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## [HIGH COURT OF AUSTRALIA.]

## DRYSDALE BROTHERS & CO.

APPELLANTS:

AND

## THE FEDERAL COMMISSIONER OF LAND

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BRISBANE, June 17.

SYDNEY.

Aug. 28.

Gavan Duffy .J., Starke Dixon, Evatt and McTiernan JJ.

H. C. OF A. Land Tax—Assessment—Improvements—Sugar-lands—Lands assigned to sugar-mill —Mill bound to take sugar from assigned land at rates fixed by Board—Value of assigned lands greater than that of similar unassigned lands-Regulation of Sugar Cane Prices Act 1915 to 1922 (Q.) (6 Geo. V. No. 5-13 Geo. V. No. 10), sec. 5-Land Tax Assessment Act 1910-1930 (No. 22 of 1910-No. 8 of 1930), sec. 3.

> Under the Regulation of Sugar Cane Prices Act 1915 to 1922 (Q.) sugar-lands may be assigned to a particular sugar-mill, which is bound to accept all the sugar-cane grown on the lands so assigned and to pay for same at prices determined by a Board. The market and capital values of lands so assigned are, because of the assignment, greater than the values of similar lands in the same neighbourhood not so assigned.

> Held, by the whole Court, that the assignment is not an improvement within the meaning of the Land Tax Assessment Act 1910 to 1930.

> Held, by Gavan Duffy C.J., Starke and Evatt JJ. (Dixon and McTiernan JJ. dissenting), that the value of the assignment is not included in the value of improvements as defined by the Land Tax Assessment Act (No. 2) 1930.

> Held, by the whole Court, that the enhancement in value of the lands so assigned should be taken into consideration in ascertaining the unimproved value of the lands for the purposes of the Land Tax Assessment Act 1910-1930.

## CASE STATED.

This was a case stated pursuant to sub-sec. 8 of sec. 44m of the Land Tax Assessment Act 1910-1930, for the opinion of the High Court, on an appeal against an assessment to land tax with regard to certain sugar-lands in Queensland. The case was substantially H. C. of A. as follows:—

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1. The appellants are and were at all material times the owners in fee simple of certain lands in the State of Queensland.

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- 2. The appellants in copartnership or their tenants at all material times carried on and still carry on the business of sugar-farmers and cane-growers within the meaning of the Regulation of Sugar Cane Prices Act 1915 to 1922 (Q.) on portion of the said lands, which said portion is hereinafter referred to as the subject lands. The subject lands are physically improved lands. The appellants at all material times carried on and still carry on in copartnership the business of graziers on the portion of the lands mentioned in par. 1 which is not the subject lands.
- 4. The appellants duly made and lodged land tax returns for the financial year 1929-1930.
- 5. The Deputy Federal Commissioner of Land Tax assessed (inter alia) the subject lands to land tax, and later reassessed the same.
- 6. Notices of objection to such assessment and reassessment were duly given by the appellants.
- 7. The appellants' objection to the said reassessment was in the words and figures following, that is to say :- "With reference to the amended land tax assessments issued to the abovenamed in respect of landed interests held as at 30th June 1928 and 1929, is considered that the value of land as assessed . . . is still excessive, and accordingly it is desired that you treat the objections as appeals and forward them to the High Court for determination. It is apparent, in view of the high values adopted, that the value of the licences to grow cane on certain areas has been included in the unimproved value of the land whereas sec. 2 (c) of the amended Land Tax Assessment Act (No. 2), No. 8 of 1930, definitely provides that the value of any such licence is in the nature of an improvement. The High Court will be requested to review the values adopted having regard to the value of licences to grow cane which should be included in the value of the improvements as provided by the section of the Act quoted above."

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- 8. The Central Board, meaning thereby the Central Sugar Cane Prices Board constituted under the provisions of the Regulation of Sugar Cane Prices Act 1915-1922, from time to time assigned the subject lands under the provisions of the said Act to a mill as defined by the said Act, that is to say, to the Pioneer Mill, being a mill situate near Ayr in the said State. The subject lands remained at all material times and still remain assigned to the said mill.
- 9. The market value of the subject lands so assigned as aforesaid, and by virtue thereof, became greater and at all material times remained greater than the market value of similar lands in the neighbourhood and with respect to which no such assignment or assignments had or have been made.
- 10. The capital value which the fee simple of the subject lands so assigned as aforesaid might be expected to realize, if offered for sale on such reasonable terms and conditions as a bona fide seller would require, is greater by virtue of such assignments than the capital sum which the fee simple of similar lands in the same neighbourhood, but with respect to which no such assignments have been made, might be expected to realize if similarly offered.
- 11. The Deputy Federal Commissioner of Land Tax, for the purpose of ascertaining the unimproved value of the subject lands, valued the subject lands as assigned lands, and did not deduct from such valuation any amount in respect of the value of such assignment.
- 12. The appellants claim that the assignment or assignments of the subject lands are improvements to such lands acquired by them as such owners as aforesaid within the meaning of the Land Tax Assessment Act 1910-1930, and that neither the assignment or assignments, or the enhanced value resulting from the making of the same, is or are part of the unimproved value of the subject lands, whilst the respondent denies the same.

