Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Melbourne Tramway and Omnibus Company, Limited, v. *The Mayor, &c., of the City of Fitzroy, from the Supreme Court of the Colony of Victoria; delivered 10th November 1900.*

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD LINDLEY.
SIR RICHARD COUCH.
SIR HENRY STRONG.

[*Delivered by Lord Hobhouse.*]

This Appeal is not unimportant to the parties directly concerned; and it derives greater importance from the fact that it involves a controversy on the principle of levying local rates which is pending between the Appellants and other local authorities besides the Respondents; and another controversy on procedure which affects rating authorities and ratepayers generally.

The Appellants carry on their business in the city of Fitzroy and several other cities or towns under the provisions of Acts of Parliament passed in the years 1883 and 1884. For the year 1896-97 the Appellants were rated by the Respondents at 10 per cent. on the assessed value of 13,225*l*. The Appellants objected to the principle on which the value was assessed, mainly because the Respondents refused deductions for certain classes of outgoings. They appealed to the County Court, and on 15th March 1898 Judge Casey who presided in that

Court decided in accordance with their contention, reducing the valuation from 13,228*l.* to 1,682*l.* In May 1898 either on the 12th or the 17th the Supreme Court issued a mandamus to Judge Casey directing him to state the facts for their determination. The Appellants appealed to the Full Court on the ground that the decision of the County Court in a rate appeal is final and conclusive, and that the mandamus was issued without jurisdiction. On the 26th July 1898 the Full Court dismissed the Appeal, and the soundness of that decision is challenged in the present Appeal.

Their Lordships will first address themselves to this question which is one of nicety and difficulty. It depends on the examination of a series of statutes relating to Local Government, and of another series relating to the functions of Justices of Peace sitting in Petty or General Sessions. In making that examination their Lordships have been much aided by a very full and careful judgment delivered by Hood J. in a suit between the present Appellants and the Corporation of Melbourne, reported in 24 Victorian Reports, p. 33.

The Appellants rest their case on the provisions of the Local Government Acts of 1890 (No. 1112) and of 1891 (No. 1243). By Section 276 of No. 1112 an appeal is given on the ground of unfairness or incorrectness occurring in valuations and assessments, to the Court of Petty Sessions; and the judgment of that Court is to be final and conclusive. By Section 277 an appeal is given to the Court of General Sessions for any cause: the Court is to hear the appeal in a summary way, and its decision is to be final and conclusive on all parties.

By Section 60 of No. 1243 all rate appeals, which then lay to General Sessions, are to be made to the County Court; the Court is to hear them in a summary way and its decision is to be final and conclusive on all points. According

to the provisions of these sections considered by themselves the decisions of County Courts in rate appeals are unimpeachable. No. 1243 however in Section 61 enacts that all provisions of Acts relating to such appeals to General Sessions shall (subject to the provisions of No. 1243) apply to appeals to the County Court. For that purpose County Courts are to have all the powers and jurisdiction possessed by the Court of General Sessions.

But while the Legislature was passing No. 1112 it was also passing the Justices Act of 1890 (No. 1105) of which Section 139 runs as follows:—"No proceeding to be had touching "the conviction of any offender against any Act, "or touching any order made or any other "matter or thing done or transacted in or "relative to the execution of any Act, shall be "vacated or quashed for want of form or be "removed or removable (except as hereinafter "mentioned) by certiorari or any other writ or "process whatsoever into the Supreme Court; "but in any case of appeal the Court of General "Sessions before whom the same is heard and "determined shall if so required by any party "to such appeal state the facts specially for the "determination of the Supreme Court thereon, "in which case that Court may determine the "same, any Act to the contrary notwithstanding." The literal construction of these words is quite clear, viz., that the Court of General Sessions may be required to state a case in all appeals, without any apparent exception of rate appeals. There is therefore a contradiction between the two simultaneous directions of No. 1105 Section 139 and No. 1112 Section 277, and there must be some qualification of the literal meaning of one or the other in order to bring out any sensible result.

