[HIGH COURT OF AUSTRALIA.]

THE SYDNEY HARBOUR TRUST COMMISSIONERS . . . . . } APPELLANTS;

AND

THE COUNCIL OF THE MUNICIPALITY OF BALMAIN . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *Nov* 19, 22, 23; *Dec.* 3.

Griffith C.J., Isaacs and Gavan Duffy JJ.

Local Government—Rates—Exemption from rating of lands of public body—Exception of houses or buildings erected on such lands—Rate on unimproved capital value of land—Local Government Act 1906 (*N.S. W.*) (*No.* 56 *of* 1906), *secs.* 131, 135, 151—*Local Government* (*Amending*) *Act* 1908 (*N.S. W.*) (*No.* 28 *of* 1908), *sec.* 21—*Sydney Harbour Trust Act* 1900 (*N.S. W.*) (*No.* 1 *of* 1901), *sec.* 39.

Sec. 39 of the *Sydney Harbour Trust Act* 1900 (N.S.W.) provides that "All lands vested in" the Sydney Harbour Trust Commissioners "by this Act, or which may hereafter be purchased or acquired by them pursuant to this Act, shall be exempt from any land tax and any rate or tax which the council of the city of Sydney or any municipal council might but for this section have imposed or levied thereon; but nothing herein shall preclude the council of the city of Sydney or any municipality from levying and collecting rates upon houses and buildings erected on such lands and leased and occupied for private purposes and by persons other than the Commissioners or their officers and servants."

Held, that land vested in the Sydney Harbour Trust Commissioners on which houses or buildings are erected and leased and occupied for private purposes by persons other than the Commissioners or their officers or servants is exempt from municipal taxation in respect of its unimproved capital value under the *Local Government Act* 1906 (N.S.W.), as amended by the *Local Government* (*Amending*) *Act* 1908 (N.S.W.), notwithstanding the exception to sec. 39 of the *Sydney Harbour Trust Act* 1900 (N.S.W.).

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Decision of the Supreme Court of New South Wales: *Sydney Harbour Trust Commissioners* v. *Council of the Municipality of Balmain*, 15 S.R. (N.S.W.), 274, reversed.

APPEAL from the Supreme Court of New South Wales.

On the hearing of an appeal by the Sydney Harbour Trust Commissioners from a valuation for rating purposes of certain land in the municipality of Balmain, the Stipendary Magistrate stated a special case, for the opinion of the Supreme Court, which was as follows:—

"The notice of appeal set out that the appellants, being aggrieved by the valuation of the land referred to in the Notice of Valuation and Rate No. 572, and described as No. 38 Donnelly Street, Balmain, which was valued by the valuer as therein specified, gave notice that they appealed to the Court of Petty Sessions at Balmain against the said valuation for the following reason:—That all lands purchased or acquired by the said Commissioners, the appellants, pursuant to the *Sydney Harbour Trust Act* 1900, are exempt from any land tax and any rate or tax which any municipal council might but for sec. 39 of the said Act have imposed or levied thereon.

"After hearing the parties by their solicitors or agents I did, on 12th April 1915, overrule the objection taken on behalf of the appellants, as stated in their said notice of appeal, and by agreement between the said parties, subject to the result of any appeal to this Honourable Court from my said decision, I assessed the unimproved capital value of the said land at the sum of £750.

"The appellants, alleging that they were dissatisfied with the said determination as being erroneous in point of law, did within sixteen days thereafter apply in writing to me to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of this Honourable Court, and thereupon in pursuance of the Act in such case made and provided I state and sign the following case:—

"On the hearing it was admitted by both parties that the land comprised in the notice of valuation and rate above mentioned had been purchased by the Sydney Harbour Trust Commissioners pursuant to the *Sydney Harbour Trust Act* 1900, and that a house and out-buildings were erected thereon which were let

at a rental, and were occupied by the tenant of the Commissioners.

