

charge and loading in the United Kingdom, during her stay there, and thence back to Barbados or all or any of the West Indian colonies until the ship shall have arrived at her final port." The vessel arrived at Barbados on the 2nd August 1821; the whole of her cargo was, as the jury found, discharged at Barbados. She then made preparation to sail from Barbados on the 11th August on another voyage but was wrecked in a hurricane on the night of the 10th. Little-dale, J., in giving judgment said—"The only question for us is the construction of the policy. Now the first expression used in it relatively to the duration of the adventure is 'port or ports of discharge and loading in the United Kingdom.' The words 'final port' do not occur until a later part of the instrument, and they must be interpreted by the aid of the earlier words. I am therefore of opinion that the risk was meant to end as soon as the substantial purpose of the voyage, that is, the delivery of the cargo, was completed. I cannot agree that it was to continue while the empty ship was on a seeking voyage for a fresh cargo."

Parke, J., said—"It is contended that the adventure continued not only till the cargo was discharged but during all the time for which the vessel should be seeking a fresh cargo. But it seems to me impossible to put so wide a construction on the policy. "Final port" must mean the port which is final with reference to the goods to be taken on board in the United Kingdom."

Just as it was considered impossible in that case to construe the policy of insurance so as to cover the risk while the empty vessel was on a "seeking voyage" for new cargo, so here it is impossible, I think, to construe this policy as covering a voyage in ballast to Barry and the possible coasting trading of the ship insured from port to port in the United Kingdom. I adopt the only alternative left, as I conceive it, and construe the policy as intended to cover and actually covering the risk attending a voyage terminating at St Nazaire.

I think that the decision of the Court of Appeal was erroneous and should be reversed, that the judgment of Bailhache, J., was right and should be restored, and that the appeal be allowed with costs.

LORD BUCKMASTER—I concur. I agree in the conclusion that according to the true effect of this policy of insurance what was contemplated was a voyage that was to end with the vessel discharging her cargo, and this conclusion can in my opinion be reached without calling in aid the printed portions of the form which relate to a loaded vessel. It is therefore unnecessary to consider the extent to which the common structure of the policy affects the interpretation of the added words, and upon this question I express no opinion.

Appeal allowed.

Counsel for the Appellant—Leck, K.C.—A. R. Kennedy, K.C. Agents—Parker, Garrett, & Company, Solicitors.

Counsel for the Respondents—Mac-

Kinnon, K.C.—R. A. Wright, K.C. Agents—Ballantyne, Clifford, & Company, Solicitors.

HOUSE OF LORDS.

Friday, January 30, 1920.

(Before the Lord Chancellor (Birkenhead), Lords Haldane, Dunedin, and Buckmaster.)

PORT OF LONDON AUTHORITY v. ORSETT UNION.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Rates—Assessment—Docks—Net Annual Value—Deduction for "Tenants' Profits."

The appellants, the Port of London Authority, appealed against an assessment by the respondents upon Tilbury Docks for poor rates, claiming that in arriving at the assessable value the Assessment Committee should have made a deduction from the annual value in respect of "tenants' profits." The respondents maintained that the decision in *Mersey Docks and Harbour Board v. Liverpool Overseers* (1873, L.R., 9 Q.B. 84) precluded such deduction.

Held that the deduction claimed was not precluded by law, and that if and so far as *Mersey Docks and Harbour Board v. Liverpool Overseers* precluded Quarter Sessions from entering upon an inquiry as to the amount of profits a hypothetical tenant would expect to make, it was wrongly decided.

Remit to the King's Bench Division.

Appeal by the Port of London Authority from judgment of the Court of Appeal (BANKES, WARRINGTON, and DUKE, L.J.J.) reported [1919] 2 K.B. 1, affirming an order of the Divisional Court upon a case stated by the Essex Quarter Sessions on an appeal against a poor rate assessment made upon the appellants.

At delivering judgment—

LORD CHANCELLOR (BIRKENHEAD)—This is an appeal from an order of the Court of Appeal, dated the 24th February 1919, affirming an order of a Divisional Court of the King's Bench Division, dated the 13th November 1918.

The question now before this House arose in the course of a rating appeal to the Essex Quarter Sessions brought by the present appellants in respect of that part of their undertaking which is known as Tilbury Docks. The appellants are a public body incorporated by the Port of London Act 1908, and the docks are vested in them on the conditions laid down by that Act, which is a Public General Act.

On the 5th December 1917 the Essex Quarter Sessions made an order embodying their decision, and their findings are set out in par. 20 of the case which they subsequently stated for the opinion of the High Court:—"The Quarter Sessions in giving judgment on the said appeal fixed the gross

estimated rental of the Port Authority's undertaking in the parish of Chadwell St Mary at £106,863, and the rateable value thereof as £52,063, and stated that in arriving at this decision the Court had acted upon the decision in *Mersey Docks v. Liverpool Overseers* (1873, L.R., 9 Q.B. 84), and it had in consequence made no allowance for tenants' profits beyond allowing interest on the capital employed. . . . The case raised two questions, only one of which is material, namely—“(1) Whether the Quarter Sessions were right in holding that they were precluded by law from making any allowance for tenants' profits”; and proceeded—“If the Court answers . . . in the affirmative the decision of the Quarter Sessions is to stand, otherwise the case is to be remitted to them to determine the gross and the rateable values respectively in the light of and in accordance with the decision of the Court.”

The Divisional Court, conceiving itself equally bound by the decision of the Court of Queen's Bench referred to, affirmed the decision of Quarter Sessions. The Court of Appeal came to the conclusion that the question should be answered in the negative, but did not remit the case to Quarter Sessions. The view of the Court of Appeal was that in substance the respondents had succeeded and they therefore dismissed the appeal, and this appeal therefore comes before your Lordships in the unfortunate position that neither of the parties supports the form of the order made by the Court of Appeal.

The difficulty in this, as in so many other cases, arises from the terms of the Parochial Assessment Act 1836 (6 and 7 Will. 4, cap. 96), sec. 1—“No rate for the relief of the poor in England and Wales shall . . . be of any force which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto—that is to say, of the rent at which the same reasonably might be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. . . .”