It is indeed suggested by the Appellants that No. 1243, passed in the next year, disposes of the matter by providing that the decisions of

the County Court shall be "final and conclusive "on all points." This, it is urged, is different from being "conclusive on all parties"; it embraces points of law as well as of fact, and shuts out the explanation that enactments of finality coupled with provisions for consideration on a stated case mean that the finality does not extend to points of law.

But in No. 1243 itself, immediately after the provision for finality in Section 60, comes Section 61 applying to rate appeals all the provisions of other Acts, and giving to County Courts all powers and jurisdiction possessed by Courts of General Sessions. That would include the jurisdiction, and with it the obligation, to state a case, unless there is some provision to prevent it. It is true that all this is done "subject to the provisions of this Act." But all this portion of the Act is aimed at substituting County Courts for General Sessions in rate appeals and to those provisions the whole is subject. It is almost inconceivable that the framers of the Act should have deliberately intended to make an alteration of a different kind and of great importance in jurisdiction, by the obscure process of writing in the word "points" instead of "parties." That is the only "provision" in No. 1243 calculated to exclude the operation of Section 139 of No. 1105. It was then, and had long been, the practice of Courts of General Sessions to state cases in rate appeals, and that practice must have been well known to all persons familiar with these branches of law. If there had been an intention to prohibit that practice, something more direct and definite would surely have been said.

The existence at that time of the practice of stating cases in rate appeals is not disputed, though it has been disputed at the Bar whether or no it has continued up to the present time. In his judgment delivered in this case the learned

Chief Justice speaks of it as a well defined practice which has prevailed from the earliest time since local government has existed. Hood J. has known instances in the year 1892. He does not think it necessary to trace it back earlier than the year 1865. By the Municipal Corporations Acts of 1863 (No. 176 Sections 199–201 and No. 184, Sections 199–201) provisions were made for rate appeals to Petty Sessions and General Sessions respectively, in terms corresponding to those used in No. 1112, including the provisions as to finality. But by the Justices Act of 1865 (No. 267, Section 135) the Courts of General Sessions had power to state a case "in any appeal."

At that time then, if no earlier, the framers and readers and administrators of Sessions Statutes found in Local Government Acts general expressions of finality for decisions in rating appeals, coupled with the provision in Justices Acts of one special mode of questioning the finality of the same decisions. It is a hazardous use of language and difficulties have sprung from it in other statutes and other departments of law; but it seems to have found favour in Victoria. Hood J., says truly that throughout the legislation on rate appeals appears a desire that the decision of the Appellate Court should be final, and also an intention to allow reconsideration by means of stating cases. It is pointed out by him and also by Madden C.J. that unless there is some machinery for such reconsideration by some tribunal the common superior of all, the Courts are certain to diverge in opinion, and there will be diversity of laws in every separate area of a Court of General Sessions or of a County Court. The learned Judges below have no right, and this Board has no right, to set up practice or policy against clear enactments. But when the Legislature

has spoken with two voices, it is very much to the purpose to show which voice has in fact been listened to by suitors and by administrators of the law, and which must lead to confusion such as all statesmen desire to avoid.

The most plausible argument in favour of the Appellants is that which seeks to qualify Section 139 of No. 1105 by saying that it does not apply to rating appeals at all; by which process one of the discordant voices is silenced, while the other speaks. It is urged that the obligation of stating a case is laid upon the Court of General Sessions in substitution for the writ of certiorari which is taken away; the section is mainly directed to criminal cases, and is at all events satisfied by confining it to matters within the ordinary jurisdiction of the Court of General Sessions derived from common law. This reasoning however cuts down the generality of the words used not only in the latter part of the section "any case of appeal," but in the former part which includes "any other matter "or thing done or transacted in or relative to "the execution of any Act": and its departure from the literal meaning of the words is hardly if at all less than that which is made by imposing a qualification on the provisions for finality.

