[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE MUNICIPALITY OF BANKSTOWN . . . . . Appellant;
Plaintiff,

AND

FRIPP . . . . . Respondent.
Defendant,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1919.

SYDNEY, *July* 28, 29, 30; *August* 8.

Barton, Isaacs and Rich JJ.

Local Government—Rates—Action to recover rate—Defences that may be taken—Invalidity of rate—Local rate—Power to make—"Service"—Removal of night-soil—Local Government Act 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *secs.* 74, 103, 146, 154—*Local Government* (*Amending*) *Act* 1908 (*N.S.W.*) (*No.* 28 *of* 1908), *sec.* 14.

Sec. 146 of the *Local Government Act* 1906 (N.S.W.) provides that "(1) In any proceeding by a council to recover the amount of any rate . . . the plaintiff must, in the event of a notice of defence or plea being filed, prove —(*a*) the amount of the rate; (*b*) that the prescribed notice has been duly given of the valuation; (*c*) that the prescribed notice has been duly given to pay the rate. . . . (3) In any such proceeding to recover the amount of any rate the defendant shall not be allowed to raise any question of law or fact except as to a matter which by this section the plaintiff must prove, or except that he is not the owner, lessee, licensee, or tenant, as the case may be, of the land subject to the rate."

Held, that the word "rate" in sec. 146 means a rate which the council has power under the Act to make; and, therefore, that notwithstanding the provisions of the section the defendant may set up the defence that the rate was not one which the council had power to make.

Sec. 103 of the *Local Government Act* 1906 (substituted by sec. 14 of the *Local Government* (*Amending*) *Act* 1908) provides that "(1) A council may

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

fix, with the approval of the Governor, and may recover from the person to whom or on whose order any service is rendered by the council, in pursuance of its powers under this Act, fees and charges for such service. . . . (2) After the thirty-first day of December, one thousand nine hundred and eight, a council shall, in cases where the service is rendered, make such charges as aforesaid, recoverable as aforesaid, for the removal of night-soil or garbage, or both night-soil and garbage, payable by the occupier of the premises served. . . . Such charges shall be carried to a special fund. The cost of night-soil and garbage removal shall not be paid out of the general fund, but out of the said special fund: Provided that the Governor may, from time to time by Proclamation, exempt any council from the operation of this sub-section." Sec. 154 provides that "(1) For or towards defraying the expenses of executing any work or service which in the opinion of the council would be of special benefit to a portion of its area to be defined as prescribed, a council may make and levy a local rate on the unimproved or, at the option of the council, on the improved capital value of rateable land within such portion. (2) A local rate duly made may be levied each year until the cost of executing the work or performing the service for which the rate was made has been paid. But the council may, in any such year, levy a lower rate."

Held, that the word "service" in sec. 154 (1) includes the removal of night-soil and, therefore, that a council which had been exempted by the Governor from the operation of sec. 103 (2) so far as it applied to the making of charges for the removal of night-soil, might properly make a local rate to provide for such removal in a particular portion of its area.

Decision of the Supreme Court: *Bankstown Municipality* v. *Fripp*, 19 S.R. (N.S.W.) 17, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by the Council of the Municipality of Bankstown against Edward Fripp to recover the sum of £31 18s. 4d., being the amount of certain local rates made and levied by the plaintiff upon the defendant, he being the owner of the lands in respect of which the said rates were so made and levied. By consent of the parties and by order of *Pring* J., the following special case was stated under the *Common Law Procedure Act* 1899 for the opinion of the Full Court:—

1. The plaintiff is the Council of a municipality duly constituted under the *Local Government Act* 1906, and the defendant is and was at all material dates the owner of property situate in Chapel Street within the said Municipality.

2. Prior to the year 1917 the plaintiff Council rendered the services

mentioned in sec. 103 of the said Act in the removal of night-soil from the said premises of the defendant and of other persons in the Municipality, and charged the occupiers for such services in the manner provided for by said section.

3. By a notification published in the New South Wales *Government Gazette*, and dated 6th February 1918, His Excellency the Lieutenant-Governor, in purported exercise of the power and authority vested in him by the said Act as amended by subsequent Acts and upon the application of the plaintiff Council, did exempt the said Council from the operation of sub-sec. 2 of sec. 103 of the *Local Government Act* 1906, as so amended, so far as such sub-section applied to the making of charges for the removal of night-soil and the non-payment of the costs of such removal from the general fund.

4. In the year 1918, and after the publication of the last mentioned notification, the said Council purported to make and levy on the unimproved capital value of all rateable land within a certain area within the said Municipality a local rate under sec. 154 of the said Act for the said service, which is the rate sued for in this action.

