actually got the solicitor who acted for the trustee to draw up the assignments.

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For these reasons I agree with the view that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. W. Dixon.*

Solicitors, for the respondents, *Morgan & Fyffe.*

B. L.

HIGH COURT OF AUSTRALIA.]

McDONALD . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX FOR NEW SOUTH WALES . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 25, 26, 27; *Sept.* 3.

Isaacs, Powers and Rich JJ.

Land Tax—Assessment of unimproved value—Pastoral property—Standard of value—Improvements—Water bore—Proof of presence of water—Value of land—Evidence—Price given on sale—Price offered—Land Tax Assessment Act 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 3.

In ascertaining the improved value of pastoral land for the purpose of the *Land Tax Assessment Act* 1910-1911 the value of land which, situated as the land in question is, would carry one sheep to the acre may properly be taken as the standard of value.

The existence of a water bore which has been constructed by a public Trust on land adjoining a pastoral property, and from which part of the property may be watered, is not an improvement appertaining to the property the value of which may be deducted from the improved value in order to arrive at the unimproved value.

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The added value which the proof by means of a bore of the presence of water below the surface of the land gives to that land is not an improvement on or appertaining to the land, and, therefore, the value of the improvement attributable to a water bore on the land is what at the date of the assessment it would cost in time and money to sink the bore.

In ascertaining the value of land for the purposes of the *Land Tax Assessment Act* 1910-1911 the price paid for the particular land, or for similar land, on a concluded contract is admissible as evidence of such value, but the price offered for the particular land, or the price which the owner has offered to accept, not followed by a concluded contract, is not so admissible.

Harris v. *Municipal Council of Sydney*, 10 S.R. (N.S.W.), 860, approved.

Decision of the Supreme Court of New South Wales (*Ferguson* J.), affirmed.

APPEAL from the Supreme Court of New South Wales.

On the assessment of John McDonald in respect of a certain pastoral property called "Mungie Bundie," near Moree in New South Wales, as of 30th June 1910, for the purposes of the *Land Tax Assessment Act* 1910-1911, the Deputy Federal Commissioner of Land Tax for New South Wales transmitted to the Supreme Court of New South Wales an objection that the assessment was excessive. The objection was heard by *Ferguson* J., who reduced the assessment from approximately £2 2s. 6d. per acre to £2 per acre, McDonald having claimed that it should be reduced to approximately £1 7s. 6d. per acre, and he ordered each party to bear his own costs.

From that decision McDonald now appealed to the High Court.

Campbell K.C. (with him *Harper*), for the appellant.

Shand K.C. (with him *Pike*), for the respondent.

During argument reference was made to *Harris* v. *Municipal Council of Sydney* (1); *Mersey Docks* v. *Liverpool* (2); *Cartwright* v. *Sculcoates Union* (3); *Spencer* v. *The Commonwealth* (4); *Harris* v. *Minister for Public Works* (*N.S.W.*) (5); *Cliquot's Champagne* (6).

Cur. adv. vult.

(1) 10 S.R. (N.S.W.), 860.
(2) L.R. 9 Q.B., 84.
(3) (1900) A.C., 150.
(4) 5 C.L.R., 418.
(5) 14 C.L.R., 721.
(6) 3 Wall., 114.

The judgment of the COURT, which was read by ISAACS J., was as follows:—

This is an appeal from the decision of *Ferguson* J. given under sec. 46 of the *Land Tax Assessment Act* 1910-1911 on appeal from the Commissioner's assessment.

The property assessed is a sheep station called, as a whole, "Mungie Bundie," near Moree. It consists of over 74,000 acres, and has been regarded by the witnesses as divisible internally for the purpose of considering its varied characteristics, into four areas—two areas fronting the Gwydir River and the two others further back. The two river frontages comprise about 28,000 acres; the first of the back areas consists of about 17,000 acres, and the second back area about 29,000 acres.

The taxpayer returned the unimproved value at approximately £1 7s. 6d. per acre; the Commissioner assessed it at approximately £2 2s. 6d., and the learned Judge reduced that to £2.

The first objection argued was this. *Ferguson* J. adopted a rate of £3 5s. an acre as the standard improved value of land situated as the land in question is, provided it carries one sheep to the acre. The objection raised to this was twofold.

First, it was contended that such a standard cannot legitimately be taken as a guide, but only as a test or check as to whether some other guide leads to the correct result. It is impossible to see why such a standard is not a proper guide. The carrying capacity of a station, when its improved value is sought for in the first place, is essential as a starting point. But when that is ascertained, the next step must inevitably be to find what price land of that actual capacity, due partly to nature and partly to human effort, would fetch per acre. This the learned Judge has done, and has concluded that the land of this station, the whole 74,000 acres, situated as it is, if it were capable of carrying all round one sheep to the acre, could be sold to a willing buyer for £3 5s. an acre.

