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Acquisition of land—Compensation—Land used for agricultural purposes—Ripe for building—Compensation awarded on value as building land—Compensation also for disturbance to business—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *rr.* 2, 6.

The Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2 provides: "In assessing compensation an official "arbitrator shall act in accordance with the following rules: . . . . "(2.) The value of the land shall, subject as hereinafter provided, "be taken to be the amount which the land if sold in the open "market by a willing seller might be expected to realize . . . . "(6.) The provisions of r. (2.) shall not affect the assessment of "compensation for disturbance or any other matter not directly "based on the value of the land":—

Held, by the Court of Appeal (Sir Wilfrid Greene M.R., and Scott L.J., Goddard L.J. dissenting), that when land being used for agricultural purposes is ripe for building and compensation for its compulsory acquisition is fixed on the basis of its value as building land, compensation for disturbance shall only be awarded to the extent (if any) that the value of the land for agricultural purposes together with the compensation for disturbance exceeds the compensation payable on the basis of the land being building land.

Per Sir Wilfrid Greene M.R. It is a mistake to construe rr. 2 and 6 as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation.

Per Scott L.J. Prima facie the purchase price for the land to be taken pursuant to the notice to treat is the market value of the land, the estimation of which must take into account future and potential value, including "special adaptability." The market value is to be taken as at the moment when the notice to treat was given and to be of land in a normal state for the market. If the state of the land is better than normal, it should attract a higher price; if it is below the normal, it should attract a lower price. Included in the price of the land on a forced sale will be, not only the market value, but also the amount of the personal loss imposed on the owner by the sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement, but the statutory compensation must never exceed the owner's total loss.

Decision of Atkinson J. reversed.

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APPEAL from Atkinson J.

The following statement of facts is taken from the judgment of Sir Wilfrid Greene M.R.

On August 20, 1936, the appellants, the corporation of Sunderland, served on the respondent a notice to treat in respect of 102·123 acres of freehold land known as Springwell Farm and owned by the respondent. On May 13, 1937, the appellants served on the respondent another notice to treat in respect of the sand and gravel and the upper stratum of limestone lying within and under the same land. These notices were served in connection with a compulsory purchase by the appellants under s. 64 of the Housing Act, 1925, and they were preceded by the usual order made by the corporation and confirmed by the Minister of Health in accordance with the provisions of Schedule III. to that Act. Para. 3 of that schedule provides that the order of the Minister "shall "incorporate, subject to the necessary adaptations, the Lands "Clauses Acts (except s. 127 of the Lands Clauses Consolidation "Act, 1845) as modified by the Acquisition of Land (Assess-"ment of Compensation) Act, 1919." The respondent was a farmer and he occupied the land in question as farm land, largely for pedigree horses. The sand, gravel and limestone he acquired in March, 1936. By his particulars of claim, submitted under the earlier notice to treat, he put forward the following claims: (1.) Land, 47,713*l.* (2.) Amount required to induce the occupier of another farm to give immediate vacant possession (exclusive of the cost of land), 12,900*l.* (3.) Unforeseen damage arising by reason of another farm having to be rented (to be claimed later in this event). (4.) Loss on farming operations from date of notice to treat to date of dispossession, 300*l.* Alternatively to claims (2.) and (3.), he claimed: (1.) Injurious affection with reference to trust money in Ayres Quay business, 10,760*l.* (2.) Loss on forced sale of pedigree horses and other stock at Springwell Farm, 7000*l.* (3.) Loss of farm profits (three years at 350*l.* a year), 1050*l.* The claim under head (4.) and the alternative claim (3.) were abandoned in the course of the ensuing arbitration. Alternative claim (1.) proved to be devoid of foundation,

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The claim for 47,713*l.* for the land was put forward by the respondent on the basis that the land was a building estate ripe for immediate development and should be valued as such and not as a farm. By his particulars of claim submitted under the later notice to treat the respondent claimed 1988*l.* for the sand and gravel and 1491*l.* for the limestone. The assessment of compensation was referred to Sir Charles Gott, one of the official arbitrators under the Acquisition of Land (Assessment of Compensation) Act, 1919. By his award dated April 8, 1940, the arbitrator assessed the compensation payable to the respondent in respect of the subject-matter comprised in both notices to treat at the sum of 22,700*l.* No separate assessment was made in respect of the sand, gravel and limestone, the evidence on both sides being to the effect that, if they had to be considered as likely to be worked, it would be impossible to get building value for the surface of the farm. The award contained the following paragraph: "The said sum of 22,700*l.* does not include any sum as "compensation for the disturbance of the claimant's business "by reason of his dispossession of the land. I find that the "sum so assessed could not be realized by a willing seller in "the open market unless vacant possession were given to the "purchaser for the purpose of building development." On May 16, 1940, the respondent served a notice of motion asking that the award might be remitted for the reconsideration of the arbitrator on the ground that there were errors of fact and law apparent on the face of the award in three respects. Two of these related to a cross appeal which does not call for report. The other alleged error was stated to be as follows: "The reason given by the arbitrator for not "awarding any sum by way of compensation for consequential "damage is erroneous in law." The motion was heard by Atkinson J., on December 18 and 19, 1940, and he held that under r. 6 of s. 2 of the Act of 1919, the respondent retained his right to be compensated for the disturbance of his business, notwithstanding that he was receiving the selling value of his land, and ordered the award to be remitted to the arbitrator to assess the loss occasioned

by the disturbance of the respondent's business. The corporation appealed.

Beyfus K.C. and *J. Charlesworth* for appellants. The arbitrator has found that the claimant could not have sold the land in the open market at a price equal to the sum awarded unless vacant possession were given to the purchaser for building development. He has, therefore, rightly disallowed compensation for disturbance, for if, in addition to the value of the land, the respondent were awarded compensation for disturbance, he would be placed in a better position than if he had sold the land voluntarily, and that would be a negation of the principle of compensation. The law is summed up as much as possible in favour of the respondent in Cripps on Compensation, 8th ed., p. 183. It is true that s. 2, r. 2, of the Acquisition of Land (Assessment of Compensation) Act, 1919, lays down the method of computing the value of the land itself while r. 6 provides also for compensation for disturbance, but it is not the policy of the Act that a claimant should make a profit; and it is not in every case that he is entitled to compensation for disturbance. [They referred to *Metropolitan Railway Co.* v. *Burrow* (1).] *Venables* v. *Department of Agriculture for Scotland* (2), confirms the view that under the Act of 1919 anyone dispossessed of property is entitled to compensation not only for its loss but also in a proper case to compensation for other loss resulting from the enforced sale, but the compensation payable in respect of these two elements form a single amount of compensation with the exception of the element of the injurious affecting of other land: see s. 48 of the Lands Clauses Act, 1845. Thus *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (3) shows that stamp duty is payable on the whole compensation as consideration for the sale, although part of it is attributable to compensation for disturbance. The arbitrator here awarded a sum representing the value of the property as a building

(1) (1884) The Times newspaper of Nov. 22.
(2) 1932 S. C. 573.
(3) (1887) 12 App. Cas. 315.