The question is whether such rate, being imposed for the said service, is valid. If yes, verdict for the plaintiff for the amount claimed with costs ; if no, verdict for the defendant with costs.

5. A preliminary question of law is : Can such rate be challenged in this action ? If no, verdict for the plaintiff for the amount claimed with costs.

The Full Court, by a majority (*Pring* and *Sly* JJ., *Cullen* C.J. dissenting), answered the questions in favour of the defendant, and ordered judgment to be given for him : *Bankstown Municipality* v. *Fripp* (1).

From that decision the plaintiff now, by special leave, appealed to the High Court.

Leverrier K.C. and *Bonney*, for the appellant. The effect of sec. 146 of the *Local Government Act* 1906 is to prevent a ratepayer who is sued for a rate from raising the defence that the making of the rate was not authorized. Ratepayers have every opportunity of preventing the rate being made, and any one of them may, by injunction

(1) 19 S.R. (N.S.W.), 17.

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

in a Court of equity, prevent the making of a rate or the enforcement of it when made. The Attorney-General may, either on his own motion, or at the instance of the Minister, or on the relation of a ratepayer, take proceedings in equity to prevent the council from making the rate. The intention of the Legislature was that, if no previous step had been taken to question the validity of the rate, a ratepayer when sued for the rate should not be allowed to question its validity. The language of sec. 146 is clear, and has the same meaning as the provision in sec. 317 of the *Local Government Act* 1915 of Victoria, which expressly provides that upon a complaint or action for the recovery of a rate "the invalidity or badness of the rate" shall not avail to prevent such recovery. The only way in which it can be said that sec. 146 is limited is that the words "proceeding to recover the amount of any rate" must be read "proceeding to recover the amount of any *valid* rate." But an action to recover a rate is no less a proceeding to recover a rate because no valid rate can be proved; just as an action for debt is no less a proceeding to recover a debt because no debt can be proved. The mere allegation that a rate has been made and has not been paid is sufficient to bring the case within sec. 146. The character of the proceeding depends on the character of the claim, and not on that of the defence. The object of the section is to simplify the procedure for the recovery of rates, and with that object to allow a ratepayer, when sued, to take objections personal to himself but to prevent him from taking objections which go to the validity of the whole rate. This is a reasonable construction of the section, having regard to the fact that under sec. 144 (7)—as amended by sec. 26 (2) of the Act of 1908—proceedings for the recovery of rates may be taken in a Small Debts Court, from which there is no appeal (*Small Debts Recovery Act* 1912, sec. 17).

[RICH J. referred to *Ex parte Killen* (1).]

As to the main point, the rate was properly made under sec. 154. The Council, having been exempted from the provisions of sec. 103 (2), might properly make a local rate under sec. 154 for the removal of night-soil in any particular portion of their municipal area. The removal of night-soil may reasonably be considered to be a benefit

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

not only to the persons from whose premises it is removed but also to the owners of all land in the locality, for it may enhance the value of vacant land there. The removal of night-soil is a "service" within the meaning of the section. There is no reason for limiting the meaning of that word to services which are not continuous or which are to extend over a fixed period of time only.

Maughan (with him *Barton*), for the respondent. [Counsel were not called upon to argue the question based on sec. 146.] The removal of night-soil is a duty cast upon a council by sec. 74 in respect of every house erected in the municipal area, and the council has no option as to the removal either with regard to the whole area or to any particular portion of it. The value of vacant land, therefore, cannot be said to be enhanced by the performance of that duty. For that reason also, the removal of night-soil must be a continuous service so long as there is an unsewered area in the locality. Sec. 154 only deals with an isolated service which is to begin after the rate is made and to end at some particular time, some service the cost of which can be estimated before the rate is made and which, once paid for, is at an end. The language of the section is inapt to cover a service which is to continue for an indefinite time. The rate is invalid for the reason also that there is no power in the Governor under sec. 103 (2) to make a partial exemption. The only proper exemption is from the operation of the whole of the sub-section.

Leverrier K.C., in reply. The objection based on the Proclamation is not open on the special case (*Banbury* v. *Bank of Montreal* (1)).

Cur. adv. vult.

August 8.

The following judgments were read :—

BARTON J. This appeal comes to us by reason of a judgment of the Supreme Court of New South Wales (Full Court) upon a special case stated under the *Common Law Procedure Act* 1899.

The appellant Council sued the defendant for the amount of certain local rates on lands within the Municipality which the respondent

(1) (1918) A.C., 626, at p. 659.

