[HIGH COURT OF AUSTRALIA.]

THE GRAHAMSTOWN AND CAMPVALE SWAMPS DRAINAGE TRUST . } APPELLANTS;
PLAINTIFFS,

AND

WINDEYER AND ANOTHER . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 23, 24; *Dec.* 14.

Isaacs, Gavan Duffy and Rich JJ.

Local Government—Drainage trust—Rates—Recovery—Defence—Remedy where lands not benefited—Appeal to Magistrate—Water Act 1912 (*N.S.W.*) (*No.* 44 *of* 1912), *secs.* 55*, 72.

* Sec. 55 of the *Water Act* 1912 contains the following provisions:—"(1) For the purpose of providing money for exercising their powers and performing their duties under this Part, the trustees may fix and levy rates upon the whole of the lands within the trust district as follows:—(*a*) In connection with the supply of water for stock purposes, a rate per acre of the land benefited by the works shall be fixed, and the rate may vary in proportion to the benefit received as aforesaid . . . (*b*) In connection with the supply of water for domestic purposes, a rate for each separate tenement in the trust district shall be fixed, and the rate may vary in proportion to the benefit received. (*c*) In the case of drainage, . . . a rate per acre of the land benefited by the works shall be fixed; and this rate may vary according to the distance of the land from drains, . . . and in proportion to the benefit received as aforesaid. (*d*) In the case of irrigation, a rate per acre on the whole of the irrigable land within the trust district shall be levied, whereupon the ratepayer shall be entitled to a proportion of the water to be fixed by the trustees, either by measure or according to the area irrigated, or which, in the opinion of the trustees, should be irrigated. (*e*) In all cases not otherwise in this section provided for, a rate per acre of the land benefited, directly or indirectly, by the works shall be fixed yearly, and shall, as far as practicable, be in proportion to the benefit received as aforesaid." "(2) All such rates shall be payable by the occupiers of the lands." "(3) Any occupier aggrieved by the amount at which he is rated may appeal to the Police Magistrate having jurisdiction in the district, who shall hear and determine the matter, and may confirm or vary such amount." "(4) If in any such appeal the Police Magistrate reduces the amount at which the appellant is rated, he shall increase the other ratings of the trust in such amounts as he thinks just, where he considers such course necessary, in order to secure that the total amount to be received by the trust for rates shall not be diminished by such reduction."

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Where a drainage trust constituted under Part III. of the *Water Act* 1912 have imposed a rate upon lands within their district, the only remedy of an occupier of land upon which a rate has been imposed, but which has not been benefited by the drainage works, is by an appeal under sec. 55 to a Police Magistrate.

Held, therefore, that in an action by a drainage trust against an occupier of such land to recover rates in respect of such land, the occupier, not having appealed to a Police Magistrate under sec. 55, is not entitled to raise the defence that his land has received no benefit from the drainage works.

Decision of the Supreme Court of New South Wales: *Grahamstown Drainage Trust* v. *Windeyer*, 15 S.R. (N.S.W.), 146, reversed.

APPEAL from the Supreme Court of New South Wales.

Archibald James Windeyer and John Caddell Windeyer, executors of Isabella Mowbray Windeyer, deceased, were the owners of certain lands within the trust district of the Grahamstown and Campvale Swamps Drainage Trust, which was constituted under Part III. of the *Water Act* 1912. An action was brought in the District Court at Maitland by the Trust against the executors to recover certain rates which had been imposed in respect of such lands, namely, £82 16s. 10d. in respect of 414 acres of land for the year 1912-1913, and £122 16s. in respect of 614 acres of land for the year 1913-1914. The defence taken was that none of the lands in question were benefited by the drainage works, or alternatively that not more than 50 acres had been benefited, in respect of which the defendants paid into Court, with a denial of liability, £10 in respect of each year. At the hearing the defendants called evidence to show that none of the land received any benefit. The learned District Court Judge found that no portion of the defendants' land was benefited by the drainage works, and therefore that the land did not come within the taxable area, and he found a verdict for the defendants accordingly.

