Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Council of the Borough of Randwick v. *The Australian Cities Investment Corporation, Limited, from the Supreme Court of New South Wales; delivered 20th April* 1893.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
THE HON. G. DENMAN.

[*Delivered by the Lord Chancellor.*]

The question raised by this appeal is the construction of the 163rd section of the Municipalities Act of 1867, a Statute of New South Wales. That section renders liable to rating "all lands houses warehouses counting-houses "shops and other buildings tenements or here-"ditaments within any Municipality." It then provides for the following exceptions:—"Land "the property of Her Majesty and unoccupied or "used or reserved or vested in trustees for public "purposes land and buildings in the occupation "of the Imperial Government or the Govern-"ment of New South Wales or of the Council "of the Municipality hospitals benevolent "institutions and buildings used exclusively for "public charitable purposes churches chapels "and other buildings used exclusively for public "worship all schools subject to the provisions of

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" the Public Schools Act of 1866 colleges and " universities." It is upon the construction of the words which provide for these exceptions that the question raised by this appeal turns.

Certain lands were occupied by the Municipality of Sydney for the purpose of water supply. It was, at the trial of the action, contended that this property was exempt from rateability inasmuch as it was " used or reserved or vested in " trustees for public purposes." On the part of the Appellants it was said that these words were only applicable to land which was the property of Her Majesty, and that even if " used " or reserved or vested in trustees for public " purposes," the land was not exempt from rateability if it were not property belonging to Her Majesty. The exception commences with the words " land the property of Her Majesty and " unoccupied," and then come the words upon which so much discussion has turned, " or used " or reserved or vested in trustees for public " purposes." The real question is whether the words " or used or reserved or vested in trustees " for public purposes " are to be coupled only with the word " unoccupied " which immediately precedes them, and treated as alternative cases to unoccupied land, being governed like it by the words " the property of Her Majesty," or whether the words in question are to be treated as coupled with the word " land " which introduces the exception.

Their Lordships do not think that there is anything in the general framework of the section to point as suggested very decidedly to the conclusion at which the Appellants ask their Lordships to arrive. No doubt there has been a good deal of ingenious criticism for the purpose of showing that the words " used or reserved or " vested in trustees for public purposes " ought to be coupled with the word " unoccupied " which they follow, rather than with the word " land."

But their Lordships do not think there is sufficient in those criticisms to establish that the construction contended for by the Appellants is necessarily the right one. No doubt if there were some very good reason for drawing a distinction between land the property of Her Majesty used for public purposes, and other land not the property of Her Majesty used for the same purposes, it is possible that the points upon which stress has been laid might have enabled their Lordships to come to the conclusion desired by the Appellants. But no solid reason was put before their Lordships for the distinction as to rateability which is supposed to be drawn by the provisions of this section if the Appellants' view is correct. It does not appear to their Lordships that there is the least difficulty in coupling the words "or used or reserved or "vested in trustees" with the word "land," and indeed if the contention of the Appellants be correct their Lordships would not have expected to find the word "and" where it is found, but rather the word "whether" or the word "either," which would have been the more natural words to have used if the intention were to couple the words which follow "unoccupied" with the words "the property of Her Majesty," as alternative descriptions of land belonging to Her Majesty. If the matter had been *res integra* their Lordships would certainly have been disposed to come to the conclusion that the construction which has been put upon the clause by the Court below was correct. But when it is remembered that this construction was put upon this section as long ago as the year 1880, that it has been repeated in several decisions since, that no fewer than six learned Judges in the Courts of New South Wales have expressed their opinion in accordance with that view, it would require very decisive weight in

the one direction rather than the other to induce their Lordships now to adopt a different construction.

For these reasons their Lordships do not see any ground for differing from the Judgment arrived at by the Court below.

It was sought to raise another point, that admitting the section to have been properly construed by the Court below, the lands now in question were not in fact used for public purposes within the meaning of the section. That point does not appear to their Lordships to have been raised in the Court below. There is nothing to show that it was raised at the trial. That would not perhaps have been material if it had been raised in the argument before the Full Court, but their Lordships think it is impossible, after reading the judgments in the Court below, to come to any conclusion but this, that the point was not argued or raised there, and that the only point there argued was the construction of the section in the particular to which their Lordships have called attention.

In these circumstances their Lordships think it was not open to the Appellants to bring that point before this Board, and that great inconvenience, and even, it may be, injustice, would result, if a point of this description which may have been deliberately abandoned, or for some reason or other not taken in the Court below, were permitted to be raised for the first time before this Board, even if there were materials before the Board sufficient to enable a judgment to be pronounced upon the point, in case it had been taken in the Court below.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.