[PRIVY COUNCIL.]

CORRIE AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

MACDERMOTT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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Crown Grant—Restrictions on alienation and user of land—Resumption for public purposes—Value of land to grantee—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 alienation of it, and to 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, 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, and *Hilcoat* v. *Archbishops of Canterbury and York*, 10 C.B., 327, explained.

Decision of the High Court: *MacDermott* v. *Corrie*, 17 C.L.R., 223, affirmed.

APPEAL from the High Court.

This was an appeal by the plaintiffs, Leslie Gordon Corrie and James Grahame Vidgen, the trustees of the Acclimatization

* Present—Lord Dunedin, Lord Atkinson, Lord Sumner and Sir Joshua Williams.

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Society of Queensland, to the Privy Council from the decision of the High Court: *MacDermott* v. *Corrie* (1).

The judgment of their Lordships was delivered by

LORD DUNEDIN. The Acclimatization Society of Queensland is a society constituted under Acts of Parliament for the purpose of carrying out experiments in acclimatization of animals and plants—using the latter word in its widest sense. The Society holds land where its experiments are carried out. Such land is held by the Society through the medium of trustees, who hold the same in trust for the uses of the Society.

By deed of grant of 17th July 1892 the land which forms the subject of this appeal was granted by the Crown to trustees for the Society "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."

Mines of gold, silver and coal were reserved to the Crown, and the deed of grant contained also the following clause:—"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 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."

Then follows an arbitration clause providing for appointment of arbitrators and umpire in common form.

The deed contained no power of sale in favour of the trustees, and no general power of sale of this land is conferred on them by any of the Acts under which the Society is governed; but by an Act of 1907 the Society was allowed to sell any part of its lands

(1) 17 C.L.R., 223.

to the local authority, and to the National Agricultural and Industrial Association.

In 1911 the Government resolved to exercise the above narrated power of resumption, and gave the necessary notice. Arbitrators and umpire were appointed, the arbitrators disagreed, and the umpire made his award in the following terms:—

"1. I find that the value of the total area of the land proposed to be resumed as aforesaid as set out in the . . . schedule hereto, on the basis of freehold land unrestricted in any way and as land held in fee simple, is the sum of seven thousand four hundred and ninety pounds (£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 three thousand eight hundred and thirty-five pounds (£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 three thousand eight hundred and thirty-five pounds (£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 Government paid the sum of £3,835 and was by arrangement given possession of the land subject to the question of the sum truly due being settled by special case. A case was accordingly presented to the Supreme Court of Queensland in which the questions put were as follows:—

"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

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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 Supreme Court of Queensland held that the Society was entitled to the sum of £7,490—£3,835 of which being already paid left a balance due of £3,655, for which sum they gave judgment (*In re The King and the Acclimatization Society of Queensland*; *Corrie and Vidgen* v. *MacDermott* (1)). Appeal was taken to the High Court of Australia, who by a majority of three to one reversed the judgment of the Supreme Court of Queensland and gave judgment in favour of the defendants (*MacDermott* v. *Corrie* (2)). From that judgment the present appeal is to this Board.

If this case be viewed as an ordinary case of compensation their Lordships think that the law is not doubtful. The general principle was restated in the very recent case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3) before this Board, which approved of the general statement by Lord *Moulton* in the case of *In re Lucas and Chesterfield Gas and Water Board* (4). The value which has to be assessed is the value to the old owner who parts with his property, not the value to the new owner who takes it over. If, therefore, the old owner holds the property subject to restrictions it is a necessary point of inquiry how far these restrictions affect the value. It is evident that in this case, always under the assumption above stated, this view is destructive of the arbitrators' finding for £7,490 being applicable; for that value is only upon the view that the ground is "unrestricted in any way."

A good deal of argument seems to have been used in the Court below, and was to a certain extent repeated before their Lordships, upon the supposed discrepancy of principle contained in the judgments in *Hilcoat* v. *Archbishops of Canterbury and York* (5), as opposed to those in *Stebbing* v. *Metropolitan Board of Works* (6). In their Lordships' opinion both cases are con-

(1) (1913) S.R. (Qd.), 10.
(2) 17 C.L.R., 223.
(3) (1914) A.C., 569.
(4) (1909) 1 K.B., 16.
(5) 10 C.B., 327.
(6) L.R. 6 Q.B., 37.

sistent with the general principle above laid down, and the only difference arose from the application of that principle to different facts.

Hilcoat's Case arose upon the question of an exception to a direction given to a jury.

Under an Act of Parliament a railway company was authorized to take the Church of St. M. and certain ground attached thereto upon the terms that they should only get possession when with consent of the Bishop of the Diocese and the Archbishop of York a price had been fixed—in the fixing of such price regard being had to the cost of getting a new site and erecting a new church and compensating the person entitled to the land not actually forming part of the church, which sum should be held by the two ecclesiastical persons aforesaid for the purpose of procuring a new site and erecting a new church, and for compensating the person entitled as aforesaid.

