THOMAS *v.* VALUER-GENERAL.

1917, October 30, December 10. Supreme Court, Wellington. Stout, C.J., Chapman, Hosking, JJ.

Native Township Act, 1910—*Valuation of land*—*Amendment Act*, 1912—"*Unimproved value*"—*On what basis to be ascertained.*

The basis on which the unimproved value of land held by a lessee under the Native Township Act, 1910, is to be ascertained, is according to the meaning of unimproved value as defined in the Valuation of Land Amendment Act, 1912, irrespective of the restriction on alienation.

G. P. Finlay for appellant:

The land of the native township of Taumarunui is vested in the Waikato-Maniapoto District Maori Land Board by virtue of s. 4 of the Native Township Act, 1910. Section 5 of that Act declares the trusts upon which the land is held. Section 23 gives a power of sale under restrictions. The land cannot be sold except with the consent of the Governor-in-Council. The occupiers hold the land on lease from the Board.

The Assessment Court wrongly valued the land as if fee-simple free from restrictions. Under s. 2 of the Valuation of Land Act, 1908, the Court is bound to fix the value of the owner's estate or interest in the land.

Compare the New Zealand cases of *In re Hutt Park and Racecourse Board* (10 G.L.R. 12: 27 N.Z.L.R. 246); *Valuer-General v. Ormsby* (10 G.L.R. 169: 27 N.Z.L.R. 44).

[STOUT, C.J.: You cannot say there are two interests in this land. There is only one estate or interest.]

The statute fixes the "unimproved value" as that which the owner's interest might be expected to realise on sale: See Valuation of Land Amendment Act, 1912, s. 3.

The restrictions upon sale upon the owner's interest must be considered and their value deducted from the value of the land.

The District Valuer proceeded upon a wrong principle: he ought to have ascertained the capital value and then deduct the value the improvements have added to the value of the land: *Nightcaps Coal Co., Ltd. v. The Valuer-General* (9 G.L.R. 97: 25 N.Z.L.R. 977).

The Solicitor-General (J. W. Salmond, K.C.), for the Valuer-General:

As to effect of restrictions: The appellant is a leaseholder, and leaseholds are valued under the provisions of s. 39 of the Valuation of Land Act, 1908. But assuming the land is freehold, the question is whether the restrictions on alienation are to have the effect of abating the value of the land. There are two decisions to the contrary which should not be followed. The cases are *Valuer-General v. Ormsby* and *In re Hutt Park and Racecourse Board*. Denniston, J., in the first case, said it must be assumed, in assessing the value of the land, that restrictions upon alienation would follow the land into the hands of a purchaser. Cooper, J., applied a similar principle in the second case. The principle applicable to compensation cases does not apply here. That is, the principle of assessing value as value to the person from whom land is taken, taking into account all restrictions affecting his title, not the value to the new owner: *Stebbing v. Metropolitan Board of Works* (L.R. 6 Q.B. 37), followed in *Corrie v. Macdermott* (1914 A.C. 1056); but see *In re Johnsonville Town Board* (9 G.L.R. 636: 27 N.Z.L.R. 36). The basis of that decision was, however, that as the law then stood native land was to be considered as settled estate, and it can therefore be reconciled with the English authorities: See also *In re Putiki Rifle Range* (26 N.Z.L.R. 33). The value for purposes of the Valuation of Land Act, 1908, is the market value of the property and not its value in the hands of its present owners. If, when the purchaser gets the land, it is free from restrictions, those restrictions are not to be taken into account in assessing the unimproved value.

There are three possible answers to the question under discussion:

(1) In assessing its value the land must be taken in the hands of the purchaser as subject to all the restrictions which affected it in the hands of the vendor. This is the principle adopted in the New Zealand cases cited.

(2) In assessing the value of land none of the restrictions affecting the vendor are to be deemed to affect the purchaser. This is the principle adopted in valuations for purposes of Land Tax under the Land and Income Tax Act, 1916, s. 40.

(3) The sound view is that some restrictions are to be taken account of and some are not. Restrictions of such a nature that if the land could be sold they would run with the land so as to affect the title in the hands of a purchaser must be taken account of because they reduce the amount a purchaser would pay: Irremovable restrictions. Restrictions which are merely personal in their nature and which would not run with the land even if the land were saleable are not to be taken into account, as they would not affect the price a purchaser would pay. All restrictions which a sale would banish are not to be taken into account.

