[HIGH COURT OF AUSTRALIA.]

THE MINISTER . . . . . APPELLANT;
DEFENDANT,

AND

THE NEW SOUTH WALES AERATED WATER AND CONFECTIONERY COMPANY LIMITED . . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1916.

SYDNEY, *Aug.* 8, 9, 10, 11; *Sept.* 1.

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

Land—Resumption by Crown—Compensation—Lessee's interest—Expectation of renewal of lease—Personal relations of lessor and lessee—Public Works Act 1900 (*N.S.W.*) (*No.* 26 *of* 1900), *sec.* 117.

By sec. 117 of the *Public Works Act* 1900 (N.S.W.) it is provided (*inter alia*) that for the purpose of ascertaining the compensation to be paid in respect of land resumed by the Crown under the Act, a jury "shall assess the same according to what they find to have been the value of such lands, estate, or interest, at the time notice" of resumption "was given."

Where land which has been resumed by the Crown is subject to a lease which at the date of the resumption has not expired, the jury, in assessing the compensation payable to the lessee under sec. 117 of the *Public Works Act* 1900, are not at liberty to take into consideration the probability of his obtaining a further occupation of the land arising out of the personal relations of the lessor and the lessee to one another.

Therefore, where the lessee was a company,

Held, that evidence that the lessor was the holder of nearly all the shares in the company was irrelevant, and that it was a misdirection to tell the jury that in determining what loss the company had incurred in having been deprived

of the residue of the term they might take into consideration any probability arising from the fact that the lessor was the holder of the shares that they would have obtained a fresh lease of the land.

By *Griffith* C.J.—In the case of a lease of business premises in which the lessee carries on operations of manufacture in buildings and with machinery which are his property and which he is entitled to remove at the expiration of the term, the expectation arising from those circumstances that the lessee will obtain a fresh lease on the expiration of the current lease may be an element in ascertaining the value of the lessee's interest in the unexpired term.

By *Isaacs* J.—The value of a lessee's interest in the unexpired term of his lease cannot be enhanced by the expectation that he will obtain an extension of the lease, unless he establishes some right to obtain that extension.

Robert Reid & Co. v. *Minister for Public Works*, 2 S.R. (N.S.W.), 405, distinguished.

Decision of the Supreme Court of New South Wales: *New South Wales Aerated Water and Confectionery Co.* v. *The Minister*, 16 S.R. (N.S.W.), 38, reversed in part.

APPEAL from the Supreme Court of New South Wales.

Under the provisions of the *Public Works Act* 1900 (N.S.W.) the Crown, on 23rd May 1912, resumed certain land of which George Edward Redman was the owner, and which was subject to a lease dated 22nd April 1907 from Redman to the New South Wales Aerated Water and Confectionery Co. Ltd. for a term of seven years and three months from 1st March 1907.

An action was brought in the Supreme Court by the Company against the Minister to recover compensation in respect of their estate and interest in the land so resumed. The action was heard before *Cullen* C.J. and a jury, who found a verdict for the plaintiffs for £3,130. The defendant thereupon moved that the verdict be set aside, and a new trial be granted, or that the amount of the verdict be reduced, on the following grounds (*inter alia*) :—

"1. That his Honor admitted evidence showing the number of shares held by the lessor, George Edward Redman, in the plaintiff Company.

"2. That his Honor directed the jury that they were to assess the plaintiff Company's interest as that of persons having a leasehold title for two years and such expectancy of continuance as the

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

jury might find to be a reasonable thing to take into consideration in the circumstances of the case.

"3. That his Honor refused to direct the jury: (*a*) that in determining the amount of compensation the jury are not entitled to take into consideration as a circumstance the probability of an extension of the lease being granted by Redman to the plaintiff Company; (*b*) that in determining the amount of compensation, the jury are not entitled to consider the plaintiff Company as having a lease of more than two years and one month to run."

The Full Court dismissed the motion with a certain exception, and ordered the verdict to be reduced to £2,820: *New South Wales Aerated Water and Confectionery Co.* v. *The Minister* (1).

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

The material facts are stated in the judgments hereunder.

Shand K.C. (with him *Pickburn*), for the appellant. Where land is resumed by the Crown which is subject to an unexpired lease, the jury, in assessing the compensation payable under sec. 117 of the *Public Works Act* 1900, are not entitled to consider the probability of the lessee obtaining a renewal of the lease: *Lynch* v. *Glasgow Corporation* (2); *Cripps on Compensation*, 4th ed., p. 104; *Balfour Browne on Compensation*, 2nd ed., p. 100; *Hudson on Compensation*, p. 303. The case of *Robert Reid & Co.* v. *Minister for Public Works* (3) is not an authority to the contrary. There the Crown had resumed the claimant's freehold land and his leasehold interest in a wharf situated on the harbour frontage of the freehold land and which was leased from the Crown. The wharf could be leased only with the consent of the owner in fee of the contiguous land of the claimant. The Court held that the chance of the Crown granting a lease to the owner of the contiguous land was an element affecting the value of that land. The proper basis of valuation is that laid down in *Spencer* v. *The Commonwealth* (4), namely, the price that a purchaser would at the date of resumption have had to pay to a vendor willing but not anxious to sell. In

(1) 16 S.R. (N.S.W.), 38.
(2) 5 F. (Ct. of Sess.), 1174.
(3) 2 S.R. (N.S.W.), 405.
(4) 5 C.L.R., 418.

making that inquiry nothing can be taken into consideration which is not inherent in the land itself. The expectation of a renewal of the lease is not inherent in the land, and must therefore be excluded from consideration. What the jury has to determine under sec. 117 is the value of the lessee's "interest" in the land, that is, the value of the unexpired term of the lease, and the expectation of a further term is not an "interest" unless the lessee has a right to it. Even if an expectation of a further term is a matter that can in certain circumstances be taken into consideration by a purchaser and so can be an element in valuing the lessor's interest, such an expectation arising from the personal relations of the lessor and lessee cannot be such an element. Those relations cannot affect the price a purchaser would give for the unexpired term of the lease. The evidence of Redman's interest in the plaintiff Company was therefore wrongly admitted and the direction of *Cullen* C.J. to the jury was wrong. [He also referred to *Fleming* v. *Newport Railway Co.* (1); *Pastoral Finance Association Ltd.* v. *The Minister* (2).]