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site as opposed to its mere agricultural value. That involved the pulling down of any existing buildings on the land, and, therefore, the disturbance of the respondent's business; but Atkinson J. was in error in saying that the respondent had two assets, the land worth 22,700*l.* and the business. The value of 22,700*l.* depended on the land being used for building and, therefore, negatived the carrying on of a farm there. At most the respondent could only be entitled to compensation for disturbance if the agricultural value of the land and the compensation for disturbance were together more than 22,700*l.* and then he could be given that surplus. It is obvious that there is no question of a surplus here. That view receives support from *Mizen Bros.* v. *Mitcham Urban District Council* (1), which is referred to in Cripps on Compensation, 8th ed., p. 271. The claimant who wants compensation for disturbance has to prove loss owing to that disturbance. The disturbance consists in the alteration of something that would otherwise have continued so that if the arbitrator values the land on a basis involving the discontinuance of its earlier use, and this results in the award of a sum larger than the combined value of the land for the purpose for which it was being used and the compensation for disturbance, there is no room for an award of compensation for disturbance as well as the larger sum.

Squibb for the respondent. The fallacy underlying the argument for the appellants is that it seeks to compare the value of the land for agricultural purposes with its value for building purposes. A piece of land has only one value, namely, its value on a sale in the open market. If land is ripe for building, no prudent owner would sell it for any other purpose. The price of the land sold as building land is the market price and that is what the arbitrator has to ascertain under r. 2, and r. 6 clearly provides that "the provisions of "r. 2 shall not affect the assessment of compensation for "disturbance." The respondent, therefore, is entitled to compensation for disturbance as well as to the market value of the land. It is said that no compensation is payable for disturbance because the building value would be unobtainable

(1) Unrep. July 19, 1929.

without giving up the farm. But that would be equally true if the land had been sold for agricultural purposes. If the respondent buys another farm for 5000*l.* and spends another 5000*l.* on setting up his business again, he will be left with 12,700*l.* and his business, whereas, if he had not been disturbed in his occupation, he would have had his business and property worth 22,700*l.* The arbitrator has to ascertain (*a*) the market value of the land and (*b*) the compensation for disturbance of the business and he has no right to disregard item (*b*). [SIR WILFRID GREENE M.R. These matters are not in water-tight compartments, but are matters aiding him to arrive at a single amount.] Yes, but the law by rr. 2 and 6 of s. 2 provides for this being done in two stages and that the arbitrator has failed to do. The whole intention is that the person dispossessed shall be put in a position not pecuniarily worse than when in occupation of the land, and it is to be remembered that this business may have a special value because it is conducted so close to the town.

Beyfus K.C. replied.

Cur. adv. vult.

1941. Mar. 24. The following judgments were read.

SIR WILFRID GREENE M.R. [after stating the facts as set out above :] The main appeal raises a question of some nicety and considerable importance. It is not disputed that the sum of 22,700*l.* awarded to the respondent, which is at the rate of 220*l.* an acre, was arrived at on the footing that the land was building land and is far in excess of the value of the land considered as agricultural land. The respondent claimed that the land should be valued on the footing that it was building land and this was accepted by the appellants.

The basic argument on behalf of the appellants may best be summarized by quoting an extract from the points submitted by the acquiring authority in *Mizen Bros.* v. *Mitcham Urban District Council* (1), decided by a Divisional Court of the King's Bench Division, to which reference will be made later

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in this judgment. In that case a similar point to that now in issue arose with regard to a market garden business, and the language of the extract is as follows: "That the "claimants were not entitled to combine in the same claim a "valuation of the claimants' land on the footing of an "immediate sale for building purposes with vacant possession "and a claim for disturbance and consequential damage on "the footing of interference with a continuing market garden "business." This argument was accepted by the Divisional Court, but it is argued on behalf of the respondent that the decision was in that respect wrong in law. The Acquisition of Land (Assessment of Compensation) Act, 1919, introduces certain new rules to be followed in assessing compensation where land is being acquired by a government department or a local or public authority. Subject to these rules and to certain other provisions of a procedural nature, the Lands Clauses Acts remain applicable in the present case: s. 7, sub-s. 1, of the Act of 1919 and Housing Act, 1925, Sch. III., para. 3. Apart from injurious affection, the question which a jury under the Lands Clauses Acts and an arbitrator under the Act of 1919 has to answer is: What is the price which ought to be paid to the owner for the land which is being compulsorily acquired, price and compensation being the same thing under different names: see *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (1). It became the practice under the Lands Clauses Acts to ask the jury to deal separately with the elements into which the price was capable of being split, although there was in strictness no necessity to do this, since the price to be paid was a global sum. The principles on which the price or compensation payable for the land acquired fell to be ascertained were settled by a long series of decisions and were extremely favourable to the landowner. The broad principle was that the price should be fixed on the basis of the value to the owner and this involved taking into consideration a number of matters which I need not mention as they are well known. But one element which the jury was entitled to take into

(1) 12 App. Cas. 315.

consideration was the damage suffered by the owner from disturbance, for example, of his business. It is important in considering the present case to remember that this was not a separate head of compensation such as compensation for injurious affection, but merely one of the elements going to build up the purchase price to which the owner was fairly entitled in all the circumstances of the case. Mr. Squibb, in his able argument, maintained that under the Act of 1919 the value of the land and compensation for disturbance must be considered as two distinct matters (so to speak, in watertight compartments), in respect of each of which the landowner was entitled as a matter of law to have a sum awarded for compensation, and that the question whether compensation for disturbance should be awarded could not in any way be affected by the nature and amount of the sum arrived at in respect of the value of the land. This argument would, in my opinion, have been incorrect if the case had been one under the Lands Clauses Acts alone, for it does not appear to me consistent with the decision in *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (1), but it must be seen whether the position is different in a case under the Act of 1919, to a consideration of which I now turn.