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

Barton J.

owns, and which, as the parties inform us, he also occupies. Under sec. 103 of the *Local Government Act* of 1906, as amended in 1908, the Council rendered the services mentioned in that section in the removal of night-soil from premises in the Municipality, including those of the respondent, and imposed upon him and other occupiers charges as authorized by that section. In February 1918 the appellant Council was exempted by Proclamation from the operation of sec. 103 (2) so far as that sub-section applied to the making of charges for the removal of night soil and the non-payment of costs of removal from the general fund. In that year, and after the gazettal of the Proclamation, the Council made and levied under sec. 154 of the Act of 1906 a rate for the service in question, the rate now sued for. It applied to the unimproved capital value of all rateable land within a certain area of the Municipality, that being the locality in which the respondent's premises are situated.

Two questions of law are stated in the case. The first is whether the rate can be challenged in this action. The second is "whether such rate, being imposed for the said service, is valid."

The preliminary question is based on sec. 146 of the Act of 1906. It is contended that a plaintiff is to prove the amount of the rate, the prescribed notice of valuation, and the prescribed notice to pay, and that the defendant must not raise any question of law or fact except as to any or all of these three matters, or except that he is not owner, lessee, licensee or tenant of the subject land. This claim is put so high as to assert that, when the three things specified are proved to the satisfaction of the Court, a defendant, even if he has paid, is precluded from proving payment. It is argued, therefore, that a defendant is equally precluded from contesting the validity of anything called a local rate which he is called on to pay, if its amount and the notices have been proved. Now, sec. 146 does not stand alone in this connection. It is one of the sections of Part XX. Under sec. 141 a rate must be one of the four kinds there specified, local rates being one of the kinds. It is quite clear from these sections that "rate" in sec. 146 (1) means an unpaid rate, and, in the same way, that it also means a valid rate (*i.e.*, a rate which the Council had power to make) remaining unpaid. Sec. 146 relieves the Council from proving a number of

formalities, but it is too much to say of it that it authorizes the recovery of a rate imposed without legal warrant in its inception. Sec. 145 gives the right to recover rates "due and unpaid." If wholly unauthorized, they cannot be said to be due. Sec. 147 requires the council to take steps to recover "amounts due to it in respect of rates," and to take legal proceedings to recover "amounts so due and owing for more than six months." I think it is quite out of the question upon a careful reading of Part XX. to suppose that a person from whom money is claimed in respect of an alleged rate unwarranted by the Statute has no recourse in any of the Courts in which that rate may be claimed, and that his only source of relief, if even that exists, is to seek the assistance of a Court of equity. No section other than sec. 146 is adduced to support the Council's contention in this regard, and I think the whole context of this part of the Act shows such a contention to be untenable. On that point, therefore, the respondent is not precluded.

The main question is whether a local rate can be imposed to defray the expense of the removal of night-soil. Sec. 74 is unamended in anything material to the purpose of this case. Under that section a council has, within its area, both the power and the duty *inter alia* to remove night-soil. How far the duty extends in conceivable circumstances, having regard to the context, it is unnecessary to inquire just now. A council has power under sec. 103, as amended, to fix and recover fees and charges for the "service," for the removal of night-soil is unquestionably a "service" within the Act. So far as it could be contended that under sec. 103 the Council was under obligation to make charges for its removal, and so far as it might not pay the cost of removal out of the general fund, but must carry them to a special fund, the Proclamation relieves the Council of parts of its duty.

The Council, having sought and obtained this relief, proceeded to fulfil the requirements of making a local rate, if it had power to make one at all, and it is that power which is now challenged. Local rates are authorized by sec. 154 (1) "for or towards defraying the expenses of executing *any* work or service which in the opinion of the council would be of special benefit to a portion of its area" &c. And here I may say that the question of special benefit to

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

Barton J.

the locality appears to rest on the opinion of the Council. The Council is a representative body, and the law has made it the mouthpiece of the ratepayers in this regard, unless a poll of ratepayers is demanded on the proposal and before the rate is made, at which poll it may be decided by them whether the rate shall be made, and, if so, whether it shall be on unimproved or improved capital value.