[ISAACS J. referred to *London County Council* v. *Churchwardens &c. of the Parish of Erith* (3); *Commissioner of Land Tax* v. *Nathan* (4).

GAVAN DUFFY J. referred to *MacDermott* v. *Corrie* (5).

RICH J. referred to *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (6).]

Campbell K.C. (with him *Waddell*), for the respondents. The objection taken by the appellant at the trial was that any expectation of a renewal of the lease should be excluded from the consideration of the jury. The ordinary business prospect of a renewal of a lease may properly be taken into consideration in determining the value of the unexpired term of the lease. That was decided in *Robert Reid & Co.* v. *Minister for Public Works* (7). The expectation of a renewal arising from the relations between the lessor and the lessee is an element in that determination. For

(1) 8 App. Cas., 265, at p. 278.
(2) (1914) A.C., 1083.
(3) (1893) A.C., 562, at p. 588.
(4) 16 C.L.R., 654, at p. 659.
(5) 17 C.L.R., 223, at p. 251.
(6) (1914) A.C., 569, at p. 579.
(7) 2 S.R. (N.S.W.), 405.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

what the lessee is to get is the value to him of the unexpired term of the lease, and in the present case that term was of special value to the respondent Company because it had attached to it that which practically ensured to them a continuance of their possession of the land. If the probability of an extension is to be taken into consideration at all, then evidence must be admissible to show the extent of the probability. Evidence might be given to show that there was no probability of an extension, and so evidence is admissible to show that the probability amounts almost to a certainty. The case of *Lynch* v. *Glasgow Corporation* (1) is irrelevant. The notice to treat in respect of the lease was given after the resumption of the reversion, so that at that time the party resuming it had become the reversioner. The judgment proceeded upon the assumption that the arbitrator had valued the probability of an extension as a separate subject of property. Here the jury were not directed to value the probability of an extension as a separate interest, but were directed that they might take that probability into consideration in valuing the respondent Company's interest in the lease. [He also referred to *Cranwell* v. *Mayor &c. of London* (2); *Metropolitan Railway Co.* v. *Burrow* (3); *Balfour Browne on Compensation*, 2nd ed., p. 97; *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (4).]

[ISAACS J. referred to *R.* v. *Commissioners of Rochdale Improvement Act* (5).]

Shand K.C., in reply.

Cur. adv. vult.

The following judgments were read :—

Sept. 1.

GRIFFITH C.J. The plaintiffs in this case are a joint stock company who for many years carried on the business of cordial manufacturers at Newcastle upon land which they held under successive leases for terms of seven years from Mr. G. E. Redman, the freeholder. The land was resumed by the Government of New South Wales under the provisions of the *Public Works Act* 1900 by notification

(1) 5 F. (Ct. of Sess.), 1174.
(2) L.R. 5 Ex., 284.
(3) *Boyle & Waghorn on Compensation*, p. 1052.
(4) 12 App. Cas., 315, at p. 320.
(5) 2 Jur. (N.S.), 861.

in the *Government Gazette* of 29th May 1912, whereupon the plaintiffs' interest in the land became extinguished and converted into a claim for compensation (sec. 39). In the events that happened the amount of compensation was to be determined by a jury, who are directed (sec. 117) to assess it according to what they find to have been "the value of the interest" at the time when the notification was published. The value is, of course, to be determined irrespective of the fact of the notification, and as if it had not been published.

The lease subsisting at the date of the notification was for a term of seven years and three months expiring on 1st June 1914, having therefore two years to run at the date of the resumption. Under the lease the lessees were entitled immediately before the expiration or sooner determination of the term to remove all buildings, erections, machinery, fixtures, and improvements upon the land other than buildings and improvements made by the lessor.

Buildings, machinery and fixtures of considerable value had in fact been put upon the land by the lessees, who were allowed by the Government to remain in possession until after 1st June 1914.

The lessor, Redman, who was over 80 years of age, was the holder of 4,237 of 4,707 the total number of shares issued by the Company.

The plaintiffs claimed compensation upon the basis that under these circumstances it was highly probable that the lessor would at the expiration of the term grant a new lease to them. The claim on this point was thus put by the plaintiffs' secretary, Mr. Lister, in his evidence: "Assuming that we had only a two years' lease to run from the time of resumption we would have suffered very serious loss in being moved on from what we considered a perpetual tenancy."

A great part of the evidence adduced by the plaintiffs was addressed to the cost of and incidental to the removal of their buildings, machinery, and business from the land, and acquiring and fitting up other premises for carrying on the business. The evidence was given on the assumption that if they had obtained the expected new lease from Redman they would not have been called upon to incur all this expense until a much later date. The unreported case of *Metropolitan Railway Co.* v. *Burrow*, decided in 1883-1884

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Griffith C.J.

by the Court of Appeal and the House of Lords, which is fully set out in Mr. *Balfour Browne's* work at p. 100 (2nd ed.), was relied upon in support of this contention.

The appellant contends that in estimating the value of the plaintiffs' interest in the land no regard whatever should be paid to the possibility or probability of their obtaining a new lease, and, alternatively, that, if any regard can be paid to such a contingency in any event, no regard can be had to the fact that the freeholder himself was largely interested in the plaintiff Company. At the trial they objected to the admission of evidence showing the fact and nature of his interest, but the learned Chief Justice admitted the evidence, and left it to the jury as a material element in the estimation of value. On the first or main ground of objection the Supreme Court thought themselves bound by the judgment of the Supreme Court in the case of *Robert Reid & Co.* v. *The Minister* (1), the soundness of which decision I see no reason to doubt. They did not in their judgment advert to the second ground, although it was distinctly taken in the notice of motion for a new trial. I infer that it was obscured by the prominence given to the larger ground.

