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BARTON, J., and O'CONNOR, J., concurred.

Appeal allowed. Order of the Supreme Court making the Rule Nisi absolute discharged, and Rule Nisi discharged with costs. Respondent to pay the costs of the appeal.

On the application of *Armstrong* the cost of printing the Judge's notes for the purpose of the appeal was allowed.

Solicitors for appellant, *Levy and Fulton.*
Solicitors for respondent, *C. Bull.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

BOROUGH OF GLEBE . . . . . APPELLANTS;
PLAINTIFFS,

AND

LUKEY (AUSTRALIAN GASLIGHT CO.) . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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March 16, 17, 18, 21.

Griffith, C.J., Barton and O'Connor, JJ.

Municipalities Act (*No.* 23 *of* 1897), *secs.* 137, 138, 141, 150, 154, 156—*Gas Company—Liability to pay rates in respect of land occupied by gas mains within the borough.*

The *Municipalities Act* (No. 23 of 1897), by sec. 137, defines "rateable property" as "all lands, houses, warehouses, counting houses, shops and other buildings, tenements, or hereditaments within any municipality," subject to certain exceptions not material. Sec. 138 provides for the annual valuation of "all rateable property," and sec. 141 provides that for rating purposes the annual assessment should be made by assessing all rateable property "at nine-tenths of the fair average annual rental of all buildings and cultivated lands or lands which are or have been let for pastoral, mining, or other purposes," and "at the rate of five per centum upon the capital value of the fee simple of all unimproved lands."

The defendants, for the purpose of supplying gas to their customers, laid mains and pipes under the streets of the plaintiff borough.

Held, that the defendants were occupiers of "land" within the meaning of secs. 137 and 141, and were liable in respect thereof for ordinary municipal rates.

Semble, the "land" so occupied by the defendants came within the class "unimproved lands" in sec. 141.

Held, also, following *Knight* v. *Municipal District of Rockdale*, 20 N.S.W.L.R., (Eq.), 3, that, on an appeal against the assessment, under sec. 150 of the *Municipalities Act*, the decision of the justices is final, both as to the amount and as to the principle of assessment.

Municipal Council of Sydney v. *Australian Gaslight Co.* (1903), 3 S.R. (N.S.W.), 66, approved; *Chelsea Waterworks Co.* v. *Bowley*, 17 Q.B., 358, distinguished; *R.* v. *East London Waterworks Co.*, 18 Q.B., 705, and *Melbourne Tramway Co.* v. *Fitzroy* (1901), A.C. 153, followed.

Decision of the Supreme Court (1903), 3 S.R. (N.S.W.), 698, reversed.

This was an appeal from a decision of the Supreme Court of New South Wales in a Special Case stated by consent of the parties. The Special Case was to the following effect:—

The plaintiffs are a duly incorporated borough within the meaning of the *Municipalities Act*, 1897. The defendant R. J. Lukey, was sued as the secretary of the Australian Gaslight Company, a company duly incorporated by Act of Parliament of 8 Wm. IV., amended by Acts of 3 and 22 Vic. In pursuance of the powers contained in the said Acts, the defendant company have from time to time erected and occupied buildings and works for the manufacture of gas within and outside the city of Sydney, and for the purpose of supplying gas, laid gas mains beneath the streets of the city of Sydney, and the streets and roads of several municipalities, and among others beneath the streets and roads of the plaintiff borough. The gas mains of the company so used within the boundaries of the plaintiff borough are all laid beneath the surface of the roads and streets, and are contained in the subsoil thereof. The said mains all form one service, and are connected by service and reticulation pipes with the head office of the defendant company in the city of Sydney. The plaintiff borough claimed to be entitled to levy general municipal rates and lighting rates on the defendant company in respect of their said gas mains within the said borough. The defendant company are not owners nor are they

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in occupation of any building or office on the surface of any lands within the boundaries of the plaintiff borough. The plaintiffs purported to make an assessment of the said property of the defendant company within the said borough, on the basis of nine-tenths of the fair average rental thereof, and to rate the defendant company in respect thereof. On 16th April, 1902, the plaintiffs caused to be served on the defendant a notice of assessment and rate for varying amounts respectively for the several wards of the plaintiff borough. The defendant company gave the plaintiff borough notice of their intention to appeal against the assessment of the said gas mains, under sec. 154 of the *Municipalities Act*, 1897. Upon the hearing of the said appeals the Stipendiary Magistrate upheld the assessments, both for the purpose of the general municipal rates and the lighting rates. The plaintiffs caused a writ to be issued against the defendant company for the recovery of the amount of the said rates calculated on the basis of the said assessment. After the issue of the writ and before judgment the parties agreed that the facts above set forth, together with the following questions of law, should be stated by way of special case for the opinion of the Supreme Court, without pleadings:—

1. Whether the defendant company are liable to pay general municipal rates under the provisions of the *Municipalities Act*, 1897 for the years 1902-1903, and 1903-1904, in respect of their said property within the plaintiff borough.

2. Whether the defendant company are liable to pay lighting rates under the provisions of the *Municipalities Act*, 1897, for the years 1902-1903 and 1903-1904, in respect of their said property in the plaintiff borough.

