[HIGH COURT OF AUSTRALIA.]

ROYAL SYDNEY GOLF CLUB . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1954-1955.

1954, SYDNEY, *Dec.* 2, 3.

1955, SYDNEY, *March* 23.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Land Tax — Land — Golfcourse — Golf club — Facilities and amenities — Use by members—Unimproved value of land—Valuation—Regard to provisions and effect of County of Cumberland Planning Scheme—"Vacant land"—"Built-up land"—Restrictions—"Land upon which there are no buildings"—Land Tax Assessment Act 1910-1950, *ss.* 3, 10, 13, 25, 26, 27, 31, 33, 44M (8)—*Local Government Act* 1919-1951 (*N.S.W.*), *ss.* 342G, 342N, 342AA, 342AB, 342AC—*Local Government Act* 1951 (*N.S.W.*), *s* 2—*County of Cumberland Planning Scheme Ordinance, cll.* 8, 10, 11 (1) (2) (3), 14, 17.

The Royal Sydney Golf Club is the owner in fee simple of certain land at Rose Bay, Sydney, comprising 142 acres 3 roods 13 perches all of which is occupied for the purposes of the club and, other than seven acres which form the site of the club house and its appurtenances and of the lawn tennis courts and bowling green, was assessable for land tax. The non-exempt land is the site of an eighteen-hole championship golf course and of a nine-hole golf course. The whole of the land, exempt and non-exempt, is used by the club for its various social activities and recreations. The members of the club avail themselves of the facilities which the club house provides and are entitled to avail themselves of all other amenities. At various positions about the land devoted to golf there are structures used in connection with the use and management of the golf links. Under the *County of Cumberland Planning Scheme Ordinance*, promulgated under the *Local Government (Amendment) Act* 1951 (N.S.W.) the land is zoned "Parks and Recreation", being coloured dark green on the scheme map. "Vacant land" is defined in Pt. II of the Scheme Ordinance as meaning land upon which immediately before 27th June 1951, there were not any buildings or upon which there were only buildings such as, *inter alia*, fences, green-houses, sheds, garages, fowl-houses and the like.

Held, (1) that in arriving at the unimproved value under the *Land Tax Assessment Act* 1910-1950 the land should not be valued without regard to the provisions and effect of the *County of Cumberland Planning Scheme Ordinance*;

(2) that the land, except the respective sites of the buildings thereon (not being buildings of the class of which examples are given in the definition of " vacant land ") and the respective curtilages thereof, is vacant land within the meaning of Pt. II of the *County of Cumberland Planning Scheme Ordinance*.

Stephen v. *Federal Commissioner of Land Tax* (1930) 45 C.L.R. 122, discussed.

CASE STATED.

The Royal Sydney Golf Club appealed to the High Court against an assessment by the Federal Commissioner of Taxation under the *Land Tax Assessment Act* 1910-1950 by which the club was assessed for the year ended 30th June 1951 on the unimproved value of the taxable portion of certain land owned by the club.

Pursuant to s. 44M of the *Land Tax Assessment Act* 1910-1950, *Kitto* J. stated a case for the opinion of the Full Court of the High Court, which was substantially as follows :—

1. On 30th August 1951 the appellant furnished a return for the purposes of the *Land Tax Assessment Act* 1910-1950 in respect of land owned by it as at 30th June 1951 at Rose Bay and elsewhere in the State of New South Wales. The land at Rose Bay is that comprised in parcels 1 and 2 of the return and is more particularly described hereafter. The area of land in parcels 1 and 2 is 142 acres 3 roods 13 perches or thereabouts, of which 135 acres 3 roods 0 perches is liable to land tax, the balance, an area of 7.08 acres, being exempt. In its return the appellant ascribed no particular value to the subject land but stated its value to be " such values as may be determined under an application made to the Valuer-General dated 14th August 1951, for a fresh valuation of the said lands as at 30th June 1951 ". The Valuer-General subsequently issued a valuation of the whole of the land owned by the appellant at Rose Bay, to which objection was taken. This objection has not as yet been determined.

2. The respondent assessed the land tax payable upon that portion of the said land which is taxable upon an unimproved value of £364,176 for the taxable area of 135 acres 3 roods 0 perches, and a notice of assessment accompanied by an alteration sheet was issued accordingly on 24th January 1952, the said alteration sheet containing the following note :—" Allowance has been made for the areas of parcels 1 and 2 exempt under sec. 13 of the Act ".

