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# In the Privy Council.

No. 37 of 1897.

## ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN—J. T. JOHNSTON and THE TORONTO TYPE FOUNDRY  
COMPANY (LIMITED), who sue on their own behalf as well  
as on behalf of all other consumers of gas furnished by the  
Defendants in the City of Toronto - (*Plaintiffs*) APPELLANTS,  
AND  
THE CONSUMERS' GAS COMPANY OF TORONTO  
(*Defendants*) RESPONDENTS.

### RESPONDENTS' CASE.

1.—This is an Appeal from the Judgment of the Court of Appeal for the Province of Ontario, dismissing the action with costs, delivered on the 30th day of June, 1896. Record, p. 84.

2.—The action was commenced on the 22nd day of February, 1894, by the Appellants who allege that they were consumers of gas furnished by the Respondents, the Consumers Gas Company, for a Mandatory Order directing the Respondents to comply with certain provisions of an Act passed by the Ontario Legislature in the year 1887 entitled "An Act to further extend the Powers of the Consumers Gas Company of Toronto," which the Appellants alleged had not been complied with but had been disregarded by the Respondents in that amongst other matters they had not formed a Reserve Fund, permitted by the 4th Section of the Act, and had not invested the moneys which had been placed to the credit of that fund in some one or more of the securities in the said 4th Section mentioned; also for an Order to compel the Company to create and maintain a certain account called "The Plant and Buildings Renewal Account," provided for in the 6th Section of the Act, and to direct the Respondents to enter all their surplus profits from the time they first accrued, together with interest on the Reserve Fund, in a "Special Surplus Account," also mentioned therein, and for a Declaration that the Plaintiffs were entitled to a reduction in the price of gas as and from such time as the profits on the Reserve Fund should show them to be so entitled under the provisions of the Act and for other purposes. Record, p. 1.  
Record, p. 76.  
Record, p. 77.  
1. 8.  
Record, p. 77.  
1. 22.

3.—The Appellants alleged that they had been large consumers of gas since the passing of the Act above referred to and that they paid large sums of money to the Defendant Company for the gas supplied to them by the Respondents and Record, p. 4.  
1. 37.

they claimed to sue on behalf of themselves and all other consumers of gas in the City of Toronto; but they did not allege or pretend that they made any of the payments under protest or otherwise than voluntarily.

Record, p. 5.  
l. 40.

4.—The Appellants further alleged that prior to bringing their action they had requested the Respondents to comply with the provisions of the above mentioned Act and had asked for an account and had demanded the repayment of the money which they alleged they had overpaid to them. And they charged that the Respondent Company had refused and still refuse to comply with the provisions of the said Statute or to account and repay to the plaintiffs the money they claim to have overpaid them.

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Record, p. 7.  
l. 26.  
Record, p. 8.

5.—The Defendants pleaded, denying the allegations contained in the Statement of Claim, and also demurred thereto, alleging as grounds of demurrer that the plaintiff's showed no cause of action or title to the relief claimed by them and that they had no locus standi or right to bring or maintain the action against the Respondents and that they did not represent and could not sue on behalf of that portion of the public interested in the matters in question.

Record, p. 8.  
Record, p. 9.

6.—Issue was joined both on the Statement of Defence and on the Demurrer and thereafter a Special Case was settled, in which the facts were stated and it was agreed that the Pleadings should be referred to as showing the questions in issue.

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Record, p. 60.

7.—The action on the Special Case came on to be tried before the Honorable Mr. Justice Ferguson, one of the Judges of the High Court of Justice for the Province of Ontario, and was tried on the 30th and 31st days of May, 1895. Judgment, having been reserved, was delivered by him on the 9th day of September following in favour of the Appellants and, speaking generally, in favor of their contentions as to the interpretation of the Statute in question

Record, p. 78.

8.—From that decision the Respondents appealed to the Court of Appeal of the Province of Ontario and the appeal came on for hearing on the 21st, 22nd and 23rd days of January, 1896, and the Court, having reserved its Judgment until the 30th day of June following, delivered Judgment on that day allowing the Appeal and dismissing the Plaintiffs' action with costs.