It is observable that if the opinion of the Council sanctions the proposal as of special benefit, &c., it covers "any work or service." But sub-sec. 2 authorizes the levying of a local rate each year "until the cost of executing the work or performing the service for which the rate was made has been paid." Counsel for the appellant strongly insisted that the words in sub-sec. 2 following the word "until" clearly and unambiguously indicate that there is contemplated some finality to the cost of performing the service, which can only be if there is an end to the service itself, and hence the removal of night-soil, which is a continuing necessity, is not such a "service" as is contemplated by the section. They insisted that where the service is of such a character that it may be expected to continue indefinitely year by year such a case is not within the section, and therefore a rate made for such a purpose is not valid. Now, the words of sub-sec. 1 are strong and general. Any work or service at all may be the subject of a local rate if only the opinion of the council affirms its special benefit to the locality. The question really is, how far do the words relied on in sub-sec. 2 make the phrase in sub-sec. 1 weaker or less general?

The argument rests on those who rely on the later words for this effect. Does Mr. *Maughan's* interpretation prevail over this other construction, that so long as the service remains to be performed the rate may be levied for its cost? It must be noted that the form of sub-sec. 2 is affirmative, and that the power to make and levy a local rate is given in sub-sec. 1 and is given in connection with the words "any work or service." Sub-sec. 2 is not in the form of a proviso or an exception, though the framers of this Act dealt freely in such things and though, indeed, there is a proviso in terms on another subject in sub-sec. 4 of the same section. Unless sub-sec. 2 must, nevertheless, be given the force of a proviso, some

construction other than that of the respondent must be given to it. I have suggested a construction equally reasonable, and I think it should be adopted. If sub-sec. 2 standing by itself were ambiguous and if it had to be detached from the context, even then I think the more reasonable of two constructions which are open would prevail, but, in the light of sub-sec. 1 and in view of the form of sub-sec. 2, I do not think an ambiguity arises. I come to an opinion in favour of the rate independently of prior legislation, because I do not think that on the whole there is an ambiguity. It is not every difficulty in statutory construction that, being called by that name, is to entail consequences which follow only if it is such in fact. Sec. 154, like many other parts of the Act, is difficult; but difficulties in construction should, if possible, be surmounted without resorting to those considerations which only ambiguities entitle one to invoke. It is enough to say that the reading of the various enactments to which reference was made in argument confirms a view which follows the general intention of the Legislature in this Act to extend, not to restrict, the powers in local government of elected bodies.

The contention founded on the terms of the notification of the Proclamation in the *Gazette* cannot, I think, be allowed to prevail. It raises a point not taken below, and although under the judgment of the House of Lords in *Banbury* v. *Bank of Montreal* (1) the question whether we should allow the point to be raised on appeal is one of discretion, and not of jurisdiction, I do not think that discretion should be used in favour of the respondent, seeing that his resistance to the claim of the Council has been all along based on the contention that the service in question cannot be the subject of a valid local rate, and that his success in that contention in the Court below is the cause of the present appeal.

I think, therefore, that the appeal should be allowed, and judgment entered for the plaintiff.

ISAACS AND RICH JJ. This is an action by a municipality to recover £31 18s. 4d. as the amount of a local rate, and the appeal raises two questions of law: (1) whether the respondent is

(1) (1918) A.C., 626.

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

Isaacs J. Rich J.

permitted to set up as a defence to the action the invalidity of the "rate" sued on, and (2) whether the rate is valid. The Supreme Court by a majority, *Pring* J. and *Sly* J., answered the first question in the affirmative, and the second question in the negative. *Cullen* C.J. did not decide, but assumed the affirmative of the first question and thought the second should be answered in the affirmative also.

1.—As to the first question we agree with the view taken by the Supreme Court. Invalidity of a rate may arise either through the omission to observe some legislative provision enacted as incidental to the making of the rate, the rate itself as made being a rate contemplated by the Act, after observance of the provisions omitted; or it may arise through the rate itself as made being entirely outside the purview of the Act and not contemplated by the Legislature. If of the latter class, sec. 146 affords no protection to the plaintiff: the claim is then outside the Act, and so is the protection.

The Act, while permitting rates to be made, has surrounded the function with various and numerous conditions appropriate to the special circumstances of the case. These conditions guard the ratepayers from possible injustice, and in some cases even from the discretion of the Council. But the Legislature apparently weighed competing considerations, and considered it better on the whole, when the matter had reached the stage of a proceeding to recover the rate, to limit the grounds of objection, rather than throw the finances of the municipality into confusion in consequence of some departure from the legislative conditions, possibly technical and probably immaterial to the substantial justice of the matter. But that assumes that the rate is one which, but for the departure, would be authorized by the Act. It is quite another thing when a council strikes a rate entirely beyond the scope of the Charter, one which would not be lawful though all the precautionary conditions were observed. It is contended for the appellant that, even then, the defendant is shut out by sec. 146. If, however, the word "rate" in the beginning of sub-sec. 1 means one of the four rates enumerated in sec. 141, that is, a rate authorized by the Act, the contention cannot be sustained. That it has that meaning we have no doubt. It means the same thing as it does in (say) sec. 147, and it cannot

be supposed that the Legislature made it mandatory on a council to recover the amount of any "rates" other than those it had authorized. If, therefore, the rate here sued upon be invalid as being wholly unauthorized by the Act, the respondent should be allowed to set it up.