It may, however, be contended that the analogy of the English Law of Rating should be applied: *c.f.* Parochial Assessment Act, 1836 (24 Halsbury, p. 25). But the analogy is misleading and inapplicable, but was no doubt the basis of two New Zealand cases against our contention. In England the hypothetical tenant is held subject to restrictions upon user of rateable owner: *The Queen v. Grand Junction Railway Co.* (4 Q.B. 18); *Rex v. Fletton* (3 E. and E. 450); *Mayor of Liverpool v. Overseers of Wavertree* (2 Ex. D. 55). What is to be valued in England is the value of the existing occupation as it stands; in New Zealand it is the value of the estate or interest of the owner. In New Zealand the use to which the owner is putting his land or the nature of the existing occupation is immaterial.

The purposes for which valuations are made under the Valuation of Land Act, 1908, are: (1) Rating, (2) death duties, (3) stamp duties, (4) sale of native lands, (5) Land Tax, and (6) compulsory purchase of land under the Land for Settlement Act. This displaces the presumption that the principle to be followed is that of the English rating law. Any hardships to ratepayers are met by exemptions provided for by our Rating Acts. Any restriction upon alienation is immaterial for the purpose of ascertaining rateable value.

There is a special provision relating to the valuation of leaseholds in s. 39 of the Valuation of Land Act, 1908. Limitations of alienation or user are not to be taken into account in valuation of leaseholds. This section was passed in consequence of *Duthie v. Valuer-General* (20 N.Z.L.R. 585). The appellant in this case is a leaseholder and is subject to this section, which disposes of the appeal. The section also throws light upon the intention of the Legislature upon the general

question. It must be assumed that as the Legislature took the precaution to provide that the capital value of all interests should not be less than the fee-simple value without taking into account any restrictions when the land was leased, it thought that the full fee-simple value without taking into account any restrictions upon alienation or user was to be the capital value where the land was not leased.

As to the proper method of assessing the unimproved value of land: In the present case the valuer adopted the method of valuing the unimproved value separately. That is the proper method: See s. 3 (4) of the Valuation of Land Amendment Act, 1912. This can be done without valuing the improvements or the capital value. The valuer determines what the bare value of the land without the improvements would be. This is the only safe and regular method, and is the proper and lawful method: *Campbell v. Deputy Commissioner of Land Tax* (20 C.L.R. 49). See also *Duthie v. Valuer-General* (20 N.Z.L.R. 585); *Nightcaps Coal Co., Ltd. v. Valuer-General* (9 G.L.R. 97: 25 N.Z.L.R. 977); *Valuer-General v. Howden* (1916 G.L.R. 232).

Finlay in reply:

Reason and common-sense demand that in ascertaining the unimproved value the capital value must first be ascertained and then the value of the improvements deducted: *c.f. Campbell v. Deputy Commissioner of Land Tax* (20 C.L.R. 49).

On the other point, the whole question turns upon the value of the owner's interest—that is, the owner's interest for the time being. It is not the value of the land in the hands of a purchaser. The restrictions on alienation reduce the purchase price to the owner, for the purchaser has, as a rule, to pay for the removal of the restrictions, and this depreciates the value of the owner's interest.

The present statutes were passed after the decision in *Valuer-General v. Ormsby* and *In re Hutt Park and Racecourse Board*, and did not amend the law so as to affect those decisions, and the Legislature must be taken to have approved the decisions. The Act is essentially a taxing statute and must be so construed. Section 39 has no application to the present case. One interpretation is that it applies where there is a subsequent interest created in the leasehold interest: Subsection (2). The true interpretation is that the section was passed to provide that where there are several interests in the freehold some of which had practically no value, the land would bear its full quota of taxation. In the *Hutt Park and Racecourse case* the land was leased and s. 39 was then in force. The Assessment Court is bound to give some value to the restrictions.

Cur. adv. vult.