Where a hereditament is let on such terms the only task of the rating authority is to find out the actual rent, and in any case where the property is let, or is of the same character as other hereditaments which are let, the adjusting of the figures to arrive at the “net annual value” is a question of fact. There is, however, no such guide available with regard to hereditament such as docks, and therefore it is necessary to have recourse to some factor other than the valuation of the market to determine what is the net annual value of the hereditaments to be rated. Several methods are available for such cases, and it does not follow that the rating authority would necessarily be wrong if it adopted one method when dealing with one hereditament and another method when dealing with a different hereditament.

Subject to the exception which I mention later, the Quarter Sessions here adopted a very usual method, namely, to make a calculation based on the profit-earning capacity of the docks. By this method the amount of the gross receipts is ascertained, and from such amount are deducted the expense of earning such receipts, the deductions provided for by statute, interest on tenant's capital, and the estimated amount of tenant's profit. The figure so ascertained would give the rating authority a valuable indication as to the rent which the hypothetical tenant would be likely to give for the right to occupy the hereditament in question, and therefore would enable them to form an opinion as to the correct amount of the “net annual value” for the purpose of rating. If such a method were adopted, then subject to the point at issue in this case it could not be contended that Quarter Sessions were wrong in law, and indeed neither side has so contended. The dispute arises on the exception, viz., that in applying the method to this particular case Quarter Sessions excluded from their calculation any sum for tenant's profit, and they did so because they conceived that they were bound in law by the authority of *Mersey Docks v. Liverpool*.

If therefore Quarter Sessions were wrong, they were wrong on a point of law and not on a question of fact, and their finding is open to review and correction.

Now if these docks had remained in the hands of the former owners not only would this exception not have been made in applying the method, but it would not have been contended that it ought to have been made. We are therefore asked to lay down as a rule of law that where hereditaments such as docks are owned and occupied by a public authority which is bound by law not to make profits in the same way as a commercial concern does, or even as a local authority by municipal trading may do, then the rating authority must assume that the hypothetical tenant does not intend or desire to make any profit. It would necessarily follow therefore that the transfer of these docks to the appellants of itself increased their annual value, and consequently their rateable value, without any other change being made. At one time it was thought that in such a case the exact opposite result followed, viz., that the docks would cease to be rateable at all, but since the decision of this House in the case of *Jones v. Mersey Docks and Harbour Board Trustees* (1864, 11 H.L.C. 443) all such hereditaments have been held to be rateable. As Blackburn, J., said in the course of the opinion given by him on behalf of the majority of the Judges consulted—“The company by virtue of its occupation receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital, and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached the rates must be lowered. It is indisput-

able that a company thus occupying a dock is an occupier and rateable as such." Now if without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbourmasters and others who manage it, we change the name of the body which occupied it from that of "the company" to that of "the board," and if instead of the "company" paying to the shareholders a maximum dividend on their capital, the "board" must pay to the same individuals the same identical sums, but call them "interest on bonds" instead of "maximum dividend on share capital," what difference does this make?

For these and other reasons set out in his opinion Blackburn, J., reached the view accepted by the House of Lords that the Mersey Docks were rateable. Subsequently the question of tenant's profits was considered by the Court of Queen's Bench in the *Mersey Docks* case already cited. Blackburn, J., was a member of the Court, and delivered the judgment upon which Quarter Sessions acted in the present case. The provisions of the Acts which regulate the undertaking of the Mersey Docks and Harbour Board are materially different from the corresponding provisions of the Port of London Act, and it might be possible on a detailed examination of those provisions to discover reasons which would justify a distinction being drawn between the Mersey Docks and the appellants' undertaking, and even a difference in the rateability of those undertakings. I prefer, however, to base my judgment upon other and broader considerations, and therefore do not pause to deal with these differences at length. The decision of the Court of Queen's Bench was that on the true construction of the statutes applicable no hypothetical tenant could lawfully derive any pecuniary benefit from his occupation, and therefore that no allowance should be made for tenant's profit. Blackburn, J., said (at p. 97)—"If the premises were let to a tenant, it must be a tenant subject to this Act, *i.e.*, to the Mersey Docks Act 1858, bound to hand over the rates received after deducting the expenses and charges of collecting the rates . . . and the persons paying the dock rates would have a right to object to any part of them being applied to pay tenant's profits. . . . In such a case as the present, where an actual demise on any terms be impracticable, and where a demise on the terms that the tenant should receive a profit beyond the expenses of collection would if practicable be illegal, we think no deduction should be made on account of tenant's profits." This decision has been mentioned in a number of cases in this House, but that part which is now under discussion has never been expressly affirmed or overruled.

Before considering this judgment of Blackburn, J., I think it desirable to restate certain propositions of law which must at the present day be regarded as established.

Firstly, the question of rateability does not depend on whether the occupier does or can make a profit by the use to which

he puts the hereditament; it depends on whether the occupation is of value. Secondly, in considering what rent a tenant would pay, the rating authority must consider the owner who is in actual occupation, or indeed the only possible occupier, as a possible tenant. Thirdly, in cases such as the present where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, such as docks, the profits earned, and the share of profits attributable to any particular hereditament, have to be taken into account. Fourthly, in such cases, any restriction imposed by law on the profit-earning capacity of the undertaking must be considered, for the profits to be taken into account must be such as the tenant can earn under the only conditions in which he is allowed to earn profits at all.