If the Supreme Court should be of opinion that the first question should be answered in the affirmative, judgment was to be entered up for the plaintiffs for £2,700. If the Court should be of opinion that the second question should be answered in the affirmative, then judgment was to be entered up for the plaintiff in the additional sum of £787 10s.

On 20th November the special case came on for argument before the Supreme Court. The point in respect of lighting rates, involved in the second question, was not pressed on behalf of the

plaintiffs, and the Court's attention was therefore directed solely to the first question, as to general municipal rates. On December 4th the Supreme Court (consisting of *Stephen*, Acting C.J., *Owen*, J. and *Pring*, J.) delivered judgment in favour of the defendant company, answering the questions in the negative (reported 1903, 3 S.R. (N.S.W.), 698). From the decision on the first question the plaintiff borough now appealed.

Gordon, K.C. (*Harvey* with him), for the appellants. The appellants do not now contend that the respondents are liable for the lighting rates. They appeal only from the decision of the Supreme Court that the respondents are not liable for general municipal rates.

The sections bearing upon the matter are 137 and 141 of the *Municipalities Act*, 1897, which consolidated the earlier Acts. In the *Sydney Corporation Act*, 43 Vic. No. 3, the section is 103 (consolidated by No. 35 of 1902). The decision of the Supreme Court in *Municipal Council of Sydney* v. *Australian Gaslight Co.* (1903), 3 S.R. (N.S.W.), 66, was right, and governs this case. There is no distinction to be drawn between rateable property under the two Acts. Sec. 103 of 43 Vic. No. 3 is practically identical with sec. 137 of the *Municipalities Act*. If sec. 137 stood alone this property would be clearly rateable. It is land within the meaning of that section; *R.* v. *East London Waterworks Co.*, 18 Q.B., 705; *R.* v. *West Middlesex Waterworks*, 1 E. & E., at p. 720. Then sec. 141 of the *Municipalities Act* provides that the council shall make an estimate of the probable expenditure for the current year and raise "the amount so estimated by an assessment and rate upon all rateable property" within the municipality. "All rateable property" is that which is enumerated in sec. 137. Sec. 141 divides this "rateable property" into two classes. Then the rate, though assessed upon the property itself, is to be paid by the "occupier": The respondents are "occupiers" of the land although it is land beneath the surface. The judgment of the Supreme Court practically admits that this is so, but they say in effect that out of "all lands" must be taken certain kinds of land in which the property of the respondents is included. They say that sec. 141 practically amounts

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to a proviso to sec. 137, and that the plaintiffs are in this dilemma, either the property in question is not "rateable property" as defined by sec. 137, or, if it is within that section, there is no way of recovering rates upon it. The effect of their judgment is that the words "rateable property" have a different meaning in the two sections. My contention is that sec. 137 points out what kinds of property are rateable, and sec. 141 lays down the manner in which the property is to be rated, dividing it into two classes for that purpose.

It is practically admitted that this property is land, and therefore rateable by sec. 137. Consequently if sec. 141 does not remove it from the category of "rateable property," the Supreme Court must be wrong. Land must be either improved or unimproved. Improved land is either "buildings or cultivated land" or "land let or having been let," that is, land that is worth occupation. The company does not own the land, they have a statutory license, a statutory tenure, but the land must still be either improved or unimproved. Originally it was in the class "unimproved," but now it is occupied under a statutory license, and is within the category of "let" lands. Whichever it now is it is "rateable property." The land occupied is the core enclosed by the pipes.

[GRIFFITH, C.J.—There seems to be no real difference between this case, and, for instance, a square pipe laid on the surface. That would clearly be an occupation of the land covered by it. (Refers to *Municipality of Brisbane* v. *Queensland Tramway Company*, 9 Q.L.J., 67)].

Next, assuming that this is rateable property, the decision of the Justices as to both amount and method of assessment is final; *Knight* v. *Municipal District of Rockdale*, 20 N.S.W.L.R. (Eq.), 32, at p. 63. This case shows that even if the Court is of opinion that this property is unimproved land, and I am wrong in the contention that it is "let" land, the answer to the question must be in the appellant's favour.

Harvey followed. It may be that the word "unimproved" in sec. 141 has a special meaning, and means "other lands," *i.e.*, any lands not coming within the first class, "buildings or cultivated lands," the latter class comprising only improved lands. The

Court will give the natural meaning to the words in that section. The first class of lands comprises such as bring in revenue, and the other class all that do not. This definition is exhaustive, and includes every kind of land subject to rates.

Wise, K.C., A.G. for N.S.W. (with him *Knox* and *J. L. Campbell*) for respondents. The special case shows that the company's property has been assessed at nine-tenths of the fair average annual rental; it must therefore have been placed in the first class of "lands" mentioned in sec. 141, *i.e.*, "buildings and cultivated lands." The difference between the amount so assessed and that which would have been arrived at by taking five per centum of the unimproved value is very great. The manner in which the case is stated makes it necessary for the Court to decide whether the assessment should be on one basis or on the other, because the question to be answered is, whether the company is to pay a certain sum for rates. A writ was issued for that amount and the case shows how that amount was arrived at, that the property was treated as coming within the first category in sec. 141. Therefore if the Court is of opinion that it does not fall within that category, the company is not liable for the rates as assessed, and the Court's decision must be in its favour. To put it shortly, if the company is not liable as for land within that category, it is not liable at all in this action. In any case the Court is asked to give its opinion on this point in view of the great and general importance of the matter. On the general question, the English cases all turn upon the construction of words used in the English Acts. The *Sydney Municipal Council Case* was decided on the ground that under similar English Acts gas mains had been held to be land in the occupation of an occupier. I do not dispute the authority of the English cases if the words of the *Municipalities Act* were similar to those of the English Acts. I contend that there is a difference. The Act 43 Eliz. c. 2 deals with the question of personal liability, that of the occupier. 38 Geo. III. c. 5 imposes a direct tax upon land. So that in England, under one Act or the other, all property in the nature of land is rateable. Neither of these Acts provides for assessment of the rateable property. There are no machinery