The Act of 1919 provides in s. 1, sub-s. 1, for the reference of "any question of disputed compensation" in cases to which the Act applies and s. 2 lays down certain rules in accordance with which the arbitrator is to act "in assessing "compensation." These rules in a number of respects alter the principles governing the assessment of compensation which had been established by judicial interpretation under the Lands Clauses Acts. The principle rule to be considered in the present case is r. 2, which is as follows: "The value "of the land shall, subject as hereinafter provided, be taken "to be the amount which the land if sold in the open market "by a willing seller might be expected to realize: Provided "always that the arbitrator shall be entitled to consider all "returns and assessments of capital value for taxation made "or acquiesced in by the claimant." It will be seen at once

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that this principle of valuation differs from that adopted under the Lands Clauses Acts since the test adopted is that of a willing seller in the open market. Had the matter stood there, it would appear that the price or compensation to be paid for the land would have had to be ascertained without giving any consideration to the loss suffered by the owner through disturbance. But r. 6 provides as follows: "The provisions "of r. (2.) shall not affect the assessment of compensation for "disturbance or any other matter not directly based on the "value of land."

Now, r. 6 does not confer a right to claim compensation for disturbance. It merely leaves unaffected the right which the owner would before the Act of 1919 have had in a proper case to claim that the compensation to be paid for the land should be increased on the ground that he had been disturbed. It is true that the arbitrator now cannot well avoid doing what a jury under the Lands Clauses Acts was not bound to do, namely, arrive at one figure for the value of the land and (in a proper case) another figure for disturbance, but these two figures are still, in my opinion, merely the elements which go to build up the global figure of price or compensation payable. The sum of them would be the proper figure to be inserted in a conveyance and stamp duty would be paid on it at the rate appropriate to the purchase money payable on a conveyance on sale, as was the case under the Lands Clauses Acts: *Inland Revenue Commissioners* v. *Glasgow and South Western Railway Co.* (1). In view of these considerations, I cannot accept Mr. Squibb's argument. I have set them out at length since they have an important bearing on the question which we have to decide. The truth of the matter is that, as in cases under the Lands Clauses Acts alone, so in cases where the Act of 1919 applies, the sum to be ascertained is in essence one sum, namely, the proper price or compensation payable in all the circumstances of the case. If those circumstances are such as to make it impossible for the owner to claim that he has suffered damage through disturbance for which he ought to be compensated, then he is not entitled to have the price or compensation for

(1) 12 App. Cas. 315.

his land increased by an addition for disturbance even if he has in fact been disturbed. It is a mistake to construe rr. 2 and 6 as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation.

In the present case the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realize from the land a sum which never could have been realized on the basis of agricultural user. Now he is claiming that the land from which he is being expropriated is for the purpose of valuation to be treated as building land and for the purpose of disturbance as agricultural land, and he says that the sum properly payable to him for the loss of his land is (*a*) its value as building land plus (*b*) a sum for disturbance of his farming business. It appears to me that, subject to a qualification which I will mention later, these claims are inconsistent with one another. He can only realize the building value in the market if he is willing to abandon his farming business to obtain the higher price. If he claims compensation for disturbance of his farming business, he is saying that he is not willing to abandon his farming business, that is, that he ought to be treated as a man who, but for the compulsory purchase, would have continued to farm the land, and, therefore, could not have realized the building value.

Approaching the matter from rather a different angle, I may put the question thus: Is the sum fixed as the value of the land without any addition for disturbance sufficient to compensate him for the loss which he suffers by having his land taken from him? In my opinion, this question must be answered in favour of the appellants, subject to the qualification mentioned above. Some examples will illustrate

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my meaning and support my conclusion. Let me take the case of a farmer who is voluntarily selling his land. First of all, I will assume that the land is merely agricultural land fetching as such a price in the market which I will take as 10,000*l.* If he sells this land and is minded to continue farming elsewhere, it will in one way or another cost him (say) 2000*l.* to move to another farm, and if that farm costs 10,000*l.* he will be 2000*l.* the worse off. If the case were one of compulsory purchase, it would be obvious that, unless he were to receive 2000*l.* for disturbance, he would to that extent have been damnified. Now let me assume that the land is building land and that he sells it for 20,000*l.* If he is minded to continue farming and purchases another farm for 10,000*l.* and spends and loses 2000*l.* in moving, he is 8000*l.* better off than he would have been if he had continued to farm on the land. If the purchase were a compulsory one and he were awarded 2000*l.* for disturbance in addition to the 20,000*l.* he would be 10,000*l.* better off. In such a case the 2000*l.* is not an element of loss at all, but merely a diminution of the profit which he obtains by giving up an uneconomic use of the land and realizing its true economic value. It is true that, while he is using the land for farm purposes, and notwithstanding that user, the land has its building value which he can realize at any moment that he chooses to do so, but this is beside the point. The extra price which he could realize could only be realized by ceasing to farm the land and would more than compensate him for what it would cost him as a farmer to move to another farm if he were minded to do so.

Mr. Squibb pointed out that there are not two values under r. 2, building and agricultural, but one value only, and it is to this value that the owner is entitled. This is no doubt true. It is not, however, for the purpose of r. 2 that agricultural value comes into the picture, but (as will be seen later) for the purpose of r. 6, since the object of ascertaining it is to enable the arbitrator to see whether the owner can be said to suffer damage for disturbance of his farming business in view of the amount assessed for the value of the land under r. 2.

It was also said by Mr. Squibb that, if the respondent is

wrong in his contention, results will follow which the legislature cannot have intended. As an illustration of his point, I may take the case of land which, at the time of acquisition, has a potential value as building land which gives it a value (say 11,000*l.*) rather higher than would have been the case if it had been purely agricultural (say 10,000*l.*). If by disturbance the owner suffers a loss of 2000*l.* and nothing is to be awarded in respect of that disturbance, the owner will be damnified. The reasoning which appeals to me does not, however, lead to any such result. In such a case the loss of disturbance would, in my judgment, be 1000*l.*, and the owner, if he moved to another farm costing 10,000*l.* and spent or lost 2000*l.* in the process, would be completely indemnified by receiving 11,000*l.* for the value of the land and 1000*l.* for disturbance. If he received an additional 1000*l.* for disturbance he would be receiving profit, not compensation.

