[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } APPELLANT;

AND

DUNCAN AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1915.

MELBOURNE, *March* 15, 16.

Griffith C.J., Isaacs and Rich JJ.

Land Tax—Assessment—Unimproved value—Evidence—Subsequent subdivisional sale of land—Conditions of sale—Valuations of land by State—Land Tax Assessment Act 1910 (*No.* 22 *of* 1910), *secs.* 3, 17.

In estimating the unimproved value of land under the *Land Tax Assessment Act* 1910 the probability of the land bringing a higher price if subdivided before sale than if sold in one block is an element to be taken into consideration, but is no more.

Although the Commissioner of Land Tax is entitled under sec. 17 of the *Land Tax Assessment Act* 1910 to have regard to the valuation of land for the purpose of State land tax, on an appeal from an assessment of land that valuation is not evidence of the value of the land.

Decision of the Supreme Court of South Australia (*Buchanan* J.) affirmed

APPEAL from the Supreme Court of South Australia.

On 21st April 1911 the Federal Commissioner of Land Tax made an assessment as of 30th June 1910 of the land of Sir John James Duncan, in which he assessed the unimproved value of a parcel of about 6,572 acres at £5 per acre, and land tax was paid on the basis of that value. On 9th September 1912 a subdivisional sale of that parcel of land was held. The conditions of sale provided (*inter alia*) that 10 per cent. of the purchase money

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should be paid on sale, that a further sum of 10 per cent. of the purchase money should be paid on 1st February 1913, and that the balance of the purchase money should be secured on mortgage at 4½ per cent. per annum for five or seven years (the then current rate of interest on mortgages being 5½ per cent.). At the sale the land brought an average price of £7 7s. per acre. By an amended assessment of 17th April 1913 the unimproved value of the parcel of land as of 30th June 1910 was assessed at £7 1s. per acre. The taxpayer objected to the amended assessment, but the Commissioner refused to allow the objection, and the taxpayer thereupon appealed to the Supreme Court of South Australia.

The appeal was heard by *Buchanan* J., who allowed it.

From that decision the Commissioner now appealed to the High Court.

During the proceedings in the Supreme Court Sir John James Duncan died, and the proceedings were carried on by his executors, Jean Gordon Duncan, James Harvey, John Grant Duncan-Hughes and Walter Gordon Duncan.

Mitchell K.C. and *McLachlan*, for the appellant.

Cleland K.C. (with him *Jessop*), for the respondents.

During argument reference was made to *Commissioner of Land Tax* v. *Nathan* (1); *Charrington & Co. Ltd.* v. *Wooder* (2); *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (3); *MacDermott* v. *Corrie* (4); *In re Lucas and Chesterfield Gas and Water Board* (5).

GRIFFITH C.J. The subject matter of this appeal is an assessment of a parcel of about 6,000 acres of land for land tax made as of 30th June 1910. The land had been assessed by an assessment made in 1911 as of an unimproved value of £5 per acre, and land tax was paid in respect of that value. In September 1912 the owner offered the land for sale by auction in about thirty blocks.

(1) 16 C.L.R., 654, at p. 661.
(2) (1914) A.C., 71, at p. 88.
(3) 12 App. Cas., 315, at p. 321.
(4) 17 C.L.R., 223, at p. 251; 18 C.L.R., 511.
(5) (1908) 1 K.B., 571.

All the land, with a small exception, was sold, and the nominal purchase money averaged £7 7s. per acre. In April 1913 the Commissioner of Land Tax made an amended assessment, by which he assessed the unimproved value as at 30th June 1910 at £7 1s. per acre. An appeal from that assessment was heard by *Buchanan* J., who, after hearing evidence, came to the conclusion that the unimproved value of the land at that date was not more than £5 per acre, and consequently allowed the appeal to its full extent.

A considerable amount of evidence was given on both sides. The case for the Commissioner depended, mainly, if not altogether, upon the proper inferences to be drawn from the nominal prices bid at the sale in 1912. He seeks to have the result of that sale treated as practically conclusive as to the value in June 1910, because there was evidence that the value of land in that district had not materially changed in the meantime.