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sections. If then under our *Municipalities Act* there are sections relating to the assessment, notices, and enforcement of rates, that are quite inapplicable in the view that property of the kind under consideration is rateable, a more limited construction must be put upon the sections enumerating or defining the classes of rateable property. In our Act there are machinery provisions that cannot be applied to gas mains at all, *e.g.*, the provisions for levy on premises, and enforcement generally. Our legislature therefore cannot have contemplated or intended the taxation of this form of property. The weight of the English decisions is then completely destroyed. This is a taxing Act, and must be strictly construed in favour of the subject.

[GRIFFITH, C.J.—That doctrine has been rather questioned in recent decisions.]

In England the Acts are old and naturally their operation becomes more extensive as new forms of property come into existence. But in our case gas companies with their mains and other apparatus were in existence at the time of the passing of the *Municipalities Act*, and no draftsman, knowing of the existence of such property and intending to make it taxable, would have attempted to do so by means of such sections as appear in the Act. The fact that gas mains were not generally considered to be rateable property at that time is evidenced by the fact that never until last year was an attempt made to levy a rate upon gas mains, with the exception of one case in a country town. As to the use of the word "all" in sec. 141, that must be qualified and explained by sec. 143. It is used to draw a distinction between general rates and special rates, to differentiate the property dealt with in one section from that dealt with in the other. It amounts to saying that general rates are payable in respect of rateable property in general, without regard to benefits received, whereas the special rates are payable only in respect of such property as derives benefit from the works described in sec. 143. The word must be qualified by what follows, the provision for assessment. There cannot be a rate unless the property is both rateable and assessable.

[GRIFFITH, C.J.—The words "assess" and "rate" are commonly used together. That may be because they are to be taken together as meaning the process of raising the tax.]

The words providing for assessment and notice thereof are quite inapplicable to the case of gas mains. A notice could not be posted to the gas main as prescribed by sec. 141. I admit that the use of such inapplicable terms does not conclude the matter, but it points strongly towards the intention of the legislature.

[BARTON, J.—Seeing that the *Gas Companies Act* was passed in 1828, and the *Municipalities Act* in 1866, you say that your argument is strengthened by the omission of the legislature to provide for a state of affairs known to exist at the time.]

Yes, and further fortified by the terms of the machinery provisions. If the words imposing the tax are vague, I am entitled to look at the machinery sections to discover the intention of the legislature. Again, in sec. 141, the word "such" is qualitative, not indicative; its use shows either that the word "all" in the fullest sense is inappropriate, or that only a particular class of property is referred to, *i.e.*, such property as is "rateable." And by that section the only property which is liable to pay rates is that which is specifically mentioned in the provision for the different methods of assessment. Secs. 151 and 152 are also inapplicable on the supposition that it was intended to rate gas mains. As to sec. 137, gas mains are not within its meaning. The English decisions are under differently worded Acts, from which the qualifying sections, such as those pointed out, are absent. In the poor rates cases the tax was upon persons, here it is upon property, it is made a charge upon the land; *Chelsea Waterworks Co.* v. *Bowley*, 17 Q.B., 358; discussed by *Stephen*, A.C.J., in *Municipal Council of Sydney* v. *Australian Gaslight Co.* (1903), 3 S.R., at p. 76; 38 Geo. III., c. 5, s. 4; *Metropolitan Railway Co.* v. *Fowler* (1893), A.C. 416, *Herschell*, L.C., at p. 422.

Knox followed. *Bowley's Case* is a decision upon an Act more in line with our *Municipalities Act* than are the Acts dealt with in the other cases cited in this and in the Sydney Council case. The Statute, (42 Eliz. c. 3), for the Relief of the Poor, to which most of the English cases refer, contains these words "the churchwarden &c." . . . "to raise" . . . "by taxation of every

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inhabitant" . . . "and of every occupier of lands, houses, tithes impropriate, or propriation of tithes, coal mines," &c., "in such competent sum and sums of money as they shall think fit" (*Chitty, Collection of Statutes*, sub. "Poor" vol. iii., p. 634). *R.* v. *East London Waterworks*, 18 Q.B., 705, turned upon the construction of Statute 11 Geo. III., c. 12, s. 36 as extended by 57 Geo. III., c. 29, sec. 24, the former imposing the tax upon "all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, warehouse, cellar, vault or other tenements or hereditaments within any of the said streets," and the latter "upon all and every person or persons who do and shall inhabit, hold, occupy, be in possession of or enjoy, any messuages, tenements, lands, grounds, &c." "or other buildings or hereditaments situate," &c. 38 Geo. III, c. 5, s. 4 (dealt with in *Bowley's Case*) enacted that "all bodies corporate having or holding any lands or hereditaments shall be charged to the land tax." The Courts held in the case of the first two Statutes that the tax was a personal tax, and in the latter a tax upon land. The case before this Court is parallel to *Bowley's Case*. Under our Act the tax is upon land. The sections to be considered are 137 and 153. The former makes no reference to persons at all, so that if that section imposes a tax it is upon land. Sec. 154 makes it clear that this is so, because it makes the rate a charge upon the land. Certainly a means of recovering rates from persons is given by the Act, but that does not alter the nature of the tax. Just as in the case of the *Land Tax Act* there is a remedy given against persons, as an alternative, in the first and the last resort the tax is a charge upon the land. The manifest scope and intention of the Act is that owners of land should contribute towards a common fund to be applied for the benefit of their property.