The questions of law arising on the appeal were as follows:—

- (1) Is or are the said assignment or assignments an improvement or improvements within the meaning of the Land Tax Assessment Act 1910-1930?
- (2) Is the value of the said assignment or assignments included in value of improvements, as defined by the Land Tax Assessment Act (No. 2) 1930?

- (3) Is the said assignment or are the said assignments, or the enhancement of value due thereto part of the unimproved value of the lands as defined by the said Acts?
- (4) By whom should the costs of and incidental to this appeal be borne and paid?

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Philp (with him Seaman), for the appellants. Under the Regulation of Sugar Cane Prices Acts 1915 to 1922 lands are assigned to certain sugar-mills and are known as "assigned lands." The definition of "cane-grower" in the Acts does not expressly include a person growing cane on assigned lands. A person on assigned lands need not grow cane. But if he does grow cane he must send it to the mill to which the lands are assigned. Only a cane-grower can apply to have his land assigned to a particular mill. Land of any tenure may be assigned. An "assignment" amounts to a licence to grow cane for a particular mill. It is therefore something incidental to the business of cane-growing, and is not part of the unimproved value of the land. It is not part of the fee simple of the land, but attaches to the ownership of the land, and has no value if the owner gave up cane-growing. If there were two pieces of land of the same area side by side, one being assigned land and the other unassigned land, their unimproved fee simple values would be the same (In re Land Tax Acts; Wilson's Case (1)). If the assignment is part of the fee simple, it is an improvement appertaining to the land and has to be deducted from the capital value (Toohey's Ltd. v. Valuer-General (2)). The amendment to the Land Tax Assessment Act was made after that case was decided, and the Legislature has allowed the method of valuation adopted in that case to stand. The questions should be answered: (1) Yes; (2) The minimum; (3) No.

Fahey, for the respondent. The "assignment" is something extrinsic to the right of ownership. It gives no personal right or licence to anyone. It makes a market for certain lands. The Regulation of Sugar Cane Prices Acts were statutes to adjust prices (Stevens v. Colonial Sugar Refining Co. (3)). The Acts take away

<sup>(1) (1927)</sup> V.L.R. 399; 49 A.L.T. 54. (3) (1920) 28 C.L.R. 330, at p. 342.

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the freedom of contract of the grower, and by way of compensation have given him the advantage that a particular mill must take all his cane. It is similar to railway facilities near lands to give ready access to market. The increase in value is due to extrinsic circumstances and not to the result of operations on the land. It is therefore portion of the unearned increment of the land and forms part of the unimproved value (McGeoch v. Federal Commissioner of Land Tax (1)). The question is not governed by Toohey's Ltd. v. Valuer-General (2). That was the case of a liquor licence granted to a certain building approved of by a licensing authority. The potentiality of the land as sugar-growing land is increased, and that potentiality goes with the land on transfer. It is therefore an improvement (see Northwood v. London County Council (3); Minister for Home and Territories v. Lazarus (4); McDonald v. Deputy Federal Commissioner of Land Tax (N.S.W.) (5)). A water right conferred by statute on land is not an improvement: it is part of the unimproved value of the land (Basey and Howie v. Commissioner of Taxation (6)). Commissioner of Land Tax v. Nathan (7) is not affected by Toohey's Ltd. v. Valuer-General. The questions should be answered: (1) No; (2) No; (3) Yes.

Philp, in reply. The words of the statute under which Basey and Howie v. Commissioner of Taxation (6) was decided are different from those of the Land Tax Assessment Act 1910-1930. An assignment is something inherent in the land and differs from extrinsic circumstances such as railways, mentioned in McGeoch v. Federal Commissioner of Land Tax (8).

Cur. adv. vult.

The following written judgments were delivered: Aug. 28.

> GAVAN DUFFY C.J. AND STARKE J. This is a special case stated pursuant to the Land Tax Assessment Act 1910-1930. The appellants are the owners in fee simple of certain lands in Queensland, which are suitable, and used, for growing sugar-cane. Sugar-mills also exist

<sup>(1) (1929) 43</sup> C.L.R. 277, at p. 290.