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9.—The main questions involved in the action are: (First) Whether the Plaintiffs or either of them have or had, either on their own behalf or as representing the other consumers of the gas furnished by the Respondents, a right to maintain the action? and (Secondly) Whether the Defendants have or have not complied with the provisions of the amending Act above referred to in respect of the matters complained of by the Appellants?

10.—The provisions of the Statute in question upon which the main questions, if the Appellants are entitled to complain, turn are as follows: by the 1st Section of the amending Act of 1887 the Company was entitled to increase their Capital to a sum not exceeding (the Capital at that time being \$1,000,000) \$2,000,000 and by the 4th Section it is provided that all surplus realized over the par value of the shares which the Company were authorized to sell should be added "to the rest or "reserve fund of the Company until the same shall be equal to half of the paid up "Capital Stock of the Company, the true intent and meaning being," the Section reads, "that the Company may at all times have and maintain a rest or reserve "fund equal to but not exceeding half of the then paid up Capital of the Company

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“and which rest or reserve fund may be invested in Dominion or Provincial Stock, Municipal Debentures, School Debentures, Drainage Debentures, Debentures of Loan Companies and Mortgages on Real Estate.”

10 11.—The 6th Section of the Act, which is important, is as follows : “There shall be created and maintained by the Company out of the earnings of the Company, another fund, to be called the plant and buildings renewal fund, to which fund shall be placed each year the sum of five per cent on the value at which the plant and buildings in use by the Company stand in the books of the Company, at the end of the then last fiscal year of the Company, and all usual and ordinary renewals and repairs shall be charged against this fund.” Record, p, 77.

20 12.—As also the 7th : “Any surplus of net profit, from any source whatever, including premiums on sales of stock after the rest or reserve fund shall have been established and maintained as aforesaid, remaining at the close of any fiscal year of the Company after payment of fees to the President, Vice-President, and Directors of the Company (not exceeding in all the sum of \$9,000 per annum), after payment of dividend at the rate of ten per cent. per annum on the paid up Capital Stock of the Company and the establishment and maintenance of the said rest or reserve fund, and providing for said plant and buildings renewal fund, shall be carried to a special account, to be known as the special surplus account, and whenever the amount of such surplus is equal to five cents per thousand cubic feet, on the quantity of gas sold during the preceding year, the price of gas shall be reduced for the then current year, at least five cents per thousand cubic feet to all consumers.” Record, p, 77.

30 13.—Also the 8th : “If in any year the net profits of the Company, from all sources, are not sufficient to meet the requirements of the Company for the payment of fees to the President, Vice-President and Directors (limited as aforesaid) the payment of dividends at said rate of ten per cent. per annum, as aforesaid, and to provide for the plant and buildings renewal fund, it shall and may be lawful for the Directors of the Company in their discretion to draw upon the said rest or reserve fund to the extent of any such deficiency, and to restore any amount so drawn from time to time from said rest or reserve fund, out of earnings of the Company, but the said rest or reserve fund shall not be otherwise drawn upon.” Record, p, 77.

40 14.—The Company was incorporated by a Statute passed in the old Province of Canada (11 Victoria, Chapter 14,) and the powers conferred upon it were to hold land for the purposes of the works authorized by the Act, to construct and maintain gas works and to do all acts necessary and convenient for supplying the inhabitants of the City of Toronto with gas, and also to sell and dispose of coke and of all and every product or products refuse or residum arising or to be obtained from the materials used in or necessary for the manufacture of gas in such manner as the Company might think proper, and also to manufacture the refuse of any such gas. (Section I). The usual powers for opening streets and incident to the business of supplying gas were also conferred on the Company ; but these were only powers which the Charter gave to the Company.