"It was contended by the appellants that the rate being made in respect only of the unimproved capital value, and not in respect of houses and buildings erected thereon, such land was not ratable, on the grounds stated in their notice of appeal as hereinbefore set forth.

"After hearing Mr. Stinson, solicitor for the respondent, in support of the said assessment, and Mr. Forrest for the appellants, I determined that the said land was ratable, on the ground that the exemption from rating contained in sec. 39 of the *Sydney Harbour Trust Act* 1900 did not apply to this property, having in view sec. 131 of the *Local Government Act* No. 56 of 1906, amended by Act No. 28 of 1908.

"The question for the opinion of this Honourable Court is whether my said determination was erroneous in point of law."

The Full Court having answered the question in the negative (*Sydney Harbour Trust Commissioners* v. *Council of the Municipality of Balmain* (1)), the Commissioners now, by special leave, appealed to the High Court on the ground that the Supreme Court was in error in determining that the land mentioned in the special case was ratable on its unimproved value.

Blacket K.C. (with him *Milner Stephen*), for the appellants. Lands vested in the Sydney Harbour Trust Commissioners cannot, in any circumstances, be rated in respect of their unimproved capital value. Whatever the words "houses and buildings erected on such lands" in sec. 39 of the *Sydney Harbour Trust Act* 1900 mean, there is no power to tax the land apart from the houses and buildings thereon. [He also referred to *Local Government Act* 1906, secs. 5, 131, 151; *Municipalities Act* 1897, sec. 141; *Land and Income Tax Assessment Act* 1895, sec. 11.]

Lamb K.C. and *Windeyer*, for the respondents. Under the system of rating in existence when the *Sydney Harbour Trust Act* 1900 was passed what was rated was land, and the object the Legislature aimed at by sec. 39 of that Act was to divide the

(1) 15 S.R. (N.S.W.), 274.

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lands of the Commissioners into two classes, first, lands occupied and used by the Commissioners, and, secondly, lands on which houses or buildings were erected and which were leased for private purposes, and to provide that the first class of lands should be exempt from rating but that the second class should be ratable. The words "houses and buildings erected on such lands" had always been used as meaning lands on which houses and buildings are erected, and they were used with that meaning in sec. 39. The words "houses and buildings" include the land on which they are erected: *Wyndham Shire* v. *Beamish* (1); *Overseers of Crayford* v. *Rutter* (2); *Municipal Council of Sydney* v. *Brownen* (3); *Grant* v. *Langston* (4). The exemption from rating in sec. 39 does not apply to rating under the *Local Government Act* 1906. *Primâ facie* a general provision for exemption from taxation such as that in sec. 39 only applies to taxation then existing: *Halsbury's Laws of England*, vol. XXVII., p. 182, par. 351; *Sion College* v. *London Corporation* (5); *Associated Newspapers Ltd.* v. *City of London Corporation* (6); *Associated Newspapers Ltd.* v. *City of London Corporation* (7). If there is power to rate the land and the buildings thereon, there is power to rate the land apart from the buildings. Notwithstanding that by sec. 5 of the *Local Government Act* 1906 it is provided that unless expressly provided nothing in the Act is to operate as a repeal of the *Sydney Harbour Trust Act* 1900, sec. 39 of the latter Act must be taken to be repealed by sec. 131 of the former Act. [Counsel also referred to *Sydney Harbour Trust Commissioners* v. *Wailes* (8); *Metropolitan District Railway* v. *Sharp* (9).] The question whether the land in question is liable to rating on its unimproved value as distinguished from its improved value was not open to the Supreme Court and is not open to this Court, inasmuch as under sec. 138 of the *Local Government Act* 1906, as amended by the *Local Government (Amending) Act* 1908, the only question open is whether the land is ratable.