In other words, if the law has prevented the hereditaments being profitable at all, then the occupation is of no value, and if the law has restricted its profit-earning capacity, then the effect of such restriction will tend to diminish the value. This proposition does not mean, and ought not to be understood to mean, that where profits can lawfully be earned, but such profits must be applied in a particular way or for a particular purpose, the occupation of the hereditament is valueless and therefore not rateable, or, on the other hand, that the tenant derives no profit from the occupation, and therefore the whole profit increases the net annual value of the land. With the greatest respect to Lord Blackburn, I think that in the second case he had not in his mind the full bearing of the principle which he enunciated in the earlier case. It will be seen that by section 284 of the Mersey Docks Acts Consolidation Act 1858 (21 and 22 Vict. cap. xcii) surplus profits were to be applied in extinguishing loans and other charges, and on their extinction the profits were to be applied in reducing the dock rates, and by sec. 4 of the 1859 Act (22 Vict. cap. xx) the board was empowered to create a sinking fund. It is easy to conceive that the Inland Revenue would rightly claim for purposes of income tax that the hypothetical tenant made profits, and that provisions such as those I have cited do not limit the profit-earning capacity so much as prescribe rules for the application of profits when earned. The same observation applies with even greater force to many of the rules prescribed by sec. 21 of the Port of London Act 1908 as binding upon the appellants. I am therefore constrained, reluctant as I am to question the very great authority of any opinion of Lord Blackburn, to hold that, in the judgment which I am now considering, he omitted to observe the distinction between restrictions upon profit-earning capacity and rules providing for the application of profit when earned, and that so far as he did so omit, his judgment cannot be upheld. In so holding I do not mean that his judgment was wholly wrong; there are provisions in the Mersey Acts and also in the Port of London Act which have, or may have, the effect of limiting the profit-earning capacity of the docks respectively

in question. So far as there are such provisions, they come within the fourth of the propositions to which I have referred, and must be taken into account by the rating authority in fixing the rateable value of such hereditaments. In my opinion the *Mersey Docks* case did not preclude the Quarter Sessions from entering upon an inquiry as to the amount of tenants' profits that a hypothetical tenant would expect to make, or if it did it was wrongly decided, and the question put by the Quarter Sessions must therefore be answered in the negative. In the result the case must be remitted to them for further consideration. This appeal must therefore, in my view, be allowed, the respondents paying to the appellants their costs here and below, and I move your Lordships accordingly.

LORD HALDANE—Under its Act of 1908 the Port of London Authority was incorporated for the administration and improvement of that port. The scheme of the Act was that the new Authority should carry on the undertakings to be transferred to it from the then existing dock companies, as well as acquire other undertakings of an ancillary character, and should possess powers of new construction and of management, as well as certain other powers. The undertakings of the existing dock companies (including that of the London and India Docks Company) were ultimately transferred, under the powers conferred by the Act, to the new Authority in consideration of the issue to these companies of stock of the new Authority. In every case the new Authority had the same power to carry on the undertakings transferred to it, and, in the main, to charge limited rates and dues, which the company, the undertaking of which was so transferred, possessed in respect of vessels entering or leaving its dock.

The receipts of the Authority were, under section 21, to be applied in payment, firstly, of the expenses of working and maintenance; secondly and thirdly, of interest on the various classes of stock thus issued; fourthly, of interest on loans raised otherwise than by the issue of port stock; fifthly, of moneys required for a sinking fund or for redemption of capital liability; sixthly, for payment into a reserve fund prescribed by the Act; and, finally, for such purposes and in such manner for the benefit of the port as the Authority should determine.

The old dock companies carried on business in order to make profits, and the scheme of the Act of 1908 appears to have been to give their stockholders a surrogatum in the shape of a new stock, which was to take the place of the existing stock, and to return fixed rates of interest in substitution for the shares of profits taken as dividends on their stock by the old stockholders. It is therefore to my mind plain that the new Port Authority was in this sense made by the Act a concern which had to carry on a profit-earning business, at all events so far as was required in order to earn profits out of which to pay this so-called interest. The

new Authority was limited, like the old dock companies, as to the amounts it could charge for dues, but it was permitted to retain any surplus left after defraying these and the other charges imposed on its revenues under section 25, and to apply that surplus as it thought proper for the purposes and for the benefit of the port. Under Part V (5) of the schedule to the Act the appropriate portion of the revenue paid over to a dock company by the Authority was to be applied, after discharge of any liabilities of the company which continue under the provisions of the Act, by being distributed among the various stockholders of the company as if it were profits available for distribution as dividend.

The question which has now arisen relates to the principle on which certain hereditaments at Tilbury, which formed a part of the transferred undertakings of the London and India Docks Company, should be rated by the respondents, who are rating authorities. The controversy is as to whether the appellants, the Port Authority, are entitled to claim an allowance for tenants' profits from the respondents in arriving at the rateable value of these hereditaments. The statute which governs the power to rate, the Parochial Assessment Act of 1863, prescribes that the basis is to be an estimate of the net annual value of the hereditaments, defined as the rent at which the same might reasonably be expected to be let from year to year, free of all usual tenants' rates and taxes and tithe commutation rent-charge, after deducting the probable average annual cost of repairs, insurance, and other expenses necessary to maintain them in a state to command such rent.

I will now for convenience state what I think are the fundamental principles ascertained as regulative of the rights of rating authorities after a good deal of judicial controversy.

It is settled that in estimating the amount of rent for which the premises may for rating purposes be expected to let, there is to be excluded from that amount the share of the profit from their occupation which the tenant would require for himself as an inducement to become tenant. It is also settled that the premises are not the less rateable merely because the owner is in occupation and is capable in law and fact neither of himself letting nor of becoming a tenant. He is none the less on that account to be taken as an "hypothetical tenant" for the purpose of arriving at the annual value. For the premises may have a value for him due to their special suitability for his purpose, and it may be estimated that he would be willing to give more rent for them for this reason than anyone else would give. Again, it has been laid down that the true test is not whether pecuniary profit can be made out of the occupation, but what is its value to the person concerned, measured, I think, simply by what he would be willing to give in order to obtain it.

It has further been made clear that in 1864 the decision of this House in the case

of *Jones v. Mersey Docks* (11 H.L.C. 443) that while property held by the Crown, or by persons occupying it exclusively for the service of the Crown, is not rateable under any statute in which the Crown is not expressly named, the mere fact that the property is in the hands of trustees who occupy it for the maintenance of works declared to be beneficial to the public, and have to apply the profits exclusively for the maintenance of their undertaking, and not for their own benefit, does not exempt it from rateability. If, however, the Legislature has prohibited them from making any profit at all, or any profits exceeding a specified amount, then their premises cannot be rated on any hypothesis as to possible profits inconsistent with this prohibition. The occupation is in such a case said to be "sterilised" in relation to any conceivable amount beyond the limit of the prohibition. This was explained in the decision of this House in *Seulcoates Union v. Hull Dock Company* ([1895] A.C. 136) which made it clear that this qualification may have to be made when considering the application to hypothetical tenancy of the general principles to which I have referred in the first place, and which were laid down in the judgment of Lord Herschell, L.C., in the *London County Council v. Erith Churchwardens* ([1893] A.C. 562).