<sup>(2) (1925)</sup> A.C. 439. (3) (1926) 2 K.B. 411.

<sup>(4) (1919) 26</sup> C.L.R. 159.

<sup>(5) (1915) 20</sup> C.L.R. 231, at p. 234

<sup>(6) (1919)</sup> S.A.L.R. 53.

<sup>(7) (1913) 16</sup> C.L.R. 654.

<sup>(8) (1929) 43</sup> C.L.R. 277.

in Queensland, to which sugar-cane is usually sold or supplied for the manufacture of sugar therefrom. Under the Regulations of Sugar Cane Prices Act 1915 to 1922 of Queensland, local Boards are constituted for determining the prices to be paid and accepted by owners of sugar-mills and cane-growers respectively for sugar-cane sold and delivered. But each local Board is constituted in respect of one mill only, and the land or lands assigned to such mill. Sugar-lands are assigned to specified mills, and, substantially, sugar-cane grown on such lands must be supplied to the mills to which they are assigned. The owners of lands not so assigned cannot or do not participate in the benefit of awards determining the price or prices of sugar-cane. Such lands are thus forced out of the cultivation of sugar-cane, and the assigned lands acquire a greater value—rising and falling, we suppose, with the prices paid for sugar-cane. The case states that the capital value which the fee simple of the assigned lands might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require, is greater, by virtue of such assignments, than the capital sum which the fee simple of similar lands in the same neighbourhood but with respect to which no such assignments have been made might be expected to realize if similarly offered.

The Land Tax Assessment Act 1910-1930 imposes a land tax upon the unimproved value of all lands as owned on the 30th June immediately preceding the financial year for which tax is levied (see secs. 10, 12). The questions stated in this case relate to the method of ascertaining the unimproved value of the sugar-lands of the appellant. Under the Acts (Act 1930, No. 8, sec. 2) the unimproved value of improved land means 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 did not exist; provided that the improved value shall in no case be less than the sum which would be obtained by deducting the value of improvements from the improved value. A long definition is given of improvements, and the value of improvements means the added value which the improvements give to the land, irrespective of the cost of the improvements, including in such

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Gavan Duffy C.J. Starke J added value the value of any hotel licence or other similar interest the value of which has been included in the improved value.

The first question stated is whether the assignment or assignments of the sugar-lands is or are an improvement or improvements within the meaning of the Land Tax Assessment Act 1910-1930. An assignment, as we have seen, enables a sugar-cane grower to send his sugarcane to a particular mill, and to obtain for it the prices determined by a local Board, and subject to such determination as it makes. The facts that the lands are suitable for growing sugar-cane and that no restriction is placed upon their most beneficial use, enhance, as already pointed out, their value in the market; but there is no "improvement" on the lands or appertaining thereto whether visible or invisible—to use the definition in the Land Tax Assessment Act (No. 2) 1930 (No. 8 of 1930), sec. 2.

The second question is whether the value of the said assignment or assignments is included in "value of improvements" as defined by the Land Tax Assessment Act (No. 2) 1930 (No. 8 of 1930), sec. 2. The answer depends upon the meaning to be attributed to the words. "including in such added value the value of any hotel licence or other similar interest." Often the existence of such a licence, &c., in respect of particular premises enhances the value of those premises in the market (cf. Belton v. London County Council (1)). So far as additional value due to a licence, &c., has been included in the improved value, then the Land Tax Assessment Act (No. 2) 1930 (No. 8 of 1930) provides that it may be deducted as part of the value of improvements. So, we should think, could the value of any covenant "annexed in actual enjoyment to the existence of premises" (Bourne v. Mayor &c. of Liverpool (2)), because the benefit arising from such a covenant is a similar interest to a hotel licence within the meaning of the Act. But we cannot understand how the fact that lands are assigned to a particular mill falls within the description of a "similar interest." The assignment is in no sense a licence, and it annexes nothing in actual enjoyment to the use of the lands. The Sugar Cane Prices Acts affect the beneficial use of unassigned lands, but they leave assigned lands wholly unaffected: it is because the unassigned lands are thrown out of cultivation and competition that the value of the

<sup>(1) (1893) 62</sup> L.J. Q.B. 222.

assigned lands rises. Consequently the second question should also be answered in the negative.

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The third question is whether the assignment or assignments is or are or the enhancement of value due thereto is part of the unimproved value of the lands as defined by the said Acts. The answer should be that the enhancement in value of the lands by reason of the operation of the Regulation of Sugar Cane Prices Acts of Queensland should be taken into consideration in ascertaining the unimproved value of the lands for the purposes of the Land Tax Assessment Act 1910-1930.

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The question of costs raised by the fourth question should be answered: Costs in the appeal.