2.—The main question is whether the rate is in that sense invalid. The respondent's position is not confined to one contention. The first contention is that no continuous service comes within sec. 154. That was the view upheld by *Pring* J. The next contention is that, whatever may be said of other services, continuous or not, the removal of night-soil being compulsory on the municipality does not come within sec. 154, and equally does not fall within sec. 153. A third view that should be noticed is that taken by *Sly* J., who thought, on somewhat general grounds, that as sec. 103 provides for fees and charges for night-soil removal, sec. 154 is not intended to include such a service; one of the considerations leading to that conclusion being the resulting charge on unoccupied land, if the rate were made, and that such a result is impossible to contemplate.

Perhaps the third ground may be conveniently dealt with first. It is, of course, not denied that the general rate may be made to cover the service, and that a charge under sec. 103 need not be made for it; if so, there is a charge on the land and on all rateable land, occupied or not, for (*inter alia*) the cost of removing night-soil. But, on principle, if a special benefit is in fact conferred on any particular portion of an area by a specially frequent sanitary removal—as in a comparatively thickly populated portion of the municipality—that fact sends up the value of all the land in the locality, and so benefits even land for the moment unoccupied. The portion of the area becomes a comparatively more desirable residential locality, and a possible purchaser or tenant would take it into consideration. The third ground, then, is not tenable, not being based on the express or implied terms of the Act but on a conjecture as to its policy, which is not sustainable.

The first contention—viz., that the "cost" must be an initial expenditure, and not a continuous expenditure—would, if correct, exclude nearly every possible service, even where a specific work

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

Isaacs J. Rich J.

requiring subsequent maintenance, as gasworks, electric works or waterworks, was undertaken. *Ex concessis*, the initial cost in such a case is payable out of a local rate, yet the subsequent maintenance and operation of the works—which, after all, is the only special benefit to the locality—could not. *A fortiori* street watering, the sole benefit of which is confined to the particular street, could not, and yet it is hard to see that a fee or charge under sec. 103 would be any fairer.

As will be pointed out hereafter, sec. 103 and sec. 154 may be used conjointly. The charge under sec. 103 cannot be made at all unless the Governor approves, and his approval may go only to part of the cost, leaving the rest to be defrayed otherwise. And sec. 154 allows an apportionment, because it begins with "*For* or *towards* defraying the expenses" &c. The two sections are not mutually exclusive. As to this contention, reliance was chiefly placed on sub-sec. 2 of sec. 154. The words of that sub-section are :—"A local rate duly made may be levied each year until the cost of executing the work or performing the service for which the rate was made has been paid. But the Council may, in any such year, levy a lower rate." It is said that the word "until" especially indicates an initial cost of a definite known amount, so that its payment may be arranged for at once. It is also said that the words "cost" and "paid" show the same thing—that "cost" indicates an amount of expenditure that can be stated, either by estimate or absolutely, and that "paid" means the discharge of that definite known sum. It may be at once observed that if the words of sub-sec. 2 had that signification clearly and unambiguously, admitting of no other reasonable interpretation, there would be an almost unanswerable argument in respondent's favour. But, at the lowest, it must be said that those words are not unambiguously in favour of the respondent's contention. To begin with, the expression in sub-sec. 2 "the service for which the rate was made" refers back to sub-sec. 1 which speaks of "any work or service." The generality of the word is the same as in sec. 103 as originally passed in these terms : "A council may fix, with the approval of the Governor, and may recover fees and charges for any service rendered by the council in pursuance of its powers under this Act." We say "as

originally passed," because sec. 154 must mean to-day what it meant in 1906 (except as altered by sec. 28 of the Act of 1908) that is, its meaning is not altered by reason of the later form of sec. 103. It is common ground that a charge could be made, under the original sec. 103 or sub-sec. 1 of the new sec. 103, for this service, although the enactment says any service in pursuance of "its *powers*." Treating the removal of night-soil as answering that description, it affords a strong argument against the contention that "service" in sec. 154 (1) excludes the removal of night soil because the service is either continuous or compulsory.