[O'CONNOR, J.—"Charge" may be used in two senses, one a tax in respect of certain property, and the second an imposition upon the property itself.]

Although the occupier is made liable he may recover the tax over against the landlord. For convenience to the rating authority the remedy is given against him in the first instance, but that is only a form. If the question were merely what sort

of occupation would bring a person within the meaning of "occupier" in the Act, assuming that the property was rateable, it might be conceded that the "holding" of the defendant in this case was an "occupation," but the question here is whether that which the company "occupies" is "land" within the Act, and rateable. On this question *Bowley's Case* is in point, and it has stood for many years untouched.

[GRIFFITH, C.J. (referred to *Holywell Union* v. *Halkyn District Mines Drainage Company*, 1895 A.C., 117.) The question whether the property was a mere easement was regarded as important in that case.]

As to sec. 141. The Act applies only to land capable of being let or dealt with in the ordinary way. "Let" means strictly "demised by lease," by some contract creating the relationship of landlord and tenant. Sec. 155 supports this view, because it makes an occupier liable for not giving the owner's name, implying that where the occupier is not the owner, he is in a position to give the owner's name. This is wholly inapplicable to the company's property in the gas mains. This is a taxing Statute, and the House of Lords has laid down the rule that a tax can only be imposed by clear and unmistakeable words. It must be assumed that the legislature was capable of expressing itself clearly with respect to the state of affairs at the date of the enactment. It is scarcely conceivable that with this knowledge they would have used these words to make this property liable, when they could easily have done so by clear words.

[GRIFFITH, C.J.—A literal reading of the Act would prevent a tax upon land that, although improved and occupied in connection with buildings, was not built upon or let, which would reduce it to an absurdity.]

I contend that the ordinary meaning is to be put upon the words. Moreover, the meaning of the words used in the enumeration in sec. 137 must be qualified by words subsequently used. The whole must be looked at together. The Court cannot take a few words, and, finding them apparently inclusive of this property, throw upon the defendants the onus of showing that subsequent words clearly cut down that meaning.

[GRIFFITH, C.J.—If we see that the object of the legislature

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was the imposition of a tax upon all rateable property we should not be astute to find a *casus omissus*; and where from one part of the Act the intention is manifest, we ought in construing the other parts to endeavour to carry out that intention.]

Next, the decision of the Justices upon an appeal under sec. 150 is final only as to the value, not as to the basis; *Municipal Council of North Sydney* v. *Milson*, 15 N.S.W.R., 55, which was overruled by *Knight* v. *Municipality of Rockdale*, was rightly decided. *The Melbourne Tramway* v. *Mayor of Fitzroy* (1901), A.C. 153, decided that there was in general an appeal from the Justices' decision.

[O'CONNOR, J.—*Mr. Gordon* argues that assuming this to be rateable property, the Court cannot consider the method by which the value was arrived at.]

There are conflicting decisions on the point. The question for the Court is whether we are liable to pay a certain amount, and that amount is shown to be nine-tenths of the fair average rental. It cannot be supposed that the legislature intended that the Justices' decision should be final on this point. Assessment of property on a rental basis might make a difference of many thousands as compared with an assessment on the other basis, and yet if the plaintiff's contention is right, there would be no appeal. Value is a mere matter of amount, a question of fact, but the basis of assessment is really a matter of law, a preliminary to the ascertainment of the fact, and *Innes*, J., at p. 61 in *Milson's Case*, points out the difference, and holds that on the one point the Justices' decision is final, but on the other is subject to appeal. The finality of their decision is co-extensive with their jurisdiction, and their jurisdiction is only as to value.

[O'CONNOR, J.—The question turns upon the words "matter of such appeal." If this means all questions coming before them, their decision is final on all, if not, not. The words are open to both constructions.]

[GRIFFITH, C.J., referred to *Smith* v. *Richmond*, 1899 A.C., 448, and 59 and 60 Vic., c. 16, ss. 1, 5, 6, 9.]

Knox cited also on this point, *Borough of Randwick* v. *Australian Cities Investment Co.*, 12 N.S.W.R., 299; *Waratah Municipality* v. *Waratah Co.*, (1874) 2 S.C.R.N.S., 167; *Borough*

of Grafton v. *A.M.P. Society*, 9 N.S.W.R., 465; *Mayor of Prahran* v. *Carter*, 15 V.L.R., 228, at p. 232; *Melbourne Tramway Co.* v. *Mayor of Melbourne*, 24 V.L.R., 33, at p. 39; and 2 *Edw. VII.*, No. 27, secs. 101, 122.