There was abundant evidence to sustain this finding. Mr. Crane, the chief witness for the appellant, fixed for the three first areas—amounting in all to about 45,000 acres—an improved value of £3 6s. 8d. on a basis of one sheep to the acre, but thought their respective carrying capacities were one sheep to one acre, one sheep to one and a half acres, and one sheep to one and

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a quarter acres. The fourth area he thought, on the basis of one sheep to the acre, would be worth £3 3s., but that its actual capacity was one sheep to one and a half acres. The total improved value he made £2 10s. per acre. The Court did not entirely agree with the estimate by Mr. Crane of the carrying capacity of the land, but thought that, taking it all round, it carried one sheep to an acre and a quarter — a conclusion that the appellant admittedly cannot ask this Court to alter. *Ferguson* J. therefore made the improved value £2 12s., or 2s. more than Mr. Crane. The £3 5s. is obviously an all round figure also, and, if it is not exact, the error is in appellant's favour. The higher price as stated is £3 6s. 8d., the lower price is £3 3s., and the average—supposing the two classes were equal in area—is £3 4s. 10d. But the area of the better class, on Mr. Crane's evidence, is 44,000 acres, leaving only 29,000 acres of the lower value land. Consequently £3 5s. is not ungenerous to the appellant.

Then it was urged that the Judge had overlooked the distinction between wool-growing and fattening country, and that Mr. Crane's higher price was based on fattening country. But the truth is that Mr. Crane fixed £3 6s. 8d. in respect of the three first areas because of two circumstances, fattening capacity and situation, and thought that whatever was wanting in one respect was made up for in the other.

That objection therefore fails.

The second ground was that the learned Judge erred in not regarding as an "improvement" the value of which must be deducted from the total improved value, the existence of a Trust undertaking established by the Government under Act No. 41 of 1897. It is entirely extraneous to the property, but, from the Trust bore, water is procurable for watering part of the station. There is no doubt in one sense the existence of such an opportunity improves the property by making the possible income from it greater, just as a new railway station close at hand would, or a new invention for clipping sheep, or a rain-making device. But it is not an "improvement" within the meaning of the Act, which is something "thereon or appertaining thereto." The "improvements" contemplated by the Act are

such as are in the strict legal sense "appurtenant" to the property and incident to its ownership. This cannot be said of the mere legal and actual possibility to obtain water from the Trust. The fact and degree of that possibility, and the cost of satisfying it, are elements in determining the value of the land as unimproved land, because that, as one of the surrounding circumstances, has become one of its characteristics, though an acquired one. It was also strenuously pressed that the value of the "bore" in Barrett's paddock as an improvement was to be measured not only by what it would have cost in 1910 to sink that bore, but also by the additional certainty of water which its presence gives. The additional certainty is not an improvement. Before the bore was sunk, no doubt the uncertainty of the presence of water left the land at a lower value; and when the presence of water was demonstrated the value of the land was increased. But in 1910 a buyer would have the knowledge that water was procurable, and the presence of water below the soil is a natural feature; it is part of the land unimproved, though the feature was previously unknown. Knowledge of a natural quality of the land does not make the quality artificial, and consequently, as the value is to be taken as at the date of valuation, the only "improvement" within the meaning of the Act, relevant to this point, was the bore itself; and its value for taxation purposes is what it would cost in time and money to sink it.

The third objection was that the learned Judge erred in estimating the value of improvements of ring-barking and clearing and water bores. He said that he thought the appellant's witnesses had been influenced too much by the increased carrying capacity they gave to the land and too little by the question of initial cost.

It is quite true that the Act defines "value of improvements" in these terms: "the added value which the improvements give to the land at the date of valuation irrespective of the cost of the improvements."

The "cost" there means what the improvements did in fact cost the owner. He may have been fortunate in getting them at a specially low cost, or unfortunate in having had to pay an abnormally high sum. But the material fact is that there they

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are, whatever they originally cost; and the question is how much their presence adds to the natural value of the land. And in ascertaining that, the cost of replacing them if they were then annihilated is a most material factor for a prospective buyer to consider in determining what he would give for the land, and, if for a buyer, so for the Court. It may not be the only factor, of course, but it is one necessary factor. Burgess, one of the appellant's witnesses, and his station manager, disregards this entirely, and looks at the value of these improvements only from the standpoint of what additional income they produce. A railway engine without a boiler would produce no income; but the added value of a boiler, which may be procured immediately at a given price, is not the yearly income otherwise lost, but the cost of installing the boiler.

