[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR PUBLIC WORKS FOR NEW SOUTH WALES . . Applicant, } Appellant;

AND

PEISLEY AND OTHERS . . . . Respondents.
Respondents,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *Dec.* 1, 4, 14.

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

Local Government—Drainage trust—Rates—Appeal to Police Magistrate—Reduction of rates—Apportionment of amount of reduction among other occupiers—Jurisdiction of Police Magistrate—Water Act 1912 (*N.S.W.*) (*No.* 44 *of* 1912), *sec.* 55.*

Held, by *Knox* C.J. and *Isaacs* J., and, with doubt, by *Gavan Duffy* J., that where a drainage trust constituted under Part III. of the *Water Act* 1912 (N.S.W.) has imposed a rate upon lands within its district, upon an appeal under sec. 55 (3) the Police Magistrate, if he reduces or annuls the rates upon the lands of some of the occupiers, must under sec. 55 (4) increase the rates upon the lands of the other occupiers to such an extent that the total sum to be raised by the rate imposed by the trustees is not diminished by such reduction or annulment.

Grahamstown and Campvale Swamps Drainage Trust v. *Windeyer*, (1915) 20 C.L.R., 653, followed and applied.

Decision of the Supreme Court of New South Wales: *Ex parte Minister for Public Works*; *Re Peisley*, (1922) 22 S.R. (N.S.W.), 485, reversed.

* Sec. 55 of the *Water Act* 1912 (N.S.W.) 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:— . . . (*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. . . . (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."

APPEAL from the Supreme Court of New South Wales.

On 12th February 1920 the trustees of the Tuckean Swamp Drainage Trust, which was created under Part III. of the *Water Act* 1912 (N.S.W.), duly determined that the sum of £1,716 15s. 8d. was required by the trustees for exercising their powers and performing their duties during the rating period commencing on 19th May 1919 and ending on 19th May 1920, and they duly fixed and levied rates of the total sum of £1,716 15s. 8d. upon the whole of the lands of the trust district. A large number of the occupiers of land within the district appealed against the rates imposed upon their land. The appeals were heard by Arthur James Peisley, Esq., P.M., who upheld some of the appeals and made reductions amounting to a total sum of £541 5s. 6d. The matter of increasing the rates upon the lands of the other occupiers pursuant to sec. 55 (4) of the *Water Act* 1912 subsequently came before the Police Magistrate who, after hearing evidence, stated that there was nothing before him to show that a distribution of the amount by which he had reduced the rates among the other occupiers was either necessary or just; and he refused to make a distribution. An order *nisi* was then obtained by the Minister for Public Works calling upon the Police Magistrate and the occupiers whose rates had been reduced to show cause why a writ of mandamus should not issue directing the Police Magistrate to increase the rates on the lands of the occupiers other than those whose rates had been reduced in order to secure that the total amount of the rates should not be diminished by such reduction.

The order *nisi* was heard by the Full Court, which, by a majority (*Cullen* C.J. and *Wade* J., *Ferguson* J. dissenting), discharged it with costs: *Ex parte Minister for Public Works*; *Re Peisley* (1).

From that decision the Minister for Public Works now appealed to the High Court.

Blacket K.C. (with him *McDonald*), for the appellant. Under sec. 55 (4) of the *Water Act* 1912 the Police Magistrate is under an imperative duty to see that the total amount of the rate imposed by the trust is not decreased. His only discretion is as to the mode

(1) (1922) 22 S.R. (N.S.W.), 485.

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of apportioning the amount by which he has reduced the rates of those occupiers whose appeals have been successful among the other occupiers. The interpretation placed upon the section by this Court in *Grahamstown and Campvale Swamps Drainage Trust* v. *Windeyer* (1) is conclusive, and what was there said as to sub-sec. 4 was not *obiter*. [Counsel also referred to *Ex parte Closer Settlement Ltd.* (2).]

Alec Thomson K.C. (with him *Small*), for a large number of the respondents. The interpretation placed on sec. 55 (4) in the *Grahamstown Case* (1) was *obiter*. The Court was not there considering the sub-section for the purpose of applying it to a particular state of facts, but it was considering generally the object of the legislation. Sub-sec. 4 vests in the Police Magistrate a discretion to say whether he thinks it necessary to make any increase in the rates upon the other occupiers, and also a discretion to say what increases he thinks should justly be made. He has to determine whether an occasion has arisen which renders it necessary that an increase of the rates upon the other occupiers should be made; and if he determines, in his discretion, that such an occasion has arisen, he is under a duty to fix the amounts of the increases. If sub-sec. 4 means that the Police Magistrate is bound to increase the rates on the other occupiers so as to provide the whole amount by which he has reduced the rates of those occupiers whose appeals have been successful, the sub-section means the same whether the words " where he considers such course necessary " are inserted or omitted. [Counsel referred to *Lumsden* v. *Inland Revenue Commissioners* (3).]

KNOX C.J. The question in this case turns on the construction of sec. 55 (4) of the *Water Act* 1912. That section was interpreted by my brother *Isaacs* in *Grahamstown and Campvale Swamps Drainage Trust* v. *Windeyer* (4), my brother *Gavan Duffy* concurring. If that interpretation be correct, the decision of the Supreme Court in this matter cannot be upheld. The judgment in the case to which I have referred was brought to the notice of the Supreme Court, and the

(1) (1915) 20 C.L.R., 653, at p. 661.
(2) (1918) 18 S.R. (N.S.W.), 489.
(3) (1914) A.C., 877, at pp. 887, 896.
(4) (1915) 20 C.L.R., 653.

reason given by the majority of that Court for not deciding according to the interpretation put on the section in this Court was that the observations of my brother *Isaacs* in that case were *obiter* and not binding upon the Supreme Court. Whether that portion of the reasons given was to be regarded as binding or not, I agree with the interpretation then put on sub-sec. 4 of sec. 55; and for that reason I think the appeal should be allowed and the rule *nisi* for mandamus made absolute.

ISAACS J. I agree.

GAVAN DUFFY J. I am by no means so sure of the meaning of sec. 55 (4) of the *Water Act* 1912 as I appear to have been when the matter came before me in the *Grahamstown Case* (1); but I am in a somewhat peculiar position: my brother *Isaacs* stands firmly by the interpretation which he then placed upon the sub-section and in which I agreed, and the Chief Justice, who now intervenes for the first time, thinks that the view I then held was right, and that my present doubt is not justified. In these circumstances I do not think that I should depart from the opinion which I formed in the *Grahamstown Case*, and I assent to the judgment already pronounced.

Appeal allowed. Order appealed from discharged. Order nisi for mandamus made absolute.

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

Solicitors for the respondents, *McIntosh & Best*, Lismore, by *M. A. H. Fitzhardinge.*

B. L.

(1) (1915) 20 C.L.R, 653.