The definition of "unimproved value" in sec. 3 of the Act is this: "the capital sum which the fee simple might be expected to realize if offered for sale on such reasonable terms and conditions as a *bonâ fide* seller would require." The underlying idea is that the land is to be treated as converted into money as on the day as of which the assessment is made, so that a realized capital sum takes the place of the land. That, of course, assumes a hypothetical purchaser. It does not mean that you are to inquire whether there was at that time a purchaser in existence who would have been willing to buy the particular parcel of land. That was pointed out in *Spencer* v. *The Commonwealth* (1), which was a case of land resumed by the Commonwealth from a private owner under the *Lands Acquisition Act* 1906, under which compensation equal to the value of the land taken is to be paid to the owner. That Act does not contain any definition of the term "value," but the meaning of the term was discussed by the Court. I said (2):—"Bearing in mind that value implies the existence of a willing buyer as well as of a willing seller, some modification of the rule must be made in order to make it applicable to the case of a piece of land which has any unique value. It may be that the land is fit for many purposes, and

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

(2) 5 C.L.R., 418, at p. 431.

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will in all probability be soon required for some of them, but there may be no one actually willing at the moment to buy it at any price. Still it does not follow that the land has no value. In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *i.e.*, whether there was in fact on that day a willing buyer, but by inquiring 'What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?' It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together." In the same case my brother *Isaacs* expressed an opinion which was adopted by the Full Court in *Commissioner of Land Tax* v. *Nathan* (1), which is, I think, entirely in accord with the view I expressed, but amplifying to some extent what I had said. He pointed out particularly that all potentialities—although he did not use that word—of the land must be taken into consideration. He said (2):—"The all important fact . . . is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him." That was not a case of land tax, but in *Nathan's Case*, which was, the Court held that substantially the same rule applied. The theory of the hypothetical purchaser does not therefore assume the existence of a person actually willing to buy. The contention for the Commissioner now is that that theory does

(1) 16 C.L.R., 654.

(2) 5 C.L.R., 418, at p. 440.

not connote a single purchaser, but that you must take into consideration the possibility of there being a number of persons —two, five, ten or a hundred—who would have been willing amongst them to buy the whole of the land. The two hypotheses are entirely different. The hypothesis of a willing purchaser assumes, as I have shown, ability as well as willingness to buy. An hypothesis which assumes an indefinite number of purchasers able and willing amongst them to buy the whole of the land in separate parcels is quite a different thing, and is not the hypothesis made by the Act. A parcel of 6,000 acres of land is not substantially the same subject matter as (say) thirty parcels of land separated from one another by roads, and comprising together with the roads the original parcel. If, therefore, the owner can be treated for any purpose as a subdividing owner, he must be treated as one who has already gone to the expense of subdividing, and the value to him is no greater than it would be to a purchaser who had bought the land for the purpose of making such a subdivision, that is, not greater than the price such a purchaser would have given for it. It was also suggested, and indeed pressed, that the vendor is not entitled to expect to get a realized capital sum, but ought to be satisfied with a nominal amount of purchase money, not realized, but part of which is allowed to remain on the security of the land. That is an entirely different thing from a realized capital sum, and may or may not be equivalent to it in value. In general, I suppose, a person who sells land assigns a value to it in his own mind, and if he chooses to give credit considers what is the present value of the amount he will ultimately and actually get in exchange for the land. If he gives credit, the length of credit, the sufficiency of the security for the unpaid purchase money, the probability of the land maintaining its value, and of his ultimately getting the whole of the price — these and many other things would be taken into consideration. A man may think that he could get £3,000 for a parcel of land at once. He may also think that, if he subdivides the land and offers very liberal terms, speculative buyers will be likely to give nominal prices amounting to a great deal more than £3,000. But on the whole he may come to the conclusion that £3,000 in hand is more

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than the present value of what he would probably get by selling on credit after taking all these contingencies into account. Nevertheless, I agree that the probability of being able to sell the whole at once on such terms is an element to be taken into consideration, but I think it is no more. For instance, in the case of city property a reasonable man might expect to obtain a higher price by selling in two parcels instead of in one, and, if an ordinary vendor would do so, that fact might very fairly be taken into consideration, not as a matter of law, but as a matter of fact, in considering the value of the land. But this only shows that the possibility of a subdivisional sale and the probability of there being a number of purchasers who amongst them would buy the whole of the land are relevant, but not conclusive, circumstances. The Statute, in my opinion, contemplates a sale of the whole of the land on the day as of which the valuation is made.

I proceed to apply these principles to this case. The learned Judge, I think, dealt with the matter from that point of view. So dealing with it, he came to the conclusion that the terms offered at the auction sale in 1912 were very unusual, that the deposit required was unusually small, the credit was very long, and the rate of interest very low. Having given what weight he thought fit to the evidence on those points, he came to the conclusion that the terms must have enhanced the nominal price by about £1 10s. per acre. There was also evidence tending to show the existence of other circumstances which further enhanced the nominal price, namely, the quantity of land of that quality remaining practically available, or likely to be available, for purchase in that part of the country in 1912, as compared with the much larger quantity which in 1910 was likely to be available. He thought that for those reasons there was much keener competition in 1912 than there would have been in 1910, and he thought that this fact further enhanced the nominal amount of purchase money.