Another illustration may be taken from the case of two adjoining owners of similar plots of land ripe for building of whom one has left his land uncultivated and the other has brought it to a high state of cultivation. It is said that to give the same figure of compensation to each of them would be unjust, since the industrious owner would lose the benefit of his cultivation as well as his land and it would cost him money to obtain land in as good a state of cultivation. But this is, in my opinion, a fallacy. It would not be that the industrious owner would suffer a loss which the other did not. If he was minded to acquire another farm and to spend part of his purchase money in moving into it, the money so spent would represent not loss, but expenditure of part of the profit realized by the cessation of his farming activities on the land taken and the reception of its value as building land.

In *Mizen Bros.* v. *Mitcham Urban District Council* (1) the same point as that which arises here was decided in favour of the acquiring authority by a Divisional Court consisting of Lord Hewart C.J., Avory and Branson JJ. We have been furnished with a transcript of the argument and the judgment. There was no reasoned judgment, but the

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considerations which influenced the members of the Court sufficiently appear from their interlocutory observations. In that case the land was used as a market garden and was in a high state of cultivation. It had erected on it greenhouses and other trade fixtures. The value of the land (including greenhouses and fixtures) as market garden land, did not exceed 12,000*l.*, but the land was ripe for immediate development for building and on that basis was valued by the arbitrator at 17,280*l.*, a sum which could only be realized if vacant possession were given, the seller being at liberty to remove the greenhouses, etc., and plants and crops. The arbitrator assessed the value of tenant right, fixtures, and disturbances (assuming that the owners were entitled to claim it) at 4640*l.*, a sum which, when added to the valuation of 12,000*l.* on a market garden basis, fell short of the value assessed on a building basis. The question submitted by the arbitrator for the opinion of the Court was "whether the claimants are "entitled to receive compensation in respect of the greenhouses "and other trade fixtures, forced sale or removal of crops "and plants, and compensation for disturbance and loss of "business, in addition to the amount which the land, if sold "in the open market by a willing seller to a willing buyer "with vacant possession, might be expected to realize." This question the Court answered in the negative, and, in my opinion, rightly so. It is worth pointing out that the statement of the reasons for this decision given in Cripps on Compensation, 8th ed., p. 27, is not accurate, and it appears to have misled Atkinson J., who did not enjoy the advantage of having this transcript before him. The basis of Atkinson J.'s judgment is to be found in the proposition that the respondent had "two assets—first, land worth 22,700*l.*, and, "secondly, a business worth so much." This, of course, is true in one sense, but the two values could not be realized at the same time. He could not farm and build as well. The only way in which he could realize the building value was by giving up farming on the land. The only way in which he could enjoy the farming value was by refraining from realizing its building value. By farming on building land he

was, economically speaking, indulging an idiosyncrasy without any economic justification. By claiming for disturbance he is asking to be compensated, not for any real pecuniary damage, but for the loss of the opportunity to indulge his idiosyncrasy. If he were to spend the 22,700*l.* in buying other building land to farm it and received (say) 4000*l.* in respect of disturbance, he would in one sense be in precisely the same position after the transaction as he was in before, that is, he would be installed as a farmer on land the value of which in the market far exceeded its value as based on its actual user. In other words, he would have received a payment sufficient to enable him to indulge what I have ventured to call his idiosyncrasy, while all that he is entitled to is compensation for pecuniary loss, a different matter altogether.

From what I have said, it will appear (and this is the qualification which I have mentioned) that, in my opinion, the respondent is disentitled to an award for disturbance only if the sum of 22,700*l.* equals or exceeds the value of the land based on the hypothesis that it will be used only for farming purposes, plus whatever value should be attributed to the minerals, plus the loss by disturbance. To the extent (if at all) that the sum of these figures exceeds the sum of 22,700*l.*, compensation should be awarded. The arbitrator did not deal with this question which in view of the very high valuation of the land may perhaps be academic, but I express no opinion on that, since the respondent is anxious to have this aspect of the matter considered by the arbitrator at his own risk as to costs. I would refer the matter back to the arbitrator with a direction (1.) to ascertain (*a*) the value of the land considered as purely agricultural land with minerals in it, and (*b*) damages for disturbance; (2) if the sum of these two items exceeds 22,700*l.*, to award to the respondent an additional sum equal to such excess; (3) to deal with the costs of the further proceedings before him. It is necessary to include the minerals in this inquiry because on the basis of agricultural user of the land, they or part of them may have an independent value which cannot be the case if the land is

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regarded as building land. [His Lordship then dealt with the cross-appeal.]

SCOTT L.J. The facts have been sufficiently stated by my Lord. I agree with his conclusions of law and with his statement of and comments on *Mizen Bros.* v. *Mitcham Urban District Council* (1), a transcript of which was supplied us, and in essence my reasoning is the same as his, but, as I have followed a slightly different route, I will state my own reasons.

The question raised by the appeal is not free from difficulty, for it is not easy to formulate the general principle on which the answer must depend. The main object of the Act of 1919 was undoubtedly to mitigate the evil of excessive compensation which had grown up out of the theory, evolved by the Courts, that because the sale was compulsory the seller must be treated by the assessing tribunal sympathetically as an unwilling seller selling to a willing buyer. The word "compensation" almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that, unless he received a price that fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice. The 1919 Act, by its abolition of the ten per cent. addition for compulsory purchase (s. 2, r. 1), and by its special rules in rr. 3, 4 and 5, undoubtedly contributed to the intended reform, but perhaps the provision which was most likely to check exaggerated prices for the land sold was the reversal by r. 2 of the old sympathetic hypothesis of the unwilling seller and the willing buyer which underlay judicial interpretation of the Act of 1845.

It was argued before us for the respondent seller that, whatever the law had been before, the effect of r. 6 was to create a general right to compensation for "disturbance," and such other matters as are covered by the general words of that rule, over and above the price of the land taken, and that it was the statutory duty of the assessing tribunal, whatever the basis of valuation on which the price had been calculated, to add this figure to the valuation of the land to ascertain the

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total compensation. I do not accept that contention, for I agree with the opinion of Lord Alness (then Lord Justice Clerk) in *Venables* v. *Department of Agriculture for Scotland* (1) that r. 6 "confers no new rights although it manifestly purports "to save existing rights." The rule deals with other matters besides "disturbance," but that topic will serve as typical. The rule appears to me to have been inserted for two purposes, one general and the other particular—general, to prevent misconception as to the scope of the alteration effected by r. 2 in the previous judicial basis for ascertaining the market value to the owner of the land sold, and particular to forestal the argument that a willing seller *must* in law be presumed to have moved out voluntarily to give vacant possession to the buyer.

