[HIGH COURT OF AUSTRALIA.]

HAZELDELL LIMITED . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMONWEALTH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 5-8, 11, 12, 20.

Isaacs A.C.J., Gavan Duffy. nd Starke JJ.

Land—Acquisition by Commonwealth—Compensation—Value of land—Basis of valuation—Determination by Judge of Supreme Court of New South Wales—Verdict—Appeal to Supreme Court—Appeal to High Court—Power of Court on appeal—Lands Acquisition Act 1906 (*No.* 13 *of* 1906), *secs.* 29, 37—*Supreme Court Procedure Act* 1900 (*N.S.W.*) (*No.* 49), *secs.* 5, 7.

A piece of land, 56 acres in extent, about thirty miles from the site of the Federal Capital and containing a large deposit of limestone, was acquired by the Commonwealth from the appellant pursuant to the *Lands Acquisition Act* 1906. The piece of land was portion of 4,130 acres which the appellant had bought for £10,000 about two years before its acquisition by the Commonwealth, and the unimproved value of which the appellant had shortly afterwards returned for land tax purposes at £1 per acre. The Commonwealth offered £1,200 compensation for the 56 acres, but the appellant asked for £100,000. On the hearing before a Judge of the Supreme Court of New South Wales of an action for compensation under sec. 37 of the Act, evidence was given to the effect that, if a capital of about £100,000 were expended in providing the necessary plant and power for manufacturing cement on the land, a profit might be made from the sale of cement which would make a purchase of the land for a sum very much larger than that offered by the Commonwealth profitable.

Held, by *Isaacs* A.C.J. and *Gavan Duffy* J. (*Starke* J. dissenting), that, on the evidence, a finding that the value of the land was £12,500 was not unreasonable.

Quœre, by *Isaacs* A.C.J., whether, on the hearing by a Judge of the Supreme Court of New South Wales of a claim for compensation under sec. 37 of the *Lands Acquisition Act* 1906, the determination by the Judge of the value of the land acquired is not subject to an appeal direct to the High Court and whether upon such an appeal the High Court has not power to do what the Judge might have done.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

APPEAL from the Supreme Court of New South Wales.

On 10th April 1915 the Commonwealth, pursuant to the *Lands Acquisition Act* 1906, acquired 56 acres of land situated in the Parish of Fairy Meadow, County of Murray, in New South Wales, of which Hazeldell Ltd. was the owner. In the notice of acquisition the purpose for which the land was acquired was stated to be "obtaining material for use in connection with buildings to be erected for the Commonwealth in the Federal Territory and other places." Hazeldell Ltd. claimed as compensation £100,000 for the loss of its interest in the land and £600 for damages caused by reason of severance and otherwise. The Commonwealth offered the Company £1,200 in satisfaction of its claim, and this offer was refused. The Company then brought an action in the Supreme Court of New South Wales pursuant to sec. 37 of the Act to recover £100,000 as compensation, alleging that the land acquired was largely composed of rich and extensive deposits and formations of limestone and shale. The Commonwealth by its plea alleged that the sum offered by it exceeded or was equal to the compensation to which the Company was entitled. The action was heard by *Ferguson* J., who ruled that the Company was not entitled to recover the value of the deposit of limestone in the land; and a verdict was entered for the Company for £1,200. On application by the Company to the Full Court a new trial was ordered: *Hazeldell Ltd.* v. *Commonwealth* (1). On appeal to the High Court the decision of the Supreme Court was affirmed: *Commonwealth* v. *Hazeldell Ltd.* (2); and an appeal from the decision of the High Court to the Privy Council was dismissed: *Commonwealth* v. *Hazeldell Ltd.* (3). The new trial which was ordered took place before *Ralston*

(1) (1918) 18 S.R. (N.S.W.) 342.
(2) (1918) 25 C.L.R. 552.
(3) (1921) 2 A.C. 373; 29 C.L.R. 448.

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A.J., who found a verdict for the Company for £12,500. The Commonwealth then by motion to the Full Court sought an order to set aside the verdict and enter a verdict for £1,200 or such other sum as the Company was entitled to, or in the alternative to grant a new trial. On the hearing of the motion the Full Court made an order setting aside the verdict and ordering a new trial.

