THE UNIMPROVED VALUE OF LAND

The assessment of compensation for land resumptions by public authorities and the high level of State and local government land taxation combine to render the law relating to the valuation of land of major importance. In New South Wales the Valuation of Land Act,[1] provides in practice the statutory basis for the valuation of nearly all urban land, and a significant proportion of the rural land of the State. The Act provides machinery for the determination of the improved and unimproved capital value, and the assessed annual value of land valued under it. Generally speaking Australian legislatures have adopted the unimproved capital value as the subject-matter to be taxed by land taxation and it is the recent developments in this field that will be considered in this article.

Section 6 of the Valuation of Land Act provides:

> The unimproved value of land is the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that the improvements if any thereon or appertaining thereto, and made or acquired by the owner or his predecessor in title, had not been made.

This principle seems very simple, but in practice it has given rise to many difficult problems. Such problems led Rich, J. to exclaim in 1915:[2] "I think a great many difficulties would disappear from these cases if the Legislature were to amend the definition of 'unimproved value' by putting it on a practical instead of a hypothetical basis." It is only necessary to add that the definition has remained substantially unchanged and the same difficulties continue to arise for solution by the Courts. Nevertheless the judicial legislation of the intervening period has done a great deal to clarify this branch of the law.

Three main problems have arisen under s. 6 of the Valuation of Land Act. They concern —

(i) The causal problems arising from the statutory assumption that the improvements on the land do not exist;

(ii) The meaning of improvements on the land; and

(iii) The fee simple to be valued.

The first two problems are related and will be considered first, followed by an examination of the nature of the fee simple to be valued.

I. *Improvements and Their Assumed Non-Existence*

Perhaps the leading case on the construction of s. 6 of the Valuation of Land Act is *Tooheys Ltd.* v. *Valuer General*.[3] The appellant appealed from the determination of the unimproved value of the site of a hotel, arrived at by deducting the value of the physical improvements from the estimated market price of the hotel sold as licensed premises. This method was upheld by the Supreme Court of New South Wales,[4] but was decisively rejected by the Privy Council. In delivering the judgment of the Board Lord Dunedin said:[5]

Now what (the valuer) . . has to consider is what the land would fetch as

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[1] Act No. 2 of 1916 — Act No. 30 of 1948.

[2] *Campbell* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (1915) 20 C.L.R. 49, 53.

[3] (1925) A.C. 439 (P.C.).

[4] (1924) 24 S.R. (N.S.W.) 154.

[5] *Supra* at 443.

at the date of the valuation if the improvements had not been made. Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are to be taken not only as non-existent, but as if they had never existed. It is therefore to approach the question from an entirely wrong point of view to begin with a valuation which takes in the improvements, and then proceed by means of subtraction . . . What the Act requires is really quite simple. Here is a plot of land; assume that there is nothing on it in the way of improvements; what would it fetch in the market? It will be observed that the value is not what has been sometimes designated by the expression 'prairie value'. The land must be taken as it exists at the date of valuation.

The major vice of the valuation method rejected in *Toohey's Case* was that the value of the liquor licence, and of the goodwill of the hotel business, were left to form part of the unimproved value of the land. Now a liquor licence and the goodwill of a business are not improvements,[6] and hence (by the simple deduction method adopted by the New South Wales courts in *Toohey's Case*) the value of these factors was held to form part of the unimproved value. The Privy Council held however, that full effect must be given to the statutory assumption that the improvements do not exist. The presence of the improvements was a condition precedent to the existence of the licence and goodwill, and the statutory assumption required not only the physical improvements, but also the factors causally dependent upon their existence to be excluded from the computation of the unimproved value. The land had to be valued as if the improvements "never existed".

The error exposed by the Privy Council in *Toohey's Case,* could not be cured merely by deducting the value of the licence and goodwill as well the value of improvements from the improved capital value.. As Sugerman, J. has observed:[7] "The value of land may be appreciated or depreciated in varying degrees by the existence thereon of particular improvements plus the effect of a variety of other circumstances such as would not have a bearing on its value if the particular improvements were not there." In such circumstances, as his Honour went on to point out, any attempt to deduce the unimproved value from the improved value by subtracting the value of improvements is likely to lead to a distorted result, and such a valuation method is also forbidden by *Toohey's Case.*[8] However, *Toohey's Case* does not forbid the use of this method in all circumstances. The question is discussed in a later section of this article.