From that decision the plaintiffs appealed to the Supreme Court, but the appeal was dismissed with costs: *Grahamstown Drainage Trust* v. *Windeyer* (1).

From the decision of the Supreme Court the plaintiffs now, by special leave, appealed to the High Court.

(1) 15 S.R. (N.S.W.), 146.

Flannery, for the appellants. That the lands which they propose to rate shall in fact be benefited is not a condition precedent to the jurisdiction of the trustees under Part III. of the *Water Act* 1912 to impose a rate. They are given by sec. 55 a quasi-judicial power to determine whether the lands are benefited. The only limits of their power to raise rates are the limits of the trust district. The determination of the trustees as to whether lands are benefited or not is a matter of jurisdiction, and is final subject only to the appeal given by the section. The Magistrate on an appeal has jurisdiction to inquire whether the land the subject of the appeal is benefited or not. The power given to him to confirm or vary the amount of the rate includes a power to determine that the particular land is not ratable at all. But if the Magistrate is not given such wide power and cannot determine whether the land is benefited, the determination of the trustees on that question is final and conclusive, and there is no intention shown to permit a person to lie by until it is sought to enforce the rate, and then raise the defence that his land is not benefited. [Counsel referred to *Allen* v. *Sharp* (1); *Nickle* v. *Douglas* (2); *Toronto Railway* v. *Toronto Corporation* (3).

Blacket K.C. and *Alec Thomson*, for the respondents. In order to entitle the trustees to impose a rate on land, the land must be in the trust district, and it must have received benefit from the works, or must be irrigable. No jurisdiction is given to the trustees to determine the subject matter of the rate. The power given to the Magistrate to confirm or vary the rate does not entitle him to inquire into the question of ratability. There are no words which take away the right which a person would otherwise have when sued for a rate to say that his land is not ratable because it has received no benefit, and clear words are required to take away such a right. [Counsel referred to *R.* v. *Tyrone Justices* (4); *Borough of Kiama* v. *Charles* (5); *Borough of Randwick* v. *Australian Cities Investment Corporation Ltd.*

(1) 2 Ex., 352.
(2) 37 Up. Can. (Q.B.), 51, at p. 64.
(3) (1904) A.C., 809.
(4) (1906) 2 I.R., 164.
(5) 15 N.S.W.L.R., 497.

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(1); *Mooney* v. *Commissioners of Taxation* (2); *R.* v. *Dayman* (3); *Moorabbin Shire* v. *Abbott* (4).]

Flannery, in reply.

Cur. adv. vult.

Dec. 14.

The following judgments were read:—

ISAACS J. In my opinion this appeal should be allowed. It is not a matter for surprise that diverse views are held, because at first sight, and reading apart from their setting the words with which we are more immediately concerned, the first impression is that they lead to the result arrived at by the majority of the Supreme Court. But those words must be read in conjunction with all that accompanies them, both before and after, and after so reading them, I am carried to the conclusion that the view adopted by *Ferguson* J. was correct.

The matter appears to stand thus. Part III of the *Water Act* 1912 provides for the constitution of various kinds of water trusts, as for conservation, supply, irrigation, drainage, prevention of floods or control of flood waters. The present is a drainage trust. The Statute enacts that, in the case of such a trust, the Minister proposing to establish it and the necessary works shall first of all notify in the *Gazette* and in some newspaper circulating in the district affected by the works his proposal containing various particulars. Having thus given public notice to the inhabitants, landholders of the proposed district, eight weeks are allowed them to raise objections. If within that time a petition signed by at least one-third in number of the occupiers of Crown lands and owners of other land is presented to the Minister, objecting to the scheme, inquiry is directed before the trust is constituted. Now, so far the point to be noticed is that all the occupiers of land within the proposed district are considered interested, and plainly because every one of them is a possible ratepayer.