The principles upon which compensation is to be assessed have been often laid down in cases of the highest authority. In the very recent case of the *Pastoral Finance Association Ltd.* v. *The Minister* (2), decided under the same New South Wales Statute (a case of the resumption of a freehold), Lord *Moulton*, delivering the opinion of the Judicial Committee, said (3) :—" The appellants were clearly entitled to receive compensation based on the value of the land to them. This proposition could not be contested. The land was their property, and, on being dispossessed of it, the appellants were entitled to receive as compensation the value of the land to them whatever that might be."

In the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (4) the question was dealt with by the Judicial Committee in more detail. In that case the value to be assessed was declared to be the value to the old owner who parts with his property, not the value to the new owner who takes it over. The Board approved

(1) 2 S.R. (N.S.W.), 405.
(2) (1914) A.C., 1083.
(3) (1914) A.C., at p. 1087.
(4) (1914) A.C., 569.

of the general statement of the law made by Lord *Moulton* (then *Fletcher Moulton* L.J.) in the case of *In re Lucas and the Chesterfield Gas and Water Board* (1), in which the learned Lord Justice said (2) :—" 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."

The learned Lord Justice also said (3) :—" I am content to rest my judgment upon a more general ground, namely, that the compensation for lands depends upon the nature and circumstances of those lands themselves (taken so far as necessary in connection with the nature and circumstances of other lands to be used with them), and has nothing to do with the personal views or wishes of the individuals who may chance at the moment to be the owners of those lands."

I venture to illustrate this position by two concrete instances. The present lessee of land may be a highly desirable tenant whose occupancy of the premises adds to the general reputation of the locality, so that it is extremely unlikely that he will be called upon to vacate the premises at the expiration of his lease. Or the lessor may be a person of amiable character, who has an extreme dislike to disturbing a tenant. Both these considerations relate to personal matters, depending in the one case on the personality of the tenant and in the other on the personality of the landlord. Neither of

(1) (1909) 1 K.B., 16. (2) (1909) 1 K.B., at p. 29.
(3) (1909) 1 K.B., at p. 34.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Griffith C.J.

them is a matter "depending upon the nature and circumstances" of the land itself. Neither of them, therefore, can be taken into consideration in estimating the value of the term.

So in the present case it is obvious that the relationship of Redman to the plaintiffs as owner of a large proportion of its capital had nothing to do with "the nature and circumstances" of the land itself, but was a matter concerning the probable "personal views or wishes of the individuals who might chance at the moment to be the owners."

This is sufficient to show that Redman's relation to the Company was irrelevant, and the evidence as to it was inadmissible. It follows that, as it was left to the jury as a material element for their consideration, there must be a new trial.

On that trial the whole question will be at large, but it may, I think, be useful to indicate briefly our opinion on the larger ground of objection. In this connection I should read the observations of Lord *Halsbury* L.C. in *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (1) :—"The language of the Legislature is this—that 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."

I proceed to consider what elements may and ought to be taken into consideration in assessing the value of the unexpired term of a lease of business premises.

The real question to be answered is, as stated by *Fletcher Moulton* L.J. in *Lucas's Case* (2), what was the residue of the term worth to the lessee in money? That sum cannot be less than the price

(1) 12 App. Cas., 315, at p. 321. (2) (1909) 1 K.B., 16, at p. 29.

which he could have obtained for it from a purchaser. In the case of a lease of business premises in which, as in the present case, the lessee carries on operations of manufacture in buildings and with machinery which are his own property and which he is entitled to remove at the expiration of the lease, he has, besides the mere right of occupation of the soil under the demise, the advantages adverted to by Lord *Halsbury* which are attendant upon the enjoyment of that site for the purposes of his business for the residue of the term. At the expiration of the term, if he does not obtain a new lease, he will incur the expense and delay attendant upon the procuring of another site for his business and the removal of his buildings and business to it, or the erection of new buildings upon it, while, if he obtains a new lease of the old site, he will for the period of its duration avoid this expense and loss. A stranger, on the other hand, acquiring the land for similar purposes will be obliged to incur a large outlay in buildings and machinery, and to wait for their erection and completion before obtaining any return for it. Probably, therefore, the rent which he would pay for the land without improvements would be less than that which the actual lessee would, or might, be willing to offer for a new lease. The tenant might, under these circumstances, reasonably hope to secure preference, and to obtain a grant of a fresh lease on terms acceptable to him. Other points will occur to any one, suggesting that the chances of the "sitting tenant" obtaining a fresh lease on terms acceptable to him are not a mere contingency, and may have a very substantial pecuniary value, which may be expressed as the amount saved by escaping the necessity of removal at the end of the lease. All these matters would undoubtedly be taken into consideration both by a tenant negotiating for a sale, and by a person negotiating for a purchase, of the residue of the term, assuming, of course, that the purchaser would be put for all practical purposes in his vendor's shoes. All matters which would be so taken into consideration by an intending purchaser, and which relate solely to the situation and condition of the land and the improvements upon it, and the right of ownership and enjoyment which the purchaser would acquire in respect of them, are, in my opinion, elements to be taken into consideration in estimating the value of the tenant's

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Griffith C.J

actual interest. The element of hope or expectation of non-disturbance arising from the physical condition of the land is not a hope of a separate and distinct interest to accrue after the expiration of the term, but an element in the value of the actual term itself. There is, therefore, no question of valuing it twice over.

The rule to be applied in assessing compensation upon resumption was laid down by this Court in *Spencer's Case* (1). That was a case of freehold, but the same principle is applicable whether the interest resumed is a tenancy at will or any greater estate, up to a freehold. The equation is identical in all cases, although some, or even all, of the elements may prove to be equal to zero.

The appeal should therefore be allowed, and a new trial granted.

BARTON J. On the general law of compensation for compulsory taking of land there are in the authorized reports some judicial utterances from which it is desirable to make quotations, especially as upon the subject matter with which they deal there is practically no difference between the English law and that prescribed by the *Public Works Act* 1900 of New South Wales. In *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (2) Lord *Halsbury* L.C. said :—" Now the language of the Legislature is this—that 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." In the case of *In re Lucas and the Chesterfield Gas and Water Board* (3) *Fletcher Moulton* L.J. (now Lord *Moulton*) said :

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

(2) 12 App. Cas., 315, at p. 321.