There is no error of principle in what *Ferguson* J. did, but it is a question of whether the value put by him on these improvements is supported by the evidence.

Mr. Crane and Mr. Cramsie certainly put values far higher than those taken by the Judge. There is clear evidence to support the finding in the testimony of Ewers and Moore. Ewers proceeds to arrive at the improved value of the land by first finding from certain sales an average which he takes as the unimproved value of this land. If that be correct, of course the task is ended. But in order to state the improved value, probably for checking purposes, as witnesses frequently do in these cases, Ewers went on to appraise the improvements. As to the fencing, tanks, and wells, and bores, and drains, he assumed a buyer, and in effect asked himself what it would cost a buyer of the property unimproved in 1911 to replace these improvements in the condition of structure and effectiveness in which they then were. Having fixed that sum, he went on to add interest on their cost, for six months during which they would be in course of construction, and added that to the cost. But he also took interest on the cost of the land itself for the same period and added that to the sum for improvements, to which it does not really belong. But even so, and assuming in favour of the appellant that that last interest was properly so added, his estimate is within the amount allowed by the Judge.

Moore's evidence is admittedly within that amount also, and no error of principle is urged against it, beyond the general one that constantly pervaded the whole argument, namely, that the original cost of improvements to the owner must in some way form an element in calculating their value, although the Act expressly excludes it.

This objection therefore fails also.

The next ground relates to the rejection of a letter written by Morton for McDonald to Ormond in 1908, offering to sell the property at a price.

Apart from the distance of time—three years—it is plain that the mere fact of a statement by an owner to a stranger that he would be willing to sell at a given figure, and that the offer was not accepted, for some reason undisclosed, is no evidence of what the Statute requires, namely, the price which a willing buyer would give, supposing the seller announced reasonable conditions. At most, it is evidence of the owner's *bonâ fide* belief at that time as to the value of his land. Nor is the refusal of the person to whom the offer was made to accept it, even if specifically on the ground of excessive amount, any more than an expression of his opinion on the point. Along with the Ormond incident there was added another which, though not mentioned in the grounds of appeal, has been allowed, by consent, to be urged, namely, a verbal agreement by one McClarty to purchase the land from the appellant at a figure which, it is said, was in fact below the value fixed by the Judge. McClarty inspected, named the price he was willing to give, and the appellant accepted the offer. But McClarty withdrew before the contract was reduced to writing, he refusing to sign. And so the matter ended. No binding contract was made.

Both these transactions stand separate from everything else as the authority to Morton was expressly limited to an offer to Ormond, and McClarty was a principal. There is evidence, apart from them, that McDonald had put his property into the hands of agents for sale without result, but that was all before the trial Court, and no question now arises as to the effect to be given to that fact. Nothing, therefore, said with respect to the Ormond and McClarty incidents has any relation to the general

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failure to sell. Those incidents are separate and independent events, and must stand on their own footing.

Mr. *Campbell* was, of course, pressed with the case *Harris* v. *Municipal Council of Sydney* (1), which decides that evidence of an offer to purchase land in the vicinity of the plaintiff's land is not admissible as evidence of the value of the plaintiff's land itself. The case gives no reasons beyond the weight of authority, mostly American. On the hearing of this case *Ferguson* J., in a passage relied on by Mr. *Campbell*, who was within his rights in asking us to hold differently from the view taken by the Court in *Harris's Case* said :— "The fact that £1,000 has been offered for a piece of land and refused, is no less relevant to the question whether its value is less than £1,000 than if the offer had been accepted, but I followed the uniform practice of the Court in rejecting the evidence." This was pressed as a personal indication of opinion, coerced only by the authority of the fixed practice. Learned counsel also relied on the quotation of the learned Chief Justice of this Court in *Harris* v. *Minister for Public Works* (*N.S.W.*) (2) on the subject of relevancy. The passage quoted from the judgment of *Ferguson* J. presents in a terse and vivid form the problem raised by the objection now under consideration.

We have to search for principles. On what principle is the act or opinion of a third person, manifested on some former occasion, respecting the value of other land, not on oath, not in presence of the parties, the opinion not capable of being tested by cross-examination, admissible at all to affect adversely one of the parties to the litigation ?

The answer is found in the principle that the rules of evidence followed by the Courts have been adopted for the better furtherance of justice, and are moulded so as to attain that object in the best possible manner.

