ARBITRATION BETWEEN

TEESDALE SMITH AND ANOTHER

AND

THE MINISTER FOR HOME AND TERRITORIES.

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ADELAIDE, *Aug.* 4, 5, 18-22, 25-29; *Oct.* 6, 7, 9, 10, 13-17, 20-25, 27-29, 1919. *Feb.* 18, 1920.

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Land—Acquisition by Commonwealth—Compensation—Acquisition for railway purposes—Water taken—Value of land—Time for assessment—Basis of valuation—Enhancement—Benefit to adjoining land—Kalgoorlie to Port Augusta Railway Act 1911-1912 (*No.* 7 *of* 1911—*No.* 3 *of* 1912), *sec.* 19—*Lands Acquisition Act* 1906 (*No.* 13 *of* 1906), *secs.* 28, 29, 31—*The Constitution* (63 & 64 *Vict.* c. 12), *sec.* 51 (XXXI.).

Pursuant to the powers conferred by the *Kalgoorlie to Port Augusta Railway Act* 1911-1912 and the *Lands Acquisition Act* 1906 the Commonwealth entered upon certain Crown lands in South Australia which had been leased, and took therefrom large quantities of water for the purposes of the railway.

Held, that the compensation payable to the lessees of the land in respect of the water taken should be based on the value to the lessees, of the water either for use or sale, at the time it was taken, and irrespective of whether they were then using the water, but without regard to the special value of the water to the Commonwealth for the purposes of the railway.

Sec. 19 of the *Kalgoorlie to Port Augusta Railway Act* 1911-1912 gives power to the Commonwealth to acquire lands for the purposes of the railway, and provides that the value of any lands acquired by compulsory process under the *Lands Acquisition Act* 1906 "shall be assessed according to the value of the lands on the nineteenth day of September one thousand nine hundred and eleven."

Held, that, in valuing lands so acquired, the value should be taken as the value at that date with all its advantages and potentialities then existing and without regard to the state of the land at the time of acquisition.

For the purposes of sec. 28 (1) (*a*) of the *Lands Acquisition Act* 1906 the value of land acquired should be taken to be its value to the claimants, that is, what a willing and prudent purchaser would have paid, and a not unwilling

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seller would have accepted, for the land with all its potentialities and advantages, including the use of it and the right to use it for the most advantageous purpose, at the relevant date.

Sec. 28 (1) of the *Lands Acquisition Act* 1906 provides that, in determining the compensation under the Act, regard shall be had to (*inter alia*) "(*c*) the enhancement . . . in value of other land adjoining the land taken or severed therefrom of the person entitled to compensation by reason of the carrying out of the public purpose for which the acquired land was acquired."

Held, that such enhancement is not limited to that which is caused by the acquisition of the land acquired, but includes that which is caused by the carrying out on the acquired land of the public purpose for which it was acquired.

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Henry Teesdale Smith and Simon Matheson were lessees under the *Pastoral Act* 1904 (S.A.) for a term of forty-two years commencing on 19th August 1908 of certain Crown lands in South Australia, about 2,983 square miles in area. Pursuant to the powers contained in the *Kalgoorlie to Port Augusta Railway Act* 1911-1912, the Minister for Home and Territories of the Commonwealth constructed a railway which passed through portion of the land included in the lease. Pursuant to the powers conferred by that Act and the *Lands Acquisition Act* 1906, persons authorized by the Minister on various dates in the year 1915 before 31st July entered upon other portions of the leased land and (*inter alia*) made bores and constructed wells for the purpose of ascertaining the suitability of such land for the public purpose of supplying water for and in connection with the construction and working of the railway, and at the expense of the Commonwealth took from certain wells and bores and used for the purposes of the railway a large quantity of water. On 10th and 31st July 1915 and 6th April 1916 the Commonwealth, under the powers conferred by sec. 15 of the *Lands Acquisition Act*, acquired by compulsory process, for the purposes of the railway, certain portions of the leased land. The lessees made claims against the Commonwealth for compensation under the Acts mentioned, in respect both of the water and of the land taken, their claim in respect of the water amounting to £4,747 14s. 2d. and that in respect of the land taken amounting to £102,934 1s. 7d. The Minister offered the lessees £695 in respect of the former claim and £3,250 in respect

of the latter. These offers the lessees refused, and, the Minister having instituted proceedings in the High Court under sec. 38 of the *Lands Acquisition Act* to determine the claims for compensation, the parties agreed to the claims being determined by the arbitration of a Justice of the High Court. The arbitration was accordingly heard by *Powers* J.