3. On 22nd February 1952 the appellant objected to the assessment mentioned in par. 2 hereof, upon the following grounds :— " (1) The unimproved value of the parcels of land numbered 1 and 2 as assessed is too high. (2) The parcels of land numbered

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1 and 2 in the Land Tax return furnished by the objector for the Land Tax year 1951-1952 have been included in the area marked dark green in the Scheme Map referred to in the *Local Government (Amendment) Act* 1951. (3) By reason of the passing of the said Act restrictions have been placed on the use and enjoyment of the said land in so far as same has been thereby reserved as a Park and Recreation Area in the terms of Part II Division 2 of the *Local Government (Amendment) Act* 1951 and in pursuance of Part II Division 3 of the said Act. (4) It is contended therefore that by reason of the said restrictions placed on the use and enjoyment of the said land by the passing of the said Act, the unimproved value of so much of the land the subject matter of this Objection as is liable to Land Tax is £34,000 0s. 0d. (Note :—The unimproved value of the area exempt from Land Tax—approximately 7.08 acres—is excluded from the above figure.)" Objection was also to the assessment in so far as it related to certain other land but this objection is not now pressed.

4. On 1st October 1952 the respondent notified the appellant in writing that its objection had been disallowed.

5. On 17th October 1952 the appellant in writing requested the respondent to treat the objection as an appeal and to forward it to this Court.

6. The land owned by the appellant at Rose Bay in the Municipality of Woollahra in the County of Cumberland which is referred to in par. 1 hereof has frontages to New South Head Road, Kent Road, O'Sullivan Road, Old South Head Road, Newcastle Street and Norwich Road. An area of about one and a quarter acres at the corner of New South Head Road and Norwich Road upon which there was not any building at any relevant time is the land contained in certificate of title Vol. 3068 Fol. 232, the balance of the land being contained in certificate of title Vol. 6058 Fol. 158. (A sketch plan of that land was annexed thereto).

7. Of the total land owned at Rose Bay by the appellant, areas totalling 7.08 acres approximately are exempt from land tax, they being the respective areas of the sites of certain buildings and other improvements, namely the club house with the drive leading to it, lawn, garages and parking area, tennis courts, bowling greens, squash racquet courts and a strip of lawn. A sketch plan of a portion of the appellant's land consisting of exempt and non-exempt land as shown thereon was annexed thereto. That sketch plan shows fencing as at the date of the return. The club house, garages and parking area are on rising ground from which steps lead down banks and terraces to the links area.

8. On the non-exempt areas there are constructed upon the land an eighteen-hole championship golf course and a nine-hole course known as " the short course ". In various positions about the land upon which the courses are constructed there are buildings the sites of which are not exempt from land tax. The locations of these buildings are shown on the sketch plan referred to in par. 6. There are : a greenkeeper's cottage with small garden, a groundsman's cottage with small garden, a professional's shop, a caddy shed and yard, a store erected by the Metropolitan Water, Sewerage and Drainage Board for its own use, two pump-houses, a soil shed, machinery shed and workshop, a fernery, a machine shed and a tool shed. The total area occupied by these buildings and their curtilage as shown in that sketch plan is about 20,500 square feet, i.e. less than half an acre.

9. Near the centre of the subject land there is a low-lying area which is the subject of a declaration under the *Public Health Act* 1896 of the State of New South Wales as being lands not to be built upon unless certain filling was carried out and other requirements complied with, the declaration referred to having been made on 28th January 1901. The area owned by the appellant which was subject to this declaration was originally about sixty acres but has now been reduced to about fifty-one acres by the resumption of portion thereof by the Council of the Municipality of Woollahra on 27th August 1948 at an agreed price of £467 per acre. The resumed portion is used by the council in part for the adjoining Woollahra Municipal Golf Links and the remaining fifty-one acres is portion of the land used for the golf course of the appellant.

10. The exempt areas referred to in par. 7 do not occupy any portion of the golf course. The whole of the land, including both exempt and non-exempt areas with the buildings and improvements thereon, is used by the appellant in connection with its various social and recreational activities, the latter including in addition to golf, lawn tennis, bowls and squash racquets. Members of the appellant club who use the golf course avail themselves of the facilities provided by the club house and are entitled to avail themselves of the other amenities of the club. The buildings described in par. 8, with the exception of one pump house, a fernery, machine shed and a tool shed which are used for the tennis courts, bowling greens and gardens, are used in connection with the use and management of the golf links, being located at various positions on the land which are convenient in connection therewith.

11. On 27th June 1951 the *Local Government (Amendment) Act* 1951 of the State of New South Wales came into operation and the

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County of Cumberland Planning Scheme Ordinance contained in the schedule to that Act came into operation on the same day by reason of the provisions of s. 2 of that Act.

12. The land the subject of the appeal is part of the land coloured dark green on the Scheme Map as defined in cl. 3 of the ordinance.

13. The said appeal coming on to be heard before me and the facts herewithbefore stated being agreed between the parties I state the following questions of law for the opinion of the Full Court of the High Court of Australia :—

1. In arriving at the unimproved value under the *Land Tax Assessment Act* of the land the subject of the appeal, should the land be valued without regard to the provisions and effect of the *County of Cumberland Planning Scheme Ordinance* ?