DIXON J. The Regulation of Sugar Cane Prices Acts 1915-1921 operate to give an added value to lands of cane-growers which are assigned to a sugar-mill. The substantial question for consideration is whether this added value is included in the unimproved value of the land within the definition contained in sec. 3 of the Land Tax Assessment Act 1910-1930.

The effect of the Regulation of Sugar Cane Prices Acts is to set up a local Sugar Cane Prices Board in respect of each mill and the land or lands assigned to the Board. The lands are assigned by the Governor in Council, who "declares" the mill and the lands of the cane-growers in respect of which the local Board is constituted; but a Central Sugar Cane Prices Board also has power to assign any particular land or lands or any defined area or locality to any mill or to alter the assignment from one mill to another, and, in exercising this power, it may declare the period for which such lands shall remain so assigned.

The local Board, subject to appeal to the Central Board, determines in every year the prices to be paid for cane supplied to the mill from the lands assigned, and cane-growers bound by the award must deliver their undamaged sugar-cane to that mill in reasonable quantities as required and must not dispose of it to any other mill, and the mill is bound to receive it. The obligations arising out of the award are binding upon all owners of sugar-mills and cane-growers upon the lands to which the award applies, including all

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mortgagees, lienees, assignees, transferees and other persons having any title to or interest in such mill or lands or the sugar-cane on such lands. The expression "cane-growers" includes persons who usually or ordinarily grow sugar-cane, and there is nothing in the Acts making it unlawful to assign to a mill lands in an unimproved condition upon which cane has not actually been grown.

The lands which are the subject of this case have long been assigned to a mill, and the price which the fee simple might be expected to realize is greater by virtue of the assignment than the price which the lands might be expected to realize if they were not assigned. This, of course, means that owners of unassigned lands upon which cane might be grown cannot easily obtain an assignment to a mill, and, without an assignment, cannot as profitably dispose of sugarcane because the mill need not pay the award prices. The increased value which arises from the assignment is a consequence of the conditions governing the disposal of the commodity; and, if it happened that those conditions were completely changed, it is not inconceivable that assignment might operate to lessen values.

It appears to me to follow, from the opinion of Isaacs C.J. and Starke J. which prevailed in Stephen v. Federal Commissioner of Land Tax (1), that peculiar conditions annexed to the ownership of land are to be taken into account in ascertaining the unimproved value, and I cannot see that it matters whether the condition operates, as it did in that case, to detract from the selling value of the land or to enhance it. In this case, as a perusal of the particular award in force will show, the assignment of the lands resulted in the imposition upon any person growing cane thereon of a complicated scheme of rights and duties requiring him to perform a number of positive acts and entitling him to services and rewards. Nevertheless, these obligations and rights run with the land and bind, to the extent of their participation in growing and disposing of cane, all persons enjoying the land or any estate or interest therein. I think the judgments referred to require the conclusion that the existence of the assignment and its consequences must be taken into account in ascertaining the capital sum which the fee simple of the land might be expected to realize if offered for sale assuming that improvements did not

exist. It is almost needless to say that the assignment is not, in my opinion, an improvement.

But the definition of "unimproved land" is not satisfied when the capital sum is found that the land is expected to realize. It requires that the unimproved value must not be less than the amount by which the improved value exceeds the value of the improvements. This necessitates a deduction from the improved value of the "value of the improvements," an expression which is defined to mean the added value which the improvements give to the land-including in such added value the value of any hotel licence or other similar interest which has been included in the improved value. The value of any hotel licence or other similar interest cannot mean the price obtainable for the licence or interest apart from the land, and must mean the amount of increase in price obtained because it is disposed of with the land. But the question what is a "similar interest" is by no means easy. To begin with, the word "interest" is used inaccurately in relation to a hotel licence. Then it does not appear in what characteristics the similarity is sought. On the whole, I think the feature of a hotel licence to which resemblance is required consists in the special authority it gives to use the land in a profitable way, which is denied to owners in general. It appears to me that this feature is to be found in the "assignment" in this case.

I think the questions in the special case should be answered:
(1) No; (2) Yes; (3) Yes; (4) Costs in the appeal.

EVATT J. The appellants carry on the business of sugar-farmers and cane-growers on lands situate in the State of Queensland and owned by them in fee simple. These lands are physically improved, and are hereinafter referred to as the "subject lands." Certain questions have arisen relating to the liability of the appellants to pay the land tax imposed by Federal law upon the unimproved value of the subject lands.

The Central Sugar Cane Prices Board, constituted under and acting in accordance with a statute of the Queensland Legislature known as the Regulation of Sugar Cane Prices Act 1915 to 1922, "assigned" the subject lands to a sugar-mill known as the Pioneer Mill, and the lands remained at all material times and still remain "assigned" to the said mill.