Sir Josiah Symon K.C., *T. Slaney Poole* and *H. Thomas*, for the claimants.

Cleland K.C. and *C. H. Powers*, for the respondent.

Feb. 18.

POWERS J., in delivering the reasons for his award, dealt with the legal questions raised as follows :—

Before referring to my finding of facts on the evidence, I think it best to refer to some at least of the important legal questions raised in the case, and to state my decisions on them.

Question 1.—What should be considered in valuing the water taken by the Government under parliamentary authority, but before the lands were acquired? The first legal question raised was as to how the value of the water taken by the Government before the acquisition was to be ascertained by me—namely, whether the value to the constructing authority was to be the value, or whether the purpose for which it was to be used was to be considered in assessing the value, or whether it was to be the value to the owner of the lands from which the water was taken, apart from any special value to the constructing authority for the public purpose, the railway. The question is very important to both parties—especially to the claimants—because, if I took into consideration the special value of the water to the Government for the purpose of the railway, I would allow far more as compensation than I can do if I assess the value as the value to the owner, apart from that special value. It is admitted by the reference that the taking of the water was duly authorized "pursuant to the powers conferred on the Minister by Parliament," and that "the water was taken for a public purpose for and in connection with the construction and working of the said railway." It was also admitted during the hearing of the case

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that the water was necessary to enable the Minister to construct and maintain the railway. The reference expressly requires me, in determining the amount of compensation to which the claimants are entitled under the first claim, to determine the amount under the principles set forth in sec. 31 of the Commonwealth *Lands Acquisition Act* 1906 [which his Honor read]. I must, therefore, grant by my award full compensation for damage done, including the damage done by the Minister and his officers, temporary or permanent, and the value of the things taken for carrying out the public purpose, but I must also recognize that the acts done were authorized by law.

Counsel for the claimants claimed, at the opening of the case, that the value of the water must be taken to be the value of the water to the Commonwealth (the constructing authority) for the purpose of constructing and maintaining the railway. Counsel, referring to the claim for water taken, said :—" It " (the value) " must include as a factor the value for the purpose for which the Government obtained it. . . . It is not the value of what you take, but the purposes for which it is taken. . . . It would have to be taken into consideration that the thing taken was of great value for the purposes intended and that it could not have been got otherwise." After the case closed counsel for the claimants, in his closing address, did not go quite so far as that, but contended that the value of the water was really fixed by the sale of water to the railway authorities prior to the taking of the water from the wells sunk by the Government ; but counsel also contended that the value of the water to the Government for the purpose of the railway should be considered in ascertaining the value, if it was not determined on the price paid by the Government for other water for the railway. Counsel for the Commonwealth contended that the " value " under the Act must be the value to the claimant as owner of the land, apart from any special value of the water to the constructing authority only for the purpose of the railway (in this case the Commonwealth). Several cases were cited by counsel in support of their respective contentions.

Whether the purpose for which the water was taken must be considered or not in assessing compensation depends on whether

the taking was by a wrongdoer or wilful trespasser, or whether the taking was authorized or in error. The case of *Whitwham* v. *Westminster Brymbo Coal and Coke Co.* (1) was quoted to show that "the purpose for which land was used" ought to be taken into account in this case; but in that case the defendant was a trespasser and a wrongdoer, and the principles of the "way-leaves" cases were applied. Here the Minister acted under parliamentary authority and cannot be treated as a trespasser or wrongdoer. The law in such a case was clearly laid down in the *Countess Ossalinsky Case*, a Queen's Bench case, which is unreported, but the judgment in which is set out in *Browne and Allen's Law of Compensation*, 2nd ed., p. 659. In that case *Grove* J. said, at pp. 662:—"That would be a serious objection to the award, and a fatal one, because, as far as my experience goes, it has been the invariable practice sanctioned by the Courts that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that it is to be excluded from consideration, and the only way it can or ought to be put forward at all is as a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument." The above statement of the law by *Grove* J. has been quoted with approval in subsequent compensation cases. Where the taking is not by a trespasser, but under parliamentary authority, I hold that the value to be ascertained is the value of the water to the owner at the time it was taken (see *In re Lucas and Chesterfield Gas and*

(1) (1896) 2 Ch., 538.