In the case now under consideration the appellants, the Port of London Authority, were rated by the respondents for poor rate on the basis that £119,240 was their gross estimated rental for the hereditaments in question and that £64,440 was the rateable value. The appellants appealed to the Quarter Sessions for the County of Essex, and that body reduced the gross rental value to £106,863 and the rateable value to £52,063. But they stated a Special Case with questions, of which the only one we have to consider is the first—Whether they were right in holding that they were precluded by law from making any allowance for tenants' profits in arriving at the rateable value of the hereditaments. They made no such allowance beyond one of interest on tenants' capital, considering that they were precluded from doing so by the decision of the Court of Queen's Bench in *Mersey Docks and Harbour Board v. Liverpool Overseers* (1873, L.R., 9 Q.B. 84). The King's Bench Division held on this Special Case that they were bound by that decision, and gave formal judgment upholding the view of Quarter Sessions. The Court of Appeal were of opinion that the first question raised by the Special Case could not be answered in the affirmative, on the ground that the refusal of an allowance for the tenants' profits depends upon questions of fact to be determined by the rating authority, but they thought that Quarter Sessions were right in their view that no general allowance for tenants' profit could legally be made in the case under consideration. In effect the Court of Appeal dismissed the appeal. What we have now to decide is whether the view so taken was correct, or whether the case should be remitted to the King's Bench Division to have the first

question answered in accordance with a different view to that of the Court of Appeal.

In the courts below the opinion appears to have prevailed that the case of the appellants was covered by the decision in *Mersey Docks v. Liverpool Overseers*. If it were clear that it was so covered I should feel reluctantly bound to review what was laid down by a decision of such authority. But I am by no means sure that the provisions of the statute of 1867, which defined the position of the Mersey Docks and Harbour Board, and was construed by the Court of Queen's Bench in that case, in the view taken of them in that case, presents a true analogy to those provisions of the Port of London Act of 1908 with which we are concerned here. In the instance of the Mersey Docks an early statute passed in the reign of George III had vested the docks and works on the Liverpool side of the river in the Corporation of Liverpool as trustees of the Liverpool Docks on trust out of the amount of the rates they were empowered to levy when all charges and mortgages on the rates had been paid off, and provision had been made for cost of management and collection of rates and improvements, repairs, and maintenance of the docks and works vested in the trustees, to lower and reduce the rates and duties which the statute had empowered the trustees to levy. Other docks having been formed on the Cheshire side of Birkenhead, these also were vested by an Act of 18 and 19 Vict. in the Corporation of Liverpool. By a subsequent Act of 1867 the whole of the debts and property vested in these trustees of the Liverpool Docks was transferred to the Mersey Docks and Harbour Board, to form one estate under a uniform system of management. By section 56 of this Act it was provided that no moneys receivable by the board should be applied to any purpose except such as conduced to facilitating shipping. There were no shareholders of the corporation, and no members of the board or other person could derive any personal advantage from the trust. Provision for payment of interest on money borrowed for construction, and provision for the application of any surplus income, were made by the Mersey Docks Consolidation Act of 1858, which prescribed that after paying the interest on money borrowed, and after providing for the construction of authorised works and their maintenance, and for management, preservation, and improvement of the Mersey Docks Estate, the surplus of the moneys received by the board should be applied in repayment of the principal of the sums borrowed or owing and the expiration of certain annuities, and when this had been accomplished then in reduction of the rates authorised to be taken, and not for any other purpose. The board claimed an allowance in estimating the rateable value of their property for tenants' profits. The Court of Queen's Bench decided that they were not entitled to this. Blackburn, J., in delivering the judgment of the Court on the question, pointed out that the revenue that was permitted to be raised was completely

appropriated to payment of expenses and charges and other specified purposes of the same kind. If the premises were let it could only be to a tenant bound under the statute to apply what he received, after defraying expenses of collection, to these purposes, and nothing could be made available for tenants' profits, for these were in effect declared to be illegal.

I think that the substance of this judgment was that in the view of the Court the Mersey Docks, if treated as in the hands of an hypothetical tenant, must be treated as in that case sterilised in his hands as far as possible profit to himself was concerned. The scheme of the Acts to which I have referred bears this out. For even if the docks were improved out of revenue, any pecuniary fruit due to the improvement had to go in reduction of rates and dues. There were no share or stockholders who were to receive part of the revenue earned as an equivalent of their profits from a transferred undertaking, and there was no way in which the docks could be made to have a greater pecuniary annual value for the trustees as distinguished from the ship-owning public.

This appears to me to have been the character of the scheme of legislation there, and in the absence of a detailed examination and argument on the details of its provisions, I do not find myself in a position to pronounce that the Court of Queen's Bench took a wrong view of them.

The scheme established by the Port of London Act is materially different from what that scheme was taken to be. In so far as the appellants can increase their revenue (and this is permitted to them within limits prescribed for dues and rates), the surplus so obtained is to go for the benefit of the Port in such form as they choose. They may increase the annual value of the property by investing the surplus in this fashion. It therefore appears to me that their position is quite different from that attributed to the trustees of the Mersey Docks, for the latter could neither accumulate and invest surplus revenue nor had they stockholders who received interest from them with the character of profit. In the view which I take, the case of *Mersey Docks v. Liverpool* does not preclude me from coming to the conclusion that the appellants may be entitled to an allowance for tenants' profit. That case was not inconsistent with the previous decision of this House in *Mersey Docks v. Jones* in 1864. There all that was held was that the mere circumstance that the trustees derived no benefit from their occupation, inasmuch as the surplus was earmarked for the benefit of the public in the form of reduction of rates and dues, did not exempt the docks from liability to be rated. The question of an allowance for tenants' profits did not arise, and it was not dealt with until *Mersey Docks v. Liverpool* was subsequently decided in 1873.