2. If question 1 is answered "No", is it open to me to find that (a) the land the subject of the appeal, or (b) the said land except the respective sites of the buildings thereon and the respective curtilages thereof, is vacant land within the meaning of Pt. II of the *County of Cumberland Planning Scheme Ordinance* ?

Relevant statutory provisions and the relevant provisions of the *County of Cumberland Planning Scheme Ordinance* are sufficiently stated in the judgment hereunder.

K. A. Ferguson Q.C. (with him *B. Burdekin*), for the appellant. The effect of the planning scheme is to affect the use to which the land can be put. The valuation upon which the land was valued for the purposes of the land tax has been based on a subdivisional basis. Since the planning scheme has come into operation the land cannot be so valued but must be valued having regard to the restriction. In *Armidale Racecourse Trustees* v. *Armidale Municipal Council* (1) *Pike* J. did not give any reasons for his coming to the conclusion that land had to be valued on the basis of the hypothetical unrestricted fee simple, but in *Goulston* v. *The Valuer General* (2) his Honour went into the question as to the reasons for coming to the conclusion he did. The restriction in the last-mentioned case had been imposed by a prior owner and was not a statutory restriction as in this case. In *Stephen* v. *Federal Commissioner of Land Tax* (3) *Isaacs* J. said (4) he could not agree with *Pike* J. in *Armidale Race-course Trustees* v. *Armidale Municipal Council* (5). In *MacDermott* v. *Corrie* (6); *Corrie* v. *MacDermott* (7) it was

(1) (1923) 6 L.G.R. 151.
(2) (1924) 7 L.G.R. 17, at p. 18.
(3) (1930) 45 C.L.R. 122, at pp. 134, 137, 144.
(4) (1930) 45 C.L.R., at p. 134.
(5) (1923) 6 L.G.R., at pp. 152, 153.
(6) (1913) 17 C.L.R. 223, at p. 246.
(7) (1914) A.C. 1056, at pp. 1058, 1062; 18 C.L.R. 511, at p. 514.

the land that had to be valued and not any estate. It was there held that when land has to be valued it must be valued having regard to the restrictions that may be applicable to it.

[DIXON C.J. referred to *In re Lucas and Chesterfield Gas and Water Board* (1).]

If, on a resumption of land upon which later there has been a restriction placed, the use to which it can be put and the restrictions on that use are to be taken into consideration then it is clear that compensation would be reduced, having regard to the restrictions. If in ascertaining the unimproved value of land under the *Land Tax Assessment Act* 1910-1950 the same principles are applied, then similarly those restrictions must be taken into account. *Toohey's Ltd.* v. *Valuer-General* (2) is of significance because it deals with a section in almost identical terms as the section now under consideration. If the respondent relies upon the definition section, then *Toohey's Ltd.* v. *Valuer-General* (3) is a case in point and is one which favours the appellant and not the respondent. There is nothing in the Act to support the contention that it is the unrestricted fee simple which has to be valued: see *Maxwell* on *Interpretation of Statutes*, 7th ed. (1929), p. 246. The basis upon which the New Zealand cases depended has been overthrown by *MacDermott* v. *Corrie* (4); affirmed *Corrie* v. *MacDermott* (5), where it was held that one had not to draw a distinction between the valuation of land and the valuation of an interest in land. The restrictions imposed by the planning scheme must be taken into consideration when valuing the fee simple of the land under the *Land Tax Assessment Act* 1910-1950. All the subject land, being coloured dark green under the planning scheme, is reserved by that planning scheme for parks and recreation. Although "vacant land" it cannot be used for purposes of subdivision. If it be "built-up land" within the meaning of the planning scheme it can be used only, in the absence of consent otherwise, as a golf course as at present. All the appellant's land not subject to taxation was dealt with in *Federal Commissioner of Taxation* v. *Royal Sydney Golf Club* (6). The land the subject of this appeal is either wholly "vacant land", or is partly "vacant land" and partly "built-up land". The mere fact that there is a building upon an area of land, whether the area be small or large, and which building is not included in the definition of "vacant land" cannot have the effect of requiring that area of land to be regarded as "built-up

(1) (1909) 1 K.B. 16.
(2) (1925) A.C. 439, at p. 442; 25 S.R. (N.S.W.) 75.
(3) (1925) A.C. 439; 25 S.R. (N.S.W.) 75.
(4) (1913) 17 C.L.R. 223.
(5) (1914) A.C. 1056; 18 C.L.R. 511.
(6) (1943) 67 C.L.R. 599.