From that decision the Company now, by leave, appealed to the High Court.

The other material facts sufficiently appear in the judgments hereunder.

Brissenden K.C. (with him *J. A. Ferguson* and *Halse Rogers*), for the appellant. There was ample evidence to support the valuation found by *Ralston* A.J., even if he took into consideration some elements which he should not (see *Federal Commissioner of Land Tax* v. *Duncan* (1)). The profits which would have been made by a hypothetical purchaser out of the land are a sufficient guide for determining the value of the land (*Rugby Portland Cement Co.* v. *London and North-Western Railway Co.* (2)).

Lamb K.C. (with him *Alec Thomson* K.C. and *Bowie Wilson*), for the respondent. There was no evidence upon which a Judge could properly find that the value of the land was greater than the sum offered by the Commonwealth. The value to the Commonwealth is not a matter which can be taken into consideration (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3) ; *In re Lucas and Chesterfield Gas and Water Board* (4)). The issue in this action was whether the sum offered by the Commonwealth was sufficient, and the facts establish that it was (*Spencer* v. *Commonwealth* (5)). This Court should itself determine the value of the land and enter the verdict which should have been entered (see *Commissioner of Land Tax* v. *Nathan* (6) ; *London Bank of Australia Ltd.* v. *Kendall* (7) ; *Heyden* v. *Lillis* (8) ; *Supreme Court Procedure Act* 1900 (N.S.W.), secs. 5, 7). If an appeal lay direct from the decision of *Ralston* A.J.

(1) (1915) 19 C.L.R. 551, at p. 553.
(2) (1908) 2 K.B. 606, at p. 609.
(3) (1914) A.C. 569.
(4) (1908) 1 K.B. 571 ; (1909) 1 K.B. 16.
(5) (1907) 5 C.L.R. 418, at pp. 429, 437, 442.
(6) (1913) 16 C.L.R. 654.
(7) (1920) 28 C.L.R. 401, at p. 406.
(8) (1907) 4 C.L.R. 1223.

to this Court and if the Full Court of the Supreme Court had no jurisdiction to entertain the appeal, this Court should now grant special leave to appeal. [Counsel also referred to *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (1); *Rofe* v. *Fuller's Theatres and Vaudeville Ltd.* [*No.* 2] (2); *Commonwealth* v. *Brisbane Milling Co.* (3); *Minister for Home and Territories* v. *Lazarus* (4); *Nash* v. *Rochford Rural District Council* (5); *McClintock* v. *Union Bank of Australia Ltd.* (6).]

Brissenden K.C., in reply. The only way in which an action for compensation under sec. 37 of the *Lands Acquisition Act* 1906 can be heard in the Supreme Court of New South Wales is by a Judge sitting at *nisi prius*, who is not the Supreme Court. His determination is a verdict (see sec. 5 of the *Supreme Court Procedure Act* 1900), and the only remedy for a party who is dissatisfied is a motion to the Full Court for a new trial. By sec. 37 of the *Lands Acquisition Act* it was intended to leave the existing procedure of the Supreme Court of New South Wales unaltered, except that the value was to be found by a Judge and not a jury. [Counsel referred to *Ripley* v. *Great Northern Railway Co.* (7); *Scottish Halls Ltd.* v. *The Minister* (8); *Pastoral Finance Association* v. *The Minister* (9); *Brown* v. *Commissioner for Railways* (10).]

Cur. adv. vult.

Aug. 20.

The following written judgments were delivered :—

ISAACS A.C.J. This case comes to us on appeal from the judgment of the Full Court of New South Wales pronounced on 17th December 1923. By that judgment it was ordered that "the verdict," as it is called, of *Ralston* A.J. of 14th May 1923, should be set aside, and a "new trial for the assessment of the compensation should be had between the parties."