(1) 22 V.L.R., 16; 18 A.L.T., 49.
(2) (1897) 1 Q.B., 650.
(3) 2 S.R. (N.S.W.), 244.
(4) (1900) A.C., 383, at p. 390.
(5) (1901) 1 Q.B., 617.
(6) (1913) 2 K.B., 281; (1914) 2 K.B., 603; (1915) A.C., 674.
(7) (1915) 3 K.B., 128.
(8) 5 C.L.R., 879, at p. 883.
(9) 50 L.J.Q.B., 14.

Blacket K.C., in reply.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. and GAVAN DUFFY J. The question for decision in this appeal is as to the meaning of sec. 39 of the Act under which the appellants were constituted (Act No. 1 of 1901). The section is as follows :—"All lands vested in the Commissioners by this Act, or which may hereafter be purchased or acquired by them pursuant to this Act, shall be exempt from any land tax and any rate or tax which the council of the city of Sydney or any muncipal council might but for this section have imposed or levied thereon ; but nothing herein shall preclude the council of the city of Sydney or any municipality from levying and collecting rates upon houses and buildings erected on such lands and leased and occupied for private purposes and by persons other than the Commissioners or their officers and servants."

The enacting words are free from ambiguity. They apply to any rate or tax that may be imposed in future, as well as any imposed before the passing of the Act, unless it falls within the description of "a rate upon houses and buildings erected on such lands." The only question is as to the meaning of these words. The respondents contend that a rate upon the unimproved value of the land on which houses are erected is within the words of the exception. They put their argument in this way : All land must be either land with houses or buildings, or land without houses or buildings, erected upon it; the exception should therefore be read "except land on which houses and buildings are erected and leased" &c. It happens that, as the land stood when the Act was passed, either phrase would have produced the same result, but it does not follow that one may be substituted for the other.

The suggestion that taxation of a house or building irrespective of the land on which it stands is unknown to British law is untenable. See, for instance, the case of *Overseers of Crayford* v. *Rutter* (1). In our judgment the true view is that, although for the purpose of assessing the rental value of a house the land

(1) (1897) 1 Q.B., 650.

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on which it stands must be taken into consideration as a part of the thing which earns the rent, yet in general the actual value of the land *quâ* land is irrelevant to that question. For instance, the appellants might well have a valuable block on the foreshore of Sydney Harbour, worth, perhaps, £10,000, upon which a small cottage is erected of an annual rental value of £50. It is quite plain that the Legislature, when passing the Act of 1901, did not mean that in such a case the capital value of the land, as such, was to be taken into consideration, but meant that the ratable value was to be estimated by the annual value of the tenement to the occupier of it. This idea was aptly expressed by the words "rates upon houses and buildings."

A little consideration will show that a power to tax land including buildings erected upon it is not necessarily to be construed as identical with a power to tax buildings including the land on which they are erected. In such a case it may be necessary to have regard to the basis of taxation in order to see whether the value of the land is the principal and that of the house the accessory, or *vice versâ*.

The Act in force in 1901 relating to municipal rating was the *Municipalities Act* 1897, which (sec. 141) required the council of every municipality to raise annually the amount estimated to be required for municipal purposes during the year by a rate to be assessed upon all ratable property. The rate was to be assessed at nine-tenths of the fair average annual rental of all buildings and cultivated lands whether occupied or not, and at the rate of five per cent. upon the capital value of the fee simple of unimproved lands. As applied to the then existing law, therefore, the only permitted subject of taxation, so far as regards the property of the appellants, was houses and buildings upon land actually leased and occupied for private purposes by persons other than the appellants, or their officers and servants, on which the basis of taxation was the annual rental.

The respondents contended, and the Supreme Court accepted the argument, that, since under the Act of 1897 the value of the land on which a house stands must be taken into consideration in estimating the annual rental value, the word "house" must be construed as denoting, as a separable entity, the land on which it

stands, and that, consequently, the land irrespective of the house may be rated as a part of a compound ratable subject matter.

It follows from what has already been said that this conclusion cannot be drawn from the premises.