Having taken into consideration all these matters, he thought that the enhancement of the nominal price at the sale in 1912 was at least equal to the difference between £7 1s. and £5. He arrived at that conclusion independently of many other arguments that were addressed to him. Having arrived at that conclusion,

the conclusion that £5 per acre was the full value of the land necessarily followed.

Another matter to which the learned Judge paid some attention —quite independently of the others—was the fact that the State valuation of the same land for land tax was £5 per acre. He thought he was entitled to regard that as evidence in the case. I do not think that he was. The Commissioner was entitled to look at the valuation for the very sufficient reason that the Statute says so. His duty is to ascertain in the best way he can what he thinks is the value of the land, just as any person required to form an opinion is entitled to inform his mind in the best way he can. But when the matter comes before a Court, the Court must have regard to the rules of evidence. The facts upon which the Commissioner has informed his mind cannot be considered by the Court, unless brought before it by proper and admissible evidence. I think, therefore, that the State assessment was not admissible in the case as evidence of the value of the land. But, as I said, that matter was entirely independent of the independent conclusion which the learned Judge arrived at on the facts.

The learned Judge also adopted another method of calculation which led to the same result, but with which I personally am unable to agree. It is unnecessary to refer to it further.

Under these circumstances it is impossible for us to say that the learned Judge was bound to say that the land, even if it had been sold in 1910 upon what are not ordinary terms would have realized more than £5 per acre. Some witnesses, indeed, spoke of the land realizing more than £5 per acre on what they called "ordinary terms," involving the giving of credit. All such matters, the extent of the credit and the length of it, involve elements of uncertainty. In my opinion, the words "such terms and conditions" in the definition of "unimproved value" do not refer to such matters at all. The only question is the present value of the land. The vendor is free to allow any credit, to ask any interest, to make any other stipulations he pleases for his own benefit, but those matters do not affect the value of the land, that is to say, the capital sum that could be realized by selling the land to a willing purchaser.

For these reasons I am of opinion that the appeal fails.

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ISAACS J. I agree that the appeal fails.

Several questions of great moment have been raised, and one or two are of general importance.

The first is what is the proper test to apply in ascertaining the value of land for the purpose of land taxation.

Reference has been made to various cases, including those of the very highest authority, the Privy Council, in which it has been held that in compensation cases the test is the value of the land to the owner. I need not pursue those cases because, as far as the particular question raised here is concerned, the Act lays down the standard, and it is a mere question of interpreting that standard. Compensation cases may fall under the same rule, as I think they do, but it is an independent consideration. This case must in any event be governed by the Act, and the standard put by the Act is that the "unimproved value" means "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, 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." The interpretation put upon that by the learned Judge from whom this appeal comes was that it does not include a possible subdivisional sale by the owner. He thought that it meant necessarily a sale of the whole of the land in one block. In my opinion, that is a wrong construction. There is one vendor, but the interpretation section says nothing about one purchaser. The whole of the land is for the purpose of the section assumed to be disposed of in fee simple by the vendor. But it does not connote that the only potentiality to be considered is one purchaser who is able and willing to take the whole of the land *uno ictu*. That would reduce the range of competition and very materially affect the unimproved value of the land. In my opinion, as far as the test is concerned, the question is what could the vendor expect to get by realizing the land on terms not unduly restricted—"such reasonable terms as a *bonâ fide* seller would require," as the section says; expanded that means the best terms a seller can get having regard to what an ordinary prudent purchaser would look upon as not unreasonable from his own standpoint, and therefore as not loading, so to speak,

the ordinary business considerations which a purchaser would take into account in agreeing to a price for the land. In other words, it means business terms from both standpoints, and the Act assumes the seller will not sacrifice his own interest, or insist on the purchaser sacrificing his. The land is, by hypothesis, to be transformed into its fair equivalent in money.

As far as payment is concerned, it may be for cash, or it may be, what I regard as equivalent, upon credit with interest. If cash is given on the spot or if cash is not given for (say) three or six months but interest is given—that is the regular current interest—those are the same thing, because in both cases alike the vendor has the use and benefit of his money. If he were to sell on credit without interest, that would not be equivalent to cash. If, then, in this case the judgment of the learned Judge depended upon the interpretation which he gave to the Act, I should think that the appeal ought to succeed. But it does not.