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Water Board (1); *Livingstone* v. *Rawyards Coal Co.* (2); *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste* (3); *Fraser* v. *City of Fraserville* (4)). Every element of value must, however, be taken into consideration so far as it increases the value to the owner. The Court or Arbitrator should also consider the most advantageous use the water taken could be put to by the owner, at the date in question, so far as it would increase the value to the claimants —apart from the value to the constructing authority (*Minister for Home Affairs* v. *Rostron* (5)). In *Livingstone's Case* the value to the owner of coal taken had to be paid, although the land was too small to warrant the owner working the land himself for coal. The coal had a value for sale to the adjoining owners, and had to be paid for. In that case Earl *Cairns* L.C. said (6):—"Of course the value of the coal taken must be the value to the person from whom it was taken. . . . The question is, what may fairly be said to have been the value of the coal to the person from whose property it was taken at the time it was taken." Lord *Hatherley* and Lord *Blackburn*, in separate judgments, concurred in that view.

The value of the water taken in this case, as it was taken from land on which no wells had been sunk by the claimants, could well be taken as what the water was worth to the owner for the most advantageous purpose at the time or for sale, less the cost of obtaining it. See *Eden* v. *North-Eastern Railway Co.* (7). In that case it was held that the compensation payable by a railway company under sec. 78 of the *Railway Clauses Consolidation Act* 1845, in respect of such mines as they require to be left unworked, is the full value of the minerals required to be left unworked, namely, what the *minerals would have sold for if worked, less the cost of working thereof.* Lord *Atkinson* said (8):—"On what principle, then, is compensation to be paid by the railway company? If the minerals had not been leased and had been removed innocently, that is, removed without the commission of any tortious act, the owner would have been entitled to obtain as compensation the value of these

(1) (1909) 1 K.B., 16, at p. 29.
(2) 5 App. Cas., 25.
(3) (1914) A.C., 569.
(4) (1917) A.C., 187.
(5) 18 C.L.R., 634.
(6) 5 App. Cas., at p. 32.
(7) (1907) A.C., 400.
(8) (1907) A.C., at p. 412.

minerals *in situ*. If, as in this case, there be no physical difficulty in the way which would render the working, mining, and raising of them not reasonably practicable, then a fair test of that value would be the price the minerals would fetch as and when won and raised, less the cost of working the mine, winning and raising them." I do not find anything in the circumstances of this case, under this submission or in the authorities quoted, to justify me in valuing the water taken at any sum beyond the value of the water taken to the claimants as lessees of the land from which it was taken at the time it was taken—as lessees exercising their full rights to the use or sale of the water in question whether using it at the time or not—but not including the special value of the water to the constructing authority only for the public purpose, the railway. I propose to act on that finding.

As to the question of assessing damages caused by the Minister before acquisition, no question was raised as to the liability of the Minister to pay full compensation for whatever damage the claimants suffered by or through any of the acts admitted in the reference to have been done by the Minister or his officers.

Question 2.—Should the value of the land in question in this case be assessed according to its value in September 1911 or in the state it was at the time of the acquisition in 1915? The land in question was not acquired until July 1915, and it was contended that, although the *Kalgoorlie to Port Augusta Railway Act* 1911-1912, by sec. 19, declared that "the value of any lands acquired by compulsory process under that Act" (the *Lands Acquisition Act* 1906) "shall be assessed according to the value of the lands on the nineteenth day of September one thousand nine hundred and eleven," I was bound to assess the value of the land as in its 1915 state (*i.e.*, with the well, water and equipment) but according to its 1911 value (*i.e.*, with no additional value owing to the railway proposal). The first and second parts of that contention appear to me to be directly opposed to each other, because the 1915 state of the land, including the wells, proved water supply, &c., was entirely owing to the carrying out of the public purpose, the railway, and the additional value, if any, was entirely caused by the construction of the railway, and necessary work in connection with it, including

