

decision independent of authority. The section deals with an offence, and in my opinion the Supreme Court were right in coming to the conclusion they did.

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BARTON J. I concur.

RICH J. I concur.

Appeal dismissed with costs.

Solicitor for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.  
Solicitor for the respondents, *J. B. Moffatt*.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR HOME AND TERRI-  
TORIES . . . . . } PLAINTIFF ;  
  
AGAINST  
  
LAZARUS . . . . . DEFENDANT.

Cons  
Taxation,  
Federal  
Commissioner  
of v Murry  
(1998) 72  
ALJR 1065  
  
Cons  
FCT v Murry  
(1998) 193  
CLR 605

*Land—Acquisition by Commonwealth—Federal Territory—Compensation—Time of assessment—Goodwill of business carried on on land—Seat of Government Acceptance Act 1909 (No. 23 of 1909), sec. 10—Seat of Government (Administration) Act 1910 (No. 25 of 1910), sec. 10—Lands Acquisition Act 1906 (No. 13 of 1906), secs. 5, 29.*

Sec. 10 of the *Seat of Government Acceptance Act* 1909 as amended by sec. 10 of the *Seat of Government (Administration) Act* 1910 provides that “The provisions of the *Lands Acquisition Act* 1906 shall apply to the acquisition by the Commonwealth, for any public purpose, of any land owned in the Territory by any person: Provided that, in determining the compensation to which the owner is entitled under that Act, the value of the land shall be taken not to exceed the unimproved value of the land, or the interest therein

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April 28;  
May 1.  
Barton, Isaacs  
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of the owner, on the eighth day of October, one thousand nine hundred and eight, together with the value of his interest in the improvements on the land at the date of the acquisition of the land.”

*Held*, that in determining the compensation in respect of land within the Territory so acquired by the Commonwealth, upon which the owner had, in premises thereon, been carrying on a business since a date prior to 8th October 1908, the value of the business and of the goodwill thereof, so far as it added value to the land, should be assessed as at 8th October 1908.

#### QUESTIONS RESERVED.

On an originating summons in the High Court on proceedings instituted by the Minister for Home and Territories against Morris Lazarus, *Barton J.* reserved certain questions for the opinion of the High Court by the following case :—

1. This matter came on for hearing by way of an originating summons before me, a Justice of the High Court of Australia sitting alone in the original jurisdiction of the High Court, on 4th and 5th December 1918, for the determination of the compensation payable by reason of the acquisition of certain land by the Commonwealth by compulsory process in accordance with the provisions of the *Lands Acquisition Act* 1906, the notification of which acquisition was published in the *Commonwealth Gazette* on 23rd March 1916.

2. The said land is situate at Hall, a place within the Territory acquired by the Commonwealth for the purposes of a Federal Capital site.

3. At the time of acquisition the defendant was the owner of the fee simple of the said land, and was and had been since the year 1905 carrying on the business of a licensed victualler in certain licensed premises upon the said land.

4. At the hearing Mr. *Blacket* K.C., of counsel for the defendant, contended that the value of defendant's said business and the goodwill attaching thereto should be assessed as at the date of acquisition, that is to say, 23rd March 1916.

5. Mr. *Campbell* K.C., of counsel for the plaintiff, contended that the value of the said business and the goodwill attaching thereto should be assessed as at 8th October 1908.

By consent I reserve the following questions for the consideration of a Full Court, that is to say :—



- (1) Whether in determining the compensation the value of defendant's said business as a licensed victualler and the goodwill attaching to the said business should be assessed as at 8th October 1908 or as at the date of acquisition, viz., 23rd March 1916.
- (2) Whether the costs of and incidental to this reference should be borne by the plaintiff or the defendant.

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*Blacket K.C.* (with him *Sanders*), for the defendant. Under the proviso to sec. 10 of the *Seat of Government Acceptance Act* 1909 as it originally stood, the defendant would have been entitled to compensation in respect of the goodwill of his business (*Commissioners of Inland Revenue v. Glasgow and South-Western Railway Co.* (1)). The new proviso substituted by sec. 10 of the *Seat of Government (Administration) Act* 1910 cannot be read as taking away that right. The business which is carried on by means of improvements on the land and the goodwill of that business are included in the words "interest in the improvements on the land," and their value should be assessed as at the date of the acquisition of the land. The business and goodwill can only be created by means of the improvements.

*Leverrier K.C.* (with him *Pike*), for the plaintiff. Goodwill is attached not to the improvements, but to the land on which they are. If the improvements were removed to another piece of land the goodwill would not go with them. Its value cannot be included in the value of the improvements, but it may be included in the unimproved value of the land; it is one of the potentialities of the land. (See *Commissioner of Land Tax v. Nathan* (2).)

[BARTON J. referred to *Rosehill Racecourse Co. v. Commissioner of Stamp Duties* (N.S.W.) (3).]

*Blacket K.C.*, in reply.

*Cur. adv. vult.*

(1) 12 App. Cas., 315, at p. 321.

(2) 16 C.L.R., 654.

(3) 3 C.L.R., 393.