Another question of law is as to the admissibility of the State valuations for State land tax as evidence of the correctness or incorrectness of the Commissioner's valuation. In my opinion the State valuations are not admissible for that purpose. Sec. 17 of the Act says:—"(1) The Commissioner may, if as and when he thinks fit, make or cause to be made valuations of any land." And subsec. 2 under which these valuations were admitted, says:—"The Commissioner may obtain and use as valuations, or for the purpose of preparing valuations, any valuations made by or for any State or any authority constituted under a State." Those are the only purposes for which State valuations may be used according to the terms of that section. That is all preparatory. It is only up to the stage of valuation, and the provision is obviously to save unnecessary trouble and expense in employing valuators. But it is one thing to say that the State valuation may be used as a convenient method of preparing the valuation, and it is quite another thing to say that the State valuation even when rejected by the Commissioner shall be evidence—and as the learned Judge thought the most reliable evidence—of the value of the land. Again, if the learned Judge's decision were not independent of the weight which he attached to the State valuations, I should think it would not be sustainable. But again I agree with what the learned Chief Justice has said, that

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the ultimate decision come to, and which governs this case, is independent of the State valuations.

The reason why the judgment is independent of the erroneous test and of the erroneous admission of evidence is this: that in taking a certain step for arriving at his conclusion the learned Judge traversed some ground which is common to both parties, that is to say, he took as his starting point at this stage the £7 7s. which was the average price obtained at the subdivisional sale in 1912, and he worked backwards from that, as he was entitled to do. He said that there were two circumstances, the terms and the competition, which as they existed in 1912 were different from the corresponding circumstances at the critical date in 1910. He had evidence before him, which he mentions, of several witnesses who stated what they thought represented in money the difference between the two sets of corresponding circumstances, and, as I read his judgment, he came to a distinct finding upon those independent facts. Mr. *Mitchell* urged that there was evidence bearing upon that point, namely, the affirmative evidence of several witnesses as to what the value of the land was on the basis of a subdivisional sale by the owner in 1910, which the learned Judge, so to speak, struck out from his consideration altogether—not that the learned Judge considered that evidence, gave it such weight as he thought it was entitled to, and then preferred other evidence upon which he acted, but that he declined even to consider it. I do not think the learned Judge took that course. He certainly discarded from his consideration the evidence of those witnesses given affirmatively as to the value of the land on subdivisional sales from the standpoint and on the basis as to which they testified. He said, "I do not accept their opinion"; and he meant that he did not agree with them in starting to consider the value of the land if subdivided by the owner. But when he reached the point of difference between the value which the land fetched in 1912 and what in the opinion of those witnesses it would have fetched in 1910, I do not think he excised from his consideration any piece of evidence, but he accepted their conclusion on the point of difference. One of those terms was the keener competition, that is to say, there was less land—6,000 acres instead of 110,000 acres.

No one can dispute that when there is less of a commodity, all other things being equal, competition is likely to be keener. The learned Judge thought it was actually so. The other consideration is as to the easiness of the terms, and there was a great body of evidence that the terms in 1912 were exceptional terms. By that is denoted that the terms were unnecessarily generous—more generous than the terms would be if an ordinary prudent but not timid or over-anxious vendor guided his action by purely business motives with a resolve to get the best price he could from prudent purchasers without sacrificing any business advantage, and therefore the learned Judge must have come to the conclusion that in giving those terms the vendor was more generous than from an ordinary business aspect he need have been in order to get a fair price for the land—in other words, that the terms were unreasonably generous. That is a matter of fact, and I am unable to say he was wrong. Then he made an allowance for that, and came to the conclusion to which I have referred. That being so, whatever the other reasons might have been, there is an independent ground, sustainable on its own footing, and which I see no reason to disturb, and this leaves the respondents here correct in the valuation which they gave.

On that ground I agree that the appeal should be dismissed.

RICH J. I differ from the learned primary Judge with regard to two matters—the admission of the State valuation, and the exclusion as an element of value of the possibility of a subdivisional sale. If these had been the sole or dominant considerations underlying the judgment, I should have been in favour of allowing the appeal. His Honor, however, arrived at his finding along four independent lines, and, as there is sufficient evidence to support the finding, I agree that the appeal fails.

Appeal dismissed with costs.

Solicitor, for the appellant, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

Solicitors, for the respondents, *Elder & Graham* for *C. L. Jessop,* Adelaide.

B. L.