J. L. Campbell followed. Sec. 137 must be taken as involving an unexpressed limitation upon the words "all." It cannot mean "all" lands within the municipality because, if that were so, "all" in section 141 would include streets. Streets are not within the express words of the operative part of the section nor the exceptions. We do not contend that the gas mains are not occupied by the company, but that there is nothing in the act to bring them within the definition of rateable property. The pipes must be regarded as part of the streets and therefore excepted. The surfaces are not rateable property although within the municipality

[GRIFFITH, C.J. — The surface of streets would be either occupied for public purposes or unoccupied and unimproved.]

The pipes run through land which is not rateable, that is, land required for the support of the surface, and therefore the company cannot be said to be occupiers of rateable property in respect of them. Again, the land occupied by the gas mains has neither a rental value nor a capital value in the ordinary sense. It could not, therefore, have been intended to include it in the property for the assessment of which sec. 141 provides; and there is no other rateable property.

Gordon, K.C., in reply. As to the finality of the Justices' decision, the statement of the law in *Knight* v. *Municipality of Rockdale*, at p. 62, is the true one. The object of the legislature, in making their decision final, was to enable the council to know their position clearly, when they had assessed their rates and the appeals were disposed of. The rates are required for immediate use, and it was obviously necessary to prevent ratepayers from lying by until they were sued, and then attacking the assessment. There may be an appeal under the *Justices Act*, but sec. 150 clearly makes the decision final on all points. But even if there was an appeal from the justices, the defendant company did not

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appeal. They cannot raise the point now. It is not open to them on the special case. Judgment is to be entered for a certain amount if the questions are answered in the affirmative. The Court in *Knight* v. *Municipality of Rockdale* considered all the authorities and decided that so long as the justices were acting within their jurisdiction their decision was final, and that the mode of assessment was within their jurisdiction; *Melbourne Tramway Co.* v. *Mayor of Fitzroy* (*supra*), does not touch this case. It turned upon the *Justices Act* and not the *Municipalities Act*. As to the rateability of the property; *R.* v. *East London Waterworks*, 18 Q.B., 705, is in point and in plaintiff's favour; *Bowley's Case* was a decision upon an Act very different from ours, and turned upon the question of what was land within the meaning of that Act. It merely decided that on the words of an Act rating persons as "owners or holders," the waterworks company were not "owners or holders" within its meaning. In our Act the occupier is primarily liable, and the defendant company are rated as occupiers, not as owners or holders. Sec. 137 makes certain owners exempt by reason of the use of their land; consequently the distinction between owners and occupiers must have been considered in drafting the section. In *R.* v. *Governor and Council of Chelsea Waterworks*, 5 B. & Ad., 156, it was held that the occupier was liable although another person was rateable in respect of the same land in respect of his use of the herbage upon it. It is by virtue of occupation that persons are made liable under our Act. [Refers to secs. 151, 154 and 156]. Lord *Hobhouse*, at p. 169 of the judgment in *Melbourne Tramway Co.* v. *Mayor of Fitzroy*, recognises the applicability of the English rating cases to the Victorian Act (collected in *MacHugh and O'Dowd's Local Government Acts*), and sec. 551 of that Act makes the rate a charge upon the land, just as sec. 154 does in our Act.

[BARTON, J., referred to *Ex parte McInnes*, 4 N.S.W. L.R., 143, and *Ingram* v. *Drinkwater*, 32 L.T.N.S., 746. These cases have some reference to gathering the intention of the legislature from their presumed knowledge of previously existing circumstances.]

Ex parte McInnes is distinctly in my favour. *Ingram* v.

Drinkwater is very similar to *Bowley's Case*, and is open to the same criticism. I admit that if from the rest of the Act it clearly appeared that there was no intention to make this property rateable, it would be a very strong authority. As to the inference drawn from the use of inappropriate words to describe gas mains, if the legislature knew of their existence and intended to make them rateable, my answer is that they must be taken to have known the meaning of the word "land," and at that time it had been established by numerous decisions that property of this nature was land and was rateable as such. [He referred also to *Interpretation Act*, 1897 (No. 4 of 1897), sec. 21, sub-sec. (*e*)].

Judgment was delivered by

21st March.

GRIFFITH, C.J. This appeal raises a question of great interest and importance to all municipalities in New South Wales as well as to all gas companies, water companies and others carrying on a business which requires the use of the streets and roads of municipalities for the purpose of laying their mains. The action was brought by the borough to recover rates claimed to be due from the defendant company in respect of their gas mains laid down in the streets of the borough. The question of the liability of the company to be rated depends entirely upon the terms of the *Municipalities Act* of 1897, clause 137 of which defines rateable property thus:—"All lands, houses, warehouses, counting houses, shops, and other buildings, tenements, or hereditaments within any municipality shall be rateable property within the meaning and for all the purposes of this Act, save as it is next hereinafter excepted," and then enumerates certain exceptions within which the property in question is not included. Under that section the first question which arises is whether that portion of the soil occupied in this way by a gaslight or any similar company, for the purpose of carrying its mains, is "land" within the meaning of the definition, and the second question is whether, if it is *primâ facie* "land" within the meaning of that definition, there are other provisions in the Act which require a more limited construction. Before the Supreme Court the latter question only was considered, because the Court had previously held, in an action brought by the Sydney City