It was soon apparent that Lord Dunedin was unduly optimistic when he stated that the valuation process required by the Act "was really quite simple". Shortly afterwards the High Court was sharply divided in *McGeogh* v. *Federal Commissioner of Land Tax*[9] on the true construction of identical legislation,[10] and on the effect of the dicta in *Toohey's Case.*

The appellant in *McGeogh's Case* was a Queensland grazier, and it was contended on his behalf that the prevention of prickly pear infestation was an improvement within the meaning of the Land Tax Act[11] and that the effect of the control measures on the value of the land should be disregarded in determining its unimproved value. The majority of the Court, Knox, C. J. and Dixon, J., upheld the taxpayer's appeal. In reaching this conclusion they relied heavily on what they considered to be the rationale of taxing unimproved land values, which they stated in the following passage of their joint judgment:[12]

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[6] *The Minister for Home and Territories* v. *Lazarus* (1919) 26 C.L.R. 159, 166.
[7] *Robertson Ltd.* v. *Valuer-General* (1952) 18 Local Government Reports New South Wales 261, 264; hereafter cited as "L.G.R."
[8] (1925) A.C. 439 (P.C.).
[9] (1929) 43 C.L.R. 277.
[10] Land Tax Assessment Act (C'wlth) 1910-1926 (No. 22 of 1910 — No. 50 of 1926), s.3.
[11] *Supra.*
[12] (1929) 43 C.L.R. at 290.

> In the legislation in Australia imposing tax on the unimproved value of land we think it is clear that the subject-matter sought to be taxed has always been that part of the value of the land at the relevant date which has been commonly described as the 'unearned increment'. The value at any given date of any given parcel of land has been considered as including two factors, namely(1) the portion of the value at the relevant date attributable to improvements . . .made by the owner or his predecessor in title, and (2) the portion of the value at such date attributable to extrinsic circumstances, such as public roads or railways, increased settlement in the neighbourhood, public services brought within reach and other causes not brought about by the operations on the land of successive occupiers.

It was a logical consequence of such a view that "any operations of man on land which had the effect of enhancing its value" were improvements[13] to be ignored in assessing the unimproved value. Such operations as the clearing of timber, draining of swamps and burning off, in so far as they continued to enhance the value of the land at the date of assessment, had been held to be improvements within the meaning of the Commonwealth Land Tax Act in a series of earlier High Court decisions.[14] In *McGeogh's Case* the Commissioner contended that these cases were no longer good law, and it was argued that the only improvements which were to be excluded from the unimproved value were visible physical improvements. In support of these contentions particular reliance was placed on two passages from the judgment in *Toohey's Case*:[15] "It will be observed that the value is not what has been sometimes designated by the expression 'prairie value'. The land must be taken as it exists at the date of valuation". That judgment further held that "the appeal should be allowed and the case remitted to the Supreme Court to direct the valuer to make a valuation of the land itself *as it at present stands*[16] with such advantages as it at present possesses and viewed as the bare land".

Knox, C. J. and Dixon, J. however rejected the arguments of the Commissioner based on *Toohey's Case*. They said:[17]

> We think the phrase 'prairie value' was used to denote the value which the land in its natural state and surroundings would have had at the relevant time assuming that nothing had ever been done by the hand of man either on the land itself or in its neighbourhood . . . We do not think the Judicial Committee . . . intended to decide that the conversion by the owner of a piece of swamp land . . . into valuable farm land by draining the swamp could not be treated as an improvement . . . because at the relevant date there was nothing in existence on the land to show what improvement had in fact been made.

The majority therefore reaffirmed the correctness of the earlier High Court decisions. They held that all human action on land which resulted in an increase in its value constituted "improvements". It followed that the unimproved value of land was its value in a virgin state, but considered as situated in its existing surroundings as developed and improved by them.

Isaacs, J. vigorously dissented. Relying on the *dicta* from *Toohey's Case* quoted above, he rejected the majority view of what constituted "improvements" within the Act. The relevant section[18] required the valuer to assume "that the

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[13] *Morrison* v. *Federal Commissioner of Land Tax* (1914) 17 C.L.R. 498, 503 *per.* Griffith C.J.

[14] *Morrison* v. *Federal Commissioner of Land Tax, supra; Campbell* v. *Deputy Federal Commissioner of Land Tax* (1915) 20 C.L.R. 49; *Fisher* v. *Deputy Federal Commissioner of Land Tax* (1915) 20 C.L.R. 242; *Keogh* v. *Deputy Federal Commissioner of Land Tax* (1915) 20 C.L.R. 258; *Kiddle* v. *Deputy Federal Commissioner of Land Tax* (1920) 27 C.L.R. 316; and *Jowett* v. *Federal Commissioner of Taxation* (1926) 38 C.L.R. 325.