After the constitution of the trust, but before completion of the works, and, therefore, be it observed, before actual benefit to

(1) 12 N.S.W.L.R., 299.
(2) 3 C.L.R., 221.
(3) 7 El. & Bl., 672.
(4) 17 C.L.R., 549, at pp. 556, 560.

any particular land can be asserted, trustees are to be appointed, and the first election of trustees is directed to be made. Where the trust district consists wholly of land acquired under the *Closer Settlement Act* or unoccupied Crown lands, the trustees appointed shall hold office, as sec. 42 declares, "until half the land in the district is occupied by persons who are liable to pay rates to the trust." Now, this section is of the highest importance in construing the whole Part. What is meant by the expression "persons who are liable to pay rates"? Does it mean actual ratepayers, or does it mean, as I think it does, persons who are potential ratepayers, that is, actual occupiers of land within the trust district, whose lands may or may not be found to be benefited? The latter are, in my opinion, "liable to pay rates." If this were not so, then an impasse might be created at the very threshold. By the argument no one is liable to pay rates until his lands are in fact benefited by the works, and, inasmuch as the works are possibly not yet constructed, therefore no one is liable to pay, and therefore, also, sub-sec. 2 of sec. 42 could not operate. The appointed trustees would then have to proceed until the works had reached the condition when at least half the landholders were in fact benefited. So "persons liable to pay," unless that extraordinary result is to follow, must mean simply occupiers of land within the district. Sec. 44 enables the first rolls of electors to be compiled by the Minister placing on the list those persons who "in his opinion" will be liable to pay rates to the trust. The words "in his opinion" are inserted because that is final. Subsequent rolls are to be of persons "liable to pay," and the trustees' opinion is not final, because the Police Magistrate may revise the list. But as he is to determine who are in fact "liable to pay rates to the trust," we have again to ask whether he is to consider the persons whose lands are in fact benefited, or simply whether a person is a potential ratepayer in the sense of occupying land.

In my opinion, at that stage the inquiry does not involve the question of actual benefit. If it did, then, independently of the possible non-completion of the works, the gradation of voting power would not be placed on the sole question of acreage.

Sec. 47 provides that any person entitled to vote may, with a

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certain exception, be elected as trustee. Again, that must mean a potential ratepayer, otherwise if his land were found not to be actually benefited the year's rating might be challenged at its source.

Sec. 55 declares that trustees shall have certain duties and powers. Observe it is their duty, supported by the necessary attendant power, to fix and levy rates to provide for the maintenance and management of the works and for interest, charges and sinking fund, and to pay interest and sinking fund to the Treasury.

Now we come to sec. 55. The paramount financial duty of the trustees being to provide the necessary money by rates, they are told that they "may fix and levy rates upon the whole of the lands within the trust district as follows." Having regard to what I have pointed out, namely, that all the occupiers of land within the trust district are potential ratepayers, those words "upon the whole of the lands within the trust district" indicate the ambit of official consideration which the Legislature has specifically and directly assigned to the trustees; in other words, the sphere of trust jurisdiction and the limits of the trust district constitute the external boundaries of that jurisdiction. They are to take the whole of the lands of the district into their consideration, and then they are to fix and levy rates in respect of all those lands "as follows," that is, in the several sub-sections. What "follows" shows that the necessary elements of consideration required to carry out the directions of the Legislature cannot be preliminary or collateral to the statutory power of the trustees, but are part of the very process of official action which the Legislature has imposed upon the trustees as a duty, and unless some independent limit such as the maximum amount of rate be contravened, what the trust do cannot be regarded as beyond their jurisdiction. Using by analogy a term more appropriate to a judicial determination, those elements are parts of the *res judicanda*. I apply to this branch of the case the observations and illustrations found in my judgment in *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Proprietary Ltd.* (1).

(1) 5 C.L.R., 33, at pp. 52 *et seqq.*

Having before them in review all the lands of the trust district, and having a definite lump sum to provide out of rates upon those lands, the trustees are told in effect to apportion that sum among the lands benefited at so much per acre, where it is stock supply, or so much per mile frontage, and, if the trust choose, they may adjust benefit and burden still more closely by varying the rate. If the purpose be domestic supply, then each tenement bears its share of the whole, equally or variably.