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Corporation against the defendant company, that the defendant company's mains came within similar words in the *Sydney Corporation Act*. The Supreme Court therefore addressed itself only to the question whether there were other provisions in the *Municipalities Act* that required a more limited construction to be put upon sec. 137. Before this Court, however, both questions were raised, and it is necessary for us to deal with both, because we are not bound by the decision of the New South Wales Court. As was pointed out by the Court in the *Sydney Corporation Case*, it is settled law in England that, under Statutes by which the occupiers of land are liable to be rated, the portions of the soil occupied by a gas, water, or tramway company are "land" within the meaning of the Statutes, and that companies carrying on their business by means of these "lands" are "occupiers" within the meaning of the same Statutes. In the *Sydney Corporation Case* an endeavour was made on behalf of the company to distinguish these authorities from the case then before the Court by suggesting that the company's occupation was somewhat different in that it was in the nature of an easement, and not land within the meaning of the Statute, and that the defendants, therefore, could not be said to be "occupiers" within the meaning of the Statute. To establish this, reliance was placed upon the case *Chelsea Waterworks Co.* v. *Bowley*, reported in 17 Q.B., 358, but, as was pointed out by *Herschel*, L.C., in *Metropolitan Railway Co.* v. *Fowler*, (1893) A.C., 416, that case turned upon the words of the Land Tax Act, and it was held by the Court that under that particular Act there was no intention to charge persons whose occupation was of such a kind as that of a waterworks company. He pointed out, however, that it was very difficult to reconcile that case with another case decided in the same year by the House of Lords, *The King* v. *East London Waterworks Co.*, 18 Q.B., 705, in which it was held, with regard to a tunnel occupied by a railway company, that so much of the soil as was occupied by the tunnel was land within the meaning of the rating Act. The same has been held by the Privy Council to be the law in Victoria under a definition in almost the same words as are in the Sydney Act; *Melbourne Tramway Company* v. *Fitzroy*, (1901) A.C., 153. Lord *Hobhouse*, in delivering the judgment of their

Lordships, at p. 167, quoted the Victorian Statute, "All land shall be rateable property within the meaning of this Act, and of the Acts relating to the incorporation of the City of Melbourne, and town of Geelong, save as is hereinafter excepted," &c. There were certain other provisions in connection with the tramway to which His Lordship referred, and at p. 169 he went on to say: "But their Lordships do not find in these provisions any indication of a departure from the principles of municipal rating established alike in England and Victoria. The use of the tramway is the occupation of the tramway. The position of the *Pimlico Tramway Co.*, L.R., 9 Q.B., 9, resembles that of the present appellant. The enactments defining the position of the two companies are almost identical. The Pimlico Company was held to be an occupier, rateable as such, and not the less so because its occupation was restricted to a particular purpose, nor because the public also had rights over the same ground. Their Lordships agree with the Supreme Court that this company is subject to ordinary municipal rates." It may therefore be taken to be settled law in England and in Victoria that such companies are liable for ordinary municipal rates in respect of their occupation of that part of the soil under the streets. The arguments addressed to the Full Court on behalf of the defendant in the case of the *Municipal Council of Sydney* v. *Australian Gaslight Company* were not accepted. In my opinion it is the law in this State that companies of this kind are liable to pay ordinary municipal rates in respect of this sort of occupation unless there is to be found something in the Statutes specially exempting them. This is also the settled law in Queensland under precisely similar Statutes. I turn now to the question whether there is anything in the *Municipalities Act* requiring that a different interpretation be put upon sec. 137. On this question there were two main lines of argument; first it was contended that see. 131 contained no provision for assessing such land, and secondly it was sought to raise a distinction between this and the English cases on the ground that under this section certain notices had to be served upon the occupiers of the property, and that the defendants were not occupiers upon whom such a notice could be conveniently served. It was also urged that the rate was a charge upon the land, and so was on a different

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footing from the poor rates in England. But as the English cases turned only on two questions, whether land so occupied was land within the meaning of the Act, and whether the person sought to be rated was an occupier, it would seem that this point about service of notice upon the company is immaterial. If it is land, and the person sued is an occupier, then the provisions requiring the occupier to pay become applicable and the liability is absolute. I can see no difficulty in applying a section providing that notice be served upon the occupier in this case any more than in the case of the Municipal Council against the Gas Company.

There remains the question whether the assessment clause in sec. 141 renders it necessary that a different interpretation be put upon the words in sec. 137. Sec. 138 in Division II. of Part X. makes provision for the valuation of all rateable property. Then follow two sections giving details as to the method of making this valuation. Then in Division III., sec. 141, there is a requirement that the council of each municipality shall make an estimate of the probable expenditure and the probable revenue for the current year, and then that they shall raise the amount required "by an assessment and rate upon all rateable property within such municipality." I pause here to note the word "all." Then follow the words which have given rise to the difficulty in the Court below, "assessing the same at nine-tenths of the fair average annual rental of all buildings and cultivated land or lands which are or have been let for pastoral, mining, or other purposes, whether such buildings or lands are then occupied or not, and at the rate of five pounds per centum upon the capital value of the fee-simple of all unimproved lands, such average rental and capital value of all such rateable property to be estimated by valuers as is hereinbefore provided." The learned Acting Chief Justice, at p. 701, puts the difficulty thus—"It seems to me that we may take the view either that this section limits the term 'rateable property' in sec. 137 to the property mentioned in sec. 141, or that it is rateable property, but not liable to assessment. In fact we are not asked in terms whether the property is rateable, but whether the defendant company are liable to pay the rates." And Mr. Justice *Owen*, at p. 703, thus:—"But the difficulty arises under sec. 141, which provides for

