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COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD.

Appeal allowed. Order of Supreme Court discharged. Question 1 *answered as follows: The sum of* £13,232 3*s.* 7*d. forms part of the dutiable estate of the deceased. Case remitted to Supreme Court to carry out this judgment.*

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Sly & Russell.*

J. B.

Appl *Commonwealth* v *Oldfield* (1976) 133 CLR 612

Cons *ACT, Chief Minister for the* v *MacRae* (1992) 110 FLR 106

[HIGH COURT OF AUSTRALIA.]

McGEOCH . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX RESPONDENT.

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SYDNEY, *Aug.* 6.

MELBOURNE, *Oct.* 28.

Knox C.J., Isaacs and Dixon JJ.

Land Tax—Assessment—Improvements—Clearing land and keeping free from prickly pear—"Improvements thereon"—Unimproved value—Method of ascertaining—Land Tax Assessment Act 1910-1924 (*No.* 22 *of* 1910—*No.* 32 *of* 1924), *secs.* 3, 10—*Land Tax Assessment Act* 1910-1926 (*No.* 22 *of* 1910—*No.* 50 *of* 1926), *secs.* 3, 10.

Held, by *Knox* C.J. and *Dixon* J. (*Isaacs* J. dissenting), that the eradication, destruction and removal of prickly pear plants which would otherwise spread and deprive the land of its utility and value are "improvements on" the land within the meaning of the *Land Tax Assessment Acts* 1910-1924, 1910-1926.

Morrison v. *Federal Commissioner of Land Tax*, (1914) 17 C.L.R. 498, and *Jowett* v. *Federal Commissioner of Taxation*, (1926) 38 C.L.R. 325, followed.

Toohey's Ltd. v. *Valuer-General*, (1925) A.C. 439, considered.

Held, also, by *Knox* C.J. and *Dixon* J. (*Isaacs* J. dissenting), that the unimproved value of land should be ascertained by considering what the land

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would have sold for at the relevant date if improvements including that which consisted in keeping the land free from prickly pear had not been made.

Per Isaacs J.: The unimproved value of land should be ascertained by considering what the land would have sold for as it exists in fact at the date of valuation.

Toohey's Ltd. v. *Valuer-General*, (1925) A.C. 439, followed.

CASE STATED.

Robert Stewart McGeoch appealed to the High Court from amended assessments of him by the Federal Commissioner of Land Tax for the years respectively ending June 1925 and June 1926 in respect of the unimproved value of certain lands owned by him, on the grounds that the departmental valuations were excessive and that such valuations were determined on a basis contrary to law. The appeals were heard by *Rich* J., who stated, for the opinion of the Full Court, a case which was substantially as follows :—

1. This appeal came on for hearing before me at Brisbane on 26th June 1929, when the following facts were admitted by the parties :—

2. The appellant is a grazier and resides at Roma Downs, Roma, in the State of Queensland.

3. The said Roma Downs is a pastoral property comprising (*inter alia*) twelve parcels of land held by the said Robert Stewart McGeoch and containing an area of 12,973 acres of freehold lands and the improvements thereon (hereinafter referred to as "the said lands") upon which and on four parcels of land held by Eileen Queenie McGeoch, wife of the said Robert Stewart McGeoch, a grazing business has been carried on for over thirty years prior to the acquisition thereof. The appellant acquired the said 12,973 acres of freehold land by purchase on or about 19th June 1925 for the sum of £22,250.

4. The appellant at all material times has been the owner of the said lands and has continued to carry on the business of grazing thereon.

5. Prior to the acquisition of the said lands by the appellant the said lands and the other lands in the near neighbourhood of the said lands became menaced by prickly pear. The said lands have ever since continued to be menaced by the said pear, and, if the

prickly pear had not been prevented from establishing itself thereon by the expenditure thereon hereinafter referred to, the whole of the said lands would have become thickly infested with prickly pear. Other lands in the neighbourhood on which the said prickly pear has not been prevented from establishing itself have become thickly infested with prickly pear and 760 acres of the said lands on which the said prickly pear was not prevented from establishing itself have also become and still are thickly infested with prickly pear. Land in the neighbourhood which has been allowed to become thickly infested with prickly pear may be taken for the the purposes of this appeal to be of negligible value.

6. During the occupancy of the said lands prior to the acquisition thereof by the appellant all the said lands (with the exception of about 760 acres thereof, which were thickly infested as aforesaid) were kept clear of prickly pear, but the expenditure of moneys for labour and material was at all times necessary to keep the said lands clear of prickly pear.

7. Since the acquisition of the said lands as aforesaid the appellant has expended moneys for such labour and material as aforesaid, and in the year ending 30th June 1926 expended for that year a total sum of £288 15s. therefor.

8. On or about 25th November 1925 the appellant furnished a return under the provisions of the *Land Tax Assessment Act* 1910-1924 in respect of the said lands owned by him on 30th June 1925, and duly set forth in such return the total improved value of the said lands at £22,250 and the unimproved value of the said lands at £8,603, with particulars of the improvements thereon as follows: —Water supply, £2,595; buildings, £720; fencing, £1,900; timber treatment, £5,189; "other—treatment of prickly pear estimated to cause appreciation of the improved value to at least 10s. per acre—minimum cost of eradication and maintenance," £3,243:—Total £13,647.

9. On or about 18th March 1926 the respondent duly assessed the appellant upon the unimproved value as set forth in the said return.

10. On or about 25th August 1926 the appellant furnished a return under the provisions of the *Land Tax Assessment Act* 1910-1926 in

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respect of the said lands owned by him on 30th June 1926, and duly set forth the total improved value of the said lands at £22,250, and the total unimproved value of the said lands at £2,626, with particulars of the improvements thereon as follows:—Water supply, £2,595; buildings, £720; fencing, £1,935; timber treatment, £5,189; clearing for cultivation 30 acres, £104; "other—cost of eradication of prickly pear over a period of 30 years at 14s. per acre, 12,973 acres," £9,081:—Total £19,624.

11. The said sum of £9,081 mentioned in the preceding paragraph hereof was claimed as the cost of keeping the said lands clear of prickly pear as hereinbefore mentioned.

12. On or about 8th July 1927 the respondent duly assessed the appellant as for the year 1926-1927 upon an unimproved value of £13,130.

13. On 8th July 1927 the respondent altered the said assessment for the year 1925-1926 so as to assess the appellant upon an unimproved value of the said lands of £13,130 on 30th June instead of £8,603 as aforesaid.

14. On 14th July 1927 the appellant, being dissatisfied with the said altered assessments, lodged with the respondent objections in writing against the said assessments on the ground that the said unimproved value so increased as aforesaid should be reduced for the following reasons: (i.) That the departmental valuations placed on the lands are excessive; (ii.) that the departmental valuations of the said lands are not the true unimproved value of the said lands; (iii.) that the valuations as determined by the Department are upon a wrong basis; (iv.) that such basis of valuation is contrary to law.

15. On 26th April 1929 the respondent further altered the said assessments by reducing the said unimproved value to £12,213 instead of £13,130 on the said respective dates.

16. On 27th April 1929 the appellant, being dissatisfied with the further altered assessments, by notice in writing requested the respondent to treat the said objections as appeals and to forward them to the High Court, and the respondent has duly forwarded the same.

17. The appellant contends that the keeping of the said lands clear of prickly pear is an improvement which has given and continues to give an added value to the said lands and that the appellant should be allowed to deduct from the improved value the value of such improvement in determining the unimproved value of the said lands.