(3) (1909) 1 K.B., 16, at p. 29.

—" 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 are 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 would appear from this passage that his Lordship recognized no practical distinction between the value to the owner of the lands taken and their market value; all elements of value which belong to the lands must be considered in so far as they increase the value to him. The broad distinction is that it is not the mere value to the purchaser that is to be assessed, but the value to the owners. That, as his Lordship went on to point out, does not mean a valuation according to the personal views or wishes of the owner; its real measure is what " a prudent man in their position would have been willing to give for the land sooner than fail to obtain it " : *Pastoral Finance Association Ltd.* v. *The Minister* (1), in which case the judgment of the Judicial Committee was delivered by Lord *Moulton*.

The principles laid down by that learned Judge in *Lucas's Case*, above cited, have been adopted since in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2) : *Corrie* v. *MacDermott* (3), and the *Pastoral Finance Association's Case* (4), above cited. In the first-named case of the last three, the Judicial Committee said (5):— "The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such

(1) (1914) A.C., 1083, at p. 1088.
(2) (1914) A.C., 569.
(3) (1914) A.C., 1056; 18 C.L.R., 511.
(4) (1914) A.C., 1083.
(5) (1914) A.C., at p. 576.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Barton J.

advantages that falls to be determined. Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking . . . the value . . . is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give." This passage again seems to me to identify the market value with the value to the owner, properly considered.

The above passages are not to be taken as indicating that the considerations to be admitted in assessing the value of the property taken are susceptible of any narrow and literal enumeration. "It is quite true," as the Judicial Committee said in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1), "that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion, which, being more or less conjectural are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity."

These, then, being the general principles to be observed, there is still need for a careful avoidance of the danger, among others, that a tribunal, and especially a jury, may be led into the addition of some specific element of value when market value has already been ascertained. An instance is the case of *Pastoral Finance Association Ltd.* v. *The Minister* (2), already cited, where the land in question had been bought by the appellants about a year before the notification of resumption had been served on them. They had carried on elsewhere the business of dealing in wool and of freezing meat for export. Owing to the expansion of their business they had acquired the land in question, with the object of transferring the business to that site, though they had not at the date of the notice erected the necessary buildings there, as they had been informed of the intention of the Government to resume possession. Evidence was given at the trial as to the savings and additional profits which the appellants would make in their business

(1) (1901) A.C., 373, at p. 391. (2) (1914) A.C., 1083.

if it were transferred to the land in question as intended. In his summing-up at the trial the learned Judge directed the jury that they should consider what capital amount fairly represented those savings and profits, and should add that amount to the market value of the land. The Judicial Committee were of opinion that the direction was at fault. They said (1):—"No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shown would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land."

It seems, therefore, to be clearly the opinion of the Judicial Committee that when once a jury have ascertained the market value as the value of the land or interest to the owner they are not at liberty to make an addition to that value upon an estimate of other considerations. So far as such matters are relevant they must be taken to have been estimated already in arriving at the value. We have seen that in the case just mentioned the addition consisted of a capitalization of the expected savings and profits to arise from the removal of the owners' business to the land taken. The decision is not merely that an addition of that kind cannot be made. It is a decision that the market value, as the entire value to the owners, is to be ascertained once for all. The question was, as *Griffith* C.J. said in *Spencer* v. *The Commonwealth* (2):—"What would a man desiring to buy the land have had to pay for it on that day" (the day of resumption) "to a vendor willing to sell it for a fair price but not desirous to sell?" This includes the case of Lord *Moulton's* "prudent man" (3). In the present case the learned Chief Justice of New South Wales, after pointing out to the jury that the plaintiff Company were entitled to the value of their leasehold interest,

(1) (1914) A.C., at p. 1089. (2) 5 C.L.R., 418, at p. 432.
(3) (1914) A.C., at p. 1088.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Barton J.

told them also that it was a question for them whether they were to regard the Company "as having a *substantial interest* based on their expectancy that the lease would be extended or renewed." "You are," he said, "to assess their interest as of persons having a leasehold title for two years, and such expectancy of continuance as you may find to be a reasonable thing to take into consideration in the circumstances of the case." Towards the conclusion of his charge to the jury the learned Chief Justice said: "I thought at first of asking you to put in a separate estimate, if any, of the amount which you awarded in regard to the expectancy of the lease, but I am afraid that that would create such embarrassment that any good purpose which might be served by it is likely to be defeated, so I will not ask you to do that." While, therefore, his Honor did not request the jury to make a specific finding of the estimated value of the expectancy, the passage is, I fear, an intimation that the expectancy might be specifically assessed by them, and the amount added to such estimate of value to the owner as the jury should arrive at, in order to constitute a complete finding, or, in his Honor's words, to make "an assessment of the total compensation to be paid to the plaintiffs." He had previously said "It is for you to take into consideration what the value of their leasehold was with the expectancy of continuance." I think the summing-up tended to create an impression in the jury's mind that the value of the expectation of a renewal might properly be added to the market value.

I grant that a probable purchaser of an unexpired term such as existed in the present case might well have in mind, in reckoning what price he ought to offer, the question whether he was likely to be allowed to occupy the land for a time no longer than the residue of the lease. But it is one thing to say that such a consideration may operate upon the calculations of a more or less sanguine bidder and another thing to admit them as factors of separate and specific valuation.

There is another matter in respect of which the jury were allowed to take into account, and did probably take into account, considerations extraneous to the real measure of value. The fact that Redman, the landlord, owned by far the greater number

of the shares in the plaintiff Company, and the influence of that fact upon his probable action and upon the prospects of the Company was in my opinion something which had an intimate relation to what Lord *Moulton*, in *Lucas's Case* (1), called "the personal views or wishes" of the owners. But that learned Judge said, in the passage which has been so frequently adopted since (1), that "the compensation for lands depends upon the nature and circumstances of those lands themselves," and the relations between Redman and the Company therefore seem to have been irrelevant to the real issue. Evidence, however, upon the subject was admitted at the trial, and I think wrongly admitted. Tending, as it must have tended, to an erroneous conception of the interest to be valued, I think its effect was probably serious.