15.—Its Capital was originally limited to the sum of £25,000, which it was enacted by the 2nd Section of the Act of Incorporation should be appropriated to the purpose of constructing, completing and maintaining their (that is the

Company's) gas works and to the purposes of the Act and to no other object or purpose whatsoever, Power was given to increase the Capital Stock by a further sum, not, however, exceeding £25,000 Currency.

16.—In 1853 the powers of the Respondent Company were territorially extended by an Act passed in the old Province of Canada, being Chapter 142 of 16 Victoria, and in and by the 4th clause thereof it was made lawful for the Company to buy, sell or dispose of, in any way, any surplus coal or coal required for making gas, or not found to answer for making gas, and to buy, sell, lease or hire all meters, interior or service pipes, mains or gas fittings, lamps, or gas apparatus, and to employ the necessary workmen for putting up fittings generally. 10

17.—In 1855 by another Statute passed in the 18th year of Her Majesty's Reign, Chapter 215, the powers of the Company were again extended and authority was given to the Company to increase its Capital Stock by a further sum not exceeding £50,000, so that the whole Stock of the Company was to extend to but not to exceed the sum of £100,000. The other extension of power was given by the 3rd Section, the Company being thereby authorized to borrow on mortgage on the Security of its property any sum or sums not exceeding £50,000, and it was enacted in the same clause (Section III) that all money so borrowed or raised should be applied to the purposes of the Company in the manufacture and distribution of gas and increasing and extending their business or discharging liabilities 20 contracted or to be contracted therefor.

18.—By the 4th clause the Company was authorised to hold lands and real property and real estate for the purposes of their incorporation and to sell and lease the same.

19.—In 1873 by an Act passed by the Legislature of the Province of Ontario the Company was authorised again to increase its Capital Stock to a sum not exceeding £600,000.

20.—In 1879 by an Act passed in the 42nd year of Her Majesty's Reign, Chapter 23, all Gas Companies then in existence or thereafter formed were authorised to manufacture and supply gas for heating, cooking and all other 30 purposes for which gas is capable of being used and to manufacture and supply electric, galvanic or any other artificial light, either in connection with gas or otherwise, and acquiring any patent or other rights for the manufacture or production of any artificial light, and to manufacture or buy and also to sell or lease all fittings, machines, apparatus or other things required for the use of the Company or its consumers.

21.—These were the acts affecting the incorporation of the respondent Company in 1887, when application was made by them to increase the Capital Stock by \$1,000,000. The application for this amendment was opposed by the Corporation of the City of Toronto; but finally the Act was passed and is Chapter 40 85 of 50 Victoria of the Province of Ontario.

22.—The position of the Company as agreed to by the parties is stated in the Special Case, as is also the disposition which was made of the Stock and the dates when the same was disposed of and the amount for which it was sold. From these statements it appears that the Company issued \$700,000 of the \$1,000,000 of additional Capital Stock authorized by the last mentioned Act, upon which the sum of \$538,524.71, being the premium or surplus over and

above the par value, was realized from the sale thereof by the Company.

23.—The moneys so received by the Respondents from the premium on the sale of the said shares was placed by them to their credit at their Bankers and was subsequently expended in the manner set forth in the Case. It was not invested in securities and it appears that at the time the action was brought the Appellants had only \$129,246.53 invested in the securities or in the class of securities mentioned in the 4th Section of the Act upon which the questions arise and had expended the residue received from the premiums realized from the sale of their Stock in the construction or acquisition of lands, buildings and plant for the purposes of the Respondents' business, as the Company were authorized to do. But, as appears from the annual statements of the Respondents, being part of the Special Case, the accounts were kept and the surplus was credited, as required by the provisions of the Statute in that behalf, as appears, for example, from the Company's account for 1887, being the first year after the Act was passed. A Reserve Fund Account was opened, to which was credited the amounts of \$71,480.03 and \$331,671.70, which had hitherto appeared at the credit of "Contingent Account" and "Profit and Loss Account" respectively and the sum of \$119,473.80, being the amount of premiums up to that time received from the sale of stock, and an account called "Plant and Buildings Renewal Fund" was also opened in accordance with the amending Act in that behalf, and so on yearly until the bringing of this action, when from the 46th Annual Report there was to the credit of "Reserve Fund" \$825,625.06  
 To the credit of "Plant and Buildings Renewal Fund" \$217,623.21.