If these be the operative effects of the rule, the legal right to compensation for disturbance stands to-day where it did before the Act of 1919. In those cases where it was formerly payable, it is still payable ; in those where it was not payable, it is not payable to-day. It is, however, perhaps well to add a cautionary note to that rather sweeping statement. Rule 6 does not purport to give statutory validity to every pre-1919 judicial determination on the subject of "disturbance," still less to perpetuate exaggeration in the practice of juries or arbitrators. The sums given even in some of the reported cases seem to predicate an almost punitive measure of damages for eviction by compulsion of law. In my view, there never was anything in the Act of 1845 to warrant such indulgence to the dispossessed owner, and I know of no decision perpetuating any such generosity to the owner at the expense of the promoters which would be binding on us. Nor is there anything in s. 2, r. 6, of the Act of 1919 to compel us to follow a practice in either jury or arbitral assessments, if there was one, of giving to the dispossessed owner an amount of compensation which exceeds the total sum of his real loss arising from the acquisition. Such a practice would now, as before, contravene the basic principle of compensation.

On the facts of the present case, the claim for disturbance

(1) 1932 S. C. 573, 579.

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would not, in my opinion, ever have been in law exigible, and its exclusion from the award would always have been, and, therefore, still is, proper. The Act of 1919 being disregarded, the question falls to be considered solely under the Act of 1845. If so, I ask myself: How can the respondent be entitled to a money payment by way of compensation for disturbance of his farm on the top of a price ascertained by valuing the whole of the land as land immediately ripe for building development and thus producing a figure much greater than the market value of it as a farm? Ex hypothesi, the building value is only realizable if and when the land is offered in the market as building land, which necessarily postulates that the selling owner will have given up his farm and cleared the land of all its farm buildings, stock and implements, or, at least, is ready and willing to do so at his own expense. Conversely, in so far as he chooses to leave that task to be performed by the purchaser, he must submit to the deduction of the cost of it from his price. This broad view is, I think, fully borne out by the detailed provisions of the Act of 1845. That Act was a consolidation of standard clauses usually inserted in private Acts, as appears from its title and preamble. It possesses two leading features. The first is that what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater. The other is that the legislation recognizes only two kinds or categories of compensation to the owner from whom land is taken: (1.) the fair value to him of the land taken, and (2.) the fair equivalent in money of the damage sustained by him in respect of other lands of his, held with the lands taken, by reason of severance or injurious affection. For compulsory acquisition those are the only two kinds of statutory compensation. There is a third kind given by the Act, namely, by s. 68, but that has nothing to do with compulsory acquisition. It is a remedy for injuries caused by the works authorized by the Act to the lands of an owner who has had none of his land taken in that

locality. The remedy is given because Parliament, by authorizing the works, has prevented damage caused by them from being actionable, and the compensation is given as a substitute for damages at law. The rights conferred by s. 68 have no direct or positive relevance to the question we have to decide, but negatively the section is important, just because there is nothing in it, in my opinion, which bears on our question. Whether the words "taken for or" in the second line of s. 68 have any meaning or were a mere clerical error, it is unnecessary in the present case to speculate, for it is notorious that s. 68 has always been construed as applying only to lands not held with lands taken. I say no more, therefore, about s. 68.

I come now to the essential point. As I have already indicated inferentially, there is in the Act of 1845 no express provision giving compensation for disturbance, or for any of the similar matters to which s. 2, r. 6, of the Act of 1919 refers, which for brevity I will treat as included in the word "disturbance," the more suitably so as the claim in issue in the appeal is for disturbance proper. If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken, (1.) for the value to him of the land, and (2.) for injurious affection to his other land, it is plain that the judicial eye which has discerned that right in the Act must inevitably have found it in (1.), that is, in the fair purchase price of the land taken. That conclusion is consonant with all the decisions, so far as I can discover.

The Act is very loosely drawn, and there is little attention paid in it to accuracy of language, but with regard to the scope and purpose of the grant of compensation for the value of the land taken or purchased from an owner, there is no ambiguity. It may parenthetically be noted that the words "purchased" and "taken" are used as synonyms. The owner is given a purchase price for the land taken which will "compensate" him for the compulsory sale. "Compensation" for "damage sustained" is expressly conferred as a separate right, and is conferred only in respect of the owner's other lands. No express provision is made anywhere in the Act about damage sustained by him in respect of his ownership

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or possession of the land taken. I will now refer shortly to the relevant sections.

Power is given by s. 6 to purchase by agreement "for a "consideration in money." Sect. 9 (a section dealing with vendors under disability) speaks of "the purchase-money or "compensation to be paid for any lands to be purchased or "taken." Sects. 16 to 68 inclusive are headed "and with "respect to the purchase and taking of lands otherwise than "by agreement." Sect. 18 provides for a written notice of the promoters' intention to take land (the "notice to treat"), which must "state . . . . that the promoters . . . . are "willing to treat for the purchase thereof, and as to the com- "pensation to be made to all parties for the damage that may "be sustained by them by reason of the execution of the "works," thus drawing plain distinction between price and damage, and between acquisition of land and execution of works. The first distinction is repeated and further explained in s. 38 which requires the promoters before summoning a jury to make an offer saying "what sum of money they are "willing to give" under each of the two heads of compensation, namely, purchase of the land and damage to be sustained by execution of the works. Sect. 49, which relates only to assessment by a jury, requires the jury to "deliver their "verdict separately" for the purchase money and "for the "sum of money to be paid by way of compensation for the "damage, if any, to be sustained by the owner of the lands by "reason of the severing of the lands taken from the other "lands of such owner, or otherwise injuriously affecting such "lands by the exercise of the powers of this or the special Act, "or any Act incorporated therewith." The definition of "the "damage that may be sustained by reason of the execution of "the works," for which compensation is payable, is still further defined in this section by limiting it to the case of "other lands of such owner." Sect. 63, which relates to assessments made, not by juries, but by arbitrators (and justices or surveyors), contains a similar reference to "the "other lands" of the owner, but makes it still more explicit by inserting the word "other" before the word "land" not