Then it is suggested that rate appeals are the creation of the Local Government Acts, which require finality; whereas the duty of stating cases is found in the Justices Acts, which are mainly directed to other matters; and that in case of conflict the directions which relate to the more specific matter should prevail. But there is too much blending of rate appeals with other appeals for the successful use of this argument. It is not the case that a series of Local Government Acts lays down one set of rules for rate appeals, and a series of Justices Acts another set for other appeals. Rate appeals are dealt

with expressly by the Justices Acts, sometimes being separately mentioned and sometimes included under the general term of "appeals." In the Justices Act of 1876 (No. 565) Sections 23 to 33 lay down rules relating to appeals, which must include rate appeals because here and there the latter are excepted and made subject to a separate provision. Then Section 34 speaking of appeals generally gives to the parties, by mutual consent and by order of the Supreme Court, power to state a case for the Supreme Court without requiring any decision by the Court of Sessions. Section 36 is the same with Section 139 of No. 1105 in all respects except that it confers a power instead of laying a duty on the Court of Sessions to state a case. It would be a very forced construction of No. 565 to hold that Section 36 differs as to its subject-matter from the group of which it forms part, and when it speaks of "any case of appeal" does not include rate appeals. Why then should not the same words be held to include them when transferred to Section 139 of No. 1105? Moreover Section 36 itself is taken from Section 11 of 12 & 13 Vict., cap. 45, which provides for stating a case in appeal against any "judgment order rate or other "matter." The Victorian legislation does not enumerate these particulars, but it uses general terms of a nature and in a context adapted to embrace them all.

As for the other parts of Section 139, the model of it is to be found in the English Highway Act of 1835. That Act gives an appeal in rate cases to Quarter Sessions and makes the decision on appeal binding and conclusive on all parties to all intents and purposes whatsoever, Section 105. Afterwards come Sections 107, 108, which take away the general right of certiorari, but give power to the Quarter Sessions to state a case "in any case of appeal," and on that a writ of

certiorari may issue. It is true that the subject-matter of the English statute puts it beyond doubt that rate appeals are included. Still the mode of drafting adopted is to provide in the most emphatic and unqualified terms for finality; and afterwards to introduce a provision the effect of which is to qualify the finality. And unless the Victorian Legislature intended to bring about the same result, it is strange that in these two simultaneous statutes they should have used forms of words corresponding with the English model.

All these lines of inquiry lead up to the conclusion that in Section 139 "any cases of "appeal" includes rating appeals; and so the Appellants fail to show that the statutes speak in their favour without contradiction. Their Lordships feel, as every Judge who has addressed himself to the subject has felt, the difficulty of the question. It is one of those difficulties in the face of which this Board would hesitate to disturb the decision of the Supreme Court on a point intimately connected with its own practice, even if their Lordships' minds had been more hardly pressed by the arguments for the appeal than they have been. On the best opinion they can form the learned Judges below have reached the most reasonable conclusion of which these unskilfully drawn Acts admit, viz., that the expressions of finality in No. 1243 must be taken as limited and qualified by the provisions of No. 1105, and that the Supreme Court had jurisdiction to grant the mandamus of May 1898.

On the hearing of the special case, the legal position of the parties appeared to be as follows. The Appellant Company was incorporated in 1864 and obtained powers to construct tramways in various municipalities. In 1883 an Act was passed part of which is an instrument

contained in its Fourth Schedule and called the scheduled agreement. By it the municipalities affected received power to establish a new corporation composed of members selected from themselves. This was called the Tramways Trust. It was vested with the powers of the Company and was placed under obligation to construct the contemplated tramways within five years, and to grant to the Company a lease of them for 30 years from the time when interest should begin to run upon the loan which the Trust was to raise.

The 14th paragraph of the scheduled agreement lays down the principal provisions of the lease. The Company is to pay to the Trust interest on the capital borrowed by the Trust; (*Sub-section* 1). It is also to pay to the Trust annual instalments to form a sinking fund in reduction of the loan; viz., during the first ten years of the lease 1½ per cent. on the borrowed capital, during the next ten years 2 per cent., and during the last ten 3 per cent. (*Sub-section* 2). It is to maintain the roadway on which the rails are laid to the satisfaction of the Trust (*Sub-section* 3).

Sub-sections 4 and 5 are as follows :—

"(4.) In consideration of the payments aforesaid, the Trust "shall give to the Company possession of the several tramway "lines according as such shall be completed and shall be avail- "able for the running of carriages thereon, and the Company "shall during the currency of the lease have the sole right of "use of the tramway, with carriages having flange wheels, or "other wheels suitable only to run on the rails of the tramway, "and also of demanding and taking the tolls and charges "authorised by the Act. Provided always that the Company "shall not be entitled to exact fares or tolls exceeding those "specified in the Act. And the Company shall be liable to no "other payment to the Trust or to the several corporations "represented thereon for proportion of profits or otherwise "howsoever, except for municipal rates."

