Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Perth Gas Company, Limited, v. *The Mayor and Councillors of the City of Perth, from the Supreme Court of the State of Western Australia*; *delivered the* 30*th June* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD MERSEY.
LORD ROBSON.

[DELIVERED BY LORD ATKINSON.]

This is an Appeal from a judgment of the Supreme Court of Western Australia, dated the 17th May 1910, on a question submitted under the 21st Section of the Arbitration Act of 1895, by way of special case for the opinion of that Court.

The case was stated by two Arbitrators and an Umpire appointed under the 50th Section of the Perth Gas Company's Act of 1886, to fix the amount of the purchase money of the thing sold by the Directors of the Appellant Company to the Respondents, in pursuance of the provisions of that Section. The question for decision in effect resolves itself in this. What was the thing sold? Was it the whole undertaking of the Appellant Company, or merely all the local works, pipes, and other physical things by means of which they carried on their business? The answer to this question depends upon the construction of this 50th Section. The Section would appear not to have formed part of the Statute, as originally drafted, in which it is found. No

reference is made to it in the preamble or the other part of the Statute It would seem to have been inserted as an afterthought without any attempt having been made to reconcile its provisions with those of the other sections of the Act, or with the general principles of the law affecting incorporated joint stock companies.

Hence the difficulty of putting any meaning, consistent with common sense and justice, on its inapt and ambiguous language. In order to solve that difficulty it is necessary to consider some of the other provisions of the Act.

From the preamble it appears that the Company had been incorporated under the Joint Stock Companies Ordinance of 1858; that before the passing of the Act of 1886 it had issued 12,907 shares upon which 1*l.* per share had been paid up; that it had become seized and possessed of certain freehold lands situated in Perth; that it had erected gas works and other buildings upon these lands or portions of them, and had used these worksand buildings for the purposes of its undertaking; that the value of its property and plant was estimated at 16,000*l.*; and that it had for the purposes of its undertaking borrowed certain moneys upon mortgage of these lands and hereditaments and on the bond of the Company, which securities were then in force. It is then recited that it would be of public and local advantage and utility, and also to the advantage of the Company, if its existing powers under the above-mentioned Ordinance and its Articles of Association were extended and more fully defined, and that it was expedient to confer upon the Company the further powers and privileges thereinafter set forth.

By Section 2, sub-section K., the expression "gas works" is most strangely defined to be "the gas works and all other works connected "therewith by this Act or in any other way

" authorized to be constructed." And by sub-section G. of the same Section the expression " undertaking " is defined to mean " the making " and supply of gas within the limits herein " mentioned, and the making and constructing " gas works for that purpose, with proper works " and conveniences and apparatus connected " therewith, and all other works by this Act " authorised to be executed, and the doing of " all things necessary or convenient for the " purpose, subject to the provisions of this Act " or the general Act."

This definition means little more than the right and power to construct, and when constructed to own and use, the works proper and necessary for the manufacture and supply of gas throughout the area defined by the Act within the limit prescribed as to price for profit and gain as a commercial undertaking. These limits are that the maximum price charged to private consumers shall not exceed 1*l.* per 1,000 cubic feet, and that in the absence of any special contract the price charged the local authority shall be 10 per cent. less than that charged for the time being to private consumers. While the area to be supplied is by Section 3 fixed so as to include not only the City of Perth itself, over which the jurisdiction of the Respondents alone extends, but in addition every place within a circle of five miles from the General Post Office in that city.

From the map produced, and by consent used upon the hearing before their Lordships, it appears that the City of Perth at the date of this Statute formed but a very small portion indeed of this very extended area. Within this area the Company are empowered, in order to construct works, to break up the soil of streets and roads, to open and break into all sewers and conduits underneath, to lay pipes, and, in short, to do all

such other acts and things as it might deem necessary for supplying the inhabitants within the above-mentioned area with gas, and further to supply the gas upon such terms as might be agreed upon between the Company and the persons supplied, and also to sell and dispose of the coke and residuum arising from the materials used in manufacturing gas in such manner as the Company may think proper. All gas tar or ammoniacal liquor created in the process of manufacturing gas to be kept in covered tanks. The Company are no doubt prohibited from laying down or placing "any pipe or other work "into, through, or against any building, or in "any land not dedicated to public use without "the consent of the owner" thereof; and they are also bound to serve upon the Local Authority notice of their intention to break up a street, the work too must be carried out and the street or road reinstated under the supervision of that authority, but outside these usual and proper restrictions the Company were clothed with all the powers usually conferred upon gas companies, and no limit whatever was placed upon the amount of their profits.