If, as in the present case, the trust be a drainage trust, they fix the rate at so much for every acre benefited, and they may, in so doing, vary the rate according to distance of the land from drains, and in proportion to the benefit received. In irrigation trusts, the rate is to be on the irrigable land, and a certain resulting right to water accrues. Then comes sub-sec. (*e*), which appears to me decisive. It runs thus: "In all cases not otherwise in this section provided for, a rate per acre of the land benefited, directly or indirectly, by the works shall be fixed yearly, and shall, as far as practicable, be in proportion to the benefit received as aforesaid." As the direction to make the rate proportionate to benefit is imperative, it is, on the face of it, an impossibility for the trust to fix the rate without considering the fact and extent of benefit. In other words, benefit or no benefit, and, if benefit, how much proportionately, is part of the function committed by Parliament in that instance to the trustees. If in that instance, why not in all others? Then in par. (*f*) it is enacted that, "in the case of a supply for more than one purpose, separate rates may be fixed, calculated on the basis set out for each such purpose." This affords additional light leading to the same conclusion. It contemplates, say, a supply for stock and a supply for domestic purposes and a supply for irrigation, all combined in one trust scheme, then the trust must, as a business proposition, set out separately the money basis representing each of those purposes, and fix separate rates "calculated" as to each set on its own basis. It is then an apportionment within an apportionment.

Having fixed the rate, and thereby necessarily assessing the amount of this liability, by considering the acreage of each individual liable within the district, and the fact, and, in some

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cases, the comparative measure of benefit he enjoys, he is *primâ facie* bound to pay. Sub-sec. 2 says "All such rates shall be payable by the occupiers of the lands."

But the Legislature, when enacting this new statutory liability, enacted with it, and as part of the code a specific mode of challenging liability. In the same section, 55, it is provided as follows:—"Any occupier aggrieved by the amount at which he is rated may appeal to the Police Magistrate having jurisdiction in the district, who shall hear and determine the matter, and may confirm or vary such amount."

This indicates a strictly judicial tribunal already existing, with known attributes, specially designated for the purpose, and which, according to the ordinary practice and procedure of that tribunal, is to "hear and determine the matter." Who is an occupier? I take it to mean any occupier of land who is called upon to pay a certain amount. What is "the matter"? It is the appeal of an occupier aggrieved by the amount at which the trust have rated him. What is the "amount" of the rate? It is the sum which an occupier is called on to pay and which results from the operation of the elements of acreage of actual benefit, in some cases of proportionate benefit, of the total amount to be received by the trust, and the number of acres or tenements, as the case may be, actually benefited.

How can the Police Magistrate determine the matter as to what amount of rate the particular appellant should bear, without ascertaining the extent of the benefit, if any, enjoyed by his lands? It cannot be said of the Police Magistrate that the existence of a benefit is a preliminary or collateral fact on which his jurisdiction depends. He must, in order to discharge the express duty cast upon him, investigate by legal evidence the relative amount of benefit accruing to the appellant's lands from the works. His finding on that point is not merely for the purpose of the day, but for the purpose of finally binding the parties. It is the height of absurdity to say that his finding as to the extent of benefit is binding in law, and yet that the law also leaves it open to another tribunal on prohibition or other original proceeding to say there was no benefit at all, absolute or relative. But that is involved in the argument that the Police Magistrate's decision

must be based on quantum only, leaving actual benefit undetermined. Some difficulty may be occasioned by the laconic direction of sub-sec. 4. Still, it is a direction not only deliberately given by the Legislature, but one inserted by amendment. It must, therefore, be carried out according to the rules of practice usually followed in the Court, aided, where necessary, by the requirements of natural justice.

But the direction so given indicates beyond any reasonable doubt the intention of the Legislature. It indicates that the total amount fixed by the trust as their financial requirement must be adhered to, and must be borne by the persons rated in such proportions as the trust fix, or by such of those persons in such proportions as on appeal the Police Magistrate determines. He cannot add to the list of contributors, and he cannot diminish the rating so as to produce an aggregate less than the sum the trust have fixed.