On the whole I fear there is no escape from the conclusion that a new trial should have been ordered by the Supreme Court, and it is for us to make the order which we think they should have made.

As to the question which the jury upon a second trial should properly consider, I think it can be gathered with some certainty from the judicial utterances which I have quoted, and nothing has been said which is terser and at the same time more comprehensive of the points proper for assessment than the "practical form" in which the matter was put in the *Pastoral Finance Association's Case* (2), namely, that the owners are entitled to that which a prudent man in their position would have been willing to give for the interest sooner than fail to obtain it. I agree that the jury should take into consideration every element of value which an average man desiring to buy the property and to use it for the same or similar purposes, would himself reasonably take into consideration in fixing the price he would offer.

I am of opinion that the appeal should succeed.

ISAACS J. The Supreme Court, in the course of the judgment appealed from, observed that the question here raised is of considerable importance both to the Crown and to the lessees of lands resumed. The accuracy of this observation is undoubted, and it

(1) (1909) 1 K.B., at p. 34. (2) (1914) A.C., 1083.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Isaacs J.

may be added that from the generality of compensation provisions the importance extends throughout Australia. Reversioners are equally interested unless the Crown is required to pay twice over for the same property (which it is not—see *Penny* v. *Penny* (1)); for what is added to the tenant must otherwise be deducted from the landlord.

One further observation of the learned Judges is to be noticed. *Gordon* J., whose judgment was concurred in by the other members of the Court, said (2):—"If this question was free from authority in this State I should feel considerable difficulty in acceding to the claimants' contention which does, it appears to me, claim compensation for more than the interest held by them at the date of resumption in the land resumed." His Honor went on to say that he was coerced by the case of *Robert Reid & Co.* v. *Minister for Public Works* (3), decided in 1902, and which, standing for 14 years, ought not, thought the learned Judge, to be questioned except by an appellate Court. In expressing the opinion that *Reid's Case* governed the present, his Honor was in accord with the view adopted at the trial by *Cullen* C.J.

I may observe, in the first place, that the *Public Works Act* was passed in 1900, and consequently there has been nothing that could be put forward as legislative adoption of the suggested judicial interpretation. But beyond that, *Reid's Case* (3) is one of an entirely different character. The land was held in fee simple; its suitability for a wharf business in connection with the jetty was clear; the wharf was a public requirement; the claimant's land adjoined the jetty land, no one else could by law obtain a lease of the wharf, and the chance of the Government granting a lease to the owners of the contiguous land was considered by the Court a proper element to take into account as affecting its value. I agree with that view, because it was a "characteristic" of the claimant's land, just as the chance of some member of the public requiring a piece of land for ordinary business purposes is one of the elements of its value. The decision is supported by the case of *Odlum* v. *City of Vancouver and Canadian Northern Pacific*

(1) L.R. 5 Eq., 227, at p. 236.
(2) 16 S.R. (N.S.W.), 38, at p. 44.
(3) 2 S.R. (N.S.W.) 405.

Railway Co. (1), decided by the Privy Council in June 1915. But there was no question there of exceeding the owner's interest in the land, and in effect adding to its value the value attributed to some extraneous interest, or the chance of procuring some extraneous interest. The two cases are entirely distinguishable.

But in any case the question for us is whether their Honors' own personal view was not the correct one. And that was the basis upon which the matter was argued here. The present case is an ordinary one of leasehold. Redman owned two pieces of land at Newcastle, in fee simple. One piece, consisting of a little over a quarter of an acre, was held under the general law, and was leased by him to the Company on 22nd April 1907 on certain terms at a rental of £50 a year, for seven years and three months from 1st March 1907. The other piece of land was held under the *Real Property Act* 1900, and consisted of a little over 1 acre; it was leased to the Company on the same date for the same period, on certain terms, the rental being £158 a year. In each case the lessee, as usual, covenanted to yield up the premises at the end of the term. The Company carried on, upon the leased lands, its business of manufacturing aerated water and confectionery, and there is nothing to make this case one of an exceptional leasehold character.

On 29th May 1912 the whole land was compulsorily acquired by the Crown by notification in accordance with Division 1 of Part V. of the *Public Works Act* 1900 (No. 26). By force of sec. 37 the land at once automatically vested in the constructing authority on behalf of the Crown, freed and discharged from the leasehold interests of the Company. There was not, and there could not be, any separate taking of those interests. Division 1 contemplates the acquisition of the *universitas* of rights, bringing back the clear fee simple as it originally left the Crown, so that the physical subject shall be completely at the disposal of the constructing authority. Sec. 39 treats each estate and interest legal and equitable as immediately conveyed to the constructing authority by the person entitled, and at the same instant converts that estate or interest into a claim for compensation. Secs. 95 and 96 provide for the procedure whereby the claim is presented and the governmental valuation made, in respect of the

(1) 113 L.T., 795.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Isaacs J.

"land," "estate" or "interest" of the claimant. The basis of assessment where the parties do not agree is enacted in sec. 117. The jury is required in every case to have regard (1) to the value of the land, (2) to the damage by severance, (3) to injury to other lands; and the section proceeds: "they shall assess the same according to what they find to have been the value of such lands, estate or interest at the time notification was published."

The moment of notification is the one moment when in law (1) the owners are divested of their property, (2) the owners become entitled to money compensation, and (3) the value of their interest is fixed. In most cases it is not incorrect to say the value is as at the moment before, so as to exclude any subsequent appreciation or depreciation; but strictly it is precisely *at* the moment of notification, the deprivation and the compensation being concurrent (*Tyson* v. *Mayor of London* (1)). There may be instances where the distinction is important (see *In re Morgan and the London and North Western Railway Co.* (2)).