only in respect of severance, but also in respect of injurious affection. These extracts from the only relevant sections show clearly that a claim for disturbance connected with the land taken must be made as part and parcel of the claim for purchase money. It cannot come under the head of compensation for severance or for injurious affection to the other lands of the owner, and the statute knows no tertium quid in the way of compensation. None the less, the owner in a proper case—that is, in a case where he really does incur a loss of money by disturbance due to the taking over and beyond the loss for which he is to be reimbursed in respect of the land taken—is entitled, because it has to do with the land, to have that element of personal loss taken into the reckoning of the fair price of the land, as has been held by the Courts from a very early stage. *Jubb* v. *Hull Dock Co.* (1), was decided on the language of a private Act passed in the session before that in which the Lands Clauses Consolidation Act, 1845, was passed, but its provisions have in more than one reported case been judicially regarded as similar in effect to those which I have quoted from the Lands Clauses Act, for example, by Blackburn J. in the Exchequer Chamber in *Buccleugh (Duke)* v. *Metropolitan Board of Works* (2), and by the same learned judge in the earlier case of *Chamberlain* v. *West End of London, &c., Ry. Co.* (3) (a case under s. 68); and in *Ricket* v. *Metropolitan Railway Co.* (4), where Erle C.J. recognized *Jubb* v. *Hull Dock Co.* (1) as in pari materia with the case of a claim under the Lands Clauses Act for compensation for personal damage in respect of the land taken. His obiter dictum was as follows: "As to the argument, that compensation is in "practice allowed for the profits of the trade where land is "taken, the distinction is obvious. The company claiming to "take lands by compulsory powers, expel the owner from his "property and are bound to compensate him for all the loss "caused by the expulsion; and the principle of compensation "then is the same as in trespass for expulsion; and so it has "been determined in *Jubb* v. *Hull Dock Co.* (1). There a

(1) (1846) 9 Q. B. 443.
(2) (1867) L. R. 5 Ex. 221, 241.
(3) (1862) 31 L. J. (Q. B.) 201, 204.
(4) (1865) 34 L. J. (Q. B.) 257, 261.

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"brewery had been taken by the defendants, and the plaintiff "claimed to be compensated for the loss of his business as a "brewer; and the Court held that he was so entitled, expressly "on the ground that the premises had been taken." Whilst accepting nearly everything there said, I venture respectfully to doubt the completeness of the analogy of damages for trespass.

In *Jubb* v. *Hull Dock Co.* (1) the jury awarded the claimant 400*l.* for the land taken (business premises) and 300*l.* for disturbance of his business there carried on. A rule nisi for a certiorari had been obtained to quash the verdict on the ground that the claim for disturbance was not authorized by the statute. Counsel showing cause submitted that "the "award for compensation for damage is correct. The intention "of the legislature clearly was that the party giving up his "property should be placed (so far as money could do it) in "the same situation as before. Justice would not be done if "the party resigning a business which is valuable to him and "might render the property valuable to a purchaser should "receive only the bare worth of the land. This additional "value may indeed be properly considered an element in the "price of the estate purchased." All possibly relevant sections of the Act are set out in the report in Queen's Bench cases. It is true that some of them contained certain additional words about compensation for damage which were not very clearly limited to the case of *other* lands, but the Court treated s. 117 as the only really material section: see the first paragraph in the judgment of the Court delivered by Lord Denman C.J. (2); and that section is in effect identical with s. 49 of the general Act of 1845. The decision has always been treated as an authority for the proposition that compensation for personal loss to the owner arising out of the eviction by statutory title is to be regarded as recoverable, if at all, only as an element in assessing the price to be paid for the land taken.

For that proposition there has been since 1887 authority of the House of Lords in *Inland Revenue Commissioners* v.

(1) 9 Q. B. 443. (2) Ibid. 454.

Glasgow and South Western Ry. Co. (1). There a timber merchant's premises at Greenock were acquired compulsorily. A special jury assessed the compensation under s. 48 of the Scottish Act (which is identical with s. 49 of the English Act), at 52,658*l.*, including in that figure 9499*l.* for loss of business. The conveyance was presented to the commissioners for stamping, and they were of opinion that the 9499*l.* was part of the consideration for the sale. The First Division of the Court of Session held the contrary, but the House of Lords took the same view as the commissioners. Lord Halsbury's judgment covers much of the ground necessary to our decision. He said (2): "The parties may if they please agree, but if "they do not agree the price is to be ascertained as between "them, and two subjects-matter are dealt with by the statute— "one the value of the property so taken, and the other the "question of severing the property so taken from the lands "held therewith." He cited s. 48 and added: "The two "things, and the only two things, which are within the ambit "and contemplation of the statute, are the value of the lands "and such damages as may arise to other lands held therewith "by reason of the particular land which is taken being taken "from them. Now, my Lords, that seems to me to be at the "foundation of the whole argument. That was alone what "the jury in this case had power to assess, because it is "admitted that no question arises here upon the other part of "the section—no question arises here about any damage from "severance. It is admitted, therefore, impliedly, that the "only thing which the jury had here to assess was the value "of the land. . . . . We, however, must be guided by what "the language of the legislature is. Now the language of the "legislature is this—that what the jury have to ascertain is "the value of the land. In treating of that value, the value "under the circumstances to the person who is compelled to "sell (because the statute compels him to do so) may be "naturally and properly and justly taken into account; and "when such phrases as 'damages for loss of business' or "'compensation for the goodwill' taken from the person are

(1) 12 App. Cas. 315. (2) Ibid. 320.

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"used in a loose and general sense, they are not inaccurate "for the purpose of giving verbal expression to what everybody "understands as a matter of business; but in strictness the "thing which is to be ascertained is the price to be paid for "the land—that land with all the potentialities of it, with all "the actual use of it by the person who holds it, is to be "considered by those who have to assess the compensation." Lord Watson said (1): "As I read these provisions, the "statute authorizes, in the first place, compensation for land, "or an interest in land. By 'compensation,' is meant an "equivalent for that which the railway company take and "acquire, and which the proprietor gives up to them." The case finally establishes two principles. The first is that compensation for disturbance is just an element in the price of the land; the second, on which Lord Watson based his opinion, is that "by compensation is meant an equivalent for "that which the railway company take and acquire and "which the proprietor gives up to them." They are both of importance in the decision of the present appeal.

There is one further principle which has some slight relevance to the question before us and that is the moment of time at which the price of the land to be taken has to be ascertained. It is when the notice to treat was given. Wood V.-C. said in *Penny* v. *Penny* (2): "The scheme of the Act I take to be "this, that every man's interest shall be valued rebus sic "stantibus, just as it occurs at the very moment when the "notice to treat was given."