By the law now in force, the *Local Government Act* of 1906, as amended by the Act of 1908, rating on the basis of annual rental value is abolished, and the only bases permitted are the unimproved capital value and the improved capital value of the land. The imposition of a rate on the first is imperative, on the second optional to the council.

If it were permissible (which it is not) to levy a rate upon the difference between the improved and the unimproved value of the tenement now in question, possibly such a rate would be within the exception of sec. 39, but in our judgment it is impossible to hold that a rate the amount of which depends wholly upon the value of land irrespective of houses or buildings upon it is a rate upon houses and buildings within that exception.

The appeal must therefore be allowed.

ISAACS J. The Supreme Court decided one point only, namely, that the expression "houses and buildings" in sec. 39 of the *Sydney Harbour Trust Act* included the land on which the houses and buildings actually stood and the land appurtenant thereto as one tenement. That is not now really contested by the appellants.

What the appellants really contend is that the law does not permit the respondents to impose a rate upon the unimproved value of the land. For a time it appeared from the terms of the judgment in the Supreme Court and one report of that case, that the last mentioned contention had not been presented, and that the appellants had pinned their whole case to the argument of complete freedom of the land itself from taxation. But it also appears from another report that in reply the second point was in some way referred to, and Mr. *Lamb* very candidly informed the Court that the latter point was taken, though the first was the one vigorously pressed.

In this connection it must be remembered that the Supreme Court had to consider the correctness, not of the original rating, but of the decision of the Stipendary Magistrate sitting as the

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Appeal Court, and his decision is thus stated by him :—" I assessed the unimproved capital value of the said land at the sum of £750." He then says the appellants contended that as the rate was made only in respect of the unimproved capital value, the land was not ratable—that is, of course, as such. It is plain that the determination, or assumption, of the liability of the land to unimproved rating was essential to any decision by the Supreme Court that the Magistrate's decision was correct.

I am bound to add that it is quite easy to understand why the learned Judges in the Supreme Court did not proceed to determine this. The omission of the point in the appellants' opening argument and the way in which it was introduced in reply were calculated to lead the Court to think no other point than the one to which it directed its attention was agitated. It is only Mr. *Lamb's* frank admission that leads me to hold the point now available in any circumstances.

Late in the argument the respondents raised the objection that under sec. 138 of the *Local Government Act* 1906 the question as to unimproved value, in contradistinction to improved value, was not open before the Stipendiary Magistrate sitting as the Appeal Court, and therefore, as it was urged, not open to the appellants in the Supreme Court, and, consequently, not open in this Court.

The objection was based on the declaration in sec. 138, as amended by sec. 25 of the Act of 1908, that " In such an appeal the question may be raised whether the land is ratable." It appears to me there is a clear answer to this objection.

It was pointed out during the argument that sub-sec. 5 of sec. 138, as so amended, says " Subject to sec. 140, the decision of any such appeal Court shall be final and conclusive." Therefore in ascertaining what may be included in the decision of the Appeal Court, sec. 140 is of extreme importance. That section admits of no doubt on this point, because among the matters which the Supreme Court may be called upon to determine there is included in express terms " matters of principle affecting the valuation of the land." And, further, when sec. 146 is looked at, it is seen that in a proceeding to recover rates the possible grounds of defence are limited to certain matters which do not include the particular ground rested on by the appellants here.

All this convinces me that sec. 138, reading the line referred to with the first line of that section, which is general, and with other provisions to which I have referred, includes such a ground, and that in view of secs. 146 and 148 the appellants are "aggrieved" if the land is wrongly valued.

One observation may here be desirable. Mr. *Lamb* said quite correctly that, by sec. 135, in a municipality the valuation of all ratable land shall be of the unimproved capital value, the improved capital value, and the assessed annual value. Therefore, it was added, the Supreme Court should have held there was nothing wrong in what had been so far done.