Dealing now with the specific words relied on, the word "until" is colourless in this connection. It merely points to some *terminus ad quem*, the nature of which must depend on its own description. The *terminus ad quem* selected by the Legislature in sub-sec. 2 of sec. 154 is the time when "the cost of executing the work or performing the service for which the rate was made has been paid." Now, taking the two words "cost" and "paid," we find that the Legislature itself has used those very words in relation to a recurring expenditure, and not only so, but in relation to this very service. In sub-sec. 2 of sec. 103—as enacted in 1908—it is said: "The *cost* of night-soil and garbage removal shall not be *paid* out of the general fund, but out of the said special fund." In truth, "cost" and "paid" are as appropriate in a business sense or popular sense to a recurring expenditure as to a fixed non-recurring expenditure. If so, the word "until" does not of itself necessarily restrict their meaning. Whether in that particular sub-section the meaning is so restricted must depend on a consideration of the whole section, and of that section in relation to the whole Act; and the Act itself can, perhaps, be best understood by considering it as part—the last phase—of the legislative scheme of local government (see *Craies on Statute Law*, 4th ed., p. 105, and also *Attorney-General for Queensland* v. *Brisbane City Council* (1)). When that course is taken, the meaning of sub-sec. 2 becomes, we think, transparently clear, and takes its place as a natural, a just and, indeed, a necessary provision in a well-considered and comprehensive system.

The *Local Government Act* 1906 (No. 56 of 1906) is, according to

(1) (1909) A.C., 582, at p. 587; 8 C.L.R., 767, at p. 770.

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

Isaacs J. Rich J.

its title, both a consolidating and an amending Act. Immediately before its enactment there were in force (*inter alia*) the *Local Government* (*Shires*) *Act* 1905 (No. 33 of 1905) and the *Local Government Extension Act* 1906 and the *Municipalities Act* 1897. For the present we need not further advert to the Shires Act.

The *Municipalities Act* 1897 was a consolidating Act, the principal of the Statutes thereby consolidated being the Act of 1867 (31 Vict. No. 12). Under the Act of 1867 itself, by sec. 164, an annual "rate," designated in sec. 168 a general rate, had to be made to raise the amount necessary for "public works" and "any other expenses necessary in carrying into effect" the provisions of the Act. By sec. 165 "special rates" could be struck, but only "for the purpose of constructing and maintaining any *works* for or relating to the draining of lands water supply sewerage or lighting with gas or otherwise." Those "special rates" were leviable upon "the owners or occupiers of any property within the municipality deriving any benefit or advantage from such works." The first thing to notice is that for those *works* and their *continuous maintenance* the "special rates" were not of a general nature; they were of a strictly local nature, the locality being ascertainable by finding the properties benefited. The section went on, however, to say that, in order to provide funds for *watering a street or road*—which is, of course, a continuous service—"a special rate or charge" might, in addition to the first mentioned special rates, be established "on the rateable property in such street or road." That is a distinctly local rate, the locality being taken as conclusive proof of benefit. By sec. 166 a special rate for "constructing and maintaining waterworks and ensuring a supply of pure water," again a continuous service, a special water rate, could be established and levied "upon the owners or occupiers of all houses in streets where the water mains are laid down." Again a rate local in character was authorized for a continuous service. But it will be observed that, except as to watering streets, the service though continuous was accompanied by the construction of works.

In 1873 the *Municipalities Lighting Act* provided that the mere "lighting with gas" might be made the subject of a special rate under sec. 165 of the Principal Act "in addition to rates for the

construction and maintenance of *works* in connection with such lighting." Here, then, was a *service*, though not so called in the Act, for which a rate called a "special rate," but of a local character, as distinguished from the general rate of a universal character, was permitted to be made though unconnected with any *works*. And in *Borough of Waverley* v. *Smart* (1) it was held in the District Court that the owner of unimproved land was liable for lighting rate, because his land was lighted by it.

The Act of 1897 preserved this law. But in the meantime, in 1895, an Act had been passed (58 Vict. No. 20) removing certain disqualifications for councillors, and using the expression "the performance by the council of any work or services in connection with" (*inter alia*) "the removal of night-soil." That was repeated in the 1897 Act, sec. 39 (I.) (*b*). By sec. 141 "general rates" are provided for. By sec. 143 "special rates" are provided for as in the Act of 1867.

Up to this point special rates are either local in character, as already mentioned, or are general in character, as in the case of the educational rate (secs. 153 and 167 of the Act of 1867 and sec. 145 of the Act of 1897).