18. The respondent contends that no such deductions should be made.

19. On the hearing of the appeal, the following questions arose, which, in my opinion, are questions of law, and I state this case for the opinion of the High Court thereon :—

(1) Whether the keeping of the said lands clear of prickly pear as aforesaid is an improvement within the meaning of the *Land Tax Assessment Acts* 1910-1924 and 1910-1926 ;

(2) Whether, in estimating the unimproved value of the said lands by deducting from the improved value the value added thereto by the improvements, the enhancement in value of the said lands occasioned by the keeping of the same clear of prickly pear as hereinbefore mentioned should be deducted from the improved value of the said lands at the relevant dates ;

(3) Whether the annual expenditure made in order to prevent prickly pear from establishing itself on the said lands is a capital or income expenditure.

McGregor (with him *Weston*), for the appellant. To clear land of prickly pear is to effect an improvement within the meaning of the *Land Tax Assessment Acts* (*In re Jones* (1) ; *Abbott* v. *Walsh* (2) ; *Minister of Lands* v. *Ross* (3)). The distinction between what constitutes an improvement and what are simply acts of maintenance is shown in *Abbott* v. *Deputy Federal Commissioner of Land Tax* (4). Operations by a man on land which contribute to bring about an enhancement of its value are improvements (*Commissioner of Land Tax* v. *Nathan* (5) ; *Morrison* v. *Federal Commissioner of Land Tax* (6)). The destruction of prickly pear is more important than the

(1) (1892) 2 L.C.C. (N.S.W.) 215.
(2) (1913) 23 L.C.C. (N.S.W.) 300.
(3) (1914) 24 L.C.C. (N.S.W.) 382.
(4) (1915) 5 L.G.R. (N.S.W.) 100.
(5) (1913) 16 C.L.R. 654, at p. 662.
(6) (1914) 17 C.L.R. 498.

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clearing and ringbarking of timber which in *Morrison's Case* (1) were held to be improvements. A licence granted under the *Liquor Act* 1912 is no part of the value of the land, therefore *Toohey's Ltd.* v. *Valuer-General* (2) is not applicable. When considering what improvements have been effected the clearing of prickly pear cannot be ignored (*Jowett* v. *Federal Commissioner of Taxation* (3)).

[DIXON J. referred to *In re Land Tax Acts, Wilson's Case* (4).]

The subject land would be worthless if active measures had not been taken to check and eradicate prickly pear.

Jordan K.C. (with him *Pitt*), for the respondent. The subject land was not originally infested with prickly pear. The evidence shows that a more or less uniform amount has been spent each year for many years in order to keep the land free of prickly pear. It was a recurring expenditure each year in respect of the same land and for precisely similar work, and such expenditure must therefore be regarded as an item of maintenance. "Improvements" do not mean past improvements now ineffective at the relevant date, but means those still effective. In order to measure the prevention of prickly pear, regard must be had to the maximum extent to which the land has been infested, because the maximum improvement cannot be more than the removal of the maximum infestment at any particular time. The proper way of reflecting the state of things into the value of land is to consider that which has been carried out since the last financial year.

McGregor, in reply.

Cur. adv. vult.

Oct. 28. The following written judgments were delivered :—

KNOX C.J. AND DIXON J. The first question for decision in this case is whether the keeping of certain lands owned by the appellant clear of prickly pear in the manner described in the case stated is an "improvement" within the meaning of the *Land Tax Assessment Acts* 1910-1924 and 1910-1926.

(1) (1914) 17 C.L.R. 498.
(2) (1925) A.C. 439.
(3) (1926) 38 C.L.R. 325, at p. 330.
(4) (1927) V.L.R. 399; 49 A.L.T. 54.

By sec. 10 of the Act land tax is to be levied on the unimproved value of all lands within the Commonwealth owned by taxpayers. By sec. 3 of the Act " unimproved value " is defined as meaning 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 thereon or appertaining thereto and made or acquired by the owner or his predecessor in title had not been made.

The facts stated in the case which are relevant to the determination of this question are as follows :—" The appellant at all material times has been the owner of the said lands and has continued to carry on the business of grazing thereon. Prior to the acquisition of the said lands by the appellant the said lands and other lands in the near neighbourhood of the said lands became menaced by prickly pear. The said lands have ever since continued to be menaced by the said pear, and, if the prickly pear had not been prevented from establishing itself thereon by the expenditure thereon hereinafter referred to, the whole of the said lands would have become thickly infested with prickly pear. Other lands in the neighbourhood on which the said prickly pear has not been prevented from establishing itself have become thickly infested with prickly pear and 760 acres of the said lands on which the said prickly pear was not prevented from establishing itself have also become and still are thickly infested with prickly pear. Land in the neighbourhood which has been allowed to become thickly infested with prickly pear may be taken for the purposes of this appeal to be of negligible value. During the occupancy of the said lands prior to the acquisition thereof by the appellant all the said lands (with the exception of about 760 acres thereof, which were thickly infested as aforesaid) were kept clear of prickly pear, but the expenditure of moneys for labour and material was at all times necessary to keep the said lands clear of prickly pear. Since the acquisition of the said lands as aforesaid the appellant has expended money for such labour and material as aforesaid, and in the year ending 30th June 1926 expended for that year a total sum of £288 15s. therefor."

The necessity of keeping lands free from prickly pear in the neighbourhood of infested lands may be gathered from the legislation

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of the Parliaments of Queensland and New South Wales on the subject. See Queensland *Land Acts* 2 Edw. VII. No. 18, sec. 50, inserting sub-division VII., 5 Edw. VII. No. 28, sec. 19, inserting sub-division IX., sec. 162M (1), (7) and (8), and the *Prickly Pear Destruction Acts* 1912-1926; New South Wales *Prickly-Pear Act* No. 31 of 1924 and previous legislation therein mentioned. See also observations of *Griffith* C.J. and *O'Connor* J. in *Sparke* v. *Osborne* (1).

It is manifest from the facts stated in the case that the keeping of the lands clear of prickly pear was brought about by the operations of the successive owners or occupiers upon the land, that those operations resulted in an enhancement of the value of the land, and that the benefit of them still continues. The operations, of course, involved the eradication, destruction and removal of plants upon the land. When the special case speaks of keeping the lands clear of prickly pear, it refers to the work of eradicating, destroying and removing plants which otherwise would spread and deprive the land of utility and value. The decision of this Court in *Morrison* v. *Federal Commissioner of Land Tax* (2) establishes that these operations resulted in an improvement within the meaning of the Act. But for the suggestion which has been advanced that the decision in that case is inconsistent with the reasons given by the Judicial Committee in *Toohey's Ltd.* v. *Valuer-General* (3), it would be unnecessary to say more than that, even if we did not agree with the decision on this point in *Morrison's Case*, as we do, we should feel ourselves bound to follow it as a decision concurred in by five Justices which has stood unquestioned for fifteen years and was expressly approved and acted on by a Full Court in *Campbell* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (4), in *Fisher* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (5) and in *Keogh* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (6)—all decided in the year 1915. We think we are justified in assuming that, if these decisions ran contrary to the intention of Parliament in enacting the definition of "unimproved value," the Act would have been amended so far as necessary to ensure that

(1) (1908) 7 C.L.R. 51, at pp. 59-60, 70-71.
(2) (1914) 17 C.L.R. 498.
(3) (1925) A.C. 439.
(4) (1915) 20 C.L.R. 49.
(5) (1915) 20 C.L.R. 242.
(6) (1915) 20 C.L.R. 258.