assessment. That section enacts that the council of the borough, after making an estimate of the probable expenses, &c., shall raise the amount so estimated by an assessment and rate upon all rateable property within such municipality." Here the learned Judge quotes that part of the section providing the method of assessment, and then proceeds—"I cannot see how gas mains laid under the surface of roads and streets can come under the words 'buildings and cultivated lands, or lands which are or have been let for pastoral, mining or other purposes,' or how roads and streets occupied by gas mains can be described as 'unimproved lands.' In my opinion gas mains laid under the surface of a road or street of a municipality do not come within either of the categories of rateable property which can be assessed. If that is so, then the words in sec. 137, 'lands, tenements and hereditaments' must have a meaning limited by the power to assess in sec. 141, and must be held to be such lands, tenements and hereditaments as are referred to in sec. 141."

In construing Statutes the first duty of the Court is to ascertain, if possible, the intention of the legislature. Now in this Act the legislature has expressed three times in forcible language its intention that all rateable property shall be valued and rated. Sec. 138 says—"The council of each municipality shall cause a valuation to be made in each year of all rateable property within such municipality by two competent persons to be styled valuers." Sec. 141 provides that the assessment and rate shall be made upon "all rateable property within such municipality," and towards the end of the main part of the section the same words "all such rateable property" are again repeated in the provision for the estimation of the value. That being the expressed intention of the legislature, it is the duty of this Court to construe the remaining words of the section in such a way as to give effect to that intention, if the words used are fairly capable of being so construed. On this subject I refer to what may be regarded as perhaps the oldest and the latest statement of the rule to be followed in such cases. I quote first that made by *Sir B. Shower*, in A.D. 1688, as set out on p. 117 of *Hardcastle on Statutory Law*, 3rd ed.: "It is a known rule in the interpretation of Statutes, that such a sense is to be made upon the whole as that no clause,

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sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may be all made useful and pertinent." The word "all" used in the Act now before us, must therefore not be made "superfluous, void, or insignificant" if it is possible to avoid making it so. In the case of *Salmon* v. *Duncombe*, before the Privy Council in 1886, reported in 11 A.C., 627, Lord *Hobhouse*, in delivering the judgment of the Committee, of which Lord *Watson* was a member, said (p. 634):—"It is, however, a very serious matter to hold that, where the intention of a Statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used. And they have set themselves to consider—first, whether any substantial doubt can be suggested as to the main object of the legislature; and, secondly, whether the last nine words of sec. 1 are so cogent and so limit the rest of the Statute as to nullify its effect either entirely or in a very important particular." Taking then into consideration this principle, that all the words used are to have a meaning given to them that is consistent with the intention of the legislature, and having regard to the words used here in particular, I confess that I do not feel very much difficulty. It is clear to my mind that the legislature thought, as the draftsman thought, that they had divided all property into two classes, one class to be valued by taking its fair average annual rental, and another class, comprising all land as to which this would not be a fair basis of valuation, to be valued by taking the capital value of the fee simple as the basis. It is said by the defendants that the property sought to be rated in this case does not fall within either of these classes. The first part of the clause describes one class as consisting of "all buildings and cultivated lands, or lands which are or have been let for pastoral, mining, or other purposes, whether such buildings or lands are then occupied or not," and the other class as "all unimproved lands." The section is, no doubt, inartificially drawn. The word "buildings" must be taken to include the curtilage as well, although, literally, it means only the actual structure, and, consequently, there is no

express provision at all for rating anything but the actual structure, although only a part of the land is built upon. It is plain that the legislature thought that the test of rateability should be whether the land was, or was not, in such a condition as to be likely to produce revenue, and enumerated what it regarded as improvements. All other lands were regarded as unimproved. Improvements were taken to be buildings or cultivation or mining operations, and if there were none of these, the land was regarded as unimproved. These two classes were intended to be exhaustive and to comprise, between them, all lands. That being the intention of the legislature, I look at the subject-matter of this case, and I see no difficulty in regarding it as unimproved land. The argument was somewhat obscured by sometimes regarding the subject-matter as the hollow space within the pipes, and sometimes as the surface above them. Traces of this mistake are apparent in the arguments of counsel for the defendants here, and in the judgment of the Court below. But in considering the subject-matter as it really is, it may be worth while to refer again to an illustration which I put during the argument. In Western Australia there is a pipe line 350 miles in length, laid to convey water to Kalgoorlie. The pipes are laid upon the surface of the soil, and are covered throughout their length by a mound of earth two or three feet in thickness. Can it be contended that the owners of these pipes are not in occupation of a strip of land 350 miles in length by some 5 or 6 feet in width? As was pointed out in the case *Pimlico, &c., Tramway Co.* v. *Greenwich Union*, and by the Privy Council in the case of the *Melbourne Tramway, &c., Co.* v. *Fitzroy*, (1901) A.C. 158, it makes no difference whether it is the surface or land a foot or two below the surface that is occupied. There can therefore be no difficulty in regarding the land on which the pipes lie and on which they rest as being occupied, though there may be some apparent but not real difficulty in regarding the space inside the pipes as occupied land. In the Kalgoorlie instance it is clearly the surface, and the land underneath it, that is occupied. That being so, what difficulty is there in regarding the land so occupied as unimproved land? There may be some difficulty about regarding it as "let" land. But if it comes within either class it is liable to be rated. It is