The "interest" of which the Company was deprived and which passed to the Crown, and for which therefore the Crown has to pay, was a leasehold interest for two years. Nothing more, and nothing less. The one question the jury have to answer is, in the words of the 117th section quoted, "what they find to have been the value of such interest at the time (the) notification was published," that is, on 29th May 1912. The claimants say that the chance of getting a new interest, called a "renewal," is a proper element to consider in valuing the limited interest for two years. At the trial before *Cullen* C.J. evidence was given by the claimants that Redman, the landlord, was a large shareholder in the claimant Company, with a view to establish the probability of the lease being extended in favour of the Company. The object of this endeavour was to enhance the value of the lease to the claimants. The evidence was objected to, was pressed, and was admitted.

In his summing-up the learned Chief Justice said to the jury: "It is for you to take into consideration what the value of their leasehold was with the expectancy of continuance." That is, as I read it, the jury were asked to value the leasehold interest enhanced,

(1) L.R. 7 C.P., 18.

(2) (1896) 2 Q.B., 469.

if the jury thought just, by the circumstance of expected extension. Towards the end of the charge his Honor made this, as I think, quite plain by telling the jury he would not ask them to state separately the amount, if any, they might award by reason of what he called "the expectancy of the lease." This does, in my opinion, show clearly that his Honor did not take the obviously wrong and disastrous course of asking the jury to value the expectancy as a separate and independent ground of compensation, apart from the lease, and then to add the two values inextricably, but asked them to consider the expectancy as merely enhancing the value of the claimants' legal interest. (See *Metropolitan Water Board* v. *Assessment Committee of Chertsey Union* (1) as to the distinction between enhancement and added value.) In the result, however, separation of the amount, or some indication of the amount, by which the lease was enhanced in value might perhaps have saved a new trial by enabling this Court finally to determine the litigation, just as in *Lynch's Case* (2), to be hereafter mentioned, the arbiter stated his findings alternatively.

I am confirmed in the view I take of his Honor's direction by the circumstances that no complaint was ever made by the Crown that the expectation was left as a separate item either at the trial, or in the Full Court or here. On the contrary, after the jury had retired, learned counsel for the Crown asked for directions—the first two of which, the only relevant ones, pointed simply to the complete exclusion of the question of extension from all consideration. The one substantial question was, and is, whether, as put in the notice of motion for new trial, pars. 3 (*a*) and 3 (*b*), and in the notice of appeal to this Court, pars. 4 (*a*) and 4 (*b*), the expectation of extension could be considered at all.

The reasoning of the Privy Council in the *Pastoral Finance Association's Case* (3) applies here, and would, in my opinion, prevent any such question as is suggested from being raised at this stage, even if the Crown urged it—which I do not understand it to do.

It was argued here, as I have stated, and in addition it was

(1) (1916) A.C., 337, at pp. 350, 358, 363. (2) 5 F. (Ct. of Sess.), 1174.
(3) (1914) A.C., 1083, at p. 1089.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Isaacs J.

pressed, that in any event Redman's interest was a purely personal circumstance. We are all agreed that it is impossible to sustain the direction in so far as the jury were instructed to include Redman's shareholding interest in the Company as a factor in determining the Company's chance of getting a renewal. That error, being inseparable, irretrievably vitiates the verdict, and renders a new trial necessary. But I am of opinion that we cannot properly decide even so much without first finding, and therefore stating, the true principle which should guide the trial Judge in directing a jury in such a case. The Full Court has enunciated a general rule, which lays down the law for New South Wales, and must control the course at the new trial, and must, if wrong, lead to further doubt and litigation. Therefore, although in the circumstances my opinion cannot be more than an individual opinion, still, as in my view the parties are entitled to have it, and the Court from which the appeal come are also entitled to whatever guidance they can obtain from this tribunal on a question that necessarily arises, I feel bound to express it for what it is worth. There is, so far as I know, no recorded instance of a similar claim ever being made in any British Court except on one occasion, and then it was repelled. I refer to the case of *Lynch* v. *Glasgow Corporation* (1), decided in 1901. English cases cited, though based on reasoning which, to some extent, supports the Crown view, are distinguishable. The great body of opinion to be collected from text-writers is decidedly opposed to the claim. An American Judge of great eminence has also pronounced against it. The circumstance that no British tribunal has ever maintained such a claim, and apparently, with the single exception mentioned, has never been asked to, is significant evidence of the general view accepted in legal and commercial circles upon the subject. Now that the question has pointedly arisen, it ought, I respectfully think, in view of its wide effect, to be settled one way or the other at once. I deal with the matter in the first place on principle.

To begin with, it must always be remembered that cases like *Spencer* v. *The Commonwealth* (2), *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3) and *Pastoral Finance Association Ltd.*

(1) 5 F. (Ct. of Sess.), 1174.
(2) 5 C.L.R., 418.
(3) (1914) A.C., 569.

v. *The Minister* (1) were cases of fee simple; that is, that although the value must be limited to the land itself, as the subject, there was no limit to the interest in the land. And therefore the very point of the present case could not arise. That point is the consequence of the interest being limited. In the class of cases referred to, the only boundaries to regard are the physical boundaries of the land itself; in the present case, besides those physical boundaries, there are the limits set by the term for which the land is to be enjoyed. On the latter limitation it is evident the fee simple cases cannot guide us.

Now, should Redman's shareholding interest in the Company have been considered? It is plain that such interest, though it might or might not impel him to grant a further lease to the Company, is a personal matter, and therefore, as we all concur, is not to be considered as influencing the value of the interest actually taken. But as the law says nothing affirmatively about excluding personal matters, the exclusion must be due to some negative consideration. The exclusion must be because, being personal, it necessarily is not inherent in or bound up with the interest taken so as to run with it in the hands of a purchaser for the Company.

Once arrive at the point that the direction in this particular case was erroneous because the circumstance relied on was personal, I see no halting place where, upon principle, the mere chance of renewing an existing lease can form an element in determining the value of the existing lease itself. Whether the land is taken for the whole fee simple or for some limited interest you have to look at what, in *MacDermott* v. *Corrie* (2), I termed its "characteristics." I there said: "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." I refer to this passage only because it has received the assent of the Privy Council (3). One characteristic there was the restricted fee simple.