It sometimes happens that facts unconnected with the facts directly in issue are valuable aids as indicating, though indirectly, the truth as to the central facts to be ascertained. To exclude them utterly and absolutely would defeat justice. And yet,

(1) 10 S.R. (N.S.W.), 860. (2) 14 C.L.R., 721, at p. 725.

there is not between them and the central facts the visible connection which would make them direct evidence.

The law makes exceptions, where justice is best served by doing so. And, where the value of a given piece of land is in issue, it is the constant practice to admit evidence of actual sales of similar land where they may be regarded as throwing light on the value of the subject land.

As to whether any particular sale can be so regarded must, in the first instance, be determined by the primary tribunal, and this is subject to review.

In the *Metropolitan Asylum District* v. *Hill* (1) Lord *Watson* says:—"In order to entitle him to give such evidence, he must, in the first instance, satisfy the Court that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute." But if it is so regarded, then by a process of comparison, and elimination, the common factor may be elicited, and a means afforded for arriving at a just conclusion.

It is true that from a logical standpoint, a *bonâ fide* offer of £1,000 is just as good evidence the moment before acceptance as the moment after. Why, then, should one be received, and the other rejected? The answer is found in the same principle, namely, the better service to justice on the whole.

When the matter has reached the point of a concluded contract, there has been a definite concrete fact established, which not only evidences value, but to some extent helps to create or modify it. Where an owner has actually parted with his land for a fixed sum and a buyer has parted with his money for the land, a clear event has arisen, which, based on the ordinary instincts and impulses of human nature, indicates a consensus of opinion between two adverse parties in the community respecting the value of similar lands. Some advantage to justice is therefore manifestly possible from considering it, and the law presumes that up to that point the disadvantages of having to undertake the collateral inquiries as to comparison do not outweigh the possible advantages.

But if the negotiations do not end in a concluded bargain, the

(1) 47 L.T., 29, at p. 35.

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field is at once open to a multitude of other considerations before the same point of opinion is reached. Excursions into the realm of collateral circumstances would be endless. They would so add to the cost, delay and uncertainty of litigation as on the whole to render a great disservice to the cause of justice. The Court might have to inquire whether the owner or the other party really terminated the negotiations, and, if so, for what reason. Had either of the parties discovered the true worth of the property or been misinformed by some means as to its real value? Did the owner mistrust the ability of the purchaser, or did the latter find an adverse claimant to the property, or did his circumstances change, or was there a personal quarrel? Or did he learn of a still better bargain? Or, again, was the offer a sham on either side, or both sides? Such inquiries would render litigation intolerable, and defeat the purpose for which they were permitted.

Consequently, though the logical relevance may be the same when once the fact of a real firm offer is reached, whether it be accepted or not, yet to reach that point in the latter case is practically in such a different position in relation to the true function and aim of Courts of Justice, as to be placed legally in a different position also. The exception in favour of the indirect evidence ends where it fails to serve with advantage, and the line of demarcation is drawn at actual contract. This is in accord with the vast weight of authority, and finds support in text-books such as *Best on Evidence* (secs. 92 and 93); *Wigmore* (secs. 443-444), and *Halsbury's Laws of England* (vol. XIII., par. 625).

This objection therefore also fails.

The appellant then relied on two grounds relating to the exclusion from evidence of three actual contracts of sale of improved land in the vicinity.

The result of the discussion was this:—The appellant, when before *Ferguson* J., *inter alia* relied, in order to establish the value of his land, on a line of investigation based on sales of other lands. He selected certain of those sales, those of large extent, which he considered more nearly comparable with his own, and his witnesses built their conclusions on these in the first instance. During this case he introduced three others, and closed

his case. The Crown witnesses in turn selected three other contracts as the basis of their opinion. The appellant then, by way of rebutting case, insisted on selecting a further number of contracts that he had laid aside in the first instance, and he so insisted for the purpose of vitiating the results of the Crown witnesses. The learned Judge determined that this was not strictly evidence in reply, and he was right. He also declined to exercise his discretion in allowing the new evidence, and there is no legal ground for saying his discretion was not properly exercised. There is a further answer to this objection. Even supposing an error had been made in rejecting the rebuttal contracts, the result could not have been affected. They pertained entirely to the one line of investigation. There was an alternative line, wholly distinct, which started with the improved value of the subject property, and worked down to its unimproved value by deducting the added value of its own improvements. The learned Judge discarded the first line, because he preferred the other as a system, and so the actual results shown by the first became altogether immaterial.

The last objection was as to the costs, each party having been left to bear his own. Clearly that cannot be disturbed in such a case as this.

This appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors, for the appellant, *Minter, Simpson & Co.*

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

B. L.