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land ". The intention of the legislature is indicated by the nature of the buildings that are included in the definition of " vacant land ". The particular buildings that are on the appellant's land are *ejusdem generis* to the buildings mentioned in the definition. The club house is not on the land which is subject to taxation. The fact that there is a building upon an area of land does not answer the question as to whether the whole of the area is built-up. A somewhat similar question was dealt with in *Hammond* v. *Housing Commission of New South Wales* (1). The buildings on the subject land are subsidiary buildings which would not prevent the land on which they stand from being regarded as " vacant land ", but even if that were not correct it would only be the land upon which they stood and perhaps a reasonable surround which would be regarded as " built-up land ".

J. K. Manning Q.C. (with him *C. M. Collins*), for the respondent. The town planning provisions in the Act cover the whole State but the County of Cumberland Planning Scheme now under consideration is a scheme solely in respect of that county. That scheme is a planning scheme on the broadest lines. At this stage it does no more than preserve for the whole of the county some general rules or general framework within which each council must devise its own planning scheme. There is not any reason why the local council, within the broad purview of the groundwork laid down by the County of Cumberland Planning Scheme, cannot itself legislate on different lines. Clause 57 of the *County of Cumberland Planning Scheme Ordinance* operates to effect a suspension of certain statutory restrictions on rights of user, the suspension of contractual restrictions upon rights of user, except in so far as they are inconsistent. That ordinance takes the place of Div. 7 (interim development) in Pt. XIIA. A scheme in broad terms has been set out. Certain functions, or the carrying into effect of the scheme *qua* certain aspects, is made the responsibility of the County Council and the individual application of the scheme is made the function of the local council. Generally speaking the scheme is directed to the use of land and the erection of buildings on land. Under the *Land Tax Assessment Act* 1910-1950 the fee-simple value of the land is to be ascertained without any regard to restrictions or conditions affecting the use of the land in the hands of the owner; that is, upon a hypothetical basis. The restrictions and conditions so to be disregarded include all those imposed by contract, by limitation or reservation in the grant

(1) (1953) 19 L.G.R. 146, at p. 147.

and by executive act, ordinance, or statute provided their operation is to limit the rights which were enjoyed by the owner of a hypothetical fee simple absolute in the particular land in question. Regard should be had to the hypothetical estate, and not to the estate in fact of the person in whom the fee simple is vested at the material time, subject to all conditions and all restrictions which may affect his estate in his hands at that time. The Court should reconsider the result of *Stephen* v. *Federal Commissioner of Land Tax* (1). The majority of the Court in that case were in favour of the view now being contended for. The view of *Dixon* J. and of *Rich* J. in that case is the correct view. *Stephen's Case* (1) has caused the greatest of difficulty (*Board of Fire Commissioners* v. *Valuer-General* (2)). The definition in the *Valuation of Land Act* 1916-1948 (N.S.W.) is substantially identical with the definition in the *Land Tax Assessment Act* 1910-1950. Until *Stephen's Case* (1) the course of decision in the Land and Valuation Court was to disregard, not only conditions in the grant but, e.g., conditions imposed as a result of a contract, restrictive covenants placed upon the title and the like. The difficulties that have been created are in fact very real and interference with the decision that has stood for so long would alleviate, rather than cause, any further difficulties.

[DIXON C.J. referred to *Drysdale Bros. & Co.* v. *Federal Commissioner of Land Tax* (3).

WEBB J. referred to *The Commonwealth* v. *Arklay* (4).]

The Commonwealth v. *Arklay* (4) is in a different category entirely. The hypothesis is that the *Land Tax Assessment Act* 1910-1950 takes an unencumbered fee simple without regard to restrictions imposed upon the enjoyment by State law. The answer to Question 1 is that the value is to be ascertained without regard to the provisions of the *County of Cumberland Planning Scheme Ordinance*. Assistance in determining what is meant in the scheme by the expressions " built-up land " and " vacant land " is to be found in cll. 10, 11, 12, 14 (2) and 17 of that ordinance. The word " land " in cl. 3 refers to land in the one ownership and in the one use. The whole of the subject land is in the one ownership and one use and accordingly is " built-up land ". The land is not " vacant land ".

K. A. Ferguson Q.C., in reply.

Cur. adv. vult.

(1) (1930) 45 C.L.R. 122.
(2) (1953) 19 L.G.R. 115, at p. 116.
(3) (1931) 46 C.L.R. 308.
(4) (1952) 87 C.L.R. 159.

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THE COURT delivered the following written judgment:—

This is a case stated under s. 44M (8) of the *Land Tax Assessment Act* 1910-1950. The case refers two questions to the Full Court arising on an appeal against an assessment of land tax. The assessment was with respect to land owned as at 30th June 1951. Since that date the *Land Tax Assessment Act* and the *Land Tax Act* 1910-1952 have ceased to be in force, as a result of the *Land Tax Abolition Act* 1953. The appellant is the Royal Sydney Golf Club. It is the owner in fee simple of an area of land at Rose Bay comprising 142 acres, 3 roods, 13 perches, all of which is occupied by and used for the purposes of the Club. A little over seven acres of the land forms the site of the club house and its appurtenances and of the lawn tennis courts and bowling green. This area was exempt from land tax under s. 13 of the *Land Tax Assessment Act*: *Federal Commissioner of Taxation* v. *Royal Sydney Golf Club* (1). The remainder of the land was assessed to land tax by the assessment against which the club appeals.