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therefore not necessary to decide to which class the land belongs, though I am inclined to think it is within the second. We have been told that we must answer this question in order to decide which is the proper method of rating this class of property. We are not, however, obliged to answer it, and therefore, as the question only arises incidentally, and as it is not necessary for the purposes of our decision, we decline to answer it. Sec. 150 provides that "If any person thinks himself aggrieved by the value at which his property has been assessed for any year, he may" . . . . "appeal against such assessment to two or more justices in petty sessions" . . . . "and such justices shall have power to hear and determine the same, and to award such relief in the premises as the justice of the case may require, and such decision shall be final as regards the matter of such appeal, and the rate-book," . . "shall if necessary be amended in accordance with such decision." The present defendants appealed against the assessment in question, not upon the ground of its having been made on a wrong basis, but on the ground that they were not liable to be rated at all in respect of the particular property in respect of which the assessment was made. The Supreme Court in *Knight* v. *Municipality of Rockdale*, reported in 20 N.S.W.L.R. (Eq.), at p. 33, held that the decision of the justices was final, not only as to the value, but also as to the basis of assessment. We are invited by counsel for the defendants to over-rule that decision, and to follow the case *Borough of North Sydney* v. *Milson*, 15 N.S.W.L.R., 55. I content myself with saying that having carefully considered the reasoning in the judgments of *A. H. Simpson*, C.J. in Eq., and of the Full Court in *Knight* v. *Municipality of Rockdale*, it entirely commends itself to me. It is, therefore, immaterial for the purpose of our decision whether the basis of the assessment was the true one or not. I may remark, however, though it is not necessary to this judgment, that I see very little difference between an assessment based upon the rental value and one based upon the capital value. If the rental value is the basis, it is to be taken as the rent that a hypothetical tenant would be willing to pay; if the capital value is the basis, then, following the rule laid down by the Court of Queensland, it is to be taken as what a hypothetical purchaser would give for the

property, and that amount would, I suppose, be estimated on consideration of the return that such land would be likely to bring to its owner in the shape of rent.

For these reasons I think that the property of the defendant clearly falls within the definition of rateable property, in the *Municipalities Act*, and that there is nothing in sec. 141 conferring exemption upon it or cutting down the effect of the previous sections. I hold, therefore, that the property is rateable, and that judgment should have been entered for the plaintiff for £2,700, the amount agreed by the special case.

BARTON, J., concurred.

O'CONNOR, J. I am of the same opinion. I would like to add a few words as to the construction to be put upon sec. 141. It would be quite impossible to construe it in such a way as to carry out the intention of the framers of the Act that all rateable property should be assessed, if the restricted meaning contended for is given to the words "unimproved lands." It appears to me that it was contemplated that whatever was rateable property should be included in the two classes mentioned, and there is only one way of reading the Act so as to include them. I may refer again to an illustration which was used during the course of the case. Take the case of a paddock within a municipality. It has been cleared, with wells sunk and dams built upon it, with the result that the owner is able to occupy it very profitably. If we take the narrow meaning placed upon the word, that is not "unimproved" land. It has no buildings upon it, and is not cultivated land. Therefore, unless it comes within the class "unimproved land" it is not rateable. To hold that there is an omission of this class of land would mean the loss of a very large amount of revenue to municipalities. Such a case must have been within the contemplation of the Legislature, and it could not have been intended that a very large quantity of valuable lands of this kind should be exempt from municipal taxation if within the boundaries of a municipality. Apparently there are only two kinds of improvement to land contemplated by sec. 141—by buildings and by cultivation. If the narrow inter-

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pretation of "unimproved lands" is to be adopted, all lands improved in other ways would be free from rates—a result which is inconsistent with sec. 137. To give effect to the Act as a whole some more extended meaning must be attached to the word "unimproved" as used in the section. The natural and obvious meaning of "unimproved lands" in that section is "lands not improved by building or by cultivation." The only kinds of land that are to be classed as improved lands are those improved as specified in the first part, and all others are to be regarded as "unimproved." That seems to me to be the proper construction to put upon the section, and that construction brings this class of lands under it and makes it rateable property. I express no opinion on the question whether the word "let" covers a case of this kind. That has not been fully argued before us, but I am disposed to think that it would not. It appears to me that if this is rateable property we are precluded from inquiring whether it has been placed in the proper class or not. On that point we are concluded by the decision of the magistrate. I concur in the opinion of the Chief Justice as to the decision in the case *Knight* v. *Municipality of Rockdale*. I think that the magistrate's decision is final.

Appeal allowed. Judgment of the Supreme Court reversed; the first question in the special case answered in the affirmative, and judgment entered for the plaintiffs for £2,700 with costs of the action: The respondent to pay the costs of appeal: The amount of security deposited to be returned.

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