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the wells on the land acquired, and at the expense of the Government. [His Honor here read sec. 19.] The question whether I am "to assess the value of the land in its 1915 state immediately before the acquisition" is a very important one for both parties in connection with the claim for the Kingoonya acquisitions, because (1) before the actual acquisition at Kingoonya the Government had spent hundreds, if not thousands, of pounds in boring and sinking wells, and providing pumping machinery, tanks, &c., on the land they proposed to acquire, if water was discovered; those improvements were, as is claimed, at the date of the acquisitions improvements effected while the land was the claimants'—they were, however, effected by the Government under the authority of an Act of Parliament and admittedly, by the submission, for carrying out the public purpose, the railway; (2) if the value is to be the value of the land at the date of acquisition plus improvements made by the Government after 19th September 1911 and before the acquisition, it would include thousands of pounds spent on the lands used for the railway in constructing the railway through the claimants' leasehold lands (including the necessary stations, buildings, works and railway plant), which lands have not yet been acquired by the Government.

Before deciding whether in valuing the land I can consider the facts that the land was so improved before acquisition and was proved in 1915 before acquisition to have an underground water supply, I must decide whether I am to value the land under sec. 19 as of the value on 19th September 1911 (1) in the state it then was with all its existing advantages and its potentialities, or (2) as it was at the date of acquisition, or (3) as it was in 1915 with any increased value proved to have been attached to it in 1915 by the expenditure of Government money expended for the purpose of the railway in 1915 but prior to the actual acquisition.

The evident intention of the section, and of similar sections in other Acts, was to prevent claims on the public funds by owners of land for the increased value which the construction or projected construction of railways generally, or works in connection therewith, usually caused to lands through which a railway is constructed. A similar question, under another Act, was decided in May last by

the High Court (under a somewhat similar clause) in the case of *Minister for Home and Territories* v. *Lazarus* (1). In that case it was held that the goodwill of a hotel attached to, and added to the value of, the land, and that, as the goodwill was attached to the land, the value of the goodwill on 8th October 1908, the date fixed by the Act there in question as that in respect of which the value of the land should be assessed, not the value in March 1916, the date on which the land was acquired by the Commonwealth, was to be the value considered in assessing compensation. Under the Act in question in that case the owner of lands compulsorily acquired was protected to the extent of entitling him to the value of his interest in permanent improvements on the land at the date of the acquisition. No such proviso appears in the *Kalgoorlie to Port Augusta Railway Act* 1911. In *Spencer* v. *The Commonwealth* (2) the statute in question fixed 1st January preceding the acquisition as the date on which the value was to be ascertained. *Isaacs* J., in that case (3), said :—"All circumstances subsequently" (to 1st January 1905) "arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts." All the members of the Court in that case assessed the value as on 1st January 1905, not at the date of acquisition.

It appears to me that the value in this case is not to be the value of the land at the date of the acquisition: sec. 19 was passed to prevent that. It also appears to me equally impossible to assess the value of the land on 19th September 1911 on some fact about it not ascertained until 1915, and then only by increased expenditure for the purpose of the railway. Under sec. 29 of the Commonwealth *Lands Acquisition Act* 1906 I am expressly required to assess the value without any reference to the increase in value arising from the proposal to carry out the public purpose. I hold that I am required under this submission and the *Kalgoorlie to Port Augusta Railway*

(1) 26 C.L.R., 159.
(2) 5 C.L.R., 418.
(3) 5 C.L.R., at p. 440.

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Act to value the land acquired subsequently to September 1911 at its value with all its existing advantages and all its potentialities as on 19th September 1911.