But it should be pointed out that, though it is necessary to ascertain the unimproved value of all land, including this land, it does not follow that when that value is ascertained the land should be "assessed" at that value. Sec. 134 provides that the assessed annual value of ratable land shall not be less than five per centum of the unimproved value, whether improved or unimproved. So that the unimproved value must be ascertained as a check or limit.

But in this case the objection is that the Magistrate wrongly *assessed* the land on that basis, which is an entirely different thing.

We come, then, to the main question whether the "houses and buildings" mentioned in sec. 39 of the *Harbour Trust Act* are liable to unimproved rating.

The respondents contend that the phrase is a mere exception from the "lands" mentioned in the earlier part of the section, and that the Legislature intended by the exception to leave the excepted lands to the full operation of municipal taxing power in respect of lands the corporation then possessed, or, in the alternative, might in the future possess. I state that in the alternative because a question was raised which involves it, and to which I shall refer later. In other words, the respondents' argument is that the land with houses and buildings in fact upon it may be municipally rated either with or without the structures.

The appellants say that the power to rate the "houses and buildings erected" involves inclusion of the structures in the rate,

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and that no system of taxation of the land to the exclusion of the structures is applicable to that power.

Sec. 39 must mean to-day what it meant when enacted in 1901. As to the municipalities other than Sydney, the Act of 1897, No. 23, was in force, secs. 137 and 141 being the sections important to this case. By sec. 137 ratable property is declared to be "all lands, houses, warehouses, counting houses, shops, and other buildings, tenements, or hereditaments," with certain named exceptions, some of the exceptions being "land" and some being buildings of various kinds. The Legislature, therefore, included by express designation the structures themselves upon land as the "ratable property." This is essential to remember. By sec. 141 the ratable property is directed to be assessed at nine-tenths of the fair average annual rental of all buildings and cultivated land or lands which have been let for pastoral mining or other purposes, adding "whether such buildings or lands are then occupied or not," and at the rate of five pounds per centum on the capital value of the fee simple of all "unimproved lands." It is clear to me that in this scheme the lands were regarded according to the fact. If improved, they were to be taxed as improved; if not improved, they were to be taxed as unimproved. But the important thing is that where there are buildings the buildings are named as the leading feature and the controlling characteristic, and the omission of the building would have altered the specific property directed to be taxed. In other words, the land on which the building stood would, without the building, be in contemplation of the Act of 1897 a different subject of taxation.

Consequently, when sec. 39 of the *Sydney Harbour Trust Act* 1901 was framed, and the Legislature, using the unqualified and generic term "lands" in the first part of the section, chose to alter its phraseology and employ as the distinctive indication of the exception from the first part of the section, not "land having houses and buildings erected thereon" as the respondents read it, but "houses and buildings erected on such lands" &c., it appears to me the Legislature meant to preserve the existing distinction and to make the houses and buildings an essential part of the taxable subject. At that time municipal taxation on unimproved values was unknown, and the Legislature had not that idea in

mind. It had in mind the fact that in municipal taxation houses and buildings where they existed were specifically designated as the controlling and inseparable feature of the subject, and the same course was followed. The second branch of sec. 39 is not a new power, but it simply conserves a power assumed to exist elsewhere.

It is true that when the system of municipal taxation was altered so as to allow municipalities to disregard improvements by imposing a rate on the unimproved value of land actually improved, and only permitted a tax on the buildings or other improvements in certain cases, that an anomaly may unexpectedly arise. Where words are ambiguous such a consideration is more or less important, but where they are clear, as here, the anomaly is irrelevant. As Lord *Parker* observed in the *Associated Newspapers' Case* (1) :—" In matters of this sort it may often happen that the Legislature fails to foresee some particular result of a statutory enactment."

It is evident that mere private occupation is not the test of ratability under the exception in sec. 39, because the Commissioners might, under sec. 40, lease superfluous lands for grazing purposes or for cultivation ; and still they would not fall within the excepted taxable power unless they had houses or buildings on them. But then to insist on a house or a building as an essential condition of liability to taxation, and yet to permit it to be treated as non-existent, is more capricious and anomalous than any other anomaly suggested.