[15] (1925) A.C. at 443, 445.

[16] *Italics supplied.*

[17] (1929) 43 C.L.R. at 291.

[18] *Supra* n. 10.

improvements if any thereon or appertaining thereto . . . had not been made". In the view of Isaacs, J.,[19] "An improvement 'on' the land, or 'appertaining thereto' is a concrete thing having a recognisable existence and identity distinct from the land on which it is 'made' . . . an improvement 'of' the land (indicates) . . . a better quality or condition of the land itself but having no independent existence". In his judgment an increase in value resulting from the latter type of improvement was outside the section and hence to be included in the unimproved value.

Moreover, he rejected the rationale of taxing unimproved land values formulated by the majority. In his view the true economic basis of land taxation was the present capacity to contribute to the national revenue measured by ownership of real property.[20] In these circumstances, a valuation method which was based not on the existing, but on the virgin state of land was, he considered, bound to produce different values for identical land and hence to result in an inequality of incidence in relation to present capacity to pay. He held therfore that the correct method of valuation was to value the land as bare land, stripped of all tangible physical improvements, but otherwise in its existing condition with all its advantages, whether produced by human action or not.[21]

In adopting this view, Isaacs, J. relied on the necessity for the law to be compatible with a practical valuation process. The valuation method accepted by the majority required an investigation into the history of the land to be valued.[22] Except in unusual circumstances this would be unknown to the valuer, and it would be frequently unknown to the owner. While such a method was feasible in the more recently developed areas, it was obviously unreal in the long developed rural districts, or in the cities. Any attempt to apply such a method in Great Britain would be absurd. On the other hand the method accepted by Isaacs, J. is universally applicable It is therefore submitted that the dissenting judgment of Isaacs, J. is to be preferred

It is here desirable to note two further decisions on what constitutes an improvement. In *McDonald* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* [23] the High Court held that the existence, close to the subject property of a government bore did not constitute an improvement to the land. The increase in value resulting from the presence of the bore was unearned increment, and forms part of the unimproved value. It was further held that while the presence of a successful bore, on the property was an improvement, the increase in value resulting from the proved presence of bore water was not part of the improved value: " . . the presence of water below the soil is a natural feature, it is part of the land unimproved, though the feature was previously unknown. Knowledge of a natural quality of the land does not make the quality artificial".[24] In the light of *McDonald's Case* it must be accepted that the value of proved minerals forms part of the unimproved value, yet having regard to the high cost of mineral exploration and development, and the risks of loss, such a view cannot be regarded as consistent with the rationale of taxing unimproved land values formulated by the majority in *McGeogh's Case.* An even more striking case is *Cooper* v. *Commissioners of Taxation.*[25] The appellant had subdivided a large

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[19] (1929) 43 C.L.R. at 295.

[20] *Id.* at 298.

[21] *Id.* at 302.

[22] The onus of proving that improvements have been effected is on the owner. *Brown* v. *Gundagai Shire Council* (1927) 8 L.G.R. 115.

[23] (1915) 20 C.L.R. 231. See also *Drysdale Bros. & Co.* v. *Federal Commissioner of Land Tax* (1931) 46 C.L.R. 308 where the High Court held that an assignment of sugar lands to a sugar mill under the Regulation of Sugar Cane Prices Act 1915-1923 (Q'ld.) (6 Geo. 5 No. 5 — 13 Geo. 5 No. 10) was not an improvement, and hence the resulting increase in value formed part of the unimproved value.

[24] *Id.* at 235. See also *Basey and Howie* v. *Commissioner of Taxes* (1919) S.A.L.R. 53.

[25] (1898) 19 N.S.W.L.R. 303 (F.C.).

block of land, constructed roads and houses, and leased the houses to tenants. He retained the fee simple of the entire block. The Supreme Court of New South Wales held that the respondents were entitled to determine the unimproved value of each lot separately, and were not bound to value the land as a whole. In determining the unimproved value of each lot, the respondents were accordingly entitled to have regard to the effect on its value of the roads and other improvements in the rest of the block. It is clear that the taxpayer was being taxed on "earned increment".[26]

It must now be considered how, since *Toohey's Case*, the unimproved value of improved land is to be determined. Where there are recent sales of comparable land in unimproved condition no difficulty arises. However, as Starke,J. observed in *Russell* v. *F.C.T.*[27]

> In *Toohey's Case* Lord Dunedin thought that what the Act required was quite simple. But I am afraid the matter is not so simple as it appeared to the noble and learned Lord. The Western District of Victoria has long been settled and is well improved, there is little if any unimproved land in the district, and none I should think being offered for sale or sold in that condition.