In this instance we have to value the claimants' interest in the land. That involves both the land as a physical object, with all

(1) (1914) A.C., 1056.
(2) 17 C.L.R., 223, at p. 247.
(3) (1914) A.C., 1056, at p. 1065; 18 C.L.R., 511, at p. 517.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Isaacs J.

that belongs to it, and the terms of the interest, including duration. First we look at the land itself and observe its characteristics, and next we must assume that its enjoyment or use is limited to two years, because that is the essential characteristic of the "interest." If we could find in the interest that has been taken some characteristic pointing to an extension or the potentiality of an extension, that would be a legitimate circumstance to consider in relation to the value of the interest itself. That potentiality however—I find no better word to express what I mean—is not found in the land itself or in the leases. Mr. *Campbell* said that every lease contains the possibility of a renewal, and that a jury could say in every case there was some chance for which an enhancement ought to be allowed. But that is impossible. A definite interest cannot be inherently indefinite ; and the business considerations which might induce one party to renew a lease for his benefit as being at an advantageous rent are precisely those which must be supposed with equal force to impel the opposite party to decline.

But if that broad and universal assumption be wrong, where can the potentiality of renewal be found when there is nothing in the lease or any binding agreement entitling the lessee to a renewal? A renewal is a new lease (see, for instance, *per Willis* J. in *Oakley* v. *Monck* (1)). Renewal assumes precisely the same term and the same rent and other conditions. Why the same term, and not a longer or a shorter term ? Why the same rent, and not a higher rent ? Is the renewal to be perpetually repeated ? All these considerations show that the matter must rest on mere flimsy conjecture, utterly unconnected with the particular interest of the two years' tenancy, of which the claimants have been deprived, and for which the Crown is bound to pay. Extending a lease in plain English means enlarging the subject taken, or in other words adding a new subject or the possibility of a new subject to the only subject which has to be paid for. The contention that such a course is permissible involves the assumption that the old lease carries the new potentiality *in gremio*, as in *Penny* v. *Penny* (2). There *Wood* V.C. said (3) : "Every man's interest shall be valued,

(1) L.R. 1 Ex., 159, at p. 164.
(2) L.R. 5 Eq., 227, at p. 235.
(3) L.R., 5 Eq., at p. 236.

rebus sic stantibus, just as it occurs at the very moment when the notice to treat was given."

It is said that it is consistent with that, and while loyally adhering to that principle, to award to the claimants compensation on the basis of what the lease was worth to them, in the sense of finding what any person would have given for any reason whatsoever to stand in their shoes as lessees. If that be correct, it is hard to see how the direction of *Cullen* C.J. can be wrong. It can undoubtedly be said that a possible purchaser would take into account the shareholding interest of Redman. To say that that is a purely personal matter is, as I have said, nothing to the point, except so far as it involves a principle. Lord *Shaw* said in *Board of Agriculture* v. *Plummer* (1) :—" An arbiter has nothing to do with the quality of the objections which either depress or raise market values. The one equally with the other he does not inspect the quality of ; he assesses their pecuniary result. Your Lordships are well aware that it is one of the duties of an arbiter to assess all things which appraise or depress value, including the modes and fashions of the time or the ideas of persons appearing in the market who may be able to purchase. These sentimental objections matter nothing one way or another except as they affect the price to be realized."

If Redman's shareholding interest did in fact affect the value of the interest taken by adding to it a chance of renewal, then, in my opinion, it ought to be considered, notwithstanding it was personal ; if, however, it is not to be considered, it is because it does not affect the value of that interest at all—the essence of which was a *terminus a quo* and a *terminus ad quem*—but merely gives at the same time the separate and independent chance of an entirely new subject.

It has been suggested that the enhancement of value by reason of goodwill is analogous to the present claim for chance of renewal. With deep respect, the two things are distinct in principle. Goodwill so far as it is not personal to the owner, as being due to his reputation or skill, increases the value of a house because it attaches to the premises themselves. See *per Cotton* L.J. in *Cooper* v. *Metropolitan Board of Works* (2). In that case, as Lord *Lindley* said in

(1) (1916) A.C., 675, at p. 683.

(2) 25 Ch. D., 472, at p. 479.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Isaacs J.

Commissioners of Inland Revenue v. *Muller & Co.'s Margarine Ltd.* (1), the goodwill is annexed to premises. That, to my mind, differentiates the so-called chance of renewal of a lease.

The Scottish case of *Lynch* v. *Glasgow Corporation* (2) is, as already said, altogether against it. The Lord President, Lord *Kinross*, said (3) :—" It is a personal matter altogether detached from the subject of the statutory purchase." Lord *Kinnear* said :—" It simply comes to this, that the tenant claims to have compensation for what he calls an interest, which according to his own statement of it is conditional on the absolute will and pleasure of the landlord for the time being. It seems to me to be out of the question to say that as between landlord and tenant there can be any obligation to pay the tenant for the loss of such an interest as that, if indeed it can be dignified with the name of interest at all ; it is nothing but a chance. To say that if things had remained unaltered some third person might have been willing to pay money for such a chance seems to me to be altogether irrelevant to the question, because whatever value the supposed purchaser might attach to the hope of a renewal of the lease cannot affect the proprietor—cannot raise a claim that is good against the proprietor who *ex hypothesi* has an absolute right to refuse if he chooses, and to require the Corporation to pay for the exercise of that right seems to me to be requiring them to pay for something that they had already paid for when they bought and paid for the land, because it is inherent in the right of property which they acquired by purchase of the lands that they shall be entitled to decline to renew any lease that they do not choose to renew after the expiry of the legal term."

His Lordship, in my view, does not mean that to depend on whether the Corporation took the reversion first, but he is emphasizing the fact that when the Corporation purchase and pay for the reversion they pay for all the proprietor has, and cannot be expected to pay twice over—as they would have to do if they paid the tenant for the chance of getting something which was in its absolute and

(1) (1901) A.C., 217, at p. 235. (2) 5 F. (Ct. of Sess.), 1174.
(3) 5 F. (Ct. of Sess.), at p. 1181.

unqualified entirety the subject of purchase for the reversioner. I respectfully agree with the view his Lordship there expresses.