As at 30th June 1951 the whole of the land assessed was affected by the operation of the County of Cumberland Planning Scheme, which forms the schedule to the *Local Government Amendment Act* 1951 (N.S.W.) (Act No. 18 of 1951). In making his assessment the Commissioner of Taxation has estimated the unimproved value of the land without regard to the provisions of the planning scheme and the actual or potential effect of the scheme on the value of the land. The first question raised by the case stated is whether in arriving at the unimproved value the effect of the scheme ought so to be disregarded. If the restrictions which the planning scheme contemplates must be taken into account in assessing the unimproved value then a second question arises. It relates to the manner in which the County of Cumberland Planning Scheme applies to the land. The scheme draws a distinction, with reference to the area of which the land assessed forms part, between built-up land and vacant land. The restrictions differ. The question in effect is whether the presence of the club house and other buildings means that all the land falls under the description of built-up land or on the other hand so much of the land as is used for golf courses and perhaps tennis courts and the like is to be considered "vacant land" within the meaning of that scheme.

The land owned by the Club is the site of an eighteen-hole championship golf course and of a nine-hole course called "the short course". It also includes the site of a club house with a drive leading to it, lawns, garages, parking area, tennis courts, bowling

(1) (1943) 67 C.L.R. 599.

greens and squash racquet courts. The sites of the buildings, drive, garage, tennis courts, bowling greens, etc., form the exempt land. The whole of the land, exempt and non-exempt, is used by the appellant Club for its various social activities and recreations, including lawn tennis, bowls, and squash racquets and, of course, golf. The members of the Club who use the golf courses avail themselves of the facilities which the club house provides and are entitled to avail themselves of all other amenities. At various positions about the land devoted to golf there are structures used in connection with the use and management of the golf links. If it matters there stand outside the area exempt from tax a fernery, machine shed and tool shed used in connection with the tennis courts, bowling greens and gardens.

The County of Cumberland Planning Scheme was introduced by the *Local Government (Amendment) Act* 1951 having force as on the date that Act was assented to, namely 27th June 1951. By s. 2 of that Act it is established as the scheme which Div. 8, Pt. XIIA of the *Local Government Act* 1919-1949 requires to be prepared. It is under the provisions of this Part that power is conferred to establish the Cumberland County District and to delegate to its council the requisite powers and duties of the councils in relation to town planning: s. 342AA. Section 342AB had cast the duty upon the Cumberland County Council of preparing and submitting to the Minister a scheme in respect of all land within the County District but, as has been said above, the Act of 1951 substituted the scheme set out in the schedule to that Act. The nature and purpose of such a scheme appears from the provisions of Pt. XIIA of the Act of 1919-1949. It is to contain provisions for regulating and controlling the use of land and the purposes for which land may be used: s. 342G. Then there follows a long list of particular matters for which the planning scheme may provide. The scheme is to specify a responsible authority (s. 342N) and that authority has the responsibility of enforcing the scheme. If an estate or interest in land to which a scheme applies is injuriously affected by the coming into operation of any provisions of the scheme or by the restrictions imposed by or under the scheme the person entitled to the estate or interest may, within a time limited, obtain compensation from the responsible authority. There are other grounds for compensation but they are not here material: s. 342AC.

The *County of Cumberland Planning Scheme Ordinance* as scheduled names the Cumberland County Council as the responsible authority for its purposes. The details of the scheme are marked

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on a scheme map identified as the County of Cumberland Planning Scheme as prepared and submitted by the Cumberland County Council and amended by the Minister. On this map the areas of land are shown in different colours. The colours have a significance in relation to the manner in which the land in the respective areas is affected by the scheme. All land coloured dark green on the map is subject to stringent reservation. The whole of the land of the appellant Club is within the area marked dark green.