Question 3.—What is the correct method of assessing the "value" of the land under sec. 28 (1) (*a*) of the *Lands Acquisition Act* 1906? The most important legal questions raised have been as to the method or basis upon which I am to determine the value of the land acquired. As I have mentioned, the written consolidated claim was based solely on estimated capitalized expected profits for thirty-three years, principally from land alleged to have been severed by the acquisition from the only valuable underground water supply in that district. The evidence as to value tendered by the claimants at the hearing was chiefly based on estimated capitalized expected profits for ten years assuming the claimants spend £51,000 (not yet expended) on new improvements including the reticulation of Kingoonya block. Counsel for the Commonwealth contended, and I think rightly, that the evidence submitted as to capitalized expected profits could only be taken into consideration by me as an element in assessing compensation, and only to the extent I thought it safe to adopt the evidence as to probable profits.

The real carrying capacity of pastoral country must in all cases be taken into consideration as a very important element in valuing the property. It was held in *Fisher* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (1) that, "in ascertaining the unimproved value of a pastoral property which has been improved and worked for some years, the only practical method in the majority of instances is to begin by finding the fair carrying capacity of the land, taking into consideration all existing improvements." This question of adding expected capitalized profits to the value of the land was fully dealt with by the Privy Council in the case of *Pastoral Finance Association Ltd.* v. *The Minister* (2); in which case Lord *Moulton*, in delivering the judgment of their Lordships, said (3):—"Their Lordships are of opinion that this direction is seriously at fault. That which the appellants were entitled to receive was compensation not for the business profits or savings

(1) 20 C.L.R., 242.
(2) (1914) A.C., 1083.
(3) (1914) A.C., at pp. 1088-1089.

which they expected to make from the use of the land, but for the value of the land to them. 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. Probably the most practical form in which the matter can be put is that 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. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would no doubt reckon out these savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value."

Counsel for the claimants did not, so far as I understood them, abandon the view that I had in some way to consider the purpose for which the land was taken, or the view that the claimants were entitled to have the value to the Government for the public purpose considered by me in assessing the value of the land. I have previously referred to the class of cases in which the purpose for which the land or other property is taken can be taken into consideration; but as the land in this case was compulsorily acquired under parliamentary authority, I hold that the purpose for which it was taken, or the value to the constructing authority, cannot be taken into consideration in assessing the compensation to be paid to the claimants (see cases referred to under Question 1 as to the value of the

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water taken). The judgment in the *Cedar Rapids &c. Co.'s Case* (1) also deals with the question. In that case it was held "that in assessing the compensation payable to the respondents it was not proper to treat the value to the owners of the lands and rights as a proportional part of the value of the realized undertaking which the appellants were proposing to carry out; that the proper basis for compensation was the amount for which the respondents' lands and rights could have been sold had the appellants with their acquired powers not been in existence, but with the possibility that that company or some other company or person might obtain those powers." In arriving at the value of the land I am bound to follow the principles laid down by the Privy Council and by our own High Court of Australia in compulsory acquisition cases.

Lord *Buckmaster*, in delivering the judgment of their Lordships in one of the latest cases dealing with the principles regulating the assessment of compensation where lands are compulsorily acquired, namely, in *Fraser* v. *City of Fraserville* (2), said:—"The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board* (3); *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste* (1), and *Sidney* v. *North-Eastern Railway Co.* (4). The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that 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 being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported." In that case the award in question was set aside because it was based upon the value to the buyer and not to the sellers. Sec. 19 of the *Kalgoorlie to Port Augusta Railway Act* fixes the date in this case on

(1) (1914) A.C., 569.
(2) (1917) A.C., at p. 194.
(3) (1909) 1 K.B., 16.
(4) (1914) 3 K.B., 629.

19th September 1911 instead of "at the time of expropriation." *Fletcher Moulton* L.J., in *Lucas's Case* (1), said :—"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." Lord *Dunedin*, in delivering the judgment of the Court in the *Cedar Rapids &c. Co.'s Case* (2), said :—"For the present purpose it may be sufficient to state two brief propositions :—(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) 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 advantages that falls to be determined." In the House of Lords case of *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.* (3) Lord *Halsbury* referred to the "value" as "the value under the circumstances to the person who is compelled to sell," and said 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." In *Pastoral Finance Association Ltd.* v. *The Minister* (4) it was held that the compensation payable to the owner of land resumed by the Government under the *Public Works Act* 1900 of New South Wales is the amount which a prudent man, in the position of the owner, would have been willing to give rather than fail to obtain it.