When the circumstances of this case are examined, it will be seen how nearly it has come to be a startling example of protracted

(1) (1920) A.C. 683, at p. 688.
(2) (1922) 22 S.R. (N.S.W.) 387, at p. 402.
(3) (1916) 21 C.L.R. 559.
(4) (1919) 26 C.L.R. 159, at p. 165.
(5) (1917) 1 K.B. 384, at p. 393.
(6) (1920) 20 S.R. (N.S.W.) 494.
(7) (1875) L.R. 10 Ch. 435.
(8) (1915) 15 S.R. (N.S.W.) 81.
(9) (1914) A.C. 1083.
(10) (1890) 15 App. Cas. 240.

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litigation, and how it has actually come to be a case where no final Court of appeal can pronounce its own judgment on the merits. That is not by reason of any fault of the parties, who are bound by an archaic legal survival that still exists in New South Wales though abandoned for over forty years, as unsuited to a progressive social system, in England and Ireland and soon afterwards in every other Australian State. Nor, needless to say, can it in any measure be attributed to the judicial tribunals of the country, which have merely to administer justice in accordance with established law. True, the Parliament of the State, if it thought such a step to the public advantage, might in twenty-four hours, and without any alteration of its general system of legal procedure, afford partial but considerable relief and permit suitors, as for instance business men, who agree to leave decisions of fact to the Court instead of to a jury, to get a speedier, simpler and cheaper disposal of their litigation. True, also, that in Federal matters the Commonwealth Parliament might, if such were its legislative will, with equal celerity make perfectly clear its freedom from this antique and cumbersome system, and place its litigation in New South Wales on as modern a basis as is the case in every other State of the Commonwealth.

These observations as to the condition of the law are directly called for by the necessities of the present case. The very first duty of any Court, in approaching a cause before it, is to consider its jurisdiction. And so we have to consider at the threshold what is our jurisdiction? Is it simply to decide whether the finding of *Ralston* A.J. is to stand or fall, and, if to fall, then to permit the direction of the Supreme Court for a new trial with all the usual possible consequences; or, in the event of the decision of *Ralston* A.J. being unsustainable, is it within our power and our duty to end the litigation at once by determining the value of the land, first placing the procedure in order by giving formal leave to appeal? In any other State the latter course would be, without question, the legal and proper one to take. Is it so here? The Supreme Court thought itself bound to follow the former course. If that were compulsory on the Supreme Court, it is compulsory on us, because we have no power to do anything the Supreme Court could not have done. The difficulty arises out of the New South Wales *Supreme*

Court Procedure Act 1900 (No. 49), on which the order of the Supreme Court now under appeal is founded. What in that order is called "the verdict" of the learned Judge of first instance was his formal judicial decision, his determination that the fair amount of compensation payable by the Commonwealth to the Company for the 56 acres of land was £12,500. On the circumstance that the Act calls that decision a "verdict" instead of a "judgment" —the merest verbal technicality—hangs the necessity for trial after trial, costs heaped on costs, the inability of the assembled Judges of the Full Court of New South Wales to do in the simplest mercantile case what one Judge of first instance can do under the Act when sitting alone, namely, form an independent opinion upon a matter of fact. On that too depends the power of this Court on appeal, and even of the Privy Council on appeal, should it go so far, to terminate the litigation, by an independent finding. That is to say, the combined Bench of New South Wales in Banco may, by an order for a new trial, empower one of their number to find the facts after a further expenditure of public and private time and money, and waste of judicial energy, but, though both parties have agreed to dispense with a jury, they cannot do it themselves at once, even where all the materials are collected at huge expense and trouble and are open before them. The latter course is that which could and would be adopted in every other State, and so also in New South Wales if this action had been originally instituted in this Court instead of the Supreme Court of New South Wales. That might afford a means of relief to the claimant, but if he chose to proceed in the State Court the Commonwealth would, in the absence of further legislation, be in the same position as it is in the present case.