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In order to understand what is involved in such an "assignment," it is necessary to refer to the main features of the Queensland statute. The Central Board is constituted by the Governor in Council, and is authorized to exercise all powers and authorities vested in it by the Governor in Council (secs. 4 (1) and (8)). The Governor may by Order in Council set up Local Boards in respect of each sugar-mill and the land or lands "assigned" to such mill, and the Order in Council also declares the mill and the lands of the cane-growers in respect of which the local Board is constituted (sec. 5). Notwith-standing the provisions of the Order in Council, the Central Board has power from time to time to assign any particular land or lands or any defined area or locality to any mill, to alter the "assignment" from one mill to another mill, and to fix the period and the conditions of the "assignment" (sec. 5).

The local Board makes an annual award determining the price to be paid for cane by the owner of the sugar-mill to the canegrowers, and also regulating delivery of cane to the mill and its handling and treatment thereat by the mill-owner (sec. 6). The general rule is that sugar-cane of standard quality must be accepted and paid for by the mill-owner, but the cane-grower referred to in the award is bound to supply his sugar-cane to the mill in reasonable quantities as required and may not dispose of the cane other than to the mill to which his land is "assigned" (sec. 20 (8) and sec. 24 (1)). Different prices may be fixed by the local Board having regard to the conditions under which the cane is grown, and harvested and delivered, and the Minister may also by regulation reduce the price if the labour conditions during growing, harvesting or delivery are considered unsatisfactory (sec. 20 (7)). Moreover, the standard or base price may, under certain circumstances, be altered by the Central Board to which (with certain limitations) an appeal lies from the award of the local Board (sec. 20 (6)).

The award of the Boards is given the force of law by terms of the statute (sec. 11 (1)), and it binds the owners of mills and canegrowers on "assigned" lands and all persons claiming under them. In place of an award, an agreement may, under certain conditions, be entered into between the mill-owner and the cane-growers whose lands are "assigned" to the mill. In such an event the agreement

is binding "on all cane-growers growing cane on lands assigned to such mill" (sec. 25).

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The terms of the local award, which apply to the appellant in respect of the subject lands, conveniently illustrate the working out of the statutory scheme. An estimate is made of the total tonnage of cane available for harvesting upon the various "assigned" lands, and cane is accepted daily at the mill in the proportion borne by the estimated tonnage of the individual grower to the total tonnage. The quantities for daily delivery are allotted at the commencement of the season, and the grower must supply his allotment from week to week according to a schedule which is under the control of the local Board. If the grower does not cut and deliver his cane in accordance with the mill-owner's requirements, he may be penalized. It should be observed that —

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- (1) The Act imposes no legal obligation upon the owner of, or grower upon, "assigned" lands to grow any cane.
- (2) Nor does it prevent occupiers of lands not "assigned" from producing or selling cane.
- (3) Nor does it limit the lands to be "assigned" to a mill, to physically improved land, or lands ready for or under cultivation.

The general scheme of the statute is clear. It regulates and protects the Queensland sugar industry, by preventing over-production, by inducing reasonable labour conditions, by providing for regular and continuous supplies of cane to the mill-owner and by ensuring to the grower on "assigned" lands a fixed market and a guaranteed price.

It is now convenient to turn to the definition of the "unimproved value" of land in relation to improved land, which has to be applied to the subject lands. The figure required to be ascertained for assessment purposes 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, at the time as at which the value is required to be ascertained for the purposes of this Act, the improvements did not exist" (Land Tax Assessment Act 1910-1930, sec. 3).

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Sec. 3 of the Act also contains a definition of "improvements," which means "improvements thereon or appertaining thereto whether visible or invisible and made or acquired by the owner or his predecessor in title . . ."

In ascertaining the "unimproved value," we are commanded to assume that, at the time in respect of which valuation is to be made, the improvements did not exist. It is therefore necessary in the first place to ascertain what features of the subject land are "improvements," attributable to the work and outlay of its successive holders. These improvements are not always visible, because they may include such things as the freedom of the land from timber and scrub. The absence of the scrub, like other "invisible" improvements, cannot be taken into account without information as to the history of the land. The task of investigation may be difficult, but it has to be undertaken. As soon as Parliament included "invisible" improvements in the statutory definition, some knowledge of the history and prior user of the improved land became essential in order to discover what "improvements" had been made on the land, and still existed thereon.

It is clear that the actual "assignment" of the subject lands to the Pioneer Mill is not an "improvement" on or appertaining to the land. The "assignment" has nothing to do with any work or labour performed on or in connection with the physical land. It is to be regarded rather as an attribute or characteristic of the land, given to it by the operation of the statutory scheme.