The exact purpose for which the land so coloured is reserved differs if it is vacant land within the definition of that expression or built-up land. The expression " built-up land " is defined by cl. 8 of the scheme to mean all land other than vacant land. " Vacant land " is defined by the clause to mean all land upon which immediately before the appointed day, that is to say 27th June 1951, there are no buildings or no buildings but fences, green-houses, conservatories, garages, summer-houses, private boat-houses, fuel sheds, tool houses, cycle sheds, aviaries, milking bails, hay-sheds, stables, fowl-houses, pig sties, barns or the like. If the land is vacant within the meaning of this definition then it is reserved for the purpose of parks and recreation areas : cl. 10. If land within an area coloured dark green on the scheme map is built-up land it cannot, without the consent of the responsible authority, be used for any purpose other than the purpose for which the land was used immediately before the appointed day : cl. 14. Whether the land is vacant land or built-up, if the result of the scheme is that the erection of any building or the carrying out of any work of a permanent character or the making of any permanent excavation is prohibited or in the case of any land reserved on which the responsible authority has refused to approve of the erection of a building or the carrying out of any work of a permanent character or the making of any permanent excavation, the owner by notice in writing may require the responsible authority to acquire such land : cl. 17. Upon vacant land within the area coloured dark green no person may erect a building or carry out work of a permanent character or make any permanent excavation other than a building or work or excavation required for or incidental for the purpose for which the land is reserved ; and no person may spoil or waste such land so as to destroy or impair its use for the purpose for which it is reserved : cl. 11 (1). There is a qualification enabling the responsible authority to approve of the erection of buildings and the carrying on of works or excavation of land if the reason for which it is reserved cannot be carried into effect immediately after the appointed day, but the approval may be made subject

to the condition that the buildings be removed or the land reinstated : cl. 11 (2) and (3).

It is needless to go into further details in relation to the scheme or to the provisions of the *Local Government Act* 1919-1951 which affect its operation. What has been already said makes it clear enough that the existence and application of the scheme must have had, as at 30th June 1951, a not inconsiderable effect upon the market-selling value of all land which, like that of the appellant Club, is comprised within the area coloured dark green.

But for the commissioner it is contended that this is immaterial. His case is that land tax was imposed upon the unimproved value of a hypothetical estate in fee simple free from encumbrances and from all specific restrictions upon enjoyment. He treats the County of Cumberland Planning Scheme as an example of such a specific restriction upon enjoyment, which must be ignored in valuing the fee simple. Accordingly any diminution of the actual value of the land brought about by the scheme is irrelevant. Stated in other words the argument is that what the *Land Tax Assessment Act* taxed is the unimproved value of an unencumbered fee simple without regard to any restrictions imposed upon its enjoyment by State law or to any reservation in the Crown grant or to any easement, encumbrance or restriction imposed by any transaction between subject and subject. The contention for the appellant Club is that what has to be ascertained is the unimproved value of the actual fee simple, subject to whatever restrictions or encumbrances operate upon it in the hands of the taxpayer. For this contention reliance is placed upon the judgments of *Isaacs* C.J. and *Starke* J. in *Stephen* v. *Federal Commissioner of Land Tax* (1).

The contention of the commissioner appears to go too far in rejecting all restrictions upon the use or enjoyment of the land which may result from the operation of any State law which affects it. To take an extreme example, if the law has a general application to all fee simples and is not concerned specifically with the particular land or the title to it, it surely must be taken into account. The commissioner may well be right in his view that the *Land Tax Assessment Act* postulated a fee simple free from encumbrances, reservations, easements and restrictive covenants and yet go too far in his claim that the Act excluded from consideration the operation of State law restricting the enjoyment of land even within a very limited area. An example is afforded by the familiar by-laws and ordinances creating residential areas. On the other hand, the contention of the taxpayer, notwithstanding the support it receives

(1) (1930) 45 C.L.R., at pp. 134, 137, 138.

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from the two judgments mentioned, is gravely open to question. It is convenient to begin by inquiring whether it is consistent with the true policy and meaning of the *Land Tax Assessment Act*. Section 10 of that statute provided that, subject to the provisions of the Act, land tax should be levied and paid upon the unimproved value of all lands owned by taxpayers and not exempt from taxation. The word " owned " possessed a meaning corresponding with that of " owner " under the definition section (s. 3) and " owner " is defined to include every person who jointly or severally, whether at law or in equity, is entitled to the land for any estate of freehold in possession, or is entitled to receive or is in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise. The expression included also every person who, by virtue of the Act, is deemed to be an owner. But that is not important. By s. 25 the owner of any freehold estate less than the fee simple, with an immaterial exception, was to be deemed to be the owner of the fee simple to the exclusion of any person entitled in remainder. Section 31 provided that there should be no deduction from the unimproved value of land in respect of any mortgage or unpaid purchase money and the mortgagor should be assessed and liable for land tax as if he were the owner of the unencumbered estate. Section 33 provided that a person in whom land is vested as a trustee should be assessed and liable as if he were beneficially entitled to the land. There were provisions which related to equitable owners and vendors and purchasers and to joint owners, but the sections which have been mentioned suffice to show that the general policy of the Act was to impose the tax on the owner of the first estate of freehold in possession and to make him liable independently of the rights of any reversioner, mortgagee or holder of security in respect of the unimproved value of the land. By s. 3 " unimproved value " is defined in relation to improved land to mean 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 at the time as at which the value is required to be ascertained for the purposes of the Act, the improvements did not exist. There is a long definition of " improvements " which it is unnecessary to consider. " Unimproved value " in relation to unimproved land is defined to mean 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.