STOUT, C.J. — This case is an appeal to the Supreme Court from the decision of the Assessment Court under s. 17 of the Valuation of Land Act, 1908. The question is, on what basis is the unimproved value of the land to be ascertained? The appeal is by a lessee of the land. The lessee is a lessee under the Native Townships Act, 1910. The land is held by the Maori Land Board, and by s. 5 the land vested in the Board is held by it in trust for the owners beneficially entitled thereto in accordance with their respective interests, and should be administered by the Board in accordance with the provisions of the Native Townships Act, 1910. Under that Act the Board has power to lease the land, and the rent is to be calculated at five per cent. on the value of the freehold. There is power under the Act to sell the land to the Crown with the consent in writing of the beneficial owners, and under s. 23 of the Act a Maori Land Board may, with the precedent consent in writing of the beneficial owners or of their trustees in the case of owners under disability, or in pursuance of a resolution of the assembled owners under s. 356 of the Native Land Act, 1909, sell to any person any land situated in a native township vested in the Board. The sale may be effected by private contract, public auction, or public tender, but no sale shall be of any validity until and unless it has been consented to by the Governor-in-Council. On such a sale taking place, however, the purchaser gets a fee-simple absolute without any restrictions of any class or kind whatever. This is not a case, therefore, where land is subject to some easement or some condition as to occupancy. This land is to be used only for townships, to be leased at 5 per cent. on the unimproved value, or to be sold, and the Maori Land Board, which is the trustee of the land, has full power to deal with it in either of those two ways.

Reference must now be made to the Valuation of Land Act. The Valuation of Land Act, 1908, was amended by the Valuation of Land Amendment Act, 1912, and the Amendment Act defines the words "unimproved value" and "value of improvements." The unimproved value means, according to the definition, the sum which the owner's estate or interest therein, if unencumbered by any mortgage or any charge thereon,

might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a *bona fide* seller might be expected to impose, and if no improvements as hereinbefore defined had been made on the said land. If the land then were sold it would have to be sold without restrictions. So far as the interest in the land is concerned, the beneficial owners own the land in fee-simple. The only restriction is that it is to be held by trustees for them, but there is no restriction on the enjoyment of the land, nor is there any restriction on the land once it passes into the hands of the purchaser.

In my opinion, this being so, the cases that have been referred to, namely, the cases of *In re Hutt Park and Racecourse Board* (10 G.L.R. 12) and *In re Ormsby* (10 G.L.R. 169: 27 N.Z.L.R. 44) do not apply. In the first case there was only a limited power of leasing, and there was no power of sale. The land was really a public reserve. As to the case of *In re Ormsby*, that land also, when sold, was restricted in its enjoyment, as the owner had no power to lease the land or mortgage the land or to alienate it. It was, therefore, not an absolute fee-simple. Here the owners' trustees can sell the land. It is true the assent of the Governor-General has to be obtained but that is not any restriction on the enjoyment of the land, in my opinion, and is not to be, and ought not to be, considered in fixing the unimproved value of the land, because the unimproved value means the sum which the owners' estate or interest therein, as I have already quoted, would fetch if offered for sale. Here, if the land is offered for sale—and it can be offered for sale by the trustees—the buyer would get it free from any conditions whatever as to its utilisation. It becomes in the buyer's hand an absolute fee-simple. It is true that in the sale of land even by the Government all the people in the colony cannot purchase. If people have a certain area of land they are prohibited from purchasing land; so it would be under the Native Townships Act, but that does not come into this case. I may add that the case in the Privy Council of *Corrie v. Macdermott* (1914 A.C. 1056) shows that the distinction between that case and this is that there the use of the land was controlled by the grant. Here the Maori Land Board is really acting as trustees of the owner of the fee-simple, and their only restriction in selling the land is that they must get the consent of the Governor-General.

I do not think it is necessary to invoke the aid of s. 39 of the Valuation of Land Act, 1908, in coming to a decision in this case. That section states:

> "Where land is subject to a lease and there are more interests therein and more owners than one, the united capital values, values of improvements, and unimproved values respectively of the interests of all the owners shall not be estimated at less than the capital value, value of improvements, and unimproved value of such land would be estimated at if held by a single owner in fee-simple without limitation of estate or power, and free from any lease or encumbrance, anything to the contrary in this Act notwithstanding."

This clearly points out that in order to ascertain the unimproved value of the land the question of restrictive covenants would not be considered. It was further submitted that the way to get the ascertained value of the land was to ascertain the capital value first, then to ascertain the value of the improvements, and the balance would be the unimproved value. That is not the way that the amending Act of 1912 assumes the valuation is to be ascertained. It states that the unimproved value is to be ascertained as if no improvements had been made in the land, and the value of the improvements means the added value which at the date of the valuation the improvements give to the land. Even if the capital value was ascertained first, still the unimproved value must be ascertained without a method of mere subtraction. The definition of the statute must be followed.

I am of opinion that the appeal should be dismissed with costs.

Judgment accordingly.