In the case before us I think that the appellants may, on principles which are now well settled, be entitled to such an allowance. I am therefore of opinion that the Court of Appeal were wrong in coming to

a different conclusion, and that the case should be remitted to the King's Bench Division to answer the first question raised by the Special Case in the negative as held by the Courts below, but with the very important declaration added, that the provisions of the Port of London Act of 1908 do not in law preclude the appellants from making a claim to an allowance for tenants' profits going beyond interest on capital employed if on the facts they can establish such a claim.

LORD DUNEDIN—Lord Halsbury in the case of the *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* ([1901], A.C. 175), pointed out that much of the difficulty in rating cases had risen from the advisory character of the judgments pronounced by the various courts of review, forgetting that the question to be determined was in its inception a question of fact for the assessing body, and that the province of the courts lay only in correcting errors of law. I had occasion myself, in the subsequent case of *Great Central Railway Company v. Banbury Union* ([1909] A.C. 78), to point out that the dictum—simple in itself—became sometimes a hard saying when you had to follow it. No one doubts its soundness, yet what it comes to is this—The question of what an assessing body ought to do in a particular case cannot be laid down without trenching on a question of fact. But if an assessing body, having considered the case, bases its valuation on the view either that it must do or that it must not do a certain thing in arriving at that valuation, that is a question of law and the courts of review may say whether the assessing body was right or wrong. And it is not in every case easy to draw a sharp line which relegates to its own compartment each of these three propositions. I regret to think that the judgment in this case of the Court of Appeal cannot stand as it is. It is not upheld either by the appellants, as is natural, who lose by it, or by the respondent, who wins under it. This is not conclusive, though it engenders uncomfortable feelings. But it cannot stand in my view for two cogent reasons. In the first place it answers the first question in the negative, and if that is so settled the necessary corollary is to remit the case, whereas the order does no such thing but affirms the finding of the Quarter Sessions. In the second place it grievously, I think, misinterprets the attitude and argument of the appellants.

The learned Lord Justice who delivered the leading judgment, says—"The appellants are contending that the Assessment Committee are, as a matter of law, bound to deduct a full tenant's profits from the dock receipts before arriving at the rateable value." That such an argument was raised before Quarter Sessions may be true, and the statements in the Stated Case suggest it. But it was not pleaded before your Lordships' House, and when Mr Talbot assures us that he used the same argument in the Court of Appeal as he has used before us I confess I accept the statement.

I therefore address myself directly to the question put in the Special Case. Now par. 20 states—"The Quarter Sessions in giving judgment on the said appeal fixed the gross estimated rental of the Port Authority's undertakings in the parish of Chadwell St Mary at £100,863 and the rateable value thereof at £52,063, and stated that in arriving at this decision the Court had acted upon the decision in *Mersey Docks v. Liverpool Overseers* (L.R., 9 Q.B. 84), and it had in consequence made no allowance for tenants' profits beyond allowing interest on the capital employed. . . ."

The natural sequence to that statement is question 1, which is as follows—"1. Whether the Quarter Sessions were right in holding that they were precluded by law from making any allowance for tenant's profits?"

Now that raises, in my humble judgment, the question sharply and decisively—Was the judgment in the case of *Mersey Docks v. Liverpool Overseers* right or wrong? I confess I see no way of practical utility to distinguish that case from this. In my view that case has never been treated in text books as it was treated by Quarter Sessions here, as laying down a general principle irrespective of the particular circumstances of the case. Now that was a decision only of the Queen's Bench before the Judicature Act. It is therefore not a judgment of a court of appeal, such as a judgment in Exchequer Chamber would have been, and in any case is not binding on the House. On the other hand it is a judgment of a Judge of very high authority, and it was pronounced more than forty years ago. But again, there have been many judgments in this House on the general subject since then which touch, if they do not decide, the question.

What is the inquiry which the Commissioners and Quarter Sessions are engaged on? It is to find the net annual value of the hereditament in question. That is to say—and here I quote textually from the statute—"of the rent at which the same might reasonably be expected to let from year to year," subject to certain deductions which I need not recite, or in other words which have been often adopted when seeking to answer the question, What would the hypothetical tenant give for the subject? If the subject is an ordinary one, similar in character to other subjects which have stood the test of the markets, or better still if it has stood the test of the market itself without disturbing circumstances, the inquiry is simple. But when the nature and the circumstances of the hereditament in question do not admit of such a test some other way must be found. Now there are several ways of attacking the problem. One way is to consider what the hypothetical tenant could make out of the hereditament, not in order to rate that profit, but in order to find out what he was likely to give in order to have the opportunity of making that profit. Another way is to see what it would cost the owner to produce the hereditament in the present form, and then to see what a

tenant who had not himself the money to be an owner would give the owner yearly, it being assumed that the sum must bear some relation at ordinary rates of interest to what has been spent. No question of law is necessarily involved in either of these methods. Should an assessing authority so state its method of procedure, then, as Lord Halsbury said in *Mersey Docks v. Birkenhead Assessment Committee*—"What abstract proposition of law can be laid down to say that the recorder (who was the assessing authority in that case) was wrong?"

Now the method of looking at the profits which are earned in order to see what the hypothetical tenant would give has been often employed when the ordinary market test was unavailable, and in particular it has often been employed in the case of docks. And assuming that these docks were in private hands, no one has said that it would not be at once an ordinary and a proper mode of procedure to calculate this—first find the gross receipts as based on experience, then deduct the expenses of getting these receipts, the statutory deductions in the Poor Law Assessment Act, a sum for interest on tenant's capital, and a further sum to represent the tenant's profits; and this would be what might have been, and probably would have been, done had the docks here remained with the former private owners. Now it would appear from the statements in the Special Case and the statements of parties that that is precisely the method which the Quarter Sessions adopted here, with this material exception, that they have made no deduction in respect of tenant's profits because they thought they were precluded from doing so as a matter of law by reason of the decision in *Mersey Docks v. Liverpool Overseers*. Accordingly they put the question directly—Were they right in so thinking?