It seems clear enough that the fee simple here means an unencumbered fee simple. Encumbrances upon land or estates in reversion appear to have been regarded as giving to reversioners or encumbrancers beneficial interests to be enjoyed by them. But the owner of the first estate of freehold was selected as the taxpayer who was to represent all persons beneficially entitled to the land. The value upon which he was to be taxed was the unimproved value of the fee simple, that is to say the capital sum which the fee simple might be expected to realize. It seems evident that the fee simple mentioned must be taken as free from encumbrances which, if they impaired the value of his estate, nevertheless operated to confer upon some other person or persons an estate or interest in the land. Were it otherwise the taxable value of the land would be diminished but the correlative estate or interest would not come into tax, unless by some chance it were an interest falling under some specific provision imposing liability. When the definitions of " unimproved value " in s. 3 speak of " *the* fee simple " they cannot mean, notwithstanding the definite article, that estate in fee simple which has been granted. For under s. 26 the hypothesis is that there has not been a Crown grant. In the Act as it stood before the enactment of the *Land Tax Assessment Act* 1914, s. 27 applied to leases from the Crown where there was no fee simple: yet s. 27 (4) (b) in conjunction with the definitions of " unimproved value " required that a fee simple should be assumed. The expression " the fee simple of the land " naturally means the fee simple as the highest estate unencumbered and subject to no conditions. Doubtless estates in fee simple may be granted by the Crown subject to conditions or reservations which operate only in the public interest. The corresponding advantages which ensue may be enjoyed only as of public right: they are not an interest in land enjoyed by a specific person or persons. But the Act does not draw any distinction based upon this possibility. The general policy was reflected in a general rule. The interpretation of the Act which seems best to accord with the policy appearing from its provisions and also to flow from its language is that in assessing the unimproved value an estate in fee simple must be taken as the hypothesis unencumbered and subject to no condition restricting the use or enjoyment of the land. *Stephen* v. *Federal Commissioner of Land Tax* (1) is not an authority standing in the way of this conclusion. For the question touching the point (question 3) was answered as the result of an equal division of opinion and that creates no precedent for the Court pronouncing

(1) (1930) 45 C.L.R. 122.

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the decision : *Tasmania* v. *Victoria* (1). But it is one thing to say that a hypothetical fee simple unencumbered and subject to no condition restricting enjoyment or use must be taken and another to say that laws of the State which affect the value of land are not to be taken into consideration. The federal Act adopts the hypothesis of an estate in fee simple to which State law attaches a *fasciculus* of rights. What those rights are, how far they extend and what measure of enjoyment they give must depend on the law of the State. This would hardly be denied in the case of a general law governing all fee simples in land throughout the State. But it is difficult to distinguish between such a law and one operating in part of a State or in a defined area only. There is all the difference between a public law affecting the enjoyment of land and a restriction of title. It is not difficult to imagine a law made by a State restricting the cultivation of land in some particular way. Such a law might well operate to prejudice the value of land which had no profitable use except for cultivation in the manner restricted. Would it matter for the purposes of the definitions of " unimproved value " that the law operated only in part of the State or within a very confined area ?

There remains the question how the distinction which is drawn above applies in this case to the County of Cumberland Scheme. Do the restrictions which it imposes upon, threatens to or suspends over land within the areas in the scheme, particularly that coloured dark green, amount to nothing but an encumbrance or condition or restrictive obligation affecting the titles to specific parcels of land ? Is it not rather a law operating over an area of country within the State which, though not large, is chosen independently of all questions of title or ownership and controlling the use to which owners in fee simple or for any less estate or interest occupiers, licensees and indeed even trespassers may put the land ? Its nature and purpose seem to bring the restrictions flowing from the scheme under the second description. However the title may be derived and whatever may be the form of ownership, occupation or enjoyment, the use of all land within the scheme is affected actually or contingently, presently or in the future, but in varying degrees and subject to varying conditions. In the case of land within the area coloured dark green the restriction, if not more proximate, is at all events more stringent. But it is nevertheless a restriction which arises from the law affecting an area in which the land lies, and not something altering the hypothesis upon which

(1) (1935) 52 C.L.R. 157, at pp. 183-185.

the Federal statute requires the land to be assessed. It must be taken into account in ascertaining the unimproved value of the land.

The first question in the case stated should therefore be answered that in arriving at the unimproved value under the *Land Tax Assessment Act* of the land the subject of the appeal the land should not be valued without regard to the provisions and effect of the County of Cumberland Planning Scheme.