In 1905 the *Local Government (Shires) Act* (No. 33 of 1905) was passed. By sec. 25 it made the same reference to the non-disqualification of councillors in respect of contracts for "the performance by the council of any work or services in connection with footways, roads, or sanitation." It provided for "general rates," and permitted them to be differential (sec. 33), which is practically equivalent to local rates. It used the word "service" (sec. 39 (2)). It provided (sec. 44 (1) (A) (ix.) and (xii.)) for ordinances for "the removal of night-soil, filth, or refuse," empowering (*inter alia*) "the fixing, recovery, and collection of fees and charges for services rendered by a council in pursuance of its powers under this Act," and it provided that one of the powers which it might have conferred upon it was (sec. 9 and Schedule 1, chap. II.) "the conservation, collection, removal, and disposal of night-soil and refuse," &c.

In 1906 the *Local Government Extension Act* (No. 40 of 1906) was

(1) S.M.H., June 9, 1875.

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

Isaacs J. Rich J.

passed, but within ten days was replaced by the present Act (No. 56 of 1906), and so need not be mentioned in detail. It, however, worked out the desired legislative scheme for municipalities as distinguished from shires.

Act No. 56 of 1906 includes the Shires Act and the Extension Act, and repeals the Act of 1897, and, in effect, combines them all. It marks a great advance in local self-government on the prior legislation of 1897. Powers are enlarged, both as to subject matter and authority, even central government authority being in many cases turned over to the municipality, and, in case of certain local rating being adopted, even public taxation Acts are suspended (sec. 151); so that it would be strange if the specific powers of rating already mentioned were taken away by the general terms used. Another thing it does, more directly relevant to the case, is this: it provides as before for "general rates," that is, for rates on all rateable land in the area (sec. 151). It also, as a new device, divides other rates into "special" and "local." The old name "special" is reserved (sec. 153) for rates made upon all rateable land in the area, but for some particular purpose. "Special rates" henceforth require segregation not of locality but of purpose. A special rate for lighting roads (sub-sec. 2) is the one exception as to locality. Such rates, formerly also termed "special," as are limited to particular localities are now in a distinct class, and are specifically termed "local rates," and are not any longer called special rates (sec. 154). And, as in the case of "special rates," they are not limited, as they formerly were, to purposes specifically selected and enumerated by the Legislature. In the case of "special rates" (sec. 153 (1)) they may be made "for any purpose which may lawfully be undertaken by the council." There is no limitation to discretionary purposes. Indeed, "lighting roads" is, by sec. 73 (iii.), placed very much in the same position as the removal of night-soil in sec. 74.

In the case of "local rates" (sec. 154 (1)) they may be made "for or towards defraying the expenses of executing any work or service which in the opinion of the council would be of special benefit to a portion of its area to be defined as prescribed." A local rate, therefore, appears to be so far really a special rate, but one which is confined to a particular portion of the area. And the

special benefit of the work or service in question may be an exclusive benefit, and so requiring equitably the whole expenses to be borne by the locality, or it may be merely a benefit greater than the benefit derived by the rest of the area from that work or service, and therefore to be equitably regulated as to defraying the expense. The words " for " and " towards " indicate this purpose, for the expense may be shared by the local rate and the general rate, and even by charges under sec. 103. But every general rate must be *made and levied* annually (sec. 151 (3)). The council must, for general purposes, consider the position yearly. Additional general rates appear to follow the same rule : *Accessorium sequitur suum principale.* This entails annually the detailed procedure prescribed by sec. 142 and other sections. Detailed procedure even more drastic is required in making special and local rates. By sub-sec. 3 of sec. 153, however, it is provided that " a special rate duly *made* may be *levied* each year until rescinded by the council. But the council may in any such year levy a lower rate." That means that a special rate, which might be, for instance, for removal of night soil—since that is a " purpose which may lawfully be undertaken by the council "—once made, could be levied from year to year, until rescinded by the Council. But, even without rescission, if the expense for the year did not require it the whole amount need not be levied. The word " until " there, is simply part of an enabling provision, and marks its limit. The compulsion to collect the amount of the rates arises under sec. 147. The enabling provision in sec. 153 is to obviate the trouble and expense of repeating the procedure necessary to precede the making of the special rate, because apparently, once it is " duly made," the purpose and the establishment of the rate have been adopted by those immediately concerned. Similarly in sec. 154 (2) the Legislature has enabled the council to go on levying the " local rate " so long as there remains unpaid any part of the expense of carrying out the " work or service " for which it was originally imposed. The word " until " is again used, the limit being in sec. 154 not the rescinding of the rate as in sec. 153, but the full payment of the expense incurred for the particular purpose for the sole or comparative benefit of the locality.