The first observation that occurs is that it is a very curious result that because a hereditament is transferred from private ownership to the ownership of a public authority, the old shareholders no longer getting dividend, but instead of that a fixed sum payable on stock issued by the authority, the rateable value of the hereditament, which so far as productiveness is concerned remains unchanged, should suddenly be raised. This remark was made in this House in the case of *Jones v. Mersey Docks* (11 H.L.C. 443) by Blackburn, J., himself reading the opinion of the majority of the Consulted Judges at p. 479. It is true that there the question was whether there was rateability at all, but if appropriate to that there is no reason so far as I can see why it is not equally appropriate to the amount of rateability which, after *Jones v. Mersey Docks*, *ex hypothesi* exists, though that was not settled at the date of the *Mersey Docks v. Liverpool*.

I now turn to the reasons given by Blackburn, J., in *Mersey Docks v. Liverpool Overseers*—"In the present case the value of the occupation depends entirely on the collection of the rates. Section 284 of the Mersey Docks Act 1858 requires that all the rates shall be appro-

prorated in payment of all expenses and charges of collecting the rates and several other purposes therein specified. If the premises were let to a tenant it must be to a tenant subject to this Act, bound to hand over the rates received after deducting the expenses and charges of collecting the rates to those purposes, and the persons paying the dock rates would have a right to object to any part of them being applied to pay tenants' profits except in so far as an allowance for that might be included in the expenses and charges of collecting the rates. But all the expenses and charges of collecting the rates actually incurred by the Mersey Dock Board who are occupiers are allowed for and deducted, and the contention for the Board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary to the provisions of the Mersey Docks Act, levy in dock rates a sum in addition to all the actual expenses of collection for his own benefit"; and he then cites the case of a tithe rent-charge and quotes a saying of Crompton, J.—"It is difficult to see in such a case why a man might not take the tenancy on the same terms, or nearly so, as the collection."

Now it is a daring thing to accuse Lord Blackburn of confusion of thought, yet I suppose *Quandoque bonus dormitat Homerus* is as true of lawyers as of poets, and I cannot help feeling that there is a confusion here arising, as Mr Talbot justly pointed out, from the varying sense of the word profit. If you take the sum which an undertaking will bring in and deduct what it costs to run it, and find a balance, that is, if you like to call it so, a profit. I think the better word would be earning capacity. But call it what you like—there it is. What becomes of it afterwards is another matter. This learned Judge says that anyone who took the docks must take them under the Act of Parliament, and would be precluded from applying the money to pay tenant's profits. Here profits is being used in another sense. I am not quite satisfied even with the initial statement. Suppose the assessing body had calculated thus—If a private person had these docks without rating powers and then said to the public "Come and use them and I will charge you so much if you come," and there was every reason to suppose that the public cannot pay his charges, and then calculated on that assumption what the hypothetical tenant would offer as rent for the ability to do the same, I do not think that that assessing body would have transgressed any legal principle. But I agree that if in calculating receipts you take the produce of rates which can only be levied under the Act, then you must suppose the tenant to be under the Act. None the less if you wished to find out what would be actually offered why should it be wrong to say he would not offer the whole amount of the return? It is here that Crompton, J., in his judgment as to the rent-charge seems to me to save himself by the words "or nearly so." If it were not for those words I would think that he was mixing up investment with

tenancy. A man will pay such and such a capital sum to acquire tithe rent-charge, and the way he will get at it will be to say the tithe charge is so much, and to get it I have to pay the expenses of collection, and then I will calculate so many years' purchase, or what is the same thing on the basis of a certain interest for my money, and arrive at what I will give. But whoever heard of a man giving £100 a-year to get £100 a-year. So that really the plan of calculating on the difference between receipts and expenditure breaks down unless you go on to consider what a tenant would probably in the circumstances give, or, if you so like to put it, what margin would he allow himself for contingencies.

The same class of confusion is, I think, to be found in the application sought to be made by the respondents' counsel of the cases of the *London School Board* and the *Sewer* cases. What the *London School Board* and the *Erith* case really settled was summarised by myself in the *Banbury* case, where I said—"They seem to me to fix conclusively that rateable value is not destroyed either because (1) there is no *profit de facto* derived from the land, or (2) the occupants were disabled from making profits, (3) there is no one in the world, except the actual occupant, who if the land as occupied were given up would have any possible use for it."

But as to the matter now in hand, be it remembered that in these cases there was no possible inquiry open on the line of receipts and payments—I mean exhaustive inquiry, for I have not forgotten that in the last case on *Sewers* in this House the sewers were partially a source of profit from payments made by others to allow their sewage to be put into them. I think the confusion was exposed and got rid of by Lord Herschell in the *Erith* case. He speaks of the expression "struck by sterility," and he says—"Now if land is struck with sterility in any and everybody's hands, whether by law or by its inherent condition, so that its occupation is and would be of no avail to anyone, I should quite agree that it cannot be rated to the relief of the poor, but I must demur to the view that the question whether profit, by which I understand is meant by pecuniary profit, can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable."

This seems to me to be the key of the whole matter. Sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects the value—the latter does not. The same thing is practically said by Lord Davey in *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* ([1901] A.C. at p. 185) —"I conceive that in principle and impliedly (as I think has been held in subsequent cases which have come before the courts) what was really decided was that, notwithstanding the restrictions upon the application of the profits resulting from carrying on that business on the hereditament, the profits so derived were a legitimate element in arriving at the value of

the beneficial occupation which was to be the subject of rating." And then, after saying that he really derives this view from *Jones v. Mersey Docks*, he says at p. 186—"In other words, it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings."

All this seems to me directly contrary to what Blackburn, J., said in the *Mersey Docks v. Liverpool* case.

It is not for me to say what calculation the assessing body ought to make, but seeing the question they have to answer is—What would the hypothetical tenant give? I say unhesitatingly in my view there is no rule of law which prevents them performing the operation described as deducting tenant's profits. I am therefore of opinion that the question should be answered in the negative and the case remitted to Quarter Sessions.