This answer makes it necessary to consider the second question, which is subsidiary and consequential. It concerns the application of the scheme to so much of the land as is used as a golf course or courses or the use of which is not immediately connected with the buildings. The question in effect, although not in form, is whether so much of the land as excludes the buildings, and what may be described as the curtilage of the buildings, is vacant land. On the side of the commissioner it is said that the whole area is owned, occupied and used as a unit, that the buildings serve a necessary part in the use of the land considered as a whole, and that it is therefore not land of which it can be said that immediately before the appointed day there were no buildings upon it or no buildings except the structures enumerated in the definition of "vacant land": it falls outside that definition and accordingly is built-up land. The difference is that as vacant land it would be reserved for parks and recreation areas only, but as built-up land it may be used for the purposes for which it is already in use, and with the consent of the responsible authority for any purpose. The definition of "vacant land" speaks of the land upon which there were no buildings or only buildings consisting in the subsidiary or minor structures specified. What is meant by land upon which there were no buildings? Except in city streets it is usual for buildings to stand on land greater in area than the actual building. It is seldom that there is not at least a curtilage to a building. Indeed in conveyancing the expression "messuage" means not only the house itself but the outbuildings, courtyard, garden and adjacent land used and occupied with it. But buildings may be used in connection with a very large area of land all in one occupation and otherwise free from any building. The actual site of the buildings may be a very small fraction of the whole. It hardly seems credible that in such a case the whole of the land is to be considered "built-up" for the purpose of the scheme. How do you identify "the land" upon which there were buildings? The scheme supplies no immediate answer to the question. Yet if you consider land independently of man-made boundaries shewn upon

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the ground or upon paper, it stretches from one piece of water to the next uninterruptedly. In constructing the definition the draftsman does not seem to have adverted to the problem. Was it meant that you were to identify the parcel of land as that on which there was or was not a building, by unity of the existing occupation of the land, by the fact that it was contained in one title deed, by enclosure by fences, by the fact that it was continuous but in one ownership, or by the fact that it is used by one occupier for a single purpose or combination of purposes ? One thing only seems certain about the meaning of the phrase " land upon which, immediately before the appointed day, there were no buildings " and that is that it cannot refer only to the exact area on the earth's surface on which buildings literally stand. And yet if that meaning must be rejected what criterion must be adopted to define the area of land which is sufficiently connected with the building to be land on which there is a building ? Many suggestions to solve this problem have been made but perhaps the least unsatisfactory is one that makes the existing buildings the cardinal factor and inquires what land really belongs to them in the sense to be explained. Any building, whether it is a habitation or has some other use, may stand within a larger area of land which subserves the purposes of the building. The land surrounds the building because it actually or supposedly contributes to the enjoyment of the building or the fulfilment of its purposes. A garden, however large, belonging to a dwelling house is there as an amenity contributing to the use of the building as an abode. But if you find a caretaker's or gardener's cottage in a park, it is evident that it is put there for the better care, management and use of the park. The park is not an incident of the cottage, the cottage is an incident of the park. No one would say that the cottage made the park built-up land. In the same way no one would regard a farm as built-up land because the farmer's house stood on some part of it. If anyone were required to say how much of the land was built-up because of the farm-house he would do his best to fix upon an area which was seen to comprise all that was really devoted to the better use or enjoyment of the house as a dwelling or place of residence, what was incidental to it. He might find out-houses, a fence, a piece of garden and so on, but whatever marginal doubts might exist, it would be possible to fix on some area which really " belonged " to the house, an area " on " which the farm-house might fairly be regarded as built.

The test may be applied without much difficulty to the present case. The golf courses cannot be said to be incidental to the club

house, the greenkeeper's cottage, the professionals' shop and so on. In applying the test the exempt land need not, of course, be considered. To apply it, however, to the remainder means that, except land which forms part of the curtilage of the club house and land on which are erected the professionals' shop, the greenkeeper's and groundsman's cottage, the caddies' shed, the store erected by the Water Board and the like, and any curtilages to these structures, the appellant's land under assessment is vacant land which therefore falls under Div. 2 of Pt. II and in particular under cl. 10 of the *County of Cumberland Planning Scheme Ordinance*. The consequence is that the second question must be answered that it is open to the learned judge to find that the land, except the respective sites of the buildings thereon (not being buildings of the class of which examples are given in the definition of " vacant land ") and the respective curtilages thereof, is vacant land within the meaning of Pt. II of the *County of Cumberland Planning Scheme Ordinance*.

Questions answered as follows :—

1. *In arriving at the unimproved value under the Land Tax Assessment Act of the land the subject of the appeal such land should not be valued without regard to the provisions and effect of the County of Cumberland Planning Scheme Ordinance.*

2. *It is open to the learned judge to find that the said land, except the respective sites of the buildings thereon (not being buildings of the class of which examples are given in the definition of " vacant land ") and the respective curtilages thereof, is vacant land within the meaning of Pt. II of the County of Cumberland Planning Scheme Ordinance.*

Costs of the case stated reserved for the judge disposing of the appeal.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.