An alternative basis for determining the unimproved value of land in these circumstances is described by the judgment of the Full Court on appeal in *Russell's Case*:[28]

> . . he (the trial Judge) was impelled to fall back upon the process which is often used of deducing the unimproved value from the productiveness of the land when suitably improved. This involves finding what expenditure, if the land were in an unimproved condition, would be required to furnish the improvements, plant and stock necessary to turn to proper account its potential earning capacity, capitalizing the estimated annual income it would then produce and deducting from the capital value then obtained of the entire undertaking the expenditure upon improvements, plant and stock, leaving a residue representing the capital contained in the unimproved land.

The valuation method thus described is very different from a valuation of the land in its virgin state, but considered as situated in its existing surroundings. The practical difference in *Russell's Case* between the method accepted by the majority in *McGeogh's Case* and that adopted by Isaacs, J. is the allowance of £2,000 as an estimate of the cost of "cultivations and clearing, including destruction of rabbits and noxious weeds", in a total improved capital value of £106,000 of which £37,000 represented the cost of improvements.[29]

The method sanctioned in *Russell's Case* is of course applicable to urban land as well.[30] Indeed anticipated net rents form a more acceptable basis for capitalization than do the net returns from a pastoral business. A prudent businessman negotiating for the purchase of land on which buildings were erected which he planned to demolish, prior to the erection of new buildings for letting to tenants, would arrive at the price he was prepared to pay by means of some simple form of capitalization of anticipated net rentals. The process would probably be largely unconscious but the method approved in *Russell's Case* is merely a development and refinement of such a process.

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[26] See now Valuation of Land Act (N.S.W.) (No. 2 of 1916 — No. 30 of 1948), s. 58(2); and *Taylor* v. *Valuer-General* (1922) 6 L.G.R. 61. Although by virtue of the section the owner is entitled to a deduction for the cost of certain improvements off the subject land, there will generally be an increase in value which would exceed the amount of the deduction.

[27] (1933) 50 C.L.R. 182, 185-186.

[28] *Id.* at 194-195.

[29] *Id.* at 193.

[30] *Australian Provincial Assurance Association Ltd.* v. *Commissioner of Land Tax* (1942) A.L.R. 156 (H.C.), 16 A.L.J. 117; *Robertson Ltd.* v. *Valuer-General* (1952) 18 L.G.R. 261.

However, while the capitalisation of net rents from property forms a satisfactory basis for determining the unimproved capital value, the capitalization of net profits from a pastoral business generally does not. If such profits are capitalized and necessary expenditure deducted, the resultant figure will represent more than just the capital value of the land since it will include the capital value of the human operations involved in working the property.[31]

How then, in the absence of sales of comparable unimproved land, can the unimproved value of improved land be determined? It is now settled that, despite *Toohey's Case*, it is permissible to deduct the value of improvements from the improved value provided that the character and extent of the improvements are not such as to produce a distorted result.[32] The value of any goodwill adhering to the improved land must of course be deducted as well. By this means it is possible to isolate from sales of comparable improved land, the portion of the purchase price attributable to the capital value of the land, and to use the resulting figures as a guide in the assessment of the value of the land in question. An alternative method is to capitalize anticipated net rentals, and deduct the estimated cost of improvements. It is common to employ both methods as a means of cross-checking.

The problems of causation arising from the statutory assumption that the improvements on the land do not exist came before the Privy Council recently in *Tetzner* v. *Colonial Sugar Refining Co. Ltd.*[33] on appeal from the Supreme Court of Fiji. The respondent company was the owner of some six hundred and fifty acres of land in the town of Lautoka, Fiji. The land was the site of a large sugar mill, and it was admitted that on it the prosperity of the town largely depended. The relevant provisions of the Fijian legislation were identical with those contained in the Valuation of Land Act (N.S.W.)[34]

The Company contended that the land should be valued on the assumption that the mill had never existed, and that the effect of the mill on land values in the town which would in turn affect the value of the Comnany's land, should be disregarded in determining its unimproved value.