Apart from this first question however, the subject lands are physically improved, and in ascertaining the unimproved value it is necessary to assume that, at the time in respect of which valuation is required, the improvements did not exist.

From what was stated at the Bar, it is clear that one improvement to the subject lands—an invisible improvement—is its state of freedom from scrub at the moment indicated. To assume that the improvement constituted by such absence of scrub does not exist, is to assume that the cleared condition of the land, so far as it still constitutes an improvement, does not exist. In other words, the land is to be considered as not being cleared or free from scrub at the relevant time. It is impossible to escape the conclusion that

the land is to be deemed, negatively as not having been cleared, and positively as having continued in its natural state.

It is true that the amending Land Tax Assessment Act of 1930 directs the hypothesis that the improvements "did not exist" instead of the previous hypothesis that the improvements "had not been made." But it also provides for the full recognition of "invisible" improvements on the land. The result of abstracting from the land all existing improvements of a "negative" or "destructive" or "invisible" character, cannot be distinguished from that obtained by supposing that the "invisible" improvements "had not been made." For, if the present absence of tropical scrub from the land is regarded as a present improvement, the same truth is expressed in the statement that the effective clearing of the land by labour and outlay was, when made, an improvement to the land and continues to be such. It follows that to consider the subject lands as being in their natural condition, unaffected by improvement, is not merely the logical consequence of the statutory assumption; it is itself the positive expression of such assumption.

It is probable, therefore, that the valuation required by the statute must be made as though there were thick tropical scrub upon the subject lands at the time to which valuation relates. Three questions then arise:—

- (I.) Must the valuer assume that the "assignment" to the Pioneer Mill still exists over the subject lands, although the latter are deemed to be unimproved and in their natural state?
- (II.) If so, would the assumed continuance of such "assignment" result in an enhancement in value of the subject lands?
- (III.) If such enhancement resulted, is it to be included in the unimproved value of the subject lands?

I deal with these three questions in order :-

(I.) In Toohey's Case (1), the Judicial Committee regarded a publican's licence to sell liquor upon certain licensed premises in New South Wales, as necessarily associated with those licensed premises. It followed that to assume that the improvements (i.e., the licensed premises) "had not been made" necessarily resulted in the assumed disappearance of the licence as well. The notion of a licence dissociated from the physical premises and adhering to the (1) (1925) A.C. 439.

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site, was not legally possible. Consequently the unimproved value of the land had to be determined without including any enhancement resulting from an existing licence, although the physical suitability of the land itself for licensed premises was an element for consideration.

In the present case the "assignment" is not a legal incident of any improvements on the land (as in *Toohey's Case* (1)) nor is it to be regarded (as a hotelkeeper's licence sometimes is) as something personal to the occupying cane-grower. On the contrary, the "assignment" is regarded by law as attached to the land itself. It follows that the valuer cannot assume the disappearance of the "assignment" from the subject lands although he must consider all improvements as non-existing. He must regard the subject lands as being in their natural state, but as still being "assigned" by law to the Pioneer Mill.

(II.) It does not follow, however, that the assumed continuance of the "assignment" will result in any enhancement of value when the direction of the statute is obeyed. This question is one of fact. But the facts stated in pars. 9 and 10 of the special case do not result in any necessary inference that enhancement would result. For the facts agreed upon and stated in such paragraphs, do no more than state that the subject lands have a greater value than similar lands in the neighbourhood by virtue of the existing "assignment" to the Pioneer Mill. This, however, is a comparison between parcels of improved lands, and it does not follow that, if the subject lands were in their natural condition but still impressed with the "assignment" in question, their market value would be greater than that of similar and similarly situated lands in the neighbourhood.

If the fee simple of the subject lands (considered as unimproved but with an "assignment" existing at the moment of sale) were offered for sale, it might not fetch a penny more because of the "assignment," unless, at the given moment, the most profitable user of the land would be to clear it and grow sugar upon it. Conceivably such user might not afford any reasonable prospects of profit to a purchaser, whereas some other form of cultivation might be considered as highly profitable.