(1) (1909) 1 K.B., at p. 29.
(2) (1914) A.C., at p. 576.
(3) 12 App. Cas., 315, at p. 321.
(4) (1914) A.C., 1083.

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In the High Court case of *Spencer* v. *The Commonwealth* (1) it was held that where land is compulsorily acquired, in assessing the value of the land resumed under the Act the basis of valuation should be the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling, but not anxious, to sell. *Griffith* C.J., in his judgment in the case, said (2) :—" It may be that the land is fit for many purposes, and will in all probability be soon required for some of them, but there may be no one actually willing at the moment to buy it at any price. Still it does not follow that the land has no value. . . . The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together." *Barton* J. said (3) : " A claimant is entitled to have for his land what it is worth to a man of ordinary prudence and foresight, not holding his land for merely speculative purposes, nor, on the other hand, anxious to sell for any compelling or private reason, but willing to sell as a business man would be to another such person, both of them alike uninfluenced by any consideration of sentiment or need." *Isaacs* J. (4) refers to the value as the fair price of the land which a hypothetical prudent purchaser would entertain if he desired to purchase it for the most advantageous purpose for which it was adapted, and says :—" To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the

(1) 5 C.L.R., 418.
(2) 5 C.L.R., at p. 432.
(3) 5 C.L.R., at p. 436.
(4) 5 C.L.R., at pp. 440-441.

then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property." See also *Minister for Home Affairs* v. *Rostron* (1); in which case *Spencer's Case* (2) was applied, and it was held that, "in determining the amount of compensation payable under the *Lands Acquisition Act* 1906, the Court should consider the most advantageous purpose for which the land was adapted at the date in question in so far as such purpose would increase its value to the claimant, and assess the compensation on that basis."

It was contended that the fact that the land or water was not put to any or the best possible use by the claimants at the time it was taken or acquired must not in itself be considered in assessing the value. I hold that that contention is correct. In *Trent-Stoughton* v. *Barbados Water Supply Co.* (3) certain streams of water had been extracted from the appellant's property by a water company acting under the *Water Supply Act* 1886, and it was held "that the compensation due to the appellant included the value of his proprietary interest therein, and was not limited to the amount of pecuniary benefits obtained by past user thereof in disregard of possible benefits in the future." Lord *Halsbury*, in delivering the judgments of their Lordships, said (4):—"Their Lordships are of opinion that the question was, what was the value of the interest of the appellant in the streams, it being conceded that in the exercise by the respondent of the powers conferred upon it by the Act, those streams had been abstracted, and that the appellant had been deprived of the power of exercising the rights which he had up to that time possessed in respect of them. That is 'damage or loss' within the meaning of the Act. Though he never had up to that time obtained one farthing for the use of the streams, and might never have made any use of them, nevertheless, the damage or loss which he sustained was, that he was deprived of the power of using the property which was his."

I propose in deciding upon "the value" to follow the principles

(1) 18 C.L.R., 634.
(2) 5 C.L.R., 418.
(3) (1893) A.C., 502.
(4) (1893) A.C., at p. 504.

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Powers J.

referred to in the cases mentioned, and to consider the value of the land to the claimants, and what a willing and prudent purchaser would have paid, and a not unwilling seller would have accepted, for the land acquired with all its potentialities and its existing advantages including the use of it and the right to use it for the most advantageous purpose on 19th September 1911; subject in this case to the fact that the claimants are lessees only and claim only as lessees.

Question 4.—Is the enhancement referred to in the reference, and in sec. 28 (1) (*c*) of the *Lands Acquisition Act* 1906, to be determined in this case by the enhancement caused only by the acquisitions in question, or by the enhancement caused by the construction and use of the railway including the works carried out on the lands in question? Under the submission I have to determine the compensation in accordance with the principles set forth in secs. 28 and 29 of the Commonwealth *Lands Acquisition Act* 1906 and sec. 19 of the *Kalgoorlie to Port Augusta Railway Act* 1911-1912.