CHAPMAN, J.—I think that this land must be valued at its freehold value, despite the restriction on alienation. In *In re Johnsonville Town Board* (9 G.L.R. 636: 27 N.Z.L.R. 36) the estate of a Maori whose land was subject to restriction on alienation was likened to that of a tenant in tail whose estate was by statute rendered inalienable. That was a case in which the question was what measure of compensation was due to a Maori whose inalienable land was taken for a public work, and reference was made to *In re the Cuckfield Burial Board: Ex parte the Earl of Abergavenny* (19 Beav. 153), where the Earl's estate was an estate tail rendered inalienable by statute. There are in England several well-

known cases of settled estates being rendered inalienable by Act of Parliament, but I can scarcely suppose that there is any recognised difference based on this circumstance in the rateable or taxable value between the lands of such an owner and similar lands of his neighbours. The case of a rifle-range or a public racecourse is quite different. The owner of a racecourse which can only be used or let for that purpose and for grazing when not in use for racing is not a case where the owner has full enjoyment of the land. The land might be of very great value, say, as a market garden, while yielding but little revenue to the body owning it because it could not be used as a market garden. A native owner has full use of the land, and on his death it passes to his successor, who has the same full use of it. If he alienates it after the removal of restrictions his purchaser has an unrestricted freehold. That, I think, differentiates this case from the cases when there is no such unrestricted right to use the land. All that can be said here is that there is a restriction on alienation capable of being removed, but it seems to me that the unimproved value of the land as defined in the Valuation of Land Amendment Act, 1912, s. 3 (4), remains the same whether the owner has this kind of freehold or an ordinary fee. If the land were sold subject to consent and confirmation, which are in these circumstances reasonable conditions, a buyer would give the full freehold value of the land just as he would in the case of a lunatic or an infant. It is quite true that the extra expense of selling would fall on the vendor or owner, but I cannot think that the valuation of land can depend on matters merely affecting the cost of making title to it. For these reasons I agree with the judgment of His Honour.

HOSKING, J.—I agree that this appeal should be dismissed. In construing the Valuation of Land Act, 1908, and its amendments one has to remember that the valuations for which they provide are not for rating purposes merely. The Act of 1908, s. 28, as amended enables the Governor-in-Council to authorise the use of the valuations for the assessment of stamp duties and for advances and investments of money by certain State offices and departments. The principle of valuation laid down by these Acts is to govern assessments for the purposes of death duties, and the test of adequacy of consideration where a Maori Land Board is called upon to confirm alienation is a valuation under these Acts. The valuations likewise govern in the case of compulsory acquisition under the Land for Settlement Acts, and there are other purposes to be found in various Acts which are to be served by valuations under the Acts referred to. The Rating Act itself provides for exceptions and modifications to meet certain cases which may be termed cases of restricted ownership and to meet other special cases, but does not for such cases prescribe any special principle of valuation.

In my opinion, in ascertaining the capital or unimproved value according to the definitions of those terms found respectively in sub-s. 2 of the Valuation Act of 1908 and s. 3 of the amending Act of 1912, all restrictions affecting the alienability and enjoyment of the estate or interest to be valued must be examined and considered. Whether upon this examination any, and, if so, what deduction should be made from what but for the restrictions would be the value are, in my view, questions of fact for the valuer, although it may be necessary as a preliminary to determine the legal nature and effect of the restrictions. According to the legislation the value means the sum which the owner's estate or interest if unencumbered by any mortgage or other charge might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a *bona fide* seller might be expected to require. The saleability of the estate or interest to be valued must be assumed as the basis. But although that is so, restrictions affecting the alienability or enjoyment of the estate or interest must in any event be considered, because they enter into the measure of what that estate or interest is—what its quantum is. The restrictions may be of a character personal to the owner, ceasing to exist upon a sale or not devolving on the buyer. On the other hand, they may be inherent or immanent so as to pass on to a buyer, with the result that the estate or interest continues subject thereto notwithstanding the alienation. The restrictions upon alienation which exist in the case before us are of the personal class, because the land is saleable and upon the purchaser getting his title all those restrictions imposed only for the protection of the native come to an end and the purchaser holds absolutely. The other class finds constant illustration in the case of leases. What effect any restriction has on the saleable value of the estate or interest is for the valuer to determine as a fact. It does not at all follow that the restrictions must have an effect on the value. If the restrictions are personal to the owner and the estate or interest itself is saleable, and upon a sale a buyer gets

what he buys free from all restrictions, there does not seem to be any foundation in fact for a difference in the saleable value as compared with the value of the like estate or interest in the like land free from restrictions. That appears to me to be the present case. But it does not necessarily follow that because restrictions exist which continue in spite of a sale there must be a deduction or allowance. To the purchaser of a public-house a covenant that the premises should be used for no other purpose than for a public-house would hardly be regarded as diminishing the saleable value of the tenancy. The question of the effect of the restriction on the saleable value of the estate or interest to be valued is in all cases one of fact, although the character or scope of the restriction itself may be one of law.