effect should be given to that intention, but no such amendment has been made and the definition stands exactly as it did when those cases were decided. But as it has been suggested that the effect of the judgment in *Toohey's Case* (1) is to exclude from the category of "improvements" in arriving at the unimproved value of land anything which is not at the relevant date visible as a physical addition to or excrescence upon the land—such as a house or a fence or a dam containing water—we think we should deal with the matter more fully in view of its importance as bearing on the liability of a great number of taxpayers engaged in rural industries. We may say at the outset that it was not contested at the Bar in this case that the removal of prickly pear from the land would be an "improvement" within the meaning of the Act, the contention for the Commissioner being that the prevention of infestation by prickly pear was not equivalent for this purpose to its removal when the land had become infested. But it is well known that the infestation of land by prickly pear is in its early stages a gradual, although unfortunately not a slow, process, manifested by the springing up of small patches or individual plants of the pear as the result of the dropping of seeds on the land by birds or of the deposit on the land by flood waters or otherwise of leaves or pieces of the plant which in due course take root and grow. It is apparent that an effective method of preventing the progress of the pear is from time to time to dig up and destroy the small patches or plants before they become too large or too numerous to be so dealt with; so that in fact it is necessary—or at any rate customary—in order to prevent infestation, to uproot and destroy plants actually growing on the land, an operation which is no different in kind from that carried out in the destruction and removal of timber growing on the land. The process is precisely similar to that adopted in eradicating the suckers or saplings which spring from the stumps or roots of trees which have been killed by ringbarking.

In *Morrison's Case* (2) the improvements were alleged to consist in the following operations, namely, (a) killing growing timber by ringbarking, and clearing the land of dead timber including that which had been brought on the land by floods or had decayed and

(1) (1925) A.C. 439.

(2) (1914) 17 C.L.R. 498.

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fallen in the natural course of events, (b) burning tussocks and other grasses, which had the effect of improving the pasture.

It is, of course, notorious that the greater portion of the land occupied for pastoral purposes in Australia would have been of little value unless it had been cleared of many of the trees growing on it in its natural state. In the course of this operation young trees or suckers spring from the stumps or roots of the trees which have been killed, and it is necessary from time to time to remove these suckers in order to derive any lasting benefit from the killing of the trees. If the suckers are allowed to remain, the result is that the land in time becomes densely covered with small trees and practically useless for pastoral, or indeed for any, purposes. An instance of this is afforded by the facts in *Kiddle* v. *Deputy Federal Commissioner of Land Tax* (1). Before the enactment in Australia of legislation imposing taxes on the unimproved value of land, it has been held by the Supreme Court of New South Wales in *Ex parte Thomas* (2) that the ringbarking of trees was or was capable of being an *improvement upon the land* on which it was carried out. In that case Sir *W. Manning* J. said (3) :—" It is said that an improvement, to be within the meaning of this section, must be *upon* the land ; but I think that all that is meant is, that the improvement should not be out of the land, and that this ringbarking is an improvement on, and adhering to the land. . . . But the act of man in ringbarking the trees leads to processes of nature by which the pasture may by degrees be improved." The same conclusion was reached thirty years later by the Supreme Court of New South Wales in *Hopkins* v. *Minister for Lands* (4). *Pring* J. said (5) :—" Improvements may be roughly divided into two classes : (1) constructive, such as dams, fences, buildings, &c. ; and (2) destructive, such as the eradication of noxious weeds, . . . clearing, ringbarking, and suckering. A legal right such as property—strictly so called—cannot exist in the latter class. What is meant by the phrase 'property in improvements' is, I think, the benefit accruing to the land by reason of the improvements. . . . Improvements by ringbarking and suckering admittedly

(1) (1920) 27 C.L.R. 316.
(2) (1881) 2 N.S.W.L.R. 39.
(3) (1881) 2 N.S.W.L.R., at p. 44.
(4) (1912) 12 S.R. (N.S.W.) 215.
(5) (1912) 12 S.R. (N.S.W.), at p. 225.

confer a benefit on the land exceeding the mere cost of effecting them."

The New South Wales Act providing for the taxation of unimproved value of land was passed in 1895 and contained a definition of unimproved value corresponding to that applicable in this case. Both in 1895 and in 1910, when the Federal *Land Tax Act* was passed, it was recognized universally in Australia that the clearing of superfluous timber from land was an improvement enhancing the value of that land, the benefit of which continued so long as the land was kept in its cleared state. And in many cases the cost of clearing was among the most important items of the expenditure necessary to bring the land to a reasonably productive capacity. As was said by *Griffith* C.J. in *Morrison's Case* (1):—"Applying these principles, the first question we are asked is whether certain operations are improvements. They are: ringing timber; clearing timber that had fallen in consequence of ringing; clearing timber that had fallen through natural decay or storms; clearing timber that had been brought there by floods; actively burning timber on the ground; actively burning tussocks and other grass; burning by bush fires which, so far as the owners of Killingworth were concerned, were accidental, and which burned off dead and useless timber, and burned tussocks and rank grass; as a result of which operations the land was sweetened and became sounder sheep country; the stocking of the land consolidated to some extent, and otherwise improved it. Anyone familiar with Australia knows that all these operations do improve the value of land, and make it saleable at a higher price. It is also obvious that every one of these operations is only a means to an end. They enable the forces of nature to operate by bringing sunshine and rain to the soil. They sweeten the land and produce as important changes as the draining of a swamp." It was argued in that case, as it is now suggested, that the improvements to be taken into consideration were those then visible on the land and did not include the present effect of improvements which had disappeared. In *Keogh's Case* (2) our brother *Rich* took into account the effect of improvements which consisted (*inter alia*) in ringbarking, picking up and burning off timber, and the question whether these improvements

(1) (1914) 17 C.L.R., at p. 504. (2) (1915) 20 C.L.R. 258.

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had been maintained by destroying the suckers. In *Fisher's Case* (1) this decision was approved by a Full Court, and the question of improvements effected by clearing timber was dealt with (see per *Isaacs* and *Gavan Duffy* JJ. (2)). It appears from what we have said that the clearing of timber from the land has uniformly been regarded as an improvement, as also has the maintenance of the effect of that improvement by destroying and thus preventing the growth of suckers, whether the question was as to an improvement in fact or as to an improvement within the meaning of the *Land Tax Assessment Acts*. Indeed clearing land in order to make it fit for pastoral or for agricultural purposes is in a country in course of settlement an outstanding example of "improvement." Just as the reduction of bush country to a condition useful to man is thus regarded, so the reclamation of country the useful condition of which has been lost or impaired by the growth or re-growth of native vegetation or of any of the many vegetable pests which have come here, has always been considered an obvious and perhaps typical improvement of country land. The destruction of vegetation which if allowed to remain will spread and envelop the land has not been thought to differ in character from the same operations conducted on the lavish scale which would afterwards be necessary to reclaim the land. This view has, we think, been uniformly acted upon in the Courts with the exception, if it be an exception, of a case decided in 1920 in the Supreme Court of New South Wales by *Ferguson* J. In *Abbott* v. *Deputy Federal Commissioner of Land Tax* that learned Judge said (3) :—"A piece of land already free from prickly pear is not improved by reason of the fact that the pear has not been allowed to spread to it, though it may be improved by operations which render the pear less likely to spread to it. In so far as land that was previously infested with pear is now clear from pear, or is less badly infested, there is an improvement, and the unimproved value is arrived at by assuming that that improvement had not taken place. In so far as the result of the expenditure has simply been that the pear has been prevented from spreading, it comes within the category, not of improvement, but of maintenance.