The effect of the New South Wales *Supreme Court Procedure Act* 1900 (No. 49), must be stated somewhat more precisely. It was passed in 1900, but was based on sec. 1 of an English Act, 17 & 18 Vict. c. 125, which was passed in 1854, and in respects material to this case was already repealed several years before 1900. Though in each Act, English and State, a Judge is said to give a "verdict," it must be noted that Sir *James Martin* C.J. in 1880 pointed out

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(*Rawnsley* v. *Hay Municipality* (1)) that the position of a Judge trying issues in New South Wales is altogether different from that of a Judge at *nisi prius* in England. There he is a mere Commissioner, and need not be a Judge of the Court in which the action is brought. Sir *James Martin's* view was affirmed by this Court in *McLaughlin* v. *Fosbery* (2), restated in *Maiden* v. *Maiden* (3). Apart from that enactment of 1900, issues of fact in common law actions and assessments of compensation are tried in State matters by a Judge with a jury. But that Act, by way of exception, enables a Judge by consent of both parties to try the facts and decide them. But here arises the point: his decision is by the Act called a "verdict" or "finding" and is declared to "be of the like force and effect in all respects as the verdict or finding of a jury." That means that, among other effects, the trial Judge, even though both parties agree to dispense with a jury and leave the Judge to decide the whole case, cannot, as any Supreme Court Judge elsewhere in Australia can, give a "judgment." He can only do what a jury could do—give a "verdict." If his decision is challenged, the Full Court can uphold it as not erroneous in law, or can set it aside as erroneous in law, or can, if, as a matter of law, a party was entitled to a nonsuit or a verdict, direct that to be entered. This latter additional power (sec. 7) is necessary where leave is not reserved (see *Chitty's Archbold's Practice*, 12th ed., vol. I., p. 445, and vol. II., p. 1530). The one Judge is therefore entrusted with the power of finding upon the facts. Let me reiterate this: the whole Supreme Court Bench, sitting solemnly in Banco, are denied that power. They may set aside the finding of the primary Judge as wrong in law, they may direct one of their number to sit alone and commence the whole proceedings *de novo* and decide upon the facts again; but the one course that a reasonable man would think obvious, where the materials are present, the law prevents them from taking, namely, to say what appears to them to be the proper conclusion upon the facts. If this case, therefore, is properly governed by the New South Wales Act No. 49 of 1900, the Supreme Court, inasmuch as it considered the assessment unsustainable in law, rightly applied

(1) (1880) 1 N.S.W.L.R. 346. (2) (1904) 1 C.L.R. 546, at pp. 568, 569.
(3) (1908-09) 7 C.L.R. 727, at p. 734.

the statute by directing a new trial. And on the same basis, the Full Bench of this Court could do no more, because our power is simply to do what the Supreme Court ought to have done. That such a course may be lamentable for all concerned cannot well be doubted.

It may be conducive to the public interest if I state the course the proceedings have so far taken. This action was commenced as long ago as 1916. The declaration was dated 4th October 1916. Issue was joined on 27th October 1916. The case then awaited trial. To-day, in August 1924, nearly eight years afterwards, the case is still awaiting trial, unless we can dispose of it. In the meantime, there was a trial before *Ferguson* J.; a motion for a new trial to the Full Supreme Court (1), which directed a new trial; an appeal to this Court in 1918 (2), affirming the order for a new trial; and then an appeal to the Privy Council (3), upholding the judgment of this Court: the Privy Council decision was given in July 1921, and the retrial began before *Ralston* A.J. on 12th March 1923 and occupied his Honor about twenty sitting days in Court, besides the personal visits the learned Judge paid to various places in New South Wales. The formal transcript of the proceedings, evidence and exhibits contains 546 pages of printed matter, besides hundreds of pages of other voluminous printed documents, which have not been incorporated in the main volume, but which are equally part of the proceedings. Supposing the decision of *Ralston* A.J. unsustainable, are we simply compelled to affirm the order of the Supreme Court, which on the view presented was the only order it could make, and must we allow this huge ball of litigation once more to go spinning on its apparently interminable course of doubt, delay and expense? If that is correct, then it means another protracted and costly trial—the third; probably another motion for a new trial—the third; possibly another order for a new trial—the fourth; with another appeal to this Court. In every other State of Australia such a legal calamity is amply provided against. Where a jury gives a verdict, the Judge representing the Court may give a formal

(1) (1918) 18 S.R. (N.S.W.) 342. (2) (1918) 25 C.L.R. 552.
(3) (1921) 2 A.C. 373; 29 C.L.R. 448.