LORD BUCKMASTER—The Port of London Authority is a body corporate established by the Port of London Act 1908 to administer, preserve, and improve the Port of London. To effect this purpose the undertakings of certain existing dock companies were by the statute transferred to the new body in exchange for the issue of certain classes of Port stocks in certain proportions.

The statute also fixed the method for distribution of the receipts, and provided in due order for the payment of (a) the expenses of working, (b) interest on the different stocks that were issued and on any loan raised, (c) for payment of the sum required by the statute for a sinking or redemption fund, (d) for the creation of a reserve, and directed that the ultimate balance should be made applicable for the benefit of the port.

Part of the undertakings so acquired by the port authorities consisted of the Tilbury Docks, and the question that arises for determination is in respect of the rating of this hereditament.

The difficulty is familiar. It is due to the fact that under the Parochial Assessments Act (6 and 7 Will. 4), sec. 1, by which the value for rating is fixed, it is essential to apply the test of a yearly letting and taking between landlord and tenant for the purpose of determining what should be the net annual value on which the rates are levied. This policy is simple and capable of ready application in respect of property like that usually dealt with by means of leases or other tenancy agreement; but it becomes extremely difficult of application when used as a standard of value to property which in the commercial sense would never find a tenant at all. These difficulties have been avoided, even if they have not been overcome, by the process of beginning with the gross receipts of the undertaking, and then after making all the necessary deductions, ascertaining a balance, part of which is attributable to tenants' profits, and the rest is assumed to be rent.

This course was pursued in the present

instance, but the deduction which the Port of London sought to make for tenants' profits was disallowed by the Court of Quarter Sessions, who stated that in fixing the rateable value they had acted in accordance with a decision of long standing known as the *Mersey Docks v. Liverpool* (L.R., 9 Q.B. 84), which in their view prevented any such deduction being made. A Special Case was accordingly stated in which the question upon which the opinion of the Court was (so far as the matter now relevant is concerned) "whether the Quarter Sessions were right in holding that they were precluded by law from making any allowance for tenants' profits."

Now it is important to observe that the real question at issue is not the extent to which the deduction for tenants' profits should proceed, nor whether in fixing the rateable value all the circumstances associated with the character and limitation of the undertaking should be borne in mind—the question asked was the exact question—"Whether the Quarter Sessions were right in holding that they were precluded by law from making any allowance for tenants' profits." The Divisional Court, doubtless acting on what they believed to be the effect of the authority of the *Mersey Docks v. Liverpool*, without investigation affirmed the Court of Quarter Sessions, and the affirmation of their judgment by the Court of Appeal approves and applies this decision. It seems difficult however to believe that that was what the Court of Appeal really meant, for Lord Justice Bankes in giving judgment says that the answer to the first question submitted to the Court must be in the negative, and continues—"There is in my opinion no reason why the Court of Quarter Sessions should eliminate altogether from their consideration the question of tenants' profits."

Warrington, L.J., stated his view that the real question was not whether the Quarter Sessions were precluded from making or having to make the allowance, but whether they were entitled to make or refuse it as one of fact to be decided by consideration of all the material circumstances. But this is not what the Court of Quarter Sessions said; they considered themselves bound by law to refuse the consideration of the items, and they did not leave themselves open to consider whether—in the words of Lord Justice Warrington—"They are entitled either to decline to make or to make the allowance according as on the facts they find themselves justified in adopting the one course or the other." And Duke, L.J., took the same view.

With the statement quoted from Lord Justice Bankes I am in entire agreement. The question is essentially a question of fact, and in its determination the character of the undertaking, and in particular its statutory restrictions, are matters to be brought into account. The decision of the Court of Quarter Sessions, however, acting on what they regarded as the true meaning of the decision in L.R., 9 Q.B. 84, say that as no profits can be earned for the benefit of the parties exercising the statutory juris-

diction all tenants' profits should be eliminated.

With this I disagree. The conclusion would indeed lead to a strange and bewildering result. Before the acquisition and collection under one head of the property of the various docks, profits were earned by the different companies and paid to their respective shareholders and others interested in the various concerns. In ascertaining for rating purposes the then rateable value of these properties taken separately, it could not be disputed that deduction in respect of tenants' profits was rightly and properly made. The revenues now received are applied in payment of the exact equivalent of these profits to the several original owners and their successors according to their several interests in the stock issued to acquire the profits; the result of the respondents' argument would consequently be that this simple operation, which could on no hypothesis have improved the rateable value of the property, had none the less resulted for purposes of rating in a very considerable increase of such value.

It is quite true that the hypothetical tenant of such an undertaking as the present must on the hypothesis be a tenant who is subject to the restrictions which have been imposed on the carrying on of the undertaking by the Legislature. This may materially affect the rateable value of the hereditament by reason of the fact that such restriction may impose a limit upon its profit-earning capacity. But the method of application of such profits, however closely defined and regulated they may be, does not mean that they cannot be earned, and consequently that they may not be brought into consideration in determining the rateable value.

I turn now to consider how far the authorities affect the position. The earliest that is relevant to this case is the case of *Mersey Docks v. Jones* (11 H.L.C. 443). The statement of Lord Blackburn in that case is very material. He said at p. 448 — "Where there is an actual demise of property the tenant . . . is rateable without any regard to the purpose to which the rent is applied. A company forming a dock under an Act of Parliament which incorporates these Acts (The Companies Clauses Acts and the Harbour Docks, and the Piers Clauses Act 1847) is bound to maintain the docks and to allow the public to use these and to receive rates, and it is common to have a maximum limit put on the rate of dividend. It is indisputable that a company thus occupying a dock is one occupier and rateable as such. Now if without in any way altering the mode in which the docks are engaged by the public, or altering the rates leviable or changing the harbour-master and others who manage it, we change the name of the body from that of the company to the board, and if instead of the company paying to the shareholders a maximum dividend on their capital the board must pay the same identical sums but call them interest on bonds, what difference does it make?"