"(5.) Each corporation within the limits of whose munici- "pality any portion of the tramway shall be, shall during the "currency of the lease be entitled to rate the Company in "respect of its use of the tramway, and to receive and recover "from the Company all rates due in respect thereof."

Section 45 of Act provides that—

"Notwithstanding anything in this Act contained, the Com-
"pany shall not acquire, or be deemed to acquire, any right
"other than that of user of any road along or across which it
"shall lay any tramway."

Some variations were afterwards made as to the number and duration of the leases, but they do not affect the question of rating. On the 30th June 1888, before which time the tramways now in question were completed by the Trust, a consolidated lease was granted by the Trust to the Company, running for 32 years from the 1st July 1884. In it the Company covenants to pay interest on the loans raised by the Trust, then amounting to 1,200,000*l*., and the statutory payments to the sinking fund. Those payments are to continue to 1st July 1916 unless that fund shall previously be sufficient to meet the whole debt and expenses of the Trust. If the payments are insufficient for that purpose the Company is to make up the deficiency. All those annual payments are to be chargeable as rent, with the usual remedies for the recovery of rent. The Company further covenants to pay salaries to the officers of the Trust to the extent of 1,000*l*. per annum, and to pay to the municipalities all such rates taxes and assessments as shall be lawfully levied or payable to them respectively in respect of the tramways passing through their municipal districts.

The statutes of Victoria have followed the English statutes in defining the principles on which property is to be rated. By Act No. 1112, Section 246, it is enacted—

"All land shall be rateable property within the meaning of
"this Act and of the Acts relating to the incorporation of the
"City of Melbourne and Town of Geelong, save as is next
"hereinafter excepted (that is to say) land the property
"of Her Majesty which is unoccupied or used for public
"purposes . . . land vested in or in the occupation of or
"held in trust for the Municipality or the Council thereof."

And by the same Act, amended by No. 1243, the property rateable is to be computed—

" at its net annual value, that is to say, at the rent at which " the same might reasonably be expected to let from year to " year free from all usual tenants' rates and taxes, and deducting " therefrom the probable annual average cost of insurance and " other expenses (if any) necessary to maintain such property " in a state to command such rent."

No mention is made of any deduction for interest or money borrowed for or employed in the construction or creation of the property which is the subject of valuation.

It is not necessary to state the figures which have been worked out by the Courts below. There is no dispute as to the amount of the gross profit made by the Company. The Company does not now claim any of the deductions which Judge Casey, and after him the Supreme Court, have disallowed. The City no longer disputes the claims to deductions which have been allowed by the Supreme Court. The Company has been allowed all the deductions allowed by the Rating Acts. The controversy is narrowed down to the questions whether Judge Casey was right in deducting from the gross profits of the Company its payments for interest on loans and for sinking fund, items amounting to 110,000*l.*, and whether the valuation of certain engine houses has been rightly adjusted. On the 21st September 1899 the Supreme Court issued its final order deciding these matters in favour of the City, with the effect that for the Municipal year 1896–97 the value of the Company's rateable property in the City is fixed at 10,423*l.*, and the rate at 1,043. The Company contends in this appeal that the Supreme Court has erred on the three points in controversy.

The first two questions resolve themselves into the prior question whether the rate levied is the ordinary occupation rate or one of a peculiar kind. It is contended that ordinary rates do not fall on the Company because it falls within the exceptions of Section 246 of No. 1112. But though

the ownership of land used for public roads is vested in the Crown, the land now in question is not unoccupied, nor used for public purposes except in the sense that the public may use it for payment. It is occupied by the Company and used for the profit of its members. Nor is there any trust for the Municipality.