The appellant, the colony's official valuer, conceded that the improvements on the subject land were to be disregarded, but contended that the land was to be valued on the basis that it was located in the existing township. The Company relied strongly on the passage in the judgment in *Toohey's Case* where Lord Dunedin said:[35] " the improvements were to be left entirely out of view. They are to be taken not only as non-existent, but as if they had never existed". It also relied on the rationale of taxing unimproved land values as formulated by the majority in *McGeogh's Case.* To value the land on the basis contended for by the appellant would (it was argued) result in the Company being taxed on values which it had created itself.

The Privy Council however distinguished *Toohey's Case* and allowed the appeal. Lord Keith said:[36]

> What in their (Lordships') opinion is required in the present case is that the physical improvements, *with any value which they attach to the land on which they are situated,*[37] be excluded from the valuer's computation. The land will then be valued as land void of buildings but situated in the community with the amenities and facilities which have grown up around it. Their Lordships see no objection in the process of valuation to regarding

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[31] *Commissioner of Land Tax* v. *Nathan* (1913) 16 C.L.R. 654, 661; *Jowett* v. *Federal Commissioner of Taxation* (1926) 38 C.L.R. 325, 328.

[32] *Estate of George James* v. *Valuer-General* (1942) 15 L.G.R. 110; *Robertson Ltd.* v. *Valuer-General* (1952) 18 L.G.R. 261.

[33] (1958) A.C. 50 (P.C.).

[34] *Supra* n. 1, s. 6.

[35] (1925) A.C. at 443.

[36] (1958) A.C. at 57.

[37] Italics supplied.

the land as situated in a sugar town. The valuer need not shut his eyes to the fact that there is a sugar manufacturing industry in existence.

With respect this is clearly correct. Acceptance of the arguments for the Company would create a host of difficult problems in the valuation of land in multi-industry towns, and it could not be assumed that the legislature intended valuers to solve the problems of causation that would arise in such cases. *Toohey's Case* had established that the statutory assumption required all elements of value causally dependent on the presence of improvements to be excluded from the unimproved value. *Tetzner's Case* has now shown that the causal enquiry thus required is limited to the direct influence of the improvements on the value of the subject land. Any influence operating indirectly by increasing the value of adjoining land is too remote.[38] Sugerman, J. had earlier reached a similar conclusion in *Wentworth Falls Golf and Recreation Co. Ltd.* v. *The Valuer General.*[39] The objector contended that the increase in the value of the surrounding land resulting from the construction of the golf course on its land should be disregarded in assessing its unimproved value. Normally an increase in the value of surrounding land is reflected in a corresponding increase in the value of the subject land, but it was contended that the principles established in *Toohey's Case* and *McGeogh's Case* required that this influence be disregarded in assessing the value of the land in question. Sugerman, J. considered the effect of upholding these submissions. Different values would be assigned to identical land, and valuers would be required to embark upon "complex and speculative" enquiries.

The rationale of taxing unimproved land values was again referred to, but the learned Judge was clearly of the opinion that it was of little assistance in construing the Valuation of Land Act. He said:[40]

> It is true that an assessment of the unimproved value involves the direction of attention to the 'unearned increment' produced by extrinsic circumstances, and a consideration of these circumstances as well as the viewing of the land itself as if the improvements had not been made. But taking the increased settlement in the neighbourhood as one of those circumstances. I think that the requirements of s. 6 are fulfilled if attention is directed to that circumstance as it in fact exists at the relevant date without investigation of the causes which may have brought it about.

Has *Tetzner's Case* affected the correctness of *McGeogh's Case*? It must be conceded that each case dealt with a distinct problem and that cases on the definition of improvements are of little relevance in dealing with the extent of the causal inquiry required by their assumed absence; and *vice versa.* Moreover the Privy Council made no express reference to the correctness of *McGeogh's Case,* as they disclaimed any intention of determining the meaning of improvements.[41] Nevertheless the judgment in *Tetzner's Case* treats the rationale of taxing unimproved land values as irrelevant in construing the legislation,[42] and in its preference for a result compatible with a practical valuation process shows a basic approach very different from that of the majority in *McGeogh's Case.* It is therefore submitted that the authority of the majority judgment in *McGeogh's Case* has been affected by *Tetzner's Case.*

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[38] *Cf. Liesbosch, Dredger* v. *S. S. Edison* (*owners*) (1933) A.C. 449 at 460 per Lord Wright: "The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because it were infinite for the law to judge the cause of causes; or consequences of consequences . . . In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons."