If there is an inherent restriction preventing sale the assumption of saleability must still be adopted in order to value, but the saleability to be assumed would be that of the thus limited interest of the owner. It does not at all follow that such a restriction on sale reduces the value of the owner's interest to *nil*: *Corrie v. Macdermott* (1914 A.C. 1056, p. 1064). The limited estate or interest which he does possess may be capable of an earning power giving the estate or interest a capital value. An instance of this was involved in the case of *The Hutt Park and Racecourse Board* (10 G.L.R. 12: 27 N.Z.L.R. 246).

I confess that the decision in *The Valuer-General v. Ormsby* (10 G.L.R. 169: 27 N.Z.L.R. 44) may not appear to be consistent with the view I have taken. But the view the Court there took seems to have been that under the legislation applicable in that case the native appealing had no more than a life interest. That is not the case here. The Court, however, also stated that the proper standard of valuation in respect of the land in question was the sum a purchaser would give for being placed in respect of it in exactly the same position as the owner. In my judgment, while that might possibly be a standard in a similar case, it does not apply here, in another and different position by conferring on him an absolute fee-simple. Further, Mr. Justice Cooper in *The Hutt Park and Racecourse Board* distinguished the case of lands held by natives in fee-simple, pointing out how it differed from the position involved in the case before him. I also think *Ormsby's case* is not consistent with the decision of the Court of Appeal in *In re Johnsonville Town Board* (9 G.L.R. 636: 27 N.Z.L.R. 36). Referring to the *Hutt Park case* in another connection, the decision in it appears to me to rest upon the ground that the Board held only a limited interest in the reserve, the land itself being unsaleable and clogged with certain public uses incompatible with complete ownership. The totality of the interest in the land was made up of the rights of the Board and the rights of the public. Only the former were held assessable. The views I have expressed are in accord with that decision.

A point was made that the acquisition of native land is more costly than where the title is simple, because the purchaser usually finds he has to pay the cost of the steps necessary to enable the native to give a title. Therefore it is said the purchaser in bargaining gives less to the owner, and so the saleable value is less. If that be the case in fact, it is obvious that the purchaser considers the land is worth the price he pays to the native, plus that cost in addition. If he does not pay the cost then the native would have to pay it, and by the same process of bargaining by which it is said the purchaser gives so much less the native might presumably ask so much more to recoup himself. So that, taken either way, the price plus the cost may be regarded as the value. Whether on the whole the question of cost does reduce the saleable value of native land as compared with that of European land is one of fact for the valuer. If it does, then he would or ought to make due allowance for the fact.

The other point involved in the appeal is that in ascertaining the value the valuer proceeded on a wrong basis, in that he had first fixed and determined the unimproved value and thereafter had fixed the value of the improvements, and by the addition of the two values had ascertained the capital value. It is said this process is wrong, and that he should first ascertain the capital value and then deduct the value which the improvements add to the land. I do not quite see how the method adopted by the valuer is a matter of law unless it must end in a wrong conclusion. If the result is right, does it matter whether he adds from the top or the bottom? If his result is wrong, then upon an appeal it is open to be attacked on evidence, whichever method he has adopted. What he has to find, however, is not the value of the improvements, but the added value which at the date of valuation the improvements give to the land—that is to say, to the unimproved value of the land. I cannot see how the valuer went wrong in principle because he

first found the unimproved value and then added the value given by the improvements.

I do not think it necessary to express an opinion on s. 39. To hold, as asked by the Solicitor-General, that wherever land is subject to a lease the values are to be estimated as if the interests held were without limitation of estate or power seems to me, as at present advised, calculated to create results that can hardly have been contemplated. For instance, are the interests, if compulsorily taken under the Lands for Settlements Act, to be paid for on such a basis of value, notwithstanding restrictions on the ownership? I doubt, also, if in any case the section applies in the case of a single tenancy, where there are only the two interests, namely, that of the landlord and that of the tenant. This leaves open the question whether "the more interests therein" referred to in the section does not mean more leasehold interests than one created unler a lease.

Solicitors: for appellant: *J. F. Strang*, Taumarunui; for respondent: *The Crown Law Office*, Wellington.