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The following judgments were read :—

BARTON J. Lazarus, the defendant, held in fee simple some land at Hall within the territory acquired by the Commonwealth in connection with the institution of a Federal Capital. In 1916, when the land was acquired, he had for some eleven years been carrying on business as a licensed victualler. In pursuance of sec. 38 of the *Lands Acquisition Act* 1906 (No. 13 of 1906) the Minister applied to this Court to determine the compensation payable to Lazarus by reason of the compulsory acquisition of the land. The notification was dated 23rd March 1916. At the hearing of the application I reserved for the Full Court the questions set out in the special case. The *Seat of Government Acceptance Act* 1909 (No. 23 of 1909) enacts in sec. 10 that the *Lands Acquisition Act* 1906 shall apply to the acquisition for any public purpose of any land owned in the Territory by any person. By a proviso to the section it was enacted that, in determining the compensation to which the owner was entitled, the value of the land should be taken not to exceed its value on the 8th October 1908. The proviso was repealed by sec. 10 of the *Seat of Government (Administration) Act* 1910 (No. 25 of 1910), and the following words inserted instead: "Provided that, in determining the compensation to which the owner is entitled under that Act, the value of the land shall be taken not to exceed the unimproved value of the land, or the interest therein of the owner, on the eighth day of October, one thousand nine hundred and eight, together with the value of his interest in the improvements on the land at the date of the acquisition of the land." By sec. 5 of the *Lands Acquisition Act* "owner" includes, with respect to land, any person who under the Act is enabled to sell or convey the land to the Commonwealth. "Interest" is not defined.

The contentions of the respective parties before me were as follows: for the plaintiff (the Minister), that the value of the defendant's business and the goodwill attaching thereto should be assessed as at 8th October 1908; and for the defendant that such value should be assessed as at the date of acquisition, that is to say, 23rd March 1916. Applying these contentions to question 1, they mean that the Minister contends that any value of the business and goodwill should be included in the unimproved value of the land, and



so be reckoned as in October 1908 ; while the defendant contends that the value of the business and goodwill should be counted as part of the value of his interest in the improvements as in March 1916, at the date of acquisition. Mr. *Blacket* argued that, because the defendant is entitled to a sum for the value of his interest in the improvements on the land in 1916, he is entitled to the value of the business and goodwill as at that date, because he carried on his business by means of the improvements. He cited no authority to justify that contention, but he seemed to attach some peculiar importance to the phrase "his interest in the improvements." I think the term "interest" is used there in the same sense as the term "the interest of the owner," a couple of lines previously, and no satisfactory reason was given why the owner's "interest" in the improvements should have a different sense from the owner's "interest" in the land. But as to the land, the owner's interest obviously means the quantity of interest in the same sense that the term "land" is used in sec. 5 of the Acquisition Act, which makes "land" include "any estate or interest in land" legal or equitable. In other words, it is a property interest, and not merely a business interest. On the other hand, the contention for the Minister is supported by the House of Lords case of *Commissioners of Inland Revenue v. Glasgow and South-Western Railway Co.* (1), where the judgment of Lord *Halsbury* goes very strongly to show that on a compulsory taking the value of the land, where that term is used in the enabling Statute, is "the value under the circumstances to the person who is compelled to sell," and that "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." Accordingly, in that case, a sum allowed by the jury as compensation for loss of business was held part of the "consideration for the sale" of the premises. That was regarded by the House of Lords as included in the compensation for the land. I am of opinion that the loss of a goodwill must be practically identical with the loss of a business where the goodwill is the subject of compensation within the Statute. It is impossible to compensate a man for the loss of his business without paying him

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(1) 12 App. Cas., 315.



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for the goodwill. *Pile v. Pile* (1) was a case where land had been compulsorily taken by a railway company. Compensation for the taking of the land had been assessed, and awarded by the jury, and it was held that compensation for the goodwill must be considered as included in compensation for the land. The case of *Commissioners of Inland Revenue v. Muller & Co.'s Margarine Ltd.* (2) may also be referred to, especially the judgment of Lord *Halsbury* at p. 239. It was indeed suggested by Mr. *Blacket* that the substitution in the 1910 Act of "the unimproved value of the land" for "the value of the land" in the 1909 Act made the case different; that, while the goodwill is included in the improved value, it was excluded from the unimproved value. I fail to see why that should be so. The goodwill of a business is not necessarily destroyed if the buildings in which it is carried on are destroyed (say) by fire or tempest. There will be a certain loss of trade through the destruction; but if the business at the place is attractive to customers, whose resort to it has given the owner a business connection in respect of it, the goodwill continues to have a saleable value, so that, if the owner sold the bare land the next day, any purchaser would give more for it by reason of the attractiveness and connection mentioned. The same considerations apply where the improvements on the land are excluded from the valuation of the land. Whatever the goodwill is worth to a buyer is not lost to the seller; and in compensation cases it is part of the value to the person who enjoyed it in connection with his land.