[39] (1949) 17 L.G.R. 107.

[40] *Id.* at 110.

[41] (1958) A.C. at 55.

[42] *Id.* at 56, 58-59. The Supreme Court of Fiji, Carew, J., had relied upon the passage from the judgment of Knox, C.J. and Dixon, J. in *McGeogh's Case* at 290, quoted above n. 12.

Recently an associated problem arose for decision before Hardie, J. of the New South Wales Land and Valuation Court in *Sydney City Council* v. *Valuer General*.[43] The Council objected to the determination of the unimproved value of some land situated at an underground railway station. The land had been excavated to build the station, and the properties in question consisted of shops and offices situated below ground level. The question for decision was whether, in giving effect to the statutory hypothesis that the improvements to the land had not been made, the respondent was required to value the properties on the assumption that the excavation, and means of access to the properties, did not exist. It was contended for the Council that the improvements which were to be disregarded were the actual shop and office premises but no more. Hardie, J. however held that the statute required the land to be valued on the basis that the excavation and means of access did not exist.

It is submitted however that the learned judge should have reached a contrary conclusion. If *Cooper* v. *Commissioners of Taxation*[44] was correctly decided, and it is submitted that it was,[45] then the Valuer General should have valued each separate shop or office on the subject land separately, and in doing so he should have assumed that the excavation and means of access to the substrata existed, but that the improvements constituted by the actual shop and office premises did not.[46]

In concluding this review of the case law on unimproved value it is appropriate to note the remarks of Sugerman, J. in *Robertson Ltd.* v. *The Valuer General*.[47]

> The unimproved value of land as defined by the Statute is . . . in the absence of any sales of unimproved land an uncertain and entirely hypothetical quantity . . . within limits its estimation is largely a matter dependent upon opinion . . . The statutory definition of the unimproved value of land was devised in simpler times. Its lineage may be traced back at least to 1895 . . . The altered and more complex conditions of to-day place a great strain on the definition. What is defined tends in certain cases to become more and more a hypothetical quantity in the search for which circumstance is piled on circumstance, assumption upon assumption, and hypothesis upon hypothesis.

These comments upon the operation of the valuation system, coming from such an experienced judge, echo the words of Rich, J. quoted at the beginning of this article, and indicate the need for amendments to the Valuation of Land Act, or to the fiscal legislation which taxes unimproved land values.

II. *The Fee Simple to be Valued*

Section 6 of the Valuation of Land Act, and similar legislation stipulate the "fee simple" as the estate to be valued. For many years two interpretations of these words have struggled for supremacy, and it is only recently that the question has finally been resolved by a decision of the High Court. Does the Act

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[43] (1956) 1 Local Government Reports of Australia 172, hereafter cited as called L.G.R.A.

[44] (1898) 19 N.S.W.L.R. 303 (F.C.). See also Valuation of Land Act (N.S.W.) s. 26, s. 27. See also *Taree Municipal Council* v. *Clarke* (1936) 53 W.N. (N.S.W.) 189, 13 L.G.R. 37; and *Colonial Sugar Refining Co. Ltd.* v. *Valuer-General* (cor. Roper J. 23/6/39 unreported except in Law Book Co.'s Land Laws Service, vol. i, at p. 294-295).

[45] See also *Deputy Federal Commissioner of Taxation* v. *Gold Estates of Australia Ltd.* (1934) 51 C.L.R. 509, 516.

[46] See also *Resumed Properties Department* v. *Sydney Municipal Council* (1937) 13 L.G.R. 170 where Roper, J. held that floors of a building could be separately valued. *Semble* he was of the opinion that a floor was to be valued as if the building existed up to but excluding that floor. *Id.* at 172. See also *Y.M.C.A.* v. *Sydney City Council* (1954) 20 L.G.R. 35, 45, 47.

[47] (1952) 18 L.G.R. 261, 273.

refer to a hypothetical fee simple absolute in the land, or to the actual fee simple, subject to the conditions and reservations of the Crown Grant, and burdened perhaps by easements and covenants?