Claimants' counsel contended that I cannot find any enhancement in value of the other lands of the claimants by the acquisitions in question. The lands on which the railway has been constructed have not yet been acquired. It is contended that the taking of the land for water for the railway construction cannot in itself possibly enhance the value of the rest of the land. The Government's answers to that are (1) that the acquisition of the land and discovery of a permanent and large supply of water on the land by wells and boring did enhance the value of the adjoining lands; and (2) that the parties have agreed by the submission that I am to determine the compensation in accordance with the principles set forth in secs. 28 and 29 of the *Lands Acquisition Act* 1906, and that sec. 28 provides that I am to set off the amount by which I find that the other land of the claimants adjoining the land taken are enhanced "by reason of the carrying out of the public purpose for which the acquired land was acquired"; not the enhancement caused only by acquiring any particular piece of land. It is also admitted by the parties in the submission that the acquisition and all other acts complained of were authorized and were for "the public purpose" of the said railway.

In *Harding* v. *Board of Land and Works* (1) it was held that the "enhancement in value" (under the Victorian Act in question) "includes that which arises from the use as well as the construction of the railway." In the Commonwealth Act the words used are "by reason of carrying out the public purpose." In that case the Privy Council held that the enhancement would only be set off against the damages sustained and not against the value of the land taken, but the Commonwealth Act expressly provides that it must be set off against both the value and damages. I hold that I am required to find to what extent the rest of the adjoining lands of the claimants is enhanced in value by reason of carrying out the public purpose for which the land in question was acquired, namely, for the construction and use of a railway from Port Augusta to Kalgoorlie.

Counsel for the claimants also during the case claimed that as the Constitution only gave the Commonwealth power to compulsorily acquire land "on just terms" (sec. 51 (XXXI.)) it was not within the power of Parliament to authorize the Commonwealth to take lands without paying for them even if a railway did enhance the value of other lands adjoining owned by a claimant to an extent exceeding the value of the lands taken. As arbitrator I cannot assume that an Act is unconstitutional or declare it to be so; and in this case I cannot regard the section as unjust, because by the reference both parties have compelled me in assessing compensation to do so on the principles laid down in sec. 28, which declares that the enhancement *shall* be set off against the value of the lands taken.

Under the reference it was provided that the arbitrator might at any stage of the proceedings, or in and by his award, and should, if so directed by the High Court of Australia, state in the form of a special case for the opinion of the said Court any question of law arising in the course of the reference. I have not been directed by the High Court to state any special case, nor have I been requested by the parties to state any special case. As no request has been made to me to state a case, and the legal questions have been ably

(1) 11 App. Cas., 208.

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and fully argued by counsel for both parties, I do not propose to put the parties to the expense of a special case.

[His Honor then dealt with the facts of the case and awarded to the claimants £945 in respect of the water taken, and in addition the value of the land taken.]

Solicitors for the claimants, *Symon, Browne, Symon & Povey.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

W. & A. McARTHUR LIMITED . . . PLAINTIFF;

AGAINST

THE STATE OF QUEENSLAND AND OTHERS DEFENDANTS.

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MELBOURNE, *Oct.* 5-8, 11-14.

SYDNEY, *Nov.* 29.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Constitutional Law—Powers of Parliament of State—Freedom of inter-State trade and commerce—Validity of State legislation—Prohibition of sales of goods above certain price—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), 92—*Profiteering Prevention Act* 1920 (*Qd.*) (10 *Geo. V. No.* 33), *secs.* 3, 12.

The *Profiteering Prevention Act of* 1920 (Qd.) provides, by sec. 12 (1), that it shall be unlawful for any trader whether as principal or agent to sell or agree to sell or offer for sale any commodity at a price higher than a price declared in the Queensland *Government Gazette*; and, by sec. 3, defines "trader" as including "the agent" of any person carrying on the business of selling any commodities.

The plaintiff, a Sydney company, had its travellers in Queensland, and they sold calicoes, &c., at a price higher than the declared price for delivery in Queensland.

Held, by *Knox* C.J., *Isaacs, Higgins, Rich* and *Starke* JJ. (*Gavan Duffy* J. dissenting), that so far as regards the sales by the travellers of goods stipulated