The Bishops agreed with the railway company for the sum of £7,700 odd and indemnity against any claim by the incumbent. They then offered the incumbent (who was the person entitled to the land not occupied by the church as aforesaid) the sum of £300. This he refused and raised action. The case was tried by *Wilde* C.J., who directed the jury, first, that the fact of the Bishops fixing £300 as a proper sum for compensation did not bind the plaintiff; and secondly, that they were not bound to estimate the value of the ground to which the plaintiff was entitled, as land irrevocably appropriated to spiritual purposes, of which the plaintiff could make no pecuniary advantage, but that it was competent to them to form this estimate of the value with reference to all the circumstances that had appeared in evidence before them. The jury found for the plaintiff and assessed damages at £1,540. Upon a rule being granted the Court held that the directions were right.

It seems quite plain that although, as above said by their Lordships, restrictions must be kept in view, the chance of such restrictions being discharged must also be kept in view. That was all that was decided in *Hilcoat's Case*, and in their Lordships' view rightly decided. Whether under the circumstances

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of the case the jury did not give too much is quite another matter, and does not affect the principles of the case.

In *Stebbing's Case* the ground taken was part of city churchyards in which any further burial had been prohibited by Order in Council. The rector claimed that he should be paid for his freehold interest in the said churchyards the value of the ground as if it was unrestricted, minus the sum which it would cost to remove the human remains to other ground. The Board of Works (who had taken the ground) contended that the value to be assessed was the value of the ground as it stood in the rector's hands. It was thus decided, and the decision upon principle is strictly right. The case does not disclose whether the arbitrator (who had formulated the contending principles to be decided by special case) eventually settled that the rector's interest was pecuniarily *nil.* There are doubtless indications in the judgments that that was the view of the Judges. In so saying, however, they in strictness went beyond their province. Strictly the rector was entitled to have valued his chance of ever getting the land in his hands in such a condition as could bring pecuniary value. But the valuation under the circumstances might well be *nil.*

And now it may be remarked that a restriction which prevents selling, though it must be taken into account and may very well affect the value, does in no way reduce the value to *nil.* To a Judge, on the facts in *Stebbing's Case,* it might indeed well appear that the value was *nil.* For the land could not be sold, for it was dedicated to spiritual purposes; and further its use so far as profitable, as *e.g.* in the matter of fees, was also exhausted, for the ground was full and no further interments were possible because of the Order in Council. But other circumstances would lead to a perfectly different result, and as an illustration their Lordships would refer to a case which, though not at law, was decided by a Judge of authority, the late Lord *Shand.* A strip of land in the West Princes Street Gardens below the Castle Rock in Edinburgh was taken by the North British Railway under an Act of Parliament under terms of paying compensation to the Corporation of Edinburgh, who were the owners of the ground. By Act of Parliament the Corporation was prohibited

from ever building on the land, or alienating it; but were bound to keep it for all time as a public garden. Under the circumstances the Railway Company contended before Lord *Shand*, who was chosen as sole arbitrator, that the land was worth nothing, and that a mere nominal sum should be paid. The Corporation, on the other hand, maintained that the true compensation was what would provide another strip of exactly the same quality; and, as this could only be got by taking Princes Street itself, that the money value must be estimated at what it would cost to buy a strip of Princes Street—the most valuable site in Edinburgh. Lord *Shand* held both these views to be wrong. He held that, the Corporation being restricted, the value could not be measured by the value of unrestricted land in a similar position; but that on the other hand the land was of value to the Corporation who enjoyed it with the rest of the adjoining land, for the use of the citizens as a garden, which garden would be so much the less valuable because it was smaller; and he assessed on that view. Their Lordships consider that this judgment proceeded on correct principles.

The appellants, however, argued that the assumption on which all that has been so far said proceeds cannot properly be made; that the present case is not one of ordinary compensation; but that in terms of the words of the bargain the value which is to be paid is the value of the land unrestricted.

Their Lordships cannot accede to this view, and they agree particularly with the reasoning of *Isaacs* J. on this part of the case. In their opinion it puts upon the word "value" an amplification of the bare word, treating it as if it was "unrestricted value," which it will not bear. And, further, the law of compensation being as they have stated it, viz., the value to the owner as he holds, which law has been so often laid down that it must be held to have been known to the contracting parties, it was, their Lordships think, incumbent on a party who wanted the valuation to proceed upon another footing to take care that the words used clearly so expressed it.

The appellants also argued that there must have been some reason for a special clause with a special tribunal being stipulated for in view of the fact that there exist general Acts which give

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very ample powers of resumption to the Government on payment of compensation in ordinary form. The simple answer to this seems to be that although the powers under the general Acts are very ample they are restricted to actual purposes specified, whereas this clause gave the Government power to resume "for any public purpose whatsoever," a fact which seems amply to account for the presence of the special clause.

It will, of course, be noticed that the third finding of the umpire is based upon an obviously irrelevant consideration. By the form of the question here the only point reserved for consideration is whether the first finding as it stands expresses the correct principle, and parties are agreed, and have so argued the case, that failing the first they will be content with the sum brought out in the third although the principle upon which it was brought out was erroneous.

For the reasons above stated their Lordships are of opinion that the first finding does not express the value upon which the Society are entitled to be paid, and that the judgment of the High Court was right. They will humbly advise His Majesty to dismiss the appeal with costs.