I should not omit to point out that compensation is "not to exceed" the unimproved value of the land. But I cannot think that this prohibition of excess in value is intended to make any diminution of the subject matter, which remains the unimproved value of the land with all its potentialities. I therefore answer the questions as follows:—(1) The business and the goodwill attaching to it should be assessed as at 8th October 1908, so far as the goodwill adds value to the land. (2) The costs of this reference to be costs in the cause.

ISAACS AND RICH JJ. If this were an ordinary case of compulsory

(1) 3 Ch. D., 36.

(2) (1901) A.C., 217.



acquisition of land, no difficulty would be presented except one of fact, depending on the particular circumstances. But the proviso to sec. 10 of the *Seat of Government Acceptance Act* 1909 introduces a special provision. It enacts that, in determining the compensation to which the owner of land acquired under that Act is entitled, the value of the land shall be taken *not to exceed* (1) the unimproved value of the land, or the interest of the owner on 8th October 1908, together with (2) the value of his interest in the improvements on the land at the date of the acquisition of the land.

The question we have to answer is whether the value of the business and goodwill of the defendant as licensed victualler upon the land acquired by the Government on 23rd March 1916 should be ascertained as at 1908 or as at 1916. The departure of the statutory rule of compensation from ordinary practice necessitates a short consideration of three matters: (1) the ordinary rule, (2) the nature of improvements, (3) the nature of unimproved value.

The ordinary rule has been repeatedly enunciated, and is thus stated in the latest case dealing with the matter—*Fraser v. City of Fraserville* (1). There Lord Buckmaster, for the Judicial Committee, said: "The value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme" for which the property is compulsorily acquired "being a question of fact for the arbitrator in each case." That is the rule which applies under the *Lands Acquisition Act* 1906, subject to sec. 29 of the Act. Now, sec. 10 of the *Acceptance Act* begins by saying that the provisions of the *Lands Acquisition Act* 1906 shall apply. This brings in the general rule. In working out that general rule, the tribunal would have to apply sub-sec. 2 of sec. 29, which says in statutory language what Lord Buckmaster says is always recognized as a just qualification of compensation in such cases, namely: "The value of the land shall be assessed without reference to any increase in value arising from the proposal to carry out the public purpose."

(1) (1917) A.C., 187, at p. 194.

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Parliament, however, in the Acceptance Act, fixes the scheme, and the method by which it shall be assured that in cases arising under that Act the principle enacted in sub-sec. 2 of sec. 29 of the *Lands Acquisition Act* will be followed. The tribunal, in following this statutory limitation, is relieved from considering any further the question of enhancement by reason of the public purpose. Parliament effects this object by the proviso to sec. 10 of the Acceptance Act, which fixes, not the standard of compensation, but a maximum. The actual compensation may possibly be less than the maximum fixed by the proviso, and, therefore, the proper course is first to inquire what the value of the land is, apart from the proviso, unless, as apparently is the case here, it is common ground between the parties that the ordinary rule would make the value exceed the maximum declared by the proviso.

This case has been conducted on that common ground. We therefore proceed to consider the proviso. It divides the land as acquired into two elements, viz., (a) the land considered as unimproved, and (b) the improvements. No definition is given of "unimproved value," or "value of improvements," applicable specially to this Act, but by the time the Acceptance Act was passed the phrases had acquired a general connotation from their use in connection with Land Taxation Acts. The land is supposed to be cleared of all existing improvements, and its value to the owner in its imaginary bare state is estimated as at the appropriate date, all other conditions remaining. The improvements are to be valued under the proviso at their value to the owner at the appropriate date. Their value is to be taken, however, not as separated but as *in situ*. The value of an hotel considered as an improvement is its value as a structure. Its value does not include the value of the business and goodwill. A building is, of course, indispensable to the business actually carried on upon the land, but not *that* building. If destroyed, it can be replaced, and the same business can proceed, with the same goodwill. The land itself, however, is different. If the goodwill of a business is personal only, it adds nothing to the value of the land. If it is attributable wholly or partly to the land, it *pro tanto* enhances its value, and that value is recoverable, not as goodwill *eo nomine* but



as part of the value of the land. *Cotton L.J.* makes that very clear in *Cooper v. Metropolitan Board of Works* (1). Lord *Lindley* again explains it in *Commissioners of Inland Revenue v. Muller & Co.'s Margarine Ltd.* (2). Although the unimproved value of the land assumes the absence of the improvements, it does not obliterate the fact that the business has been carried on there, and can be carried on there as soon as a suitable building is erected, and that a licence exists permitting that business on that land. These circumstances would be taken into account by a prudent buyer of the land, and he would consider how much of the goodwill was local and how much personal, and the value of the land would be enhanced by the value attached to the local goodwill.

The answer to the first question put should be: Goodwill, so far as it adds value to the unimproved value of the land, should be calculated for the purposes of the proviso as at 8th October 1908. The answer to the second question to be: Costs of reference to be costs in the cause, the Court to have discretion as to them.

*Questions answered thus:—(1) As at 8th October 1908. (2) Costs of reference to be costs in the cause.*

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

Solicitors for the defendant, *Shipway & Berne*.

B. L.

(1) 25 Ch. D., 472, at pp. 479-480.

(2) (1901) A.C., at p. 235.

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