The object of the argument just dealt with is not to deny the liability to rates, which is affirmed by the express terms of the scheduled agreement and of the lease, but to help the further contention that the ordinary mode of finding the value of the property rated is not to be followed, but some other mode more favourable to the Company. Accordingly arguments of some subtlety have been addressed to their Lordships on the wording of Sub-sections 4 and 5 of the scheduled agreement. The drift of these arguments is, that rating the Company in respect of its use of the tramway is not the same thing as a simple occupation rate: that the use of the tramway must have regard to the profit derived from it: that profit cannot be made till expenses have been met: that payments required by the scheduled agreement and lease are the necessary conditions of making any profit at all: that even admitting that the rent obtainable from a hypothetical tenant is the true test of value, nobody would offer any rent until he had allowed for the payments in question.

On careful consideration of these arguments their Lordships cannot admit their validity. Nothing is clearer than that the Company is laid under the obligation of paying Municipal rates. Nothing is more unlikely than that the Legislature should have intended to impose a new and peculiar kind of rate without any indication of the principles to govern it or of the methods to be followed in assessing it. It is true that the Company has not acquired any

right other than that of user of the roads on which it lays its tramway, and that the rate is leviable on nothing but the use of the tramway. But their Lordships do not find in these provisions any indication of a departure from the principles of municipal rating established alike in England and in Victoria. The use of the tramway is the occupation of the tramway. The position of the *Pimlico, &c. Tramway Company* (L.R. 9 Q.B. p. 9.) resembles that of the present Appellant. The enactments defining the position of the two companies are almost identical. The Pimlico Company was held to be an occupier, rateable as such, and not the less so because its occupation was restricted to a particular purpose, nor because the public also had rights over the same ground. Their Lordships agree with the Supreme Court that this Company is subject to ordinary municipal rates.

It is quite true that there are difficulties in applying the test of the hypothetical tenant to property which is not subject to the competition of the market. But that is the test which the Acts of Parliament do apply; nor is it easy to see what better principle there is to apply, though in the case of unmarketable property a larger amount of conjecture is necessary than in ordinary cases. It is true also that in valuing a property of this kind there comes in another element of uncertainty which does not usually exist in the case of houses and land, viz., that of profit. Nobody would take the occupation and use of a tramway except for the single purpose of making profit. This difficulty however has been met by the somewhat inexact and rough, but essentially just, method of making an allowance for the supposed profits of the supposed tenant. Both Courts have allowed the Company on this account to deduct from their gross profits

the amount of ten per cent. on their capital outlay.

But whatever the difficulties may be they hardly affect the present question. The City claims contribution to its expenses from every occupier of land within its area according to the value of his occupation. That value is what the thing is worth to use, whether it be ascertained by the hypothesis of a tenant's rent or otherwise. Its worth to use cannot be affected by the bargains which the actual occupant has made in order to acquire the occupation. They may be profitable to him or the reverse, but they do not enter into the question between him and the rating authority. In the ordinary case of houses the municipality does not, except as a possible help to get at the value, enquire what purchase money or rent the occupier has paid or is bound to pay; either of which may be much above or much below the actual value, which is the object of enquiry.

In this case the Company has in effect undertaken to make good to the Trust all its expenditure in constructing the tramways, receiving for that consideration the beneficial use of the tramways for 32 years. If it had paid down the 1,200,000*l.* owing by the Trust at the date of the lease, it could not have claimed that sum or interest upon it as so much deduction from the value of the occupation. The mode of payment actually adopted, by paying interest on the debt and providing a sinking fund, is mere machinery. It makes the case a peculiar one in form, but not differing in substance from ordinary acquisitions of rateable property. The substance of the transaction is that the Company shall have the tramways for 32 years on the terms of making good to the Trust its whole expenditure on the tramways; and whether that be a good or a bad

bargain for the Company, it cannot affect the value of the occupation which it has bought, and in which the City finds it. Whether the Company's payments on this account are called rent or instalments of purchase money, they are equally the discharge of the consideration for which the Company obtained its occupation, and equally inadmissible as deductions from rateable value.

Within the city of Fitzroy the Company possesses three engine-houses, and a controversy has arisen how they should be rated. The Company contend for what is called the mileage principle, which means that the houses shall be taken as one item in the whole concern, and that the aggregate rate shall be shared among the different municipalities according to the length of tramway in each. The City contend for what is called the parochial principle, by which separate buildings belonging to a single concern whose operations extend over a number of rating areas are rated separately to the area in which they stand.