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judgment at once, leaving the unsuccessful party to move the appellate Court for a new trial or judgment. If the case is tried without a jury, the Judge gives judgment, with a full right of appeal to the Full Court, that tribunal having the same power to deal with facts as the primary Judge had.

The crucial point for us on this appeal is: has the Commonwealth Parliament in Australian affairs also tied itself down to the ancient procedure where the land is in New South Wales, unless the action is instituted in the High Court itself? If this problem arose now for the first time, I should hesitate long before so holding. I should feel myself greatly pressed to hold that, when the Commonwealth Act is read as a whole, the "Court," as a Court, is empowered, in accordance with the modern general system, to "hear and determine" at the trial what is the proper amount of compensation to be paid, and that what one State Judge is entrusted to do this High Court of three Justices is equally entrusted to do on appeal direct from that Judge. I should have felt strongly the force of the view that the provision that the action should be "heard and determined" in the same manner as ordinary actions meant that the trial should be conducted from beginning to end in the same manner, subject to the special provisions stated, and that the provision leaving costs in the discretion of the Court indicated that the tribunal which heard the case was the tribunal to exercise discretion as to costs, and, as costs necessarily follow the judgment, that that tribunal was the one to pronounce what is to be regarded in law as the judgment. There are other reasons apparent on the face of the Act, most of which I stated during the argument. But I am compelled to observe what has already been done in this case. The Full Court set aside the finding of *Ferguson* J. on the first trial, and ordered a new trial; this Court on appeal held that decision was correct, and the Privy Council affirmed the judgment of this Court. True, the point was not raised before this Court on that occasion, and nothing was said respecting it either in the High Court or in the Privy Council. But the former judgment of this Court involves the necessary implication that the Supreme Court rightly applied the *Supreme Court Procedure Act* 1900 to this action. It is by virtue

of that judgment, affirmed by the Judicial Committee, that the decision of *Ralston* A.J. came into existence, and that decision is unquestionably to be taken as made with full jurisdiction. I therefore, on full consideration, feel bound to hold that the rest of the procedure must be taken to be as before, and that we have only the same power on appeal as the Supreme Court has in ordinary cases of new trial motion. I do so, not on the strict ground of *res judicata*, which technically has reference only to a decision in another suit, and not to a decision in a former stage of the same suit; but on the general principle of law that, if such a decision were not binding at a later stage, there would be no end of litigation (see *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (1)). There is an additional reason for taking this course, if that were needed. Learned counsel for the Commonwealth in assisting the Court to interpret the Commonwealth Act took the same view. True, they also urged, on the strength of *Kendall's Case* (2), that we could appraise the facts for ourselves and assess the compensation. That course is not warranted. In *Kendall's Case* the point at issue was really one of mixed law and fact, namely, whether in the circumstances sec. 88 of the *Bills of Exchange Act* afforded protection to the bank. Certainly the Court in that case, in its anxiety to avoid the catastrophe of another trial, went as far as it was possible to go consistently with sec. 7 of the *Supreme Court Procedure Act* 1900. It treated the question then before it as one of mixed law and fact, just as the workmen's compensation cases in England are treated by the House of Lords (see *Halsbury's Laws of England*, vol. xx., par. 566). That case, therefore, cannot be taken as an authority justifying us in determining this appeal on a pure question of fact. The exercise of general appellate power in such a case would openly violate the *Supreme Court Procedure Act* 1900. We have therefore to treat this as if the finding of *Ralston* A.J. were a "verdict" or a finding by a jury. That prevents this Court from exercising its ordinary appellate power by which, in the case of every State but New South Wales, we could terminate this litigation forthwith. Being technically a "verdict," though substantially a "judgment,"

(1) (1883) L.R. 11 Ind. App. 37, at pp. 41, 42.

(2) (1920) 28 C.L.R. 401.

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the decisions of this Court establish that our full appellate power cannot be so exercised (*R.* v. *Snow* (1); *Brisbane Milling Co.'s Case* (2)).