Since the argument I have found some relevant observations of *Holmes* J. of the United States Supreme Court. In *Emery* v. *Boston Terminal Co.* (1), a lessee compensation case, that learned Judge, then Chief Justice of Massachusetts, said (2):—"It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The Court was right in excluding expert evidence as to an increase in value from that source."

When the real nature of the tenant's interest is regarded, it seems to be almost mathematically demonstrable that the Crown's contention is correct. The Company had the right to exclusive possession of the land for a specified period on stated terms, including a fixed rent and an absolute covenant to deliver up possession on the expiration of the term. There being no extraordinary circumstances to enhance the value, the compensation payable to the tenant, in respect of the mere value of the tenancy itself, is regulated by the considerations stated in *Cripps on Compensation*, p. 101. The learned author (now Lord *Parmoor*) says:—It "depends on the difference between the actual rental paid by him and the improved annual rental that the property is worth. This difference must be multiplied by the number of years' purchase at which the tenant's interest should be valued. This will be determined by the character

(1) 178 Mass., 172.

(2) 178 Mass., at p. 185.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Isaacs J.

of the property and by the length of the term or tenancy." The capitalized value of the tenant's interest is the value to him. See also *Encyclopædia of the Laws of England*, 2nd ed., vol. VIII., p. 20.

Besides that sum, the tenant is of course entitled to compensation for expulsion, if damage is thereby occasioned, which I need not dwell upon. But the two taken together represent the value to the tenant for the term of which he is deprived. As to what is the best rent the property is worth, consistently with the terms of the lease, that must be tested by what Lord *Dunedin* in the *Cedars Rapids Co.'s Case* (1) termed "the imaginary market which would have ruled had the land" (here the term) "been exposed for sale" at the moment of notification.

The supposed competition in this market will determine the best rent procurable. Mr. *Campbell* urged that the tenant already in possession and with his fixtures could afford to give more than a stranger, and therefore had the best chance. But why? If he has his fixtures he has no longer the money they cost. And the stranger if he has not the fixtures has presumptively the money to get them with.

So that competition in the ordinary case determines the value. It is always the value to the person deprived, and the *Pastoral Finance Association's Case* (2) has been relied on as establishing that besides the market value there is another value, namely, the sum which, having regard to all the circumstances, it was worth to the owner to keep the land.

But I do not understand Lord *Moulton's* language as to meaning there are two values. His Lordship was there dealing with the claimants' contention that in addition to the "market value" of the land, they were entitled to actual money losses in respect of business profits or savings. His Lordship, as I understand him, was expressly repelling that contention and confining the value to the one test, "the value" of the land to the claimants. Actual business losses were not *eo nomine* recoverable; but they were elements to be considered in determining the only thing the claimants were entitled to *eo nomine*, namely, the value of the land to them. And

(1) 1914) A.C., at p. 576.

(2) (1914) A.C., 1083.

so the formula was phrased thus (1) :—" They were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it." That assumes a sale, an imaginary sale, in the " imaginary market " and the question was what an imaginary prudent buyer in the claimants' position—because such a person was assumed to make the best use of the land—would give for it.

For these reasons, somewhat elaborated by reason of the comparative novelty of the subject as well as its vast importance, I am of opinion that no enhancement of the value of the leasehold term by reason of a chance of extension can be considered unless there is some right established to obtain that extension, and in that case the only extension relevant is that to which the right is shown.

I agree that there should be a new trial.

GAVAN DUFFY and RICH JJ. We agree that there must be a new trial.

The learned Chief Justice, in directing the jury, left it to them to determine what loss the Company had incurred in having been deprived not merely of the residue of its term but also of such further occupation as they might think the Company would have obtained, assuming that Redman remained owner of the reversion, and bearing in mind that it was in the interest of Redman as the principal shareholder in the Company, that it should continue in occupation of the land. In doing this, we think he was in error. All the Company was entitled to was the residue of the term, that was all that was taken from it, and it was entitled to be compensated for the taking of the residue of the term and for nothing else. If any authority is required for this proposition, it is to be found in *Lynch* v. *Glasgow Corporation* (2).

A great deal of argument was addressed to us as to how far the probability of obtaining a renewal may be taken into consideration in ascertaining the price which a purchaser would be willing to give for the residue of a lease, but that investigation, in our opinion, is beside the question we have to determine, namely, whether there has been a misdirection or not.

(1) (1914) A.C., at p. 1088. (2) 5 F. (Ct. of Sess.), 1174.

H. C. OF A. 1916.

THE MINISTER v. NEW SOUTH WALES AERATED WATER AND CONFECTIONERY CO. LTD.

Appeal allowed. Order appealed from discharged so far as it dismissed the motion for a new trial. Verdict set aside and new trial granted with costs of motion. Costs of first trial to be costs in the cause. Respondents to pay costs of appeal.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondents, *W. H. Baker*, Newcastle.

Appl/Cons *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 17 ACSR 239

[HIGH COURT OF AUSTRALIA.]

REDMAN, REPRESENTING ALSO THE ESTATE OF BERNADETTA JOHNSTONE DECEASED, Defendants, } Appellants;

AND

THE PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LTD. AND OTHERS . . . . . Plaintiffs and Defendants, } Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1916.

SYDNEY, *Aug.* 21, 22, 23, 24; *Sept.* 1.

Griffith C.J., Barton, Isaacs and Rich JJ.

Power of Appointment—Exercise of power—Fraud on power—Intention to benefit stranger—Condition—Evidence—Onus of proof—Assignment of expectant equitable interest—Absence of consideration—Admissions by assignor—Rights of assignee.

A beneficiary under a will to whom was given an equitable life interest in certain land, with a power of appointment of the land in fee to all or any one or more of a class of persons, by a codicil to her will appointed the land to A, a member of the class. Before the codicil was executed, and when the land was worth about £10,000, A by deed agreed to sell to each of B and C, neither of