The next case is just that which has given rise to the present difficulties, the *Mersey Docks v. Liverpool Overseers* (L.R., 9 Q.B. 84). It is not easy from the report to be satisfied of all the circumstances and conditions attaching to the Mersey Docks. But it is clear from the argument that the point that is now under discussion was raised by counsel who quoted in support of his contention the *Queen v. Southampton Docks Company* (1851, 17 Q.B. 83), and it was in answer to that contention that Mr Justice Blackburn suggested the analogy of a lease of tithes, and the learned Judges ultimately decided in plain terms that the board was not entitled to a reduction for tenants' profits.

In the judgment of the Court a distinction that is obvious and sound in principle is drawn between the rateable value of premises and the actual profits that are made upon them, and they point out that profits are only material so far as they afford evidence of what may reasonably be expected to be made from the occupation. Reference is then made to the section of the Act that requires that all rates should be appropriated in payment of all expenses and charges made in collecting the same, and it then continues in these words — "But all the expenses and charges of collecting the rates actually incurred by the Mersey Dock Board, who are occupiers, are allowed for and deducted, and the contention for the Board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary to the provisions of the Mersey Dock Act, levy in dock rates a sum in addition to all the actual expenses of collection for his own benefit."

I understand this as meaning that in the case then under decision the gross sums received did not include sums that could be used in payment of interest on bonds or securities representing the equivalent of ownership, and if this were so the decision might be correct, but it would have no application to the present case. If the original port revenue cannot on the proper hypothesis include any sums which are the equivalent of tenants' profits, then obviously no deduction ought to be made under that head. This may have been the fact in that case and it is therefore quite possible that the statement may be supported by the special circumstances to which it refers, but if it was intended to lay down a general principle applicable in the circumstances like the present, it is not, in my opinion, in accordance with the law.

The case of the *Sculcoates Union v. Hull Dock Company* (1895, A.C. 136) is an easier case to understand. Railway and tramway lines formed part of a dock system, but the dock companies were prohibited from taking any tolls for the use of the line. It was held that if tolls could be exacted a tenant could be found. It was decided by your Lordships' House, reversing the judgment of the Court of Appeal, that the statutory restrictions must be considered in this connection, and the rents that would have been earned but for these restrictions ought not to be regarded. In other words, that deci-

sion emphasised and made clear a principle that must always be applicable to such cases. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands with all its privileges, opportunities, and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament. The character and extent of the various deductions from the gross revenue must be fixed in relation to these conditions. This has not been done in the present case, and in my opinion, therefore, the appeal should be allowed.

Appeal allowed and case remitted to the King's Bench.

Counsel for the Appellants—Talbot, K.C.—Ryde, K.C.—Konstam, K.C. Agents—E. F. Turner & Sons, Solicitors.

Counsel for the Respondents—Colefax, K.C.—Hawke, K.C.—Jeeves. Agents—Kingsford, Dorman, & Company, Solicitors.

PRIVY COUNCIL.

Tuesday, February 17, 1920.

(Present—The Right Hons. Lords Haldane, Dunedin, Atkinson, and Buckmaster.)

COMMISSIONERS OF TAXATION *v.* ENGLISH, SCOTTISH, AND AUSTRALIAN BANK, LIMITED.

(ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.)

Bank—Cheque—Payment of Stolen Cheque—“Customer”—“Negligence”—Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 82—Bills of Exchange (Crossed Cheques) Act 1906 (6 Edw. VII, cap. 17), sec. 1.

The Australian statute, Bills of Exchange Act 1909, section 88 (1), reproduces the Bills of Exchange Act 1882, section 82, as amended by the Bills of Exchange (Crossed Cheques) Act 1906, section 1. The Bills of Exchange Act 1882, section 82, enacts—“Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.” The Bills of Exchange (Crossed Cheques) Act 1906, section 1, enacts—“A banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.” *Held* (1) that “customer” signifies a relationship in which duration is not of the essence, and (2) that the test of negligence is whether the transaction

of paying in any given cheque coupled with the circumstances antecedent and present is so out of the ordinary course that it ought to arouse doubts in the bankers' mind and cause them to make inquiry.

Their Lordships' considered opinion was delivered by

LORD DUNEDIN—On the 6th June 1917 Mr A. Friend, York Street, Sydney, put a cheque drawn by himself on the Australian Bank of Commerce for £786, 18s. 3d. into an envelope along with some other cheques drawn by other members of his family, and addressed the envelope to the Commissioners of Taxation, George Street North, Sydney. He gave the envelope to a clerk to deliver, and the envelope was duly delivered by being placed in a box put for the purpose of receiving such letters in the taxation department. The cheque was in payment of an assessment for income tax and was in the following terms—“Pay 053 or bearer the sum of £786, 18s. 3d.” It was crossed with the word “Bank,” that is to say, generally not specially. The figures “053” correspond with the final figures on the number of the cheque, and this method of filling up a bearer cheque seems to be a common habit in Sydney. Attached to the assessment notice sent to Mr Friend there is the following instruction:—“Collectors will not call for payment of taxes, but the taxpayer should (a) pay the tax at the Taxation Office, George Street North, Sydney, in cash or bank notes, cheques, or postal notes payable in New South Wales; or (b) remit the same to the Commissioners at Sydney by bank draft payable on demand, or cheque crossed and marked ‘Commissioners of Taxation—not negotiable’—payable in N.S.W.; or by post office money order, or by postal note marked ‘Commissioners of Taxation—not negotiable.’”

It is therefore to be observed that in making his payment by means of a bearer cheque delivered at the office Mr Friend was acting in strict accordance with the instructions issued. The cheque in question was stolen by some person unknown and was never cashed by the Commissioners of Taxation.

On the 7th June a man who gave his name as Stewart Thallon entered the head office of the respondents' bank at Sydney and stated that he wished to open an account. He was received by the accountant of the bank, who went through the usual procedure of taking his name and address, which he gave at certain well-known residential chambers in Sydney, and making him sign the signature-book. Being asked how much he wished to bank he replied “£20” and handed that sum in bank notes to the accountant. The accountant filled up a “paid-in” slip and handed it and the money to the teller. Thallon said he would take a cheque-book and was given one, the charge being debited to his account. He then told the accountant that every cheque he signed for cash would be accompanied by an order to pay, and the accountant added a note to that effect to be entered in the ledger account. A ledger account was opened in the