Reading the evidence for the permitted purpose—stated specifically in *Middleton* v. *Melbourne Tramway and Omnibus Co.* (3)—I am unable to say that *Ralston* A.J. came to a conclusion which no jury could reasonably come to. The value of land, where there is no market price, is always a matter of opinion. Opinion is largely dependent on the personal equation. We visualize the hard-headed business man desiring the land for the most advantageous use to which it can be put—excluding, of course, in obedience to the statute and the just principle of the thing, the added value by reason of the actual proposal for which it has been acquired. We have to estimate the value of the land as on 1st January 1915, and for that reason, as well as the express command of sec. 29, apart from the actual proposal, namely, the supply by the Government itself of cement from the limestone in the land. But the hard-headed business man visualized is by inescapable necessity to a great extent the creation of each individual who forms an opinion. Theroretically we say "What would I think if I were in his place?"—practically it is "What would he think if he were in my place?" And so the range of deviation is wide. That is so even where the factors relevant to value are comparatively ordinary and stable and open to tests competitive and otherwise.

In this case some of the most important elements were yet non-existent—such as the growth of the Capital, the increase of population there, the probable requirements of the people in the shape of buildings, the length of time during which the Commonwealth will absorb 50,000 or 60,000 barrels a year, and so on, railway communication and shipping facilities. *Ralston* A.J. discarded the larger scheme of a company to be formed on the basis of supplying all New South Wales with a sort of advantageous foothold in the Federal Territory. His conclusion as to this is inalterable. But there remain many considerations of more limited scope accepted by him and not open to the same objections. On the more limited area of

(1) (1915) 20 C.L.R. 315.
(2) (1916) 21 C.L.R. 559.
(3) (1913) 16 C.L.R. 572.

Federal Territory his Honor founded his reasoning and his conclusion. I am quite unable to concur in the criticism as to his methods which commended themselves to the Full Court. When the reasons as given by *Ralston* A.J. are read as a whole, it appears that he first found the entire suitability in every way of the land in question to supply the necessary commodity of cement to the Federal area. Then he found that on the whole the only two possibly competing sites, Michelago and Marulan, were naturally, topographically and commercially inferior. We know also that the Michelago deposit, besides being inferior, is situated on private land and subject, as to mining for minerals, to the provisions of the *Mining Act*, as construed by the Privy Council (1); so that the property in that case is much less simple and certain in character for the purposes of private acquisition and valuation than Fairy Meadows. Marulan, besides being inferior, is a Crown reservation for public purposes, and there is nothing to show that the State would voluntarily part with it. The value of Fairy Meadows, therefore, cannot be simply discounted by the presence of either Michelago or Marulan on an even footing. The learned Judge then turned his mind more particularly to the adaptability of the area for cement manufacturing. He took into consideration the Kandos Cement Co.'s undertaking, but only after stripping it of irrelevancies; and, finally, he says: "It appears to me that all these matters of suitability, of royalty paid or of profit made on working limestone deposits for commercial purposes of any kind, including cement making, would be considered by a buyer and seller willing to do business on 1st January 1915; and, placing myself in the position of such a purchaser, I consider the fair and reasonable value on the date in question to be £12,500." Now, why could not a prospective buyer, then endeavouring to appraise the future in order to put a money value on the potentialities of this piece of land, arrive at £12,500, without being open to the charge of having passed the bounds of reason? The Crown gave no evidence as to what estimate of value such a hypothetical person would put upon the land. True, the land tax return of the claimant showed £1 per acre as the value all round. But on the other hand the Crown valued the land at £1,200 at a time when the claimant's

(1) (1921) 2 A.C., at p. 382; 29 C.L.R., at p. 456.

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right to the limestone was not admitted; and, further, at the trial before *Ferguson* J. the verdict, on the basis of his Honor's ruling that the limestone could not be included, was by consent, taken at £1,200. Let these circumstances cancel each other, and look at the affirmative evidence on the limestone basis.