Learned counsel for the respondents urged with much earnestness the view that as " houses " included the land on which they stood, and the land was ratable, and if the land plus the house were ratable, the land alone must be ratable. By parity of reasoning the house alone would be ratable. And it may be added that where the Legislature describes the taxable subject as " houses and buildings " it would be a strange construction, indeed, which allows the elimination from the subject of the only things mentioned to denote it. And this is particularly so when such elimination is for the purpose not merely of deducting a portion of the ratable value of the subject but of altering the

(1) (1915) A.C., 674, at p. 698.

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basis of that value, in many cases increasing it. Sec. 134 is to guard against a rate on the improved value being below one on the unimproved value. The improved value under secs. 133 and 134 regards the land as it stands with the existing improvements, which may not permit the land, while they stand, to be used to the best advantage. The exception in sec. 39 of the *Sydney Harbour Trust Act* looks to the private occupier paying rates on the land as he is allowed to enjoy it, and if he were taxed on the basis of unimproved value, that is, allowing the land to be used for its best purpose irrespective of its actually permitted use, it would be most unjust to him, and the object of the Legislature would be entirely distorted.

The respondents then fell back upon an argument that sec. 5 of the *Local Government Act* 1906 had no operation on the case, because sec. 39 of the *Sydney Harbour Trust Act* applied only to taxation existing at the time it was passed. For this he cited the *Sion College Case* (1) and the *Associated Newspaper Co.'s Case* (2). For two reasons it appears to me those cases have no application. This is not the case where private persons hold land which was specifically taken or dealt with under a bargain embodied in a statutory provision. There the statutory provision is construed with reference to that circumstance. This is the central point of those cases. See, particularly, per *Swinfen Eady* L.J. (for the Court) adopting Lord *Kenyon's* reasoning (3) and per *Bankes* L.J. (4).

The *Sydney Harbour Trust Act* is a public Act in truth—not merely a private Act deemed to be a public Act—and it deals with the matter from a public standpoint, and with reference to general governmental powers and functions of a public body which is in reality a government department.

But beyond that the language of sec. 39, as might be expected, has express reference to the unlimited future as well as the present. The exemption from liability to taxation or ratability extends to lands "which may hereafter be purchased or acquired"; it includes "any municipal council" which may be the council of

(1) (1901) 1 Q.B., 617.
(2) (1913) 2 K.B., 281; (1914) 2 K.B., 603; (1915) A.C., 674; (1915) 3 K.B., 128.
(3) (1914) 2 K.B., at pp. 616, 617.
(4) (1915) 3 K.B., at p. 151.

a municipality not then in existence, and the second part affects land which may be built on in the future. Why, then, is the "rate" to be confined to the then existing rate? Clearly the "land tax," which is a government tax, would extend to any future land tax whether on the improved or unimproved value, and my opinion, on the whole, is that the argument is unsustainable, and the appeal should be allowed.

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Appeal allowed. Order appealed from discharged. Appeal to the Supreme Court allowed with costs. Respondents to pay costs of appeal to this Court.

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

Solicitors, for the respondents, *Pigott & Stinson.*

B. L.

[HIGH COURT OF AUSTRALIA.]

JEROME . . . . . APPELLANT;
DEFENDANT,

AND

WARD . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1915. SYDNEY, *Dec.* 6. Griffith C.J., Isaacs and Rich JJ.

Principal and Agent—Vendor and purchaser—Employment as agent to purchase land—Contract of sale by agent to principal—Signature of principal procured by fraud of agent—Rescission—Recovery of deposit—Evidence.

The plaintiff employed the defendant to purchase a certain property stating that he was willing to pay £18,000 for it, and he promised to pay the defendant a certain amount of commission on the purchase. The defendant