(1) (1915) 20 C.L.R. 242.
(2) (1915) 20 C.L.R., at p. 253.
(3) (1915) 5 L.G.R. (N.S.W.), at pp. 101, 102.

The fact that such expenditure is necessary must, of course, be taken into account in estimating the value of the land, whether improved or unimproved." It appears that *Ferguson* J. considered that the removal of the prickly pear plants was a benefit to the land, and so an improvement, but that in obeying the statutory requirement and making the assumption " that the improvements (if any) thereon or appertaining thereto . . . had not been made " the valuer was not to assume that the land was in that condition which would inevitably follow from the omission to make the improvement. The reason which *Ferguson* J. gives for this view is that it is not the destruction of prickly pear which is the improvement but the benefit to the land from the destruction. He says (1):—" The fallacy of the contention, I think, lies in the confusion of two distinct things—the destruction of prickly pear and the improvement resulting from the destruction. It is not the act of destroying the plant, it is the consequent alteration for the better in the condition of the land, that constitutes an improvement. If there is no alteration for the better, there is no improvement. A piece of land already free from prickly pear is not improved by reason of the fact that the pear has not been allowed to spread to it, though it may be improved by operations which render the pear less likely to spread to it." This reasoning appears to analyze the conception of improvement into two elements rather than to distinguish something which is not an improvement from an improvement. The improvement is the beneficial alteration in the condition of the land consisting in the absence of the prickly pear plants which were upon the land before their removal. The reason why their absence is a beneficial alteration is that their continued presence was a menace to the utility of the land. Apart from the fact that any appreciable growth of plants means an appreciable impairment of the area where they are, their presence means that a process has commenced which will with ever-increasing rapidity ruin all the land. If you are required to assume that this beneficial alteration has not been made, it seems almost impossible to suppose that the land is not in the condition in which without the beneficial alteration the land must certainly have been: the condition which it was the purpose of the improvement to prevent. This decision

(1) (1915) 5 L.G.R., at p. 101.

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of *Ferguson* J. was disapproved in 1926 by our brother *Rich* in this Court (*Jowett* v. *Federal Commissioner of Taxation* (1)). But whether the definition of "unimproved value" does or does not require the assumption that the land is at the relevant date in that condition into which it would have got if the improvement had not been made, it is clear that *Ferguson* J. did not doubt that the destruction of prickly pear resulted in or involved an improvement, even if, as his opinion was, it did not itself constitute an improvement.

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 on or appertaining to the land made by the owner or his predecessors 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. See *Cox* v. *Public Trustee* (2). Adopting the language of *Hosking* J. in that case, we think the unimproved value which is the subject of taxation under this Act is the value at the relevant date of the land in its natural state as for the time being affected by extrinsic circumstances of every kind, as, for example, those above mentioned, but not by what has been done to it or upon it in the shape of improvements of any kind effected by the operations of successive owners the benefit of which continues as a factor in the then present value of the land. It is suggested that this view is inconsistent with the opinion expressed by Viscount *Dunedin*, speaking for the Judicial Committee in *Toohey's Case*, in these words (3):—"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 improvement; what would it fetch in the market? It will be observed that the value is not what has been sometimes

(1) (1926) 38 C.L.R. 325.
(2) (1918) N.Z.L.R. 95, at pp. 99, 103.
(3) (1925) A.C., at p. 443.

designated by the expression 'prairie value.' The land must be taken as it exists at the date of the valuation." We do not think Viscount *Dunedin*, when he made these observations, meant anything inconsistent with what we have said, or indeed adverted at all to the subject we are considering. In our opinion the expression " prairie value " in this quotation was used as denoting the value of the land on the assumption that there was to be excluded from such value not only any portion resulting from improvements made on the land by its successive owners but also the portion attributable to extrinsic circumstances existing at the relevant date. In other words, 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. The observation that " the land must be taken as it exists at the date of the valuation " appears to us to be directed to what we have called " the extrinsic circumstances," that is, to refer to the land in relation to the circumstances of the neighbourhood in which it is situated. We do not think the Judicial Committee decided or intended to decide that the conversion by the owner of a piece of swamp land, which in that condition was valueless, into valuable farm land by draining the swamp, could not be treated as an improvement on or appertaining to the land, because at the relevant date there was nothing in existence on the land to show what improvement had in fact been made; and if we are right in this view the decision in *Morrison's Case* (1) stands unaffected. Such a construction of the words of the Act as that suggested would, in the case of the greater part of the rural lands in Australia, result in the inclusion in the subject matter of the tax—the unimproved value of the land—of any amount wholly attributable to operations generally recognized as improvements in fact which had been effected by the owner at his own expense—a result which appears to us entirely inconsistent both with the expressed intention of Parliament and with the theory underlying the imposition of the tax.

We are much strengthened in our view of Viscount *Dunedin's* observation by a consideration of the nature of the problem before

(1) (1914) 17 C.L.R. 498.

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the Judicial Committee for decision in the case referred to and by a perusal of the transcript of the argument before their Lordships. It is true that in the course of the argument in *Toohey's Case* (1) some observations were made by Viscount *Dunedin* with reference to *Commissioner of Land Tax* v. *Nathan* (2) to the effect that this Court had rightly not gone back to the time when the land was a swamp. His Lordship seems to have been under the impression that the sum of £7,000, the cost of filling in the swamp, was not allowed as a deduction from the improved value of the land. A perusal of the report of *Nathan's Case* above referred to will show that in fact the £7,000 was allowed. (See the statement of Franklyn's evidence at p. 660 in which, after allowing that amount, he estimated the unimproved value of the land at £16,935, the amount subsequently accepted by the Court as the unimproved value.) Viscount *Dunedin's* observation seems to have been made merely to suggest a possible explanation of what his Lordship otherwise found hard to understand in *Nathan's Case*. The remainder of the argument contains no allusion direct or indirect to the question now to be decided, which indeed was plainly irrelevant to the question before their Lordships.

The question in *Toohey's Case* (1), so far as we can see, in no way touched or related to the definition of the word "improvement." The decision was concerned only with the question whether the additional value given by the hotel licence inhered in the site or unimproved land. The argument did not raise or refer to the question whether improvements might not consist in or result from the destruction of undesirable vegetation or alterations not being physical additions to the land.

In these circumstances we think it is incredible that by such a phrase Viscount *Dunedin* should have intended to decide so important a matter and to decide it in a sense contrary to the settled view of the Australian Courts settled over a long period of time.

For these reasons we think the decision of our brother *Rich* on this point in *Jowett's Case* (3) was right, and that question 1 should be answered Yes.

Question 2. In our opinion this question is concluded by the decision in *Toohey's Case* (1). Applying that decision, the

(1) (1925) A.C. 439.
(2) (1913) 16 C.L.R. 654.
(3) (1926) 38 C.L.R. 325.

unimproved value of the land should—subject to any question that may arise out of the notice of objection given by the taxpayer—be ascertained by considering what the land would have sold for at the relevant date if the improvements including that which consisted in keeping the land free from prickly pear had not been made. Our answer to this question is No.

Question 3. It is not necessary to answer this question.

ISAACS J. *Toohey's Case* (1) governs the present case, there being no relevant distinction between the Commonwealth and New South Wales statutes. The judgment of the Privy Council is expressed in terms of plain unequivocal English. At times, as it seems to me, there has been anxious care to prevent the possibility of misapprehension. That applies to the point now under consideration. Misapprehension which would here involve an enormous gap in Commonwealth and State finances and create confusion, cannot, I think, occur if the words of the judgment receive their ordinary meaning. So read, I must candidly admit for myself that the judgment gives to the statute an operation more simple, more practical and more just to the Crown and the general body of taxpayers, than that which resulted from the prior decisions of this Court, in some of which I took part. My reasons for saying this I hope to make tolerably clear, though I must add that no commentary can surpass the text in clarity.