It may be convenient to summarize the legal principles on which I base my conclusion that the official arbitrator was (subject to one very improbable possibility) right on the facts before him in refusing to add any claim for disturbance to the price he awarded for the value of the land itself. (1.) Prima facie the purchase price for the land to be taken pursuant to the notice to treat is the market value of the land, and whether to an unwilling or a willing seller, is for this principle, so far as concerns that value, irrelevant. (2.) The estimation of that value must take into account future and potential value,

(1) 12 App. Cas. 322. (2) (1868) L. R. 5 Eq. 227, 236.

including what is known as "special adaptability." (3.) It must be ascertained as at the moment when the notice to treat was given. (4.) The rule of market value necessarily presupposes the presence of the seller in the market, there offering his land for sale in a normal state for that market, that is, in a condition to attract the ruling price there. If its state is better than normal, it should attract a better price. If it is worse than normal, or if the buyer will have to spend money to bring it up to normal, the seller must expect a reduction on the normal price. (5.) In the case of a sale by private treaty or auction the seller cannot put in his pocket more than the net market value. He can recover no loss to which he is put by his decision to part with his land, but on a compulsory sale the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement, because otherwise he will not be fully compensated. (6.) But here we come to the other side of the picture. The statutory compensation cannot, and must not, exceed the owner's total loss, for, if it does, it will put an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss.

The enunciation of this principle, the most fundamental of all, is easy enough. Its justice is self-evident, but its application to varying facts is apt to be difficult. It is not easy to spell out of it a general criterion which will afford a practical test in all cases. Let me try to illustrate the difficulty. A farmer sells his land with its farm buildings by private treaty, not intending to farm any more. The land is sold and bought as agricultural land, so that it will fetch in the market only agricultural value. The farmer may sell his stock, implements, etc., but he will get nothing for his loss by "disturbance" out

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of the purchaser. If the same farmer owner is compelled by law to sell, the statutory principle of equivalent compensation entitles him to recover his personal loss arising out of the compulsory sale in addition to the agricultural value of the land. But now suppose that his land has potential building value. As a result of the statutory compulsion he is forthwith put, by the notice to treat, in a position where he is entitled as at that moment to be paid the present building value of the land. If the land is " ripe for development " that value will represent a sum of money many times as much as the agricultural value. If he had sold voluntarily he would have had to set off his " disturbance " loss against the purchase price to ascertain the net price realized. How can it be said that, by the compulsory acquisition, he has been caused a loss which is not fully compensated by the present payment of full building value ? In my opinion, there is nothing in either Act to give him anything further. I think that it is a false interpretation of the Acts to suppose that, in all circumstances and whatever the evidence, such a loss must, as a matter of law, be added to the actual price of the land to ascertain its legal price under the Act. Where, by reason of the notice to treat, an owner is enabled to effect an immediate realization of prospective building value and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on the top of the realizable building value is, in my opinion, contrary to the statutes.

It is not necessary for the present appeal to say more than that on the facts before us the official arbitrator was probably right, or, at least, may well have been right, in refusing to add to the figure of building land value anything for disturbance. In so far as his decision was one of fact we could not alter it if we would. If we were entitled to take judicial notice of the fact that the agricultural value is so small a percentage of the building value given by the official arbitrator that the total of agricultural value plus disturbance is below the official arbitrator's figure, we could dismiss the appeal,

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but I regret that we are not entitled to do this, and, as the respondent was not willing to concede that point of fact, I think the award must be remitted for the official arbitrator to deal with in the light of the judgments of the Master of the Rolls and myself. I have read with care the judgment of Goddard L.J., but in so far as his reasoning and conclusion differ from mine, I respectfully disagree with it. I agree with the order proposed by my Lord.

GODDARD L.J. The question which falls for decision depends, in my opinion, on the true construction of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. To determine that question, it is, I think, necessary to consider what the law was before the Act of 1919 was passed. Under the Lands Clauses Act, 1845, compensation can be claimed where land is compulsorily acquired in respect of three matters: (1.) for the value of the land taken; (2.) for injury done or to be done to the lands held therewith, commonly called severance; and (3.) for lands or any interest therein injuriously affected by the execution of the works. The Act nowhere in terms refers to compensation for loss by disturbance, but it has always been held that, in assessing the value of the land, it is the value to the owner that has to be ascertained, and elements in the value to him are that he was carrying on business on the land which he is forced to sell and that he would have to move out of the house where he was living. In *Ricket* v. *Metropolitan Railway Co.* (1), Erle C.J. delivering the judgment of the Exchequer Chamber, put the matter thus: "The company claiming to take land by "compulsory power, expel the owner from his property and "are bound to compensate him for all the loss caused by the "expulsion; and the principle of compensation then is the "same as in trespass for expulsion; and so it has been decided "in *Jubb* v. *Hull Dock Co.* (2). There a brewery had been "taken by the defendants and the plaintiff claimed to be "compensated for the loss of his business as a brewer and the "Court held that he was so entitled." It became the common

(1) 34 L. J. (Q. B.) 257. (2) 9 Q. B. 443.

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practice to claim, and for juries and arbitrators to assess, two separate sums, one for the land and another for the disturbance, but it was decided by the House of Lords in *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (1), that, while this division was a convenient method of enabling the jury to ascertain what was proper to be paid, the aggregate, however arrived at, was purchase money or compensation and was awarded as such. Thus, it will be seen that, while disturbance, which includes loss of business, was not mentioned eo nomine in the Act, it was a very real element to be taken into account in determining what the owner was to receive by way of compensation. The right to be compensated for his disturbance is provided by the Act of 1919.

The Act of 1919 relates to the acquisition of land by the government or by local or public authorities, that is to say, to acquisition for public purposes. It substitutes an official arbitrator for any other tribunal for determining compensation, and in s. 2 lays down rules for assessment. Rule 1 abolishes any allowance, usually 10 per cent., which it was customary to allow because the acquisition was compulsory. Rule 2 substitutes for any other measure of value the value which any willing seller might obtain in the open market, and, as it has always been the law that the value is to be ascertained as at the date of the notice to treat, it follows that the value is the market value at that time. So far the owner, however unwilling he may be to sell, is to be treated as though he had himself put his land up for sale. Rules 3, 4 and 5 are immaterial to the present case, but r. 6 raises the question which has to be here determined. That rule states that the provisions of r. 2 shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land. The latter words would clearly include severance. Now it seems to me that, while rr. 1 and 2 require that, in assessing the actual value of the land, the owner is to be regarded as a willing seller, r. 6 recognizes that in fact he is not. If the owner of a house puts it up for sale, he knows

(1) 12 App. Cas. 315.

that to obtain the market price he must give vacant possession, and he will not expect to get in addition to the price a sum to compensate him for the expense of removal. Disturbance implies that something is taking place against the will of the person disturbed. If an owner is expelled from his house, the expense he is put to in removal is in no way connected with the value of his house. It is a loss which he has suffered, as it seems to me, by being expelled, whatever the value of the house may be.

