made or suggested. It is not an unfair supposition that the legislative provision was adopted by the Commonwealth Parliament with the interpretation so placed upon it, and so both on the inherent construction and the judicial interpretation of the Statute, the respondent's argument ought to fail.

In our opinion, the evidence establishes that the unimproved value of the land is £16,935, which, after deducting the statutory sum, £5,000, leaves a taxable value of £11,935, and that the appeal should be allowed and a declaration made accordingly.

Appeal allowed, and a declaration made that the unimproved value of the land is £16,935, *which, after deducting the*

(1) 19 N.S.W.L.R., 360.

H. C. OF A. 1913.

COMMISSIONER OF LAND TAX v. NATHAN.

statutory sum of £5,000, *leaves a taxable value of* £11,935.

Solicitors for the appellant, *Chambers, McNab & McNab*, Brisbane.

Solicitors for the respondent, *O'Shea & O'Shea*, Brisbane.

N. McG.

Appl *Kitano v Commonwealth* (1974) 129 CLR 151

Cons/Appr *R v Foster, Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256

[HIGH COURT OF AUSTRALIA.]

THE MERCHANT SERVICE GUILD OF AUSTRALASIA . . . . } CLAIMANTS;

AND

THE COMMONWEALTH STEAMSHIP OWNERS ASSOCIATION AND OTHERS . . . . . } RESPONDENTS.

H. C. OF A. 1913.

MELBOURNE, *May* 19, 20, 21, 22; *June* 4, 5, 6.

SYDNEY, *Sept.* 4.

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

Constitutional Law—Extra-territorial operation of laws of Commonwealth—British ships—"First port of clearance"—"Port of destination"—Voyage—Ship's papers—Industrial dispute—"Extending beyond the limits of any one State"—Industries carried on in Australia—Part of employment beyond territorial limits—Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Award—Fixing terms to be incorporated in contracts—Commonwealth of Australia Constitution Act 1900 (63 & 64 *Vict. c.* 12), *sec. V.—The Constitution, sec.* 51 (*xxxv.*)

Held, by the Court, that the words "extending beyond the limits of any one State" in sec. 51 (xxxv.) of the Constitution mean extending from one State into another State or other States of the Commonwealth.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Barton* A.C.J. dissenting), (1) that by virtue of sec. V. of the *Commonwealth of Australia Constitution Act* a single and indivisible industrial dispute is none the less an industrial dispute extending beyond the limits of any one State within the meaning of sec. 51 (xxxv.) of the Constitution merely because some of the operations in