That it was anticipated that these profits would be considerable is evident from the financial powers conferred upon the Company. By Section 11 they are empowered to increase their capital by the issue of new shares up to 60,000*l*. By Section 6 they are empowered to borrow, either by way of mortgage of the whole or any part of the assets of the Company or by bonds or debentures or in such manner as they may think fit, sums up to 66,000*l*.

The mortgages and other securities theretofore given by the Company are declared to be good and effectual, and the moneys thereby secured are made a valid charge upon the property and assets of the Company, anything

in the General Act or Articles of Association to the contrary notwithstanding; and all monies borrowed, or to be borrowed, are to be applied only to carry into execution the objects and purposes of the Company's undertaking. By Section 8 it is enacted that debentures issued under the authority of the Statute shall be in the form set forth in the schedule. That form makes the principal mentioned in the debenture and the interest thereon a charge upon "the undertaking, rates, and other revenues "of the Perth Gas Company"; and Section 7 prescribes that "no dividend shall be declared or "profits divided amongst the shareholders of the "Company until all interest previously accrued "on such debentures so issued shall have been "paid, or a sufficient sum set apart and made "available for the payment thereof." While, most important of all, Section 10 enacts that it shall be lawful for any executor, administrator, or trustee, having the duty of investing any trust moneys, unless and not expressly or impliedly prohibited by the instrument creating the trust, to purchase with or out of such monies any debentures issued by the Company under the authority of the Act and declares that "every such "purchase shall be deemed a due investment of "such trust moneys."

It was conceded in the argument addressed to their Lordships on behalf of the Respondents, that in the year 1886, and from thence up to the commencement of the proceedings out of which this Appeal has arisen, the only powers conferred upon the Respondents in reference to the manufacture or use of gas independently of this Statute and those amending it were the powers conferred by the Statutes 40 Vict., No. 13, 44 Vict., No. 11, and 49 Vict., No. 17; and it is not disputed that these latter are confined to the power to light the streets, thoroughfares, and public places within the limits of their own municipality.

On the 17th of June 1908 the Respondents gave to the Directors of the Company the notice in writing contemplated by Section 50 of the Act of their intention to purchase at the expiration of six months therefrom all the land, buildings, works, hereditaments, lamps, pipes, stock, and appurtenances of and belonging to "the Company."

A dispute having arisen between the Directors and the Corporation of Perth respecting the purchase, it was referred, as provided in the section, to two Arbitrators and an Umpire to fix the amount of the purchase money, the only matter they had authority or jurisdiction to determine.

In the course of the arbitration the question arose as to the basis upon which the purchase money should be calculated, namely, whether it should be fixed as the value of the physical property of the Company mentioned in the notice treated as things *in situ* and capable of earning a profit, or should be fixed as the value of these things *plus* the value of the statutory powers of the Company, to use them as the Company had theretofore used them, or were entitled to use them, to make a profit thereby, or in other words whether they were to treat the thing purchased as a going commercial concern, with all its assets and powers, and to fix the purchase money accordingly.

Mr. Justice McMillan answered the question asked in the Case stated by the Arbitrators to the effect that the proper basis on which the purchase money was to be calculated was that first mentioned; namely, the value of the physical subjects of property regarded *in situ* as capable of earning a profit. He appears to have based his decision on the Judgment of the Court of Appeal in the case of *In re Kirkleatham Local Board and the Stockton and Middlesborough Water Board* (1893), 1 Q.B. 375, a case which, in their

Lordships' view, is wholly different from the present, and the decision in which is inapplicable to the present. In that case a certain public body, a Joint Water Board, not at all a commercial company trading for gain, was empowered to construct work to improve the water supply in the Boroughs of Stockton and Middlesborough and also in certain outlying districts, including Kirkleatham amongst others.