In *Stephen* v. *Federal Commissioner of Land Tax*[48] the High Court was evenly divided on the question. Isaacs, C. J. and Starke, J. held that the statute[49] referred to the actual fee simple in the land,[50] while Rich, and Dixon, JJ. held that it referred to a hypothetical fee simple absolute. The former opinion prevailed by virtue of the vote of the Chief Justice. Isaacs, C. J. held that there was nothing in the concept of the "fee simple" inconsistent with the existence of restrictions and conditions since it merely referred to the quantum of estate.[51] Both Isaacs, C. J. and Starke, J. relied upon the settled principles applicable where land is valued for resumption purposes. The owner is only entitled to compensation for the value of what he has lost, and this principle necessarily involves a consideration of any restrictions or conditions binding the land.[52] Starke, J. said[53] " It would be strangely unjust if a taxpayer were required to pay land tax on the value land would fetch in the market with all its potentialities and free from all the restrictions, although in his hands, owing to restrictions upon its use, the land had little or no value". Dixon, J. with whom Rich, J. concurred, reviewed the provisions of the statute, and adopted the other view.

Stephen's Case was subsequently followed in the New South Wales Land and Valuation Court in construing the corresponding provisions of the Valuation of Land Act.[54] The question again came before the High Court in *Royal Sydney Golf Club* v. *Federal Commissioner of Taxation*.[55] On this occasion however a differently constituted Bench, led by Dixon, C. J. as he had since become, refused to follow *Stephen's Case*, and adopted the reasoning of the dissenting judgments. The Court[56] said:

> It seems evident that the fee simple must be taken as free from encumbrances . . . Were it otherwise the taxable value of the land would be diminished but the correlative estate or interest would not come into tax unless by some chance it were an interest falling under some specific provision imposing liability . . . . The expression "the fee simple of the land" naturally means the fee simple as the highest estate, unemcumbered and subject to no conditions.[57]

The High Court also considered whether the effect of restrictions on land use imposed by town planning legislation was to be disregarded in determining the value of "the fee simple". The fee simple was viewed as an estate or bundle or rights, the quantum and nature of which were determined by State law. Restrictions on the use and enjoyment of land imposed by State law were of a fundamentally different nature from similar restrictions imposed by contract, or contained in Crown Grants. The latter restrictions were extraneous to the fee simple, and operated to limit it in given cases, while leaving the general

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[48] (1930) 45 C.L.R. 122.

[49] Land Tax Assessment Act (C'wlth) 1910-1930 (No. 22 of 1910 — No. 8 of 1930).

[50] Prior to *Stephen's Case* it was held in *Goulston* v. *Valuer-General* (1924) 7 L.G.R. 17 that the effect of a privately created restrictive covenant was to be ignored in valuing the fee simple. The language of Isaacs, C. J. and Starke, J. in *Stephen's Case* is at least consistent with the view that the existence of easements and covenants was not to be ignored. There is no reported case dealing with this question after *Stephen's Case*. *Cf*. *Ford* v. *Valuer-General* (1924) 6 L.G.R. 179. Conditions in Crown Grants are of course analytically different from privately created easements and covenants in relation to the nature of the fee simple to be valued.

[51] *Cf*. *The Commonwealth* v. *New South Wales* (1923) 33 C.L.R. 1, 42.

[52] *Corrie* v. *MacDermott* (1914) A.C. 1056 (P.C.); (1914) 18 C.L.R. 511.

[53] (1930) 45 C.L.R. at 138.

[54] *Beecroft School of Arts Trustees* v. *Valuer-General* (1940) 14 L.G.R. 199; *Sydney Exchange Co.* v. *Valuer-General* (1953) 19 L.G.R. 111; *Board of Fire Commissioners* v. *Valuer-General* (1953) 19 L.G.R. 115.

[55] (1955) 91 C.L.R. 610.

[56] Dixon, C.J., McTiernan, Webb, Fullagar, Kitto, JJ.

[57] *Id*. at 623.

concept of the estate itself intact. On the other hand, the former restrictions operated to limit or qualify the general concept of the estate itself.[58]

In other words the concept of the fee simple was to be deduced from State laws governing land use. Until recently general laws regulating and restricting land use were almost non-existent, and the fee simple was a purely common law concept. With the advent of legislation regulating land use, the concept of the fee simple has become a creature partly of the common law and partly of statute. The effect of such legislation on the concept of the fee simple does not depend on its having a State-wide operation, it depends on the source of the restriction. Hence no distinction is to be drawn between the proclamation of a few acres as a residential district, the regulation of land use in the County of Cumberland, or a State-wide law. All limit the fee simple itself.