As I understood the argument for the Commissioner, while it was admitted, and indeed could not be denied, that the clearing away of prickly pear was an improvement of or to the land, yet it was urged that the present freedom of the land from prickly pear was not an " improvement on " the land within the meaning of the Act, that is to say, an improvement which had to be disregarded in order to arrive at the taxable unimproved value of the land. No other meaning can, as it seems to me, be attributed to the first question submitted, and it is really now the only point of law in the case.

The material portion of the judgment of Lord *Dunedin* for present purposes is contained in the following passage (2), the decisive portions of which I italicize :—" It is with the latter of the two

(1) (1925) A.C. 439.

(2) (1925) A.C., at p. 443.

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sections that the valuer has to do. Now, what he has to consider is what the land would fetch as 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 never had existed.* It is, therefore, *to approach the question from a completely wrong point of view to begin with a valuation which takes in the improvements* and then proceed by means of subtraction of a sum arrived at by an independent valuation in order to find the required figure. 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 improvement*, 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 the valuation.*" The last two sentences evince the extreme care to avoid misunderstanding as to what is meant by "improvement."

There are four points in that passage which must be distinctly noted. They are: (1) improvements are to be considered as if they had *never* existed; (2) improvements are *on* or *appertaining to* the land, and are distinct from the land itself; (3) in *no case* is it permissible to value the land plus the improvements, and then subtract the value of improvements; (4) the only permissible way is to ascertain what the land itself would fetch in the market, *not as prairie land, but as it exists at the moment of valuation.* The task of the valuer is to observe and give effect to all these points. As to the first, no question submitted touches it. The present case stated raises no such question for the Full Court, because the only relevant suggested improvement is the absence of prickly pear. The second point is extremely important. Bearing in mind that the "land" is distinct from the "improvements," we must, in view of the passage, regard only improvements that are "on" the land or are "appertaining," that is, "belonging" (see *Barlow* v. *Rhodes* (1) and *McDonald* v. *Deputy Federal Commissioner of Land Tax* (2)), and not those which merely create improvement "of" the

(1) (1833) 1 Cr. & M. 439, at p. 448; 149 E.R. 471.

(2) (1915) 20 C.L.R. 231, at pp. 234-235.

land. An improvement " on " the land, or " appertaining thereto," is a concrete thing, having a recognizable existence and identity distinct from the land on which it is " made," with a locality and extension of its own. An improvement " of " the land has an abstract denotation indicating a better quality or condition of the land itself, but having no independent existence or identity. Instances of the former are readily suggested, as a house, a fence, a bank, a wall, a tank, a right of light or water from an adjoining tenement; and so on. The latter is not a thing, but the qualitative result of some act. The removal of scrub, of noxious weeds or vermin, the clearing of stones, the cutting down of a hill, the filling up of a hollow, the drainage of a swamp, the grubbing of stumps, are all acts which leave only beneficial results in the form of an improved condition of the land itself, that is, of the bare land or " site " as it exists at the moment of valuation, but add nothing to it, though they add to its *value*. Lord *Dunedin's* words seem to me as to this hardly susceptible of doubt; the " plot of land " as contrasted with " nothing on it in the way of improvement." To *remove* a detriment is, of course, an improvement to the land or of the land, but does not constitute an improvement *on*, or " appertaining to " the land. The force of this may be more fully appreciated when one remembers that after the removal, say, of valuable building timber naturally growing, it would not be correct to say there was a detriment *on* the land. The land was thereby probably rendered less valuable, but the absence of a given object does not constitute the presence of its opposite. To call the mere past removal of an obstruction or any other positive detriment—such as prickly pear—an existing improvement on the land as it exists at the date of valuation, is not, I think, consistent with the general understanding of the quoted passage in *Toohey's Case* (1). The *prevention* of a detriment is still further removed: it leaves the land precisely as it is. The third point is clear, and in effect it cuts away one source of confusion as to improvements. I need say no more about it except this: that it would, in my opinion, be a violation of it to substitute " value of improvement " for " improvement on the land." What I mean is this. It would be a violation of the third point to ask

(1) (1925) A.C., at p. 443.

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what the land in fact free from prickly pear would fetch, and then deduct a sum as representing the value of the absence of prickly pear. It is, in effect, the same thing to imagine what does not exist—namely, prickly pear—and deduct from the value of the bare land as it in fact exists a sum representing the imaginary cost of an imaginary removal of the imaginary prickly pear. The fourth point is that the land itself as it exists at the date of valuation—that is, the "bare land"—of the taxpayer—the "plot of land," as Lord *Dunedin* calls it—is to be valued as a vacant site, and that value is the final figure of the problem. To quote Lord *Dunedin's* words (1), "the valuer to make a valuation of the land itself as it at present stands with such advantages as it at present possesses, and viewed as bare land." "Advantages" of the bare land are factors in constituting its unimproved value, whether they arise naturally or artificially. The absence of prickly pear is, of course, such an advantage as compared with land still infested, and adds to its unimproved value, just as any other incidental expense would, but cannot be deducted from the capital value of the land as it stands. To regard the absence of prickly pear as an improvement *on* the land, and to value the land as if it were not presently free from prickly pear, and therefore had not that advantage, is to value the bare land, not as it actually exists at the date of valuation, but as it existed in the unlimited past, or as it would have still existed in the present, practically, that is, as "prairie land."

My learned brothers have expressly approved the case of *Jowett* v. *Federal Commissioner of Taxation* (2). I at once admit that it is in accordance with the conclusions at which they have arrived, and in opposition to my own. It may usefully be examined, because the tests are there explicitly stated by my brother *Rich* in these words (3):—"If the growth of the prickly pear had not been checked by early removal, what would be the condition of the land? Would the price of the land be any different if the prickly pear which would have been there had not been stopped from growing?" Applying these tests, *Rich* J. held that "the freedom of the land from prickly pear must be treated as an improvement," that is, of course, as an "improvement on the land."

(1) (1925) A.C., at p. 445.
(2) (1926) 38 C.L.R. 325.
(3) (1926) 38 C.L.R., at p. 330.

That brings the matter to a point. With great respect, I consider the test as leading to error. The land is to be taken *as it is*, not as it is not and never was but " would be " if something had happened that did not happen. And therefore the price is not what it " would be " if the land were different, but on the basis that the land was sold in its actual condition at the moment for valuation. The difference between my view and that expressed in *Jowett's Case* (1) arises, so far as the authority of *Toohey's Case* (2) is concerned, on a few words omitted in *Jowett's Case* (3) from the quotation made from Lord *Dunedin's* judgment. Those words are the two concluding sentences in the quotation already made in this judgment. I regard them as the keystone of the whole of this matter. If in order to get the " unimproved value " of the land, which means the net sum on which the tax is to be levied, you must take the land " as it exists at the date of valuation," it is an inescapable contradiction to apply a test which takes for that purpose the land as it would exist under different conditions. These concluding sentences are the evident result of great care and deliberation to prevent any notion that the word " improvement " in the preceding sentence extended to cover a more improved condition of the land itself. Not only so : they are an essential part of the reasoning embodied in the actual order made. The order was to remit the cause to the Supreme Court " to direct the valuer to make a valuation of the land itself *as it at present stands with such advantages as it at present possesses*," &c. (4). It would, I confidently suggest, have been a clear departure from that direction if the valuer, for instance, had valued the land as it " would be " had it remained in its original condition, say, in the days of Captain Cook, or perhaps worse by reason of constantly accumulating natural growth, or natural disintegration. But *Jowett's Case* would require that and more.