On 1st January 1915 the hypothetical prospective buyer would know that there were in this land within thirty miles of the Capital somewhere about 6,000,000 tons of good quality limestone with shale reasonably near, and a good water supply, a short distance for a railway to the main line, and a good prospect of a railway to the coast. There was a practical certainty of the Commonwealth requiring 10,000 tons of cement per annum for several years, and a fair probability of a considerable population in the Federal Territory requiring cement also. There were advantages and disadvantages, compared with outside cement works, but certain important broad facts presented themselves. There was a great, constant and growing demand for cement in New South Wales, a demand that was not overtaken by the supply. Prices had gone up, and, though production was slightly diminishing, the evidence is that the works were producing all they could. Prices may or may not have been the result of a combine, but the fact is they were up and stayed up; the Necessary Commodities Board had fixed the price at 108s. a ton, and the lowest price at which the Commonwealth could, as a favoured customer, get cement at Canberra was 14s. 9d. a cask. There is evidence that, for a production of 100,000 casks a year, the average cost to the manufacturer would be about 8s. 3d. a cask at the factory with 7d. additional for transport to Canberra. True, the evidence seems to show that 120,000 casks would be the lowest profitable output. That would, of course, reduce the average cost, but, as there is no direct evidence what that would be, Dr. *Brissenden* accepted the average cost on the 100,000 cask basis. To that the prospective buyer must add something for interest on capital cost of land and depreciation, and, after a not illiberal allowance, something over 1s. a cask is to be added to the 8s. 3d., say 9s. 6d. in all, if £12,500 be taken as the cost of the land. Having regard to the possible demand, the chances of other supplies competing, the chances of some enterprising manufacturer stepping in and offering

a royalty, or alternatively the chances of profit direct, I find it impossible to say that a tribunal, after carefully weighing the evidence, visiting the locality, and estimating potentialities as best one could, passes the bounds of reason in fixing on £12,500. It is not for me to say what I would name as in my opinion the just and fair sum. That is not, as I conceive, in the existing state of the law, my province. I have only to say whether the frontiers of reason have been transgressed. In this debatable region, where so much was new, where so much was prophetic only, nothing but the broad axe can serve to clear the way. To my mind, there is no legal warrant for disturbing the conclusion so carefully and laboriously arrived at, on an immense mass of material aided by personal inspection, by the tribunal entrusted by law to determine the matter.

The appeal ought therefore, in my opinion, to be allowed, and the verdict of *Ralston* A.J. restored.

GAVAN DUFFY J. I agree to the form of order proposed by my brother *Isaacs*.

STARKE J. The sum of £12,500, awarded in this case as compensation to Hazeldell Ltd. for the land acquired from it by the Commonwealth is, in my opinion, excessive, and such that no Judge or jury could reasonably give. Consequently I am for affirming the decision of the Supreme Court. The value of the land must in this case be ascertained as of 1st January 1915. A detailed examination of the facts would serve no useful purpose. But the outstanding facts are that the Company, in July 1913, acquired 4,130 acres, including the 56 acres the subject of the claim for compensation, for £10,000, and that £12,000 was returned by the Company as the improved value of the whole 4,130 acres for land tax purposes in December 1914 and again in August 1915. Since then it has been discovered that the special adaptability of 56 acres of this land for a limestone quarry in connection with the construction of the Federal Capital made its value, on 1st January 1915, £100,000 according to the claim made by the Company, and £12,500 according to the award given in the case. And to support the award reference

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was made to evidence showing that the land might be worked as a limestone quarry with substantially only local trade about the Federal Capital Territory, if some £90,000 to £100,000 capital were expended in buying the land and in providing the necessary plant and power. Even so, a return of about thirteen per centum was all that could be estimated on this great outlay—omitting, I observe, many charges on the profits which would necessarily be incurred. A sum of £12,500 assessed on such a basis as this is beyond what any reasonable or prudent man would give for the property and wholly beyond what any reasonable Judge or jury ought to give. The evidence as to royalties is equally unconvincing, but the Full Court has sufficiently dealt with this matter.

I therefore record my dissent from the judgment of this Court.

Appeal allowed with costs. Order of Full Court set aside with costs. Verdict of Ralston A.J. restored.

Solicitors for the appellant, *Parish & Stephen.*

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

B. L.