It is obvious that the mileage principle may work unfairly as between the several areas. In this case it works to the disadvantage of Fitzroy, because the mileage within that city is about one-twelfth of the whole, whereas the value of the engine-houses within it is more than one-sixth of the value of all the engine-houses of the Company. Madden C. J. lays it down that the parochial principle should be applied wherever reasonably practicable. Judge Casey applied the mileage principle, for reasons not stated in the special case. The Supreme Court found in the case materials for applying the parochial principle and saw no practical difficulty in doing it.

What they have done is to deduct from the rating value of the whole concern the separate rating value of the engine-houses, which they

have taken at the minimum fixed by statute for rating value, being 5 per cent. on the fee simple value. The remainder of the rating value of the concern they distribute among the rating areas on the mileage principle; and they allot to a separate area the rate leviable on the engine-houses within it. This appears to their Lordships to be the right method of dealing with the case.

There is yet another question which arises on the proceedings for obtaining leave to appeal. On the 4th October 1899 the Supreme Court made an order which was corrected on 21st December 1899. It then took the form of a declaration that if within three months from the 4th October security should be given by the Company in a bond or mortgage or personal recognizance of the value of 400*l.* for the prosecution of an appeal and payment of all such costs as may be awarded to the Respondents, the appeal shall be allowed.

On the 4th January 1900 the Court passed an order which after referring to certain bonds of the Company and others, allowed the appeal. On the first of February 1900 the Prothonotary certified the transcript, and further certified that the Appellants had given security to the value of 400*l.* for the prosecution of the appeal and payment of costs. On the 9th February the City of Fitzroy appealed from the order of the 4th January, and on the same day the Court passed an order by which, after declaring that the conditions prescribed by the Order in Council of the 9th June 1860 had not been performed by the Company, they discharged the order of the 4th January 1900, and refused with costs the Company's motion on which that order was made. This proceeding prevented the Company from prosecuting their appeal except by special leave of the Queen in Council. That was obtained without difficulty, and at the same time

the Company asked and obtained leave to appeal from the order of the 9th February.

The conditions required by the Order in Council are as follows :—

" And in all cases security shall also be given by the party " or parties Appellant in a bond or mortgage or personal " recognizance not exceeding thevalue of 500*l.* sterling, for the " prosecution of the appeal and the payment of all such costs " as may be awarded by Her Majesty, her heirs and " successors, or by the Judicial Committee of Her Majesty's " Privy Council to the party or parties respondent, and if " such last-mentioned security shall be entered into within " three months from the date of such motion or petition for " leave to appeal, then and not otherwise the said Court shall " allow the appeal, and the party or parties appellant shall be " at liberty to prosecute his her or their appeal."

What the Appellant Company did was to execute bonds in favour of the Respondent City and to deposit them with the Prothonotary. It also, though it was superfluous, deposited 400*l.* in Court. The reasons for the order of the 9th February are not stated in the Record, but Counsel agree that the objection to the Company's proceedings was that the bonds were delivered to the Prothonotary and not to the City. The validity of this objection has not been maintained by any argument at the Bar. It seems to their Lordships to proceed on an erroneous construction of the Order in Council. That order requires security for payment of costs to the Respondent, but does not require delivery to him of the bonds constituting his security. The Court's order as settled on the 21st December 1899 correctly follows the Order in Council. If there is an effectual delivery of the instruments constituting the security, that is a compliance with both the orders. It is stated at the Bar to be the common practice to deliver bonds to the Prothonotary. The practice is probably very convenient, and certainly there is nothing at variance with it to be found in the Order in Council.

Their Lordships are of opinion that the order of the 9th February 1906 should be discharged, and that instead thereof the appeal of the City from the order of the 4th January should be dismissed with costs. They will humbly advise Her Majesty to make order to this effect, and with that exception to dismiss the present Appeal. The Appellant having failed in every point on the merits of the controversy, must pay the general costs of the Appeal. But as in consequence of the order of 9th February 1900 the Appellant Company was forced to make application to this Board, the Respondents must pay the costs of that application, which will form a set-off against the general costs of appeal.