No doubt, use of the subject lands for the purpose of sugar cultivation would be more obvious than its use for other purposes. expense and delay involved in clearing the land for cultivation and otherwise improving it would, however, be a very important factor in the price realized. Further, although the statutory definition requires the assumed existence of the "assignment" at the moment of sale, the continuance thereafter of such "assignment" in respect of the land regarded as free of improvements, is not required to be assumed. The hypothetical purchaser might have grave doubts as to whether the "assignment" would be continued or taken away by those in authority. That question in turn would depend upon the conditions existing at the moment of the proposed sale and would invite enquiries into the existing policy of the Queensland Government and the Central Sugar Board in respect to "assignments" and the constitution of the local Boards. A purchaser would have to pay close regard to future conditions, because a considerable time might elapse before the land would be ready for sugar cultivation or suitable for resale, and, if policy allowed "assignments" to continue on particular lands devoid of any improvements, the same policy might also extend "assignments" to other unimproved lands in the neighbourhood and result in a levelling of values

All these considerations show that the mere legal existence upon one parcel of land of an "assignment" at the moment when that and another similarly situated parcel of (say) tropical scrub are being sold, might not operate to increase the price of the "assigned" parcel over that of the "unassigned" parcel.

(III.) Assuming that an enhancement in price resulted on the hypothetical sale because of the element of "assignment," the question remains whether such enhancement is to be deemed part of the unimproved capital value of the subject lands.

The enhancement in such a case would result from the probability or possibility of the land being more profitably used for sugargrowing by reason of the advantages which flow from "assignment" to a mill. The nature of these advantages has, I think, already appeared from the description of the statutory scheme. The essential thing to the cane-grower on "assigned" land is that his

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The statutory scheme in Queensland is no different in principle. External authority enforces a series of relationships in the sugar industry. The assumed increment of value due to the "assignment" of the subject lands, is one of the many incidents of the scheme. It is not that the hypothetical sale is of something more than the "fee simple of the land," but that a bona fide seller of the fee simple would reasonably require and probably get more for his land, owing to the probability or possibility of a market for the cane to be grown upon it. The increment is none the less unearned because an "assignment" is usually found attached to improved lands. The fact is that the State has not only facilitated the marketing of cane from all "assigned" lands, but has assured it, and that there is a resultant increase in the value, even of unimproved "assigned" land. It is closely analogous to an enhancement arising from better transport and a better market. It follows that such increment should be considered as part of the unimproved capital value of improved lands which are "assigned."

I would answer question 3 by stating that in my opinion the subject lands must be valued as if "assigned" to the mill but with no improvements thereon, and that the enhancement of value (if any) due to the "assignment" is part of the unimproved value of the subject lands.

The Federal Land Tax Assessment Act now provides, however, a method by which a minimum unimproved value may be fixed. A deduction of the "value of improvements" may be made from the "improved value" of improved lands. The method provides a convenient enough rule of thumb, if it is not possible to observe the primary command contained in the definition of "unimproved value." Deducting is not a scientific method of approximating to the unimproved value of improved land, and its general adoption would cut right across the grain of "unearned increment" taxation. For some "improvements" on land render land less saleable, because demolition of unsightly or unsuitable buildings or "improvements" may reduce the improved or total value of the land below the unimproved value. Land—urban and suburban as well as rural—is often not put to its most profitable use.

The "deduction" method, however, may have to be adopted for want of any opportunity of comparison with unimproved land values in the neighbourhood. Question 2 therefore asks whether the value of the "assignment" upon the subject lands is part of the "value of improvements" to be deducted (on this alternative method) from the "improved value" of the land. The answer depends upon whether the "assignment" is a "similar interest" within the meaning of the phrase "value of any hotel licence or other similar interest" in the statutory definition of "value of improvements" (Land Tax Assessment Act, sec. 3).

The object of including the value of a hotel licence as part of the "value of improvements" is reasonably clear. The inclusion operates only for the purpose of ascertaining a minimum unimproved value by the method already described. That method was not authorized by the Act until the 1930 amendment, but it had previously been used, upon the authority of a catena of decisions.

Even as used, however, the "deduction" method sometimes resulted in the inclusion in the unimproved value of land of a value attributable to the existence of a hotel licence upon the lands valued. And this result was caused by not adding to the value of improvements (i.e., the licensed premises) the value of the licence itself when (a) the value of the licence was included in the "improved value" of the land and (b) the "value of improvements" was being deducted from the first sum. The Commonwealth Parliament, anxious to prevent the recurrence of the fallacious method exposed in Toohey's Case (1), therefore enacted that if (and only if) the value of the licence were included in the improved value of the lands, it should also be deducted therefrom by including it in the "value of improvements." It followed that, if it became necessary to use the

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"deduction" method, the existence of the licence could never operate so as to swell or enhance the unimproved value of land on which there was a hotel.

In the case of a hotel licence, therefore, Parliament thus sought to prevent the inclusion of its value in that of the land considered as unimproved. It properly regarded the licence as being an interest in the nature of a business goodwill, inseparable from the improvements, which were erected upon the land, and in which the hotel business was being conducted.