It may be well, in view of the circumstances, to do what I regard as a work of supererogation, namely, show how the view as expressed by Lord *Dunedin* (5) in this respect is based on the broadest grounds of accuracy. The unimproved land tax rests upon a very distinct

(1) (1926) 38 C.L.R. 325.
(2) (1925) A.C. 439.
(3) (1926) 38 C.L.R., at p. 330.
(4) (1925) A.C., at p. 445.
(5) (1925) A.C., at p. 443.

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and obvious basis, differentiating it completely from all legislative provisions for settlement on Crown lands which were the groundwork of the New South Wales cases relied on for the opinion from which I have the misfortune to differ. The land tax has no reference to relative improvement of Crown land by Crown tenants, or the adjustment of equitable claims as between outgoing and incoming Crown lessees. Its basis is the duty to bear a share of public expenditure, measured by the value of property actually owned. It is a general tax on present possessions. It takes the form of a ratable contribution to the revenue for the purposes of ordinary government, and is required from the taxpayer proportioned to his present capacity in the shape of the actual value of his land as at the given moment. In law his land includes not merely the site itself, but also whatever structures and other things which are by legal doctrine attached to it, being either on it or appertaining to it. But, as a matter of policy, the only portion of this legal landed property made liable is what is in fact "land," that is, the "bare land" itself. That "bare land" as a vacant site is necessarily to be valued as it in fact then exists. I say "necessarily" because any other conception destroys the fundamental equality of the taxation. A has a vacant piece of land, never altered by man, and worth, say, £1,000. B has a vacant piece of land, also worth £1,000, but it was by an ancestor fifty years ago converted from swamp to arable land. C has a vacant piece of land also worth £1,000 which was menaced by prickly pear, but which fortunately was preserved free and of full utility at a slight expenditure, which will be duly acknowledged in his income tax assessment. All three are equally competent to contribute to the Consolidated Revenue for current needs of the nation. What possible justification in reason is there for supporting an intended discrimination? A, by concession, would be assessable in respect of the full £1,000. B, on the appellant's contention, would be absolved on the merits of his deceased ancestor. C would on the same contention be absolved because he had luckily succeeded in warding off a possible danger whereby his land was as productive as before. In my opinion, so long as the land in its actual present condition is worth £1,000 capital value, how it came to be in that condition, and how it was prevented from falling into a worse

condition, are nothing to the point. The all-sufficient fact in each case is that the taxpayer is owner of x bare land representing so much wealth in money, because the land as it stands would fetch that sum in the market. That amount of wealth is the taxable amount as being the unimproved value of the land. If the land is free of prickly pear, it would, let us say, fetch in fact £x. There is no intelligible principle on which a Court can presume it would fetch less merely because it was menaced, or because some former owner filled up some holes in it, or removed some stones, or burnt off some dead timber. The menace is one of many factors which vendor and purchaser would consider in arriving at the price. But the same must be said of every other business consideration in such a transaction. The other circumstances are not even so much.

The plain truth is that Parliament, in levying the tax, supposes the valuer to go on to the property and view the concrete land, and all upon it, and make his valuation as a practical man. He sees the "plot of land," and he sees whatever there may be of "improvements" on it. He disregards the improvements, shuts them clean out of his mind, and looks at the vacant site. He does not trouble about ancestral efforts, or menaces averted, or any part alterations for good or evil; nor does he delve into the antiquarian history of the allotment, nor trouble himself with economic theories. He views the land as a present saleable commodity, and supposes a seller and a buyer. On what sum would those two agree in a fair market operation in respect of that piece of land? Intrinsically, the land is as it stands and as it would appear to the buyer; extrinsically, all circumstances of supply and demand arising from the general affairs of the community come into the problem. The buyer would not give a penny more because the land possessed its advantages from nature and not man. The seller would not take a penny less because some of the advantages of the land were due to the hand of man and not to nature. Suppose the valuer were to take in hand the list of improvements set out in *Morrison's Case* (1), a list for which I acknowledge my share of responsibility, since I assented; he would see included "actively burning timber on the ground; actively burning tussocks and other grass; burning by bush fires which, so

(1) (1914) 17 C.L.R., at p. 504.

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far as the owners . . . were concerned, were accidental, and which burned off dead and useless timber, and burned tussocks and rank grass." These examples will serve. The valuer may see there has been a fire, and that some timber has been burnt. He will observe from the Act that even if the result be technically an "improvement," he can discard it only if it has been "made or acquired" by the owner or his predecessor in title. An accidental bush fire does not, nor does the actual burning of the timber, reasonably answer that description. There is no assignable reason why, if the gratuitous result prove advantageous to the owner, it should further entitle him to escape taxation. But further, how is the valuer to know whether timber or tussocks were "actively burned"? How is he to tell whether a passing tramp or a negligent neighbour was not the cause of the fire? Is he to institute inquiries, not only as to the natural condition of the land and all apparent alterations, but as to whether each alteration is a benefit or a detriment or neither, and, if a benefit, whether it was "made or acquired" by the owner or his predecessor in title? And all his conclusions are to be open to challenge. If the Act required all this, then it would not be true that "what the Act requires is really quite simple." The one question, as it seems to me, the valuer has to answer is: "What sum would the hypothetical purchaser and the hypothetical vendor in open market agree to as the fair price of the bare land as a vacant site in its actual state at the statutory date of valuation?" That sum the land represents in cash, and is the statutory measure of the owner's present pecuniary capacity to contribute to the present needs of government. A purchaser might, of course, take into consideration the probable cost of keeping the land in its present condition—dependent on his purpose. But that would be only one of the considerations—one of the items in his calculation—in fixing the price. The cost cannot possibly be a deduction from the price-value of the land, any more than any item of the probable income or profit is to be added to that price-value. The cost as a revenue expenditure would probably find a place in income tax returns.

The present freedom of the subject land from prickly pear is, of course, an "advantage" which the land possesses over similar land covered with prickly pear. But as directed, the value is to include

all " advantages it at present possesses." *Ferguson* J., in *Abbott* v. *Deputy Federal Commissioner of Land Tax* (1), was so far right in declining to recognize " the prevention " of prickly pear as itself an improvement on the land. A fence on the land which had the effect of excluding vermin is, of course, such an improvement. But if their entry were " prevented " by watchmen and dogs operating on the land, I cannot see that the absence of the vermin could be regarded as an " improvement on the land." So if a firebreak were made by the taxpayer on his adjoining land, with the consequent " prevention " of fire spreading to the subject land, could the prevention reasonably be said to be such an improvement ? I think not. Again, if the subject land, originally a swamp, were for many years protected from flooding by means of a wall on the land, the land being now long turned to profitable use, the results of the presence of the wall during the period of its existence would not be an improvement on the land, leading to a notional reversion to swamp. The wall itself would be an improvement *on* the land. The land would still be regarded as in its present improved condition, but its unimproved value would have to be ascertained by including a factor of providing a wall, just as if that had been physically removed a moment before, unless the contemplated use of the land permitted swamp conditions.

The truth is that an " improvement on the land or appertaining thereto " must in all reason be something present on or belonging to the land, and not something absent from it. It must be a part of the taxpayer's landed property. " Prevention " is not something on the site. The confusion is between " prevention " (abstract) and the " means of prevention " (concrete) ; and the presence of the means in the shape of an improvement on or appertaining to the land must exist at the moment of valuation.