The question soon arose as to whether this decision applied to the corresponding provisions of the Valuation of Land Act. In *Sydney City Council* v. *Valuer General* [59] Sugerman, J. held that it did. He held therefore that the land in question, which was a public park, was to be valued without reference to the restrictions on its use, enjoyment, and alienation resulting from its dedication as a public park, but taking into consideration the effect of the County of Cumberland Town Planning Scheme. This decision was recently approved and followed by the Full Court of the Supreme Court of New South Wales in *Rutledge* v. *Randwick Municipal Council*.[60]

The fact that property is let to tenants was not, before 1939, a factor which necessarily reduced the value of the reversion. Whether that was so depended on the terms and conditions of the relevant leases. At the present time, owing to the restrictions on eviction, and the limitations on the power to fix rents by contract, imposed by the Landlord and Tenant (Amendment) Act (N.S.W.)[61] and similar legislation in other Australian States, tenanted property is almost invariably worth far less on the market than the same property with vacant possession. It was not long therefore before it was contended that the value under the Valuation of Land Act of tenanted property was less than that of similar untenanated property. The question arose for decision in *Robertson Ltd.* v. *The Valuer General*[62] where Sugerman, J. said:[63]

> The "fee simple of the land" referred to in (sections 5 and 6) . . . is in my opinion the fee simple in possession. It is not the fee simple in reversion or remainder expectant upon the determination of some prior estate. No more is it the fee simple subject to the rights or immunities conferred on a tenant or a tenant holding over . . . bythe(landlord and tenant) legislation . . . So to say does not mean that the existence of the legislation, as a factor which may in a general sense affect land values, must be left out of consideration.

However the question of rent control arose in connection with the capitalization

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[58] *Id.* at 624. See also *Drysdale Brothers & Co.* v. *Federal Commissioner of Taxation* (1931) 46 C.L.R. 308. This case involved the effect of the Regulation of Sugar Cane Prices Act 1915-1923- (Q'ld.) (6 Geo. 5 No. 5 — 13 Geo. 5 No. 10) on land values, and was decided at a time when the views of Isaacs, C.J. and Starke, J. in *Stephen's Case* prevailed. The scheme of the Act was to 'assign' certain land to specified sugar mills. The land did not have to be used to grow sugar cane, but if it was, the cane had to be sold to a particular mill. Non-assigned land could not be used to grow sugar cane. The assignment ran with the land. By analogy with restrictions on title the increase in value attributable to the assignment was held to form part of the unimproved value. Since the *Golf Club Case* the decision would be supported on the ground that the legislation enlarged the traditional concept of the fee simple by adding to it a valuable liberty and right in the Hohfeldian sense.

[59] (1956) 1 L.G.R.A. 229.

[60] (1957) 3 L.G.R.A. 9.

[61] Landlord and Tenant (Amendment) Act 1948-1958 (N.S.W.) (No. 25 of 1948 — No. 7 of 1958).

[62] (1952) 18 L.G.R. 261.

[63] *Id.* at 263. See also *Commissioner for Railways* v. *Andreas* (1955) 55 S.R. (N.S.W.) 323 where the Full Court of the Supreme Court of New South Wales approved *Robertson's Case* in relation to the meaning of the fee simple.

of anticipated net rentals. The learned judge held that the anticipated rentals, and the rate of capitalization, could not be assessed "without due regard to the existence and general operation of the system of rent control"[64] but must nevertheless be assessed independently of any hypothetical determination of the fair rent of the hypothetical building on the land.[65]

Robertson's Case was decided at a time when new buildings were subject to the landlord and tenant legislation. Since then, amendments to that legislation in New South Wales have freed new buildings from the provisions of the legislation.[66] It is therefore submitted that the anticipated rents of the hypothetical building are now to be assessed independently of the system of rent control, except in so far as the existence of controlled rents operates to depress market rents.

It can be said in the light of the foregoing that the recent case-law on the nature of the fee simple to be valued has resolved some old problems, as well as new ones resulting from post-war legislation.

*K. R. HANDLEY**

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[64] *Id.* at 268.

[65] It was held in *Turner* v. *York Motors Pty. Ltd.* (1951) 85 C.L.R. 55 that vacant land was not "prescribed premises", and so was not within the provisions of the Landlord and Tenant (Amendment) Act 1948-1949 (N.S.W.) (No. 25 of 1948 — No. 22 of 1949).

[66] Landlord and Tenant (Amendment) Act 1948-1958 (N.S.W.) (No. 25 of 1948 — No. 7 of 1958) s. 5A(1)(a), s. 5A(1A). In relation to new dwelling houses the exclusion has operated since 1954, and in relation to new business premises the exclusion has operated since 1957.

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