But if he reduces the amount claimed from an appellant, he must do so on the principle that his true proportionate share is less than such amount. This connotes that the true proportionate contributory share of others is greater, and should be increased accordingly. The onus lies on the appellant to establish this, and that requires the presence of the others affected. So that in ordering the proper reduction of one, the Magistrate is in a position of making the corresponding increase in respect of another ratepayer or ratepayers. It may be that the appellant can thus reduce his contribution to a very small amount, or can show that he is not benefited at all, and that as between him and the others he ought not to be a contributory at all. So much is clearly within the power to "hear and determine the matter."

The section starts with the assumption of a fixed required sum and affords the means of "providing" the money, and it concludes with a direction to maintain the provision for that sum in its integrity. It follows that either the Legislature has treated the trust's conclusion as to the fact of benefit as final, leaving quantum only to be revised by the Police Magistrate, or—as I think preferably—it has accepted as final the determination of the trust that the area of benefit does not extend beyond those persons they have rated, and that the sum must be found by those

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persons either equally whatever their relative shares of benefit may be, or in proportion to their respective benefits, which in a given case may be nothing.

This all assumes that the lands are within the district, and that no extra-territorial jurisdiction is assumed; it also assumes that the other external requirements of the Act as to maximum rate, shall be observed. It concerns itself only with the internal working out of sec. 55, and the practical application of the various sub-sections of sec. 55 to the circumstances of a given trust district is only an internal working out of the section.

The fact that part of the mechanism of that section is the determination of a competent Court of Justice completely answers any objection that explicit words are necessary to deprive a person of a right to litigate an objection to liability. The specific right is given, in a particular mode, with respect to a new statutory obligation, and that method must be followed. The principle of *Pasmore* v. *Oswaldtwistle Urban District Council* (1) is applicable. No reason can be assigned for refusing to the Police Magistrate the power under sub-sec. 3 which it is claimed is given to him by sec. 72.

The meaning of the section, in my opinion, is that the trustees' fixation, so far as it is confined to the district, and conforms to other external legal conditions, is to be taken as the legal rate unless altered by the process mentioned in sub-secs. 3 and 4. When sued for under sec. 72, the objection that in fact no benefit from the works attaches to the land rated is not a competent objection, and the tribunal before which the claim is made is not the tribunal intended to determine that fact.

In my opinion, therefore, the appellants are entitled to succeed. I would only add as to *Mooney's Case* (2), that the Privy Council appear to have left open the question as to the result of not exercising the prescribed right of appeal.

The appeal should be allowed.

GAVAN DUFFY J. I agree with the judgment of my brother *Isaacs*.

(1) (1898) A.C., 387.
(2) (1907) A.C., 342; 4 C.L.R., 1439.

RICH J. In my opinion the conclusion arrived at by *Ferguson* J. was correct. I consider that the defendants were not entitled to set up the defence that the subject land was not in fact benefited. Within the area committed to them the finding of the trustees as to the fact of benefit is final, subject to an appeal to the Police Magistrate as to the amount of the rate.

The appeal should be allowed.

Appeal allowed. Order appealed from reversed. Appeal from District Court allowed. Judgment for plaintiffs in the District Court. Parties to bear their own costs in all Courts.

Solicitors, for the appellants, *T. A. Hill*, West Maitland, by *Weaver & Allworth*.

Solicitors, for the respondents, *Cope & Co.*

B. L.

[HIGH COURT OF AUSTRALIA.]

ROACH . . . . . APPELLANT;
DEFENDANT,

AND

BICKLE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown Lands—Lease from Crown—Irrigation farm—Sub-lease, validity of—Consent of Commissioner for Water Conservation and Irrigation—Action for trespass—Defence—Crown Lands Consolidation Act 1913 (*N.S. W.*) (*No.* 7 *of* 1913), *secs.* 226, 273, 274—*Crown Lands and Irrigation (Amendment) Act* 1914 (*N.S. W.*) (*No.* 10 *of* 1914), *sec.* 2.