It was suggested during the argument that by " prairie value " Lord *Dunedin* meant that its surroundings are not to be regarded as prairie. I cannot, even with all the consideration I have given to the suggestion, read that meaning into his Lordship's words. To me it has no relevancy to the rest of the judgment. It is a cautionary addition to the previous sentence, and it refers simply to the absolute

(1) (1915) 5 L.G.R. (N.S.W.) 100.

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state of the plot of land the subject of valuation. The observation is in order to fix the actual condition of that plot as at the date of the valuation. Its purpose is to indicate time of the relevant condition, and, so far as I can discern, there is no relation indicated to the general circumstances of the community. There was no need for such an indication. No one has ever, so far as I know, suggested that the subject land should be valued as if the whole country were still in the primeval state. No such contention was made in *Toohey's Case* (1) that I can discover, or, indeed, in any other case I have seen. But it does appear to me that if the unimproved value of the subject land is to be estimated according to its own prairie condition, the surrounding land, which forms the chief standard of value, should also be reduced, for the purpose of comparison, to the same prairie condition. You cannot measure the unimproved value of the subject land by the improved value of the neighbouring lands; for that would be manifestly unfair. But equally unfair is it to measure the unimproved value of the subject land on the basis of its natural condition, by the value of neighbouring land, with the added value of human action. Merely deducting the value of human action on the subject land does not correct the error. Both must be reduced to a common basis. Otherwise it is impossible to measure the amount of unearned increment attributable to the lands compared with the subject land. If, for instance, a huge swamp of 1,000 acres were reclaimed twenty years ago, and the subject land were 100 acres of that reclamation, it would be quite wrong to regulate the present selling price of the subject land as it was twenty years ago, by the selling price obtained for the other 900 acres as they are to-day. On principle, I cannot think the suggested interpretation should be implied. Its acceptance would set a task impossible to be carried out in its integrity. What Lord *Dunedin* conveyed, as I understand his words, was that the subject land, while stripped notionally of all improvements thereon or appertaining thereto, so as to make it, in short, *vacant land*—self-contained—was not itself to be reduced for valuation purposes to its original primeval condition. It was not to be notionally considered as it was at the foundation of Australia, or worse, if nature since made it so. It was to be taken

(1) (1925) A.C. 439.

as bare land in its then present state, which might be better or might be worse than its original state. If stripped of valuable timber or clay, it would probably be less valuable; if cleared of stone or dead timber, it would probably be more valuable. But the prairie value of that land was not to be the standard. The standard was the value of the bare land at the moment of valuation.

"Prairie value" is a well-known economic term. Its meaning is given in the *Oxford Dictionary* under "Prairie." One of the references there mentioned is very clear. In the *Contemporary Review* for 1884 (vol.XLV.), at pp. 175 *et seqq.*, is an article on the *Irish Land Act* by Mr. *W. O'Connor Morris*. At p. 185 occurs—so far as relevant—the following passage, representing a certain erroneous view as to rent:—"Rent, accordingly, should be assessed only on the value of the land in its rude state, when first let, centuries perhaps ago. . . . This is the celebrated doctrine of 'prairie value,' which . . . would all but annihilate landed property." (See also per *Griffith* C.J. in *Campbell's Case* (1).) The meaning of the expression is unmistakably shown in Sir *Thomas Whitaker's* book on *Ownership, Tenure and Taxation of Land*, pp. 86-88. He says (at p. 86): "What is the rental value of the land in the United Kingdom, meaning thereby the value of the land in its natural condition before anything has been spent on it—in a word, what is known as its 'prairie value'?" Further, he says (at p. 88):—"Indeed I am satisfied that the rent of a very large proportion of the farms of this country is not more than 5 per cent of what would be the cost of reclaiming the land from its natural state and equipping it with house and buildings, roads, fences, &c. The prairie value is really nil." I have not been able to find any reference on which I could attribute to Lord *Dunedin* the use of the term in any sense other than that I have adopted.

The improved condition of the land includes all improvements to the land, whether *on* it or *of* it, and their total notional elimination reduces the land to its prairie condition and value, which is expressly forbidden by *Toohey's Case* (2). Its antithesis, namely, the subject land in its present bare state, that is, as notionally stripped simply of all improvements *on* it, is taken as the taxable subject.

(1) (1915) 20 C.L.R., at p. 51.

(2) (1925) A.C. 439.

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It follows from *Toohey's Case* (1) that three main prior decisions of this Court can no longer be regarded as authoritative on the questions now under consideration: they are *Nathan's Case* (2), *Morrison's Case* (3) and *Campbell's Case* (4)—the first, so far as it runs counter to points 1 and 2 above stated; the second, because inconsistent with points 2 and 3; the third, because in conflict with points 3 and 4. With respect, I am not prepared to regard parliamentary inaction as equivalent to legislative confirmation. If it could be so regarded, then *Nathan's Case* must also be accepted as correct, and other cases that followed it, and *Toohey's Case* should be wholly disregarded, so far as Federal law is concerned. As to *Morrison's Case*, besides the observations already made upon it, the very foundation of its interpretation of "improvements" is gone beyond recall. The judgment of *Griffith* C.J. (in which the rest of the Court concurred) rested on the interacting forces of the three expressions, "improved value," "unimproved value" and "value of improvements" (5). Then, interpreting "value of improvements" as "the present enhancement of the value of the land attributable to the operation of man," from the beginning since the land ceased to be Crown land, the rest followed. That brought the "unimproved value of the land" to its value as it existed as untouched Crown land. But as *Toohey's Case* destroys that foundation and fixes the relevant condition of the land as at the date of valuation, the whole structure falls. The doctrine of primeval condition is part of the debris. It, therefore, appears to me beside the question to appeal to those decisions, and some others dependent on them, such as *Fisher's Case* (6) and *Kiddle's Case* (7), in order to support the taxpayer's contention. If *Toohey's Case* is to be faithfully applied, as I conceive it my plain judicial duty to do, without questioning its accuracy, even if I did not agree with it, I do not see how any of those prior decisions can be regarded as authoritative. I do not attempt to overrule them in this regard: the Privy Council has done that. I simply follow the ultimate tribunal.

(1) (1925) A.C. 439.
(2) (1913) 16 C.L.R. 654.
(3) (1914) 17 C.L.R. 498.
(4) (1915) 20 C.L.R. 49.
(5) (1914) 17 C.L.R., at p. 50.
(6) (1915) 20 C.L.R., at pp. 252-254.
(7) (1920) 27 C.L.R., at p. 319.

I do not think the New South Wales case of *Ex parte Thomas* (1) of any real assistance. The Crown lands legislation of that State has a special history. The Acts do not touch the subject of "unimproved values," nor that of taxation. They are in different terms, and have a different object. Their expressions must be construed *secundum subjectam materiem.* They reach very far back, and were for development and settlement purposes. I shall condense what I have to say about them :—They began in 1861, and offered facilities and inducements to settlers to purchase Crown lands. But they required the purchaser to prove his bona fide intention to settle, and so compelled him to improve the land. No definition of improvement was given, but a minimum value of improvement was insisted upon, as well as residence. Whether the land was so improved or not was a question of fact, to be ascertained if necessary by a jury, the only judicial direction being that there had to be "something that for the time will add appreciably to the value of the land" (*McBean* v. *Grieve* (2)). Amendments took place in 1875 that did not affect this matter. If a settler failed to complete and the land was resold, he could take away improvements, or be paid for such as he left. Ringbarking, which, of course, added to the value of the land, but was immovable, was for that reason held to be not a matter for which he could claim payment (*Ex parte O'Dwyer* (3)). Then Parliament provided that improvements on the land, though irremovable, should, if left, be paid for. Under this, in *Thomas's Case*, the Court held he was entitled in respect of ringbarking. The Court based its view on the history of the subject as applied to the statutes, and particularly that the Act was intended simply to include irremovable improvements as they in that connection were understood. The core of that matter is that the legislation was dealing with Crown lands to be improved *in value*, and to be regarded as improved lands. Improvement was *to* or *of* the land, so long as it was the result of acts on the land, and it was the *value* to the land that was the point of consideration. From that point of view it was quite natural to read the words in the light of the subject matter

(1) (1881) 2 N.S.W.L.R. 39.
(2) (1879) 2 S.C.R. (N.S.) (N.S.W.) 153, at p. 155.
(3) (1879) 2 S.C.R. (N.S.) (N.S.W.) 26.