The main argument which was addressed to us, as I understand it, was this. It was said that the respondent was occupying his land as a farm; that he has been awarded compensation on the basis that the farm was a building estate and he could only realize that value by giving possession for building; and that, therefore, he must be treated as though he has disturbed himself. But would not this equally be the case were he to have been awarded compensation based on agricultural value? He could only realize that by giving possession. Mr. Beyfus admitted that, had the agricultural value been awarded, the respondent would have been entitled to compensation for disturbance, but I am unable to see wherein the difference lies. The value of the land is what it will fetch. The arbitrator has to find its value apart from any question of disturbance, and the value is the same whether the purchaser is a builder or a philanthropist who desires to present the site to the town for a public park or a local authority. Parliament might have provided that the value was to be what a willing purchaser would give if he intended to put the land to the same use as the vendor was putting it at the time of the notice to treat, but that is not what the rule says, and I see no warrant for reading it in that way.

Then the Act says that the fact that the value of the land is to be taken to be the amount it would realize if sold in the open market by a willing seller is not to affect the assessment of compensation for disturbance, which appears to me plainly to contemplate that, if the owner can show that he has been put to expense or loss from being disturbed, he is to be compensated for that in addition to receiving the value of

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his land. If it were found in the arbitration that the owner had at the time of the notice to treat put his land into the market, or was intending to do so, so that, if the authority had not exercised their powers when they did, he would none the less have sold and left the property, I agree that no compensation for disturbance could be awarded. If the owner intended to disturb himself by selling, there is nothing for which to compensate him, but that is not found to be the case here. If he intended to remain, he is disturbed by being obliged to sell against his will, and I can see no reason why he should not be compensated under r. 6 on this account.

Let me take as an illustration a case which might well arise. The owner of a house standing in a park near a town hopes and intends to end his days there. The town increases in size and perhaps extends its boundaries so as to embrace the property, and what was once a wholly rural situation becomes part of an urban district. The owner, however, continues to reside on his property and wishes to remain there, it may be for reasons of sentiment, it may be because his age or health makes him disinclined to move, or he may have business interests in the town which render residence close by desirable. His income being sufficient for his needs, he is content to forego the advantage of selling at the enhanced price which the extension of the town has caused. He has the property to leave to his descendants, who incidentally will have to pay death duties on the actual value and not on what it would have fetched as a country residence. The local authority decides to acquire it. The owner will get the value of the land, presumably the same as his executors would have realized had he died and there had been no notice to treat, but he is put to heavy expense in moving and fitting up a new house. I cannot conceive that in these circumstances he may not have recourse to r. 6 and seek to be recouped for what it has cost him to get into his new house. Nor can I see the justice of saying: "Well, had you sold half a dozen "years ago you would not have got as good a price," nor do I see anything in the Act enabling the acquiring authority to

say: "You ought not to be using your property as a dwelling-"house or farm, therefore you should have nothing for being "bought out against your will."

Or, again, suppose there are two adjoining sites separately owned on the outskirts of a town, both equally ripe for development. One is vacant and uncultivated, having been bought merely in the expectation that as the town extends the value will rise and so prove a profitable investment. The other is occupied and highly cultivated as a market garden. The market price of both as building land would presumably be the same, and, if the land were compulsorily acquired, both owners would have to be treated as willing sellers. Surely the owner of the latter site could say that he was entitled under r. 6 to have compensation assessed for the disturbance to his business, for the loss of his cultivations, and the like. If he is not, I do not see that any meaning or effect can be given to r. 6. On the other hand, the owner of the vacant site could not be heard to say that he wanted to hold on to his land for another four or five years in the hope of getting a still better price. He gets the market price at the time of the notice to treat which must be taken to include any potential value for future improvement, and that is all he will get. As the learned judge pointed out, exactly the same argument could be used to exclude a claim for compensation for severance, which is a matter not directly based on the value of the land. The selling price of the land taken could, as he said, only be obtained by somebody willing to submit to the depreciation in value of the land not taken. For my part, I think that the reasoning of Atkinson J. is quite unassailable, and that to hold the contrary would be to ignore entirely the provisions of r. 6. I think also that his opinion is supported by the judgment of the Court of Session in *Venables* v. *Department of Agriculture for Scotland* (1). Their opinion, I think, exactly coincides with that of the learned judge.

I ought perhaps to say a word with regard to *Mizen Bros.* v. *Mitcham Urban District Council* (2), especially as I think that, from the language of the award, the arbitrator based his

(1) 1932 S. C. 573. (2) Unrep. July 19, 1929.

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finding on that decision. The case is not very helpful as an authority, because the Divisional Court delivered no reasoned judgment but merely answered the questions propounded in the special case with a simple negative. We have been supplied with a shorthand note of the argument, and are asked to draw conclusions from the interlocutory observations of the members of the Court during the argument. That case was complicated by certain agreements under which the owners, who were market gardeners, were allowed to retain possession for certain periods, apparently to obtain the benefit of the cultivation and also to remove their greenhouses. A claim for loss of business was raised, but the principle matter that seems to have been discussed was whether the owners could claim the cost of removing the greenhouses and fixtures. If the decision means that, where the value is assessed on the footing that the site is vacant, and, therefore, more valuable than if it is encumbered with buildings, the owners cannot have the higher value and the cost of clearing in addition, I should agree, but if it means that where building value is given for farm or market garden lands no compensation for disturbance is to be awarded, I respectfully differ.

As I have already said, compensation for disturbance is one of the elements to be taken into account, under the Lands Clauses Act, in arriving at the total sum to be paid to the claimant, but it has never been held, as far as I am aware, that the right to have this element taken into account depends on the market value of the land. And in my opinion this is expressly recognized by the Act of 1919, because r. 6, in preserving the right to have compensation assessed for disturbance, refers to it in terms as a matter not directly based on the value of the land.

I think that, when the case is remitted to the arbitrator, he should be directed to assess compensation for disturbance, taking into account all such matters as could be considered under the Lands Clauses Act under this head, which would include the expense of removal, loss of business and depreciation in stock, live and dead, but not the

cost of removal of buildings. For my part, I would dismiss the appeal.

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Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for G. S. McIntire, Town Clerk, Sunderland; Maples, Teesdale & Co., for Steel, Maitland & Byers, Sunderland.*

H. C. G.