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

Isaacs J. Rich J.

Now, why this distinction between the two terminal limits? The answer to this gives, we think, the key to the whole problem. In the case of a special rate, except a lighting rate, the rescission of the rate does nothing more than abolish a special charge upon the whole area. It leaves the whole area—that is, the whole of the ratepayers—precisely in the same position as to liability as before. A general rate and a special rate, other than a lighting rate, fall upon the same shoulders, and rescinding the special rate throws no obligation on persons other than those already liable. It relieves them of a burden. But the essence of a local rate is to make only a certain portion—that is, the ratepayers in a certain portion of the area—wholly or principally liable for the particular service. If the local rate were to be leviable only until rescinded, that would, by reason of sec. 147, release the local ratepayers, and, by reason of the general rate, throw the liability for any expense still unpaid on the shoulders of the whole area, a result in the assumed circumstances unjust. Therefore, said Parliament (by combined force of secs. 154 and 147) the local rate is to be levied *until*—and this is the true force of the word "until"—the cost of executing the work or performing the service for which the rate was made has been paid. It is not the difference between initial and continuous cost that is in the mind of the Legislature; it is the difference between payment and non-payment of the cost to which it is directing its attention. It is part of the scheme of dividing former "special rates" into "special rates" and "local rates"; and the distinction of locality carries with it an equitable requirement of differentiating, not between fixed and continuous services but between general and local responsibility to discharge the costs of general or local benefit. For instance, suppose a specially densely populated portion of the area, and a tri-weekly service of sanitation provided for that part; while a weekly service is sufficient for the rest. The natural force of the language of sec. 154 would apply to the adjustment between benefit and burden. The respondent, however, excludes that on the ground that the extra attention is not "a service" but is part of a service. Again, suppose under sec. 86 a council let a contract for three years for a special night soil

service, or, indeed, any service, at a fixed sum per annum for a particular locality. Although the total cost is known at the beginning, the respondent contends that the service, being continuous, is not within sec. 154. We cannot agree with those contentions. They unnecessarily limit the primary meaning of the Act. And further, the respondent contends that the case is equally outside sec. 153 because of the obligatory nature of the service. But obligatory or not, the service has to be paid for, and the general fund may need supplementing, and sec. 103 may not be thought sufficient, or entirely just, or may not be approved by the Governor. And as the Legislature has left it to the council as the local parliament of the ratepayers of the area to impose a special rate "for any purpose which may lawfully be undertaken by the council," and has devised a personal veto upon a poll of the persons actually and directly affected, we see no reason to cut down the natural import of the words.

With regard to sec. 154 we would add this:—In differentiating between specific special rates which do, and those which do not, in fact, confer special benefit on a locality, and as to the extent of that locality, various opinions may be held. To prevent litigation on that question of fact (see, for instance, *Borough of Alexandria* v. *Cooper* (1)) Parliament has described the services which may be the subject of a local rate as those "which in the opinion of the council" would be of such limited benefit. Provided only the service is one which is reasonably capable of being so considered, the question of whether it "would be" of such benefit is concluded by the council's opinion. Any extra convenience or attention in the way of sanitation is reasonably capable according to circumstances of being considered a special benefit to the locality to which it is confined, and therefore a local rate is possible in respect of it.

We desire to say that we would arrive at the same conclusions quite apart from any prior legislation. We think they result from the natural meaning of the language of the Act of 1906 itself. But prior references seem to us not only to be strongly confirmatory of our own reading of the present Act, but also to help to repel the argument

(1) 11 N.S.W.L.R. (L.), 166.

H. C. OF A. 1919.

BANKSTOWN MUNICIPAL COUNCIL v. FRIPP.

that it should be given a construction narrower than its primary interpretation would suggest.

For the reasons above stated, we think that the rate cannot be held invalid, and that the appeal must be allowed.

Appeal allowed. Judgment appealed from discharged and judgment entered for plaintiff with costs. Respondent to pay costs of appeal.

Solicitors for the appellant, *Boyce & Magney.*

Solicitors for the respondent, *Pigott & Stinson.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE AUSTRALIAN JOURNALISTS' ASSOCIATION.

H. C. OF A. 1918-1919.

MELBOURNE, *Sept.* 3-5, 1918. *May* 19-20, *June* 11, 1919.

EX PARTE THE DAILY NEWS PROPRIETARY LIMITED.

Industrial Arbitration—Award—Commonwealth Court of Conciliation and Arbitration—Deputy President—Prohibition—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (XXXV.)—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915).

Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Orders *nisi* for prohibition in respect of an award were discharged by the High Court.