By Section 4 of the Stockton and Middlesborough Waterworks Act of 1876 it was provided that this Board should, when required by the sanitary authority of any district beyond the boundaries of these boroughs, sell to such authority all mains, pipes, and fittings belonging to the Board within that district other than and except any mains, pipes, or fittings used for service beyond the limits of that district at a price to be fixed by arbitration. The Kirkleatham Local Board required the Joint Board to sell to them the mains, pipes, and fittings belonging to the Joint Board situate within the former's district which were used exclusively for the service of that district. The Arbitrators in fixing the purchase price took into account the loss by the Joint Board of the revenue derived by them from the works so purchased. It was held that in this the Arbitrator was wrong, and that the price to be ascertained was the reasonable price of the mains, pipes, and fittings regarded as apparatus fixed in the ground and capable of earning a profit, but without any compensation to the Joint Board for the loss of the right to supply water to the Kirkleatham district.

It is to be observed that it was only portion of the mains, pipes, and fittings, belonging to the Board situated within the Kirkleatham district, which were purchased, namely, that portion exclusively devoted to the supply of that district

It therefore could not for a moment be suggested that the whole undertaking of the Joint Board in that district was purchased by the Local Board, but notwithstanding this Lindley, L.J., is at page 383 reported to have used these words, "In "considering their (*i.e.*, the Joint Board's) rights "as between themselves and the Kirkleatham "Local Board, it is important to bear in mind "that the vendors were not ordinary owners of a "going concern, but were only invested with "statutory powers to be exercised in certain con- "ditions." And again at page 384 he says, "I am "not surprised that the Arbitrator went wrong, "for if you look at the Joint Board as ordinary "vendors, as vendors of a water supplying busi- "ness it would be hard to deprive them of com- "pensation, but the Arbitrator has gone wrong "in not realizing who the vendors were, and in "not seeing that they were a mere statutory autho- "rity acquiring this property and this right "upon terms fixed by the Act of Parliament, "which terms were not intended to give them "any right to compensation for the loss of the "profit which they made in supplying the "district." Bowen, L.J., appears to have concurred in this judgment.

In the present case not only are the words of Section 50 much wider and more general in character than those of the Section with which Lindley, L.J., had to deal, but, in addition, the provisions of the Statute of 1886 place the Appellant Company in a position altogether dissimilar from that of the Joint Board, as described by him. The Company is a commercial body carrying on a gas supplying business for profit. They are empowered, if indeed not bound, by the exigencies of that business, to enter into contracts for the supply of gas to the inhabitants of the vast area over which the Respondents have no jurisdiction or control

whatever They are entitled in order to secure the repayment of trust moneys lent to them by executors, administrators, and trustees to charge their profits and their powers as well as their plant and physical assets, their whole undertaking, with the amount of such loans. With all respect to the learned Judge, Mr. Justice McMillan, he does not seem to have given any consideration to many of the consequences to which his decision necessarily leads. He does not allude to the position of the debenture holders or to that of the other creditors of the Company, or, indeed, to a great extent to that of the Company itself when all its physical equipment for carrying on its business shall have been acquired by the Council. He does not indicate whether, in his opinion, it is dissolved or continues to exist. He admits that its statutory powers are probably the most valuable part of its assets, but holds that these are not purchased by the Corporation, and that no compensation is to be paid for the loss of them. He recognises clearly that it could not be rationally supposed that the Legislature which passed this measure could ever have intended anything so grotesque as that the Council should purchase the works designed to supply this wide district and yet not have any power to use them for supplying gas outside the narrow limits of their own municipality, and only the power to use it within that limit to a very limited extent. He seems to have seen clearly that to avoid such an absurd result the Corporation must be held to have obtained from some source statutory powers to use these works and apparatus similar, in some degree, to those conferred upon the Company, and he came to the conclusion that notwithstanding the statutory assurance given to the debenture holders that these debentures were securities in which trustees might lawfully,

and presumably safely, invest trust funds, the statutory powers necessary to enable the Company to carry on the business were only given to it until the Corporation chose to exercise its option, that they were not transferred from this Company to the Corporation but ceased to exist, and that similar powers were upon the sale by implication granted by the Legislature to the latter body. The Statute admittedly contains no express provision to this effect as did the statutes under consideration in *The Edinburgh and London Street Tramway Cases* (1894), A.C. 456 and 489; nor any provision such as they contained to the effect that no allowance should be made for any past or future profits of the undertaking. Nor again does this Statute expressly or by implication provide for the winding up of the Company, the application of the purchase money to be paid by the Corporation, the collection of the debts due to the Company, or the release or discharge of its obligations. All these things are left in obscurity. It was urged in argument that the purchase money to be paid by the Corporation was sufficient in amount to discharge the debenture debt, and might be so applied, but for all that it appears these debentures may have been made redeemable at a date not yet arrived; in which case the debenture holders might decline to accept payment. It is obvious that a construction of this Section 50 which would inflict upon the shareholders and secured creditors of the Company such an injustice as is involved in the destruction of what may be its most valuable asset—its statutory powers—ought not to be adopted, unless it is the only construction of which the section is reasonably susceptible. And it appears to their Lordships that there is only one construction which would at once obviate that injustice, and meet to a large extent the difficulties already indicated. That construction