It will be noted that the Act speaks of a "hotel licence," implying the existence of a hotel building and negativing any connection between the licence and the actual land. From another aspect the licence may of course be regarded as something personal to the licensee, and therefore entirely disconnected from the land.

I see little or no resemblance between a hotel licence and an "assignment" of lands to a sugar-mill under the Queensland statute. The authority of the owner of the land to grow sugar does not spring from the "assignment," but the authority of the licensee to conduct a hotel and sell liquor thereon does spring from his statutory licence. There is nothing in the Queensland Act which makes it unlawful for persons to grow sugar on lands not "assigned," but a feature of a hotel licence is that persons, not licensees, are denied the right to conduct a hotel or sell liquor. There is an obligation on a licensee to conduct his hotel and sell liquor at times fixed by law. There is nothing which obliges the owner of "assigned" lands to grow any sugar, although, if he does produce, he must sell to the mill specified. The "hotel licence" may be spoken of as an "interest," but it is related to the improvements erected upon land or to the person of the licensee, and never to the land itself. On the other hand, the "assignment" relates directly to the land itself, is legally an incident of the ownership of the land and may exist if the improvements on or appertaining to the land are considered as abstracted from the land itself.

I would therefore answer question 2 in the negative.

The answers should in my opinion be: -(1) No: (2) No: (3) The subject lands must be valued as if "assigned" to the mill but with no improvements existing thereon; the enhancement in value (if any) due to the "assignment" is part of the unimproved value of the subject lands: (4) The costs should be costs in the appeal.

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McTiernan J. I agree that question 1 should be answered in the negative and question 3 in the affirmative. I have nothing to add to the reasons which have been given for a negative and an affirmative answer to these questions respectively.

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In my opinion question 2 should also be answered in the affirmative. I do not think that the Legislature intended that the words "other similar interest the value of which has been included in the improved value" were intended to indicate only the licences of various descriptions issued under the provisions of the laws relating to the sale of liquor, for example an Australian wine licence under the Liquor Acts of New South Wales. The nature of a hotel licence was described by Higinbotham C.J. in Anthoness v. Anderson (1), in these terms :- "No doubt the licence constitutes one of the most valuable parts of the plaintiff's security. A licence of this kind—a publican's licence—is, in our opinion, a personal licence, the exercise of which is limited to particular specified premises. Being a personal licence, it is not at common law capable of assignment or transfer. It is a licence to an individual for particular premises till it is taken out of him by legal authority. The Act provides several ways in which the licence may be transferred from the licensee to another person, and also for means by which the exercise of the authority given by the licence can be transferred from one house or premises to another house or premises. But, unless in the way provided by the Act, the right of property cannot be affected, nor can the licensee transfer his licence to another person, except subject to the provisions of the Act. The transfer depends upon the authority given by the Licensing Court." In Jack v. Smail (2) Griffith C.J. said :- "It" (a licence to sell liquor) "is not property; it is a personal right of the insolvent" (the licensee) "to carry on business in a particular place under conditions prescribed by law." That it is a personal licence, is but one characteristic of a hotel licence. Having regard to the Act and the context in

<sup>(1) (1888) 14</sup> V.L.R. 127, at p. 142; 9 A.L.T. 175, at p. 177. (2) (1905) 2 C.L.R. 684, at p. 705.

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which the words "hotel licence or other similar interest the value of which has been included in the improved value" are found. I do not think that it is the character of a hotel licence as a personal licence which is the relevant criterion for determining whether an "interest which has been included in the improved value" is similar to it. The other qualities inherent in a hotel licence and their effect appear to me to be material in determining whether the "interest" in question is similar. I am of opinion that in those respects an "assignment of lands" is similar to a hotel licence. Without attempting an exhaustive definition, the Land Tax Assessment Act (No. 2) 1930, appears to me to show that the Legislature intended to include within the scope of the words "hotel licence or other similar interest the value of which has been included in the improved value" at least a special authority created by statute to carry on business subject to conditions, which would not otherwise be allowed, resulting in a privilege or advantage, that gives added value to the land in respect of which the authority exists. Therefore, in my opinion, the answer to question 2 should be "Yes."

Question 4: I think that the costs should be costs in the appeal.

Questions answered:—(1) No. (2) No. (3) The enhancement in value of the lands by reason of the operation of the Sugar Cane Prices Act 1915 to 1922 should be taken into consideration in ascertaining the unimproved value of the lands for the purposes of the Land Tax Assessment Act 1910-1930. (4) Costs of case costs in appeal.

Solicitors for the appellant, Roberts, Leu & North, by W. H. Conwell.

Solicitor for the respondent, W. H. Sharwood, Crown Solicitor for the Commonwealth, by Chambers, McNab & Co.