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and scheme of the legislation. Obviously, however, those cases cannot lead the way in the present instance. The case of *Hopkins* v. *Minister for Lands* (1) cannot, as I think, be relied on as a safe guide here. It was decided upon a statute that called for the interpretation of the term "improvements the property of the holder," and the Court held by analogy to the *Crown Lands Act* decisions (see *Minister for Lands* v. *Kitto* (2)) that "property" did not mean property, and therefore the "improvements" did not mean the improvements themselves (3), but, in the words of *Pring* J. (4), "the benefit accruing to the land by reason of the improvements." That conclusion, as applied to those Acts and the history behind them, as set out in the judgments in *Hopkins' Case* and *Kitto's Case*, I do not presume to criticize. But I respectfully decline to accept it as controlling the construction of the Federal Land Taxation Acts, especially as they apply to every State in Australia, and not merely to New South Wales.

On the other hand, the New Zealand case of *Cox* v. *Public Trustee* (5) seems to me to assist the Commissioner considerably. True, it did not deal with an analogous statute, and it is pointed out at p. 99 of the report that the Acts with which it was concerned contained no reference to "unimproved value." The question was what, in ascertaining compensation to a lessee, was meant by "substantial improvements of a permanent character." In other words, how was the land substantially improved? If no definition of "unimproved value" of land is given, then one has to regard the collocation and scheme in which the phrase occurs, and construe the expression accordingly. That it may, and in the surroundings in the New Zealand case probably did, mean the total value given to the land by all the efforts to improve it, is undeniable. But there is a passage in the judgment of the Court which brings out very prominently the point in this case. At p. 99 it is said :—"Land in a natural state may receive an increase in value from two factors —one intrinsic, consisting of what has been done *on* or *to* the land itself and may be comprised under the term 'improvements'; the other consisting of extrinsic circumstances, such as public roads or

1) (1912) 12 S.R. (N.S.W.) 215.
2) (1912) 12 S.R. (N.S.W.) 80.
(3) (1912) 12 S.R. (N.S.W.), see p. 221.
(4) (1912) 12 S.R. (N.S.W.), at p. 225.
(5) (1918) N.Z.L.R. 95.

railways, public systems of drainage, increased settlement in the neighbourhood, public services brought within reach, or other causes to which the tenant does not contribute. The *object* to be served by the valuations required by the leases under consideration is to give to the tenant the benefit of so much only of the *increased value* as is due to substantial improvements of a permanent kind, and to leave to the landlord the value attributable to all other intrinsic improvements and the whole value due to extrinsic circumstances." I italicize certain words. It is, of course, evident how different is the problem there from that in the present case. It is *assumed*, to begin with, and indeed it is essential in that case, that the starting-point is the land in its natural state. That is the *datum*. Then circumstances increasing its value are divided into intrinsic and extrinsic. With the latter we have no concern here, and nowhere can I find any difference of opinion as to them. The intrinsic circumstances consist of " improvements," but these again are divided into " improvements on " the land, and improvements " to " the land. That is precisely the distinction recognized by the taxation Act here and the judgment in *Toohey's Case* (1), and the former class only is included in the statute now under consideration, just as in the New Zealand cases only " substantial improvements of a permanent character " were included. In our present case also the basic assumption made in *Cox's Case* (2), namely, " natural state " of the land—in other words, " prairie value "—is precisely what is precluded by *Toohey's Case*.

Apart altogether from the distinct injunction of the Privy Council judgment, it would patently be not only a fruitless, but a wholly intolerable and often impossible task for Revenue purposes, to go back to the " natural state " of the land. Imagine the process in long settled districts, especially towns and capital cities. On the mature consideration induced by the decision in *Toohey's Case* (1), I cannot picture the Commissioner, when assessing land in Sydney, Melbourne or any other capital, investigating the primeval state of the block in George Street or Collins Street, or any other street, at the time of the first settlement of Australia or the Crown grant. He would find, to apply Sir *Thomas Whitaker's* words to most cases,

(1) (1925) A.C. 439. (2) (1918) N.Z.L.R. 95.

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that "the prairie value is really nil," and the land tax would scarcely be worth collection. To follow *Morrison's Case* (1) would entail the result correctly stated in *Rydge* on *Federal Land Tax Law*, at p. 45, and hardly, as I read it, with approval:—"The improvements on a parcel of land in (say) George Street, Sydney, would include, in addition to the actual buildings erected thereon, the original clearing of the land when it was in its virgin state, the filling in of holes and the general levelling of the land for building purposes. In effect, it is necessary to trace all improvements made on the land since the time the land ceased to belong to the Crown, provided that the benefit of such improvements exist at the date of valuation." I would modify that only by saying the improvements must all be traced, in order to see how far their benefit remains.

Until so further instructed by the Privy Council, or until it be so adjudged by this Court, I am quite unable to adopt an interpretation of Viscount *Dunedin's* words opposed not only to their primary meaning but also to the practical and reasonable administration of the Land Taxation system of the Commonwealth.

Since writing the above I have had the opportunity of reading the transcript of the shorthand notes of the argument in *Toohey's Case* (2) before the Privy Council. At p. 34 the following observations by Lord *Dunedin* relative to *Nathan's Case* (3) occur:—"The language may be obscure, but I think the learned Judge's application of it to the facts of the case is right enough. The land was originally a swamp, and then it was filled in at a cost of £7,000 for the purposes of a sports ground, and the last sale price of the land was £16,935, and they put that in as the valuation, and it seems to me arguable, though one can only guess at that, that you should go back to the time when it was a swamp, and *I think it was quite right not to go back to that.* They said you were not entitled to deduct the £7,000 because the question was *the value of the land at the present time.*" Then at p. 44 the same learned Lord says: "You take the land with all its potentialities, but you say you must take it as at 8th October 1908." I regard those observations as conclusively confirming the interpretation I have given to his Lordship's judgment.

(1) (1914) 17 C.L.R. 498.
(2) (1925) A.C. 439.
(3) (1913) 16 C.L.R. 654.

It is true the learned Lord, on reading the rather complicated statement of facts in *Nathan's Case* (1), thought the £7,000 for the swamp reclamation had been excluded by this Court. But that quite understandable error of fact in no way touches the validity or force of Lord *Dunedin's* clear legal proposition, namely, that that item should not have been deducted, and that it was quite right not to go back to the swamp era, "because the question was the value of the land at the present time." The importance of the matter, as it appears to me, is that it puts beyond question the meaning of the crucial words in the formal judgment of his Lordship.

In my opinion the question should be answered in favour of the Commissioner.

Questions answered: (1) *Yes*; (2) *No. Answer to question* 3 *not necessary.*

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J. B.

(1) (1913) 16 C.L.R. 654.