is this, that the transaction which the section contemplates and authorises is the sale and transfer to the Corporation of the commercial undertaking of the Company as a going concern; not only the physical apparatus by which they carry on their business, but their powers to use that apparatus for the purposes of carrying it on. The question, therefore, is whether the section taken in connection with the other provisions of the Statute is or is not reasonably susceptible of such a construction.

The wording of the section is somewhat peculiar. The subjects of the sale are expressed to be "all the land, buildings, works, hereditaments, lamps, pipes, stock, and appurtenances of and belonging to the Company." If the word "works" be taken to indicate physical things alone, then there is obviously a redundancy of expression in the section, for buildings are undoubtedly "works," as also are pipes and conduits over or under ground. The amount of the purchase money may in the absence of agreement between the parties be settled by arbitration, but the special peculiarity of the section is this, that while it empowers the Respondents to buy, it does not expressly oblige the Company to sell, and, moreover, it leaves all the other terms and conditions of the sale to be settled by mutual agreement between the two contracting parties and by that method alone. It provides, no doubt, that if any dispute or disagreement should arise, which might not, however, be a dispute or disagreement touching the price at all, but touching some other term or condition of the contract, the parties or either of them may, if they think fit, require that it be referred to arbitration to determine, not the matter in dispute, but the amount of the purchase money, upon which matter alone is the determination of the Arbitrators binding

on the parties. It may possibly be that if the amount of the purchase-money was the only matter in dispute between the parties the Company could not refuse to carry out the sale after the Arbitrators had determined that question, but if the Company should, for instance, insist that their pending contracts with their customers should be carried out by the Council, and the latter refused to yield on this point, then it appears to their Lordships to be clear that the Directors could not be compelled to carry out the sale. It is needless to point out that neither in the Kirkleatham case nor in any other of the cases to which they have been referred were the provisions of the enactment under consideration at all similar in this respect to those of Section 50.

There is no way of getting rid of the charge of the debenture holders upon the assets of the Company sold under Section 50 save by their concurrence in the sale. The Directors have clearly the right to refuse to carry out the sale unless they do concur, and having that right it is their duty to those encumbrancers, whose trustees the Directors in a certain sense are, to exercise it. There appears little doubt that debenture holders could by law restrain the Directors from completing, against their will, a transaction which would diminish so vastly the value of the debentures they hold. The Directors, like every other encumbered vendor, would be bound, in the absence of agreement to the contrary, to convey to the purchaser the property sold free from incumbrances. All these considerations, in their Lordships' opinion, go to show that what the Statute contemplated was the sale of the whole undertaking, the whole subject charged, carried out with the consent of the incumbrancers whose claims would then attach to the money which represented

the entire property. There are no words in Section 50 which in their Lordships' view prohibit such a transaction. It is the only just and the only workable one. Every other is beset with difficulties almost, if not altogether, insurmountable. Moreover, when a Statute authorises the sale of such things as the physical land, buildings, apparatus, and equipment of such a body as a gas company, things which are comparatively worthless to the purchaser, unless with them he acquires the statutory powers to use them which the vendors enjoyed, the reasonable conclusion to be drawn in the absence of an express provision dealing with the matter would appear, *primâ facie*, to be that the sale of the physical things carried with it to the purchaser the right and power to use them as the vendor had used them, and that this right and power were part of the subject sold. They are therefore of opinion that the judgment appealed from is wrong and should be reversed, and that the proper answer which should be given to the question put by the Arbitrators in the Special Case is that the contention of the Company as there set forth was right. And they will humbly advise His Majesty accordingly. The Respondents must pay the cost of the Appeal.

In the Privy Council.

THE PERTH GAS COMPANY, LIMITED,

v.

THE MAYOR AND COUNCILLORS OF THE CITY OF PERTH.

DELIVERED BY LORD ATKINSON.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1911.