24.—The respondents had always been limited in the amount which they were permitted to distribute amongst their shareholders as dividends to ten per cent. per annum upon the paid up Capital of the Company and that provision of the Act of Incorporation is re-affirmed in the 7th Section of the Act of 1887. In addition thereto it is enacted that the Company may have a Reserve Account but that it is never to exceed half of the paid up Capital of the Company. Further that the Company is to create and maintain out of the earnings another fund to be called "The Plant and Buildings Renewals Fund," to which shall be placed each year the sum of five per cent. of the value at which the plant and buildings in use by the Company stand in its books at the end of the then fiscal year of the Company. Thirdly: Any surplus of net profits after the rest or reserve fund reaches the maximum figure of fifty per cent. of the Capital Stock and after the payment of the dividend for the year and the fees to the President, Vice-President and Directors, not exceeding in all the sum of \$9,000 per annum, and after the five per cent. has been carried to the plan and buildings renewal fund is to be carried to a special account which is to be known as "The Special Surplus Account." The question involved in the action is, whether the Company have complied with the provisions of the Act thus set forth or have failed to do so in such a way as to give a cause of action to those who are injured, if such there be, by the manner in which the fund has been dealt with?

25.—It is clear from the statements that the Company did open a "Reserve Fund Account" which at the end of the last year before action had not reached the sum which by the Statute the Company was authorized to carry to that account. The sum to the credit of that account being \$825,625.06, while as the paid up

Capital was \$1,700,000, there is still nearly \$25,000 wanting of the maximum sum which might be placed to the credit of that account.

26.—The “Plant and Buildings Renewal Fund” account was also duly opened by the Company and it is equally plain from the statements that the amount at the credit of that account falls short of the sum which the Company were authorized or required to carry to the credit of the account as stated in the 9th paragraph of the Case.

27.—There is no complaint that any sum in excess of the amount authorised by the Statute has been distributed to the shareholders in dividends, nor that the Directors have taken more than the sum permitted for their fees, and the accounts clearly show that the time has not yet arrived when there is any surplus on hand requiring the Company to open “The Special Surplus Account” provided for and consequently no such account has been opened in their books. The contention of the appellants can only be that the amount appearing to the credit of the “Reserve Fund” has been or most of it has been expended in the Company’s business and has not been invested in the securities which the Statute authorized the Company to invest the Reserve Fund in. 10

28.—The intention of the Legislature in imposing these restrictions upon the Company or permitting the Company to increase its Capital Stock is not, however, difficult to understand. The object plainly was to prevent the Company, already restricted in the amount which it was permitted to pay in dividends, from applying its profits to a reserve fund beyond what was deemed to be a reasonable figure to provide against contingencies, namely, fifty per cent. on the Capital Stock. 20

29.—Then provision is made for a “Renewal Plant and Building Fund” account, which the Legislature thought ought to be provided for at the rate of five per cent. upon the value at which the plant and buildings in use by the Company stood in its books at the end of each fiscal year. But a time might come if the price of gas was not reduced when the “Reserve Fund” would have attained its maximum ; and after the payment of the dividend and setting apart the five per cent. for the renewal fund there would still be money on hand and the question was, what is to be done with that surplus ? The last part of the 7th Section of the Act plainly indicates the purpose, for it enacts that whenever the amount of such surplus is equal to 5 cents per thousand cubic feet on the quantity of gas sold “during the present year” the price of gas shall be reduced for the then current year at least 5 cents per thousand cubic feet to all consumers. The surplus was not to be returned to the consumers nor had they any interest except as forming a basis in the future price of gas. 30

30.—The appellants, however, contend that the Company has not observed the directions of the Statute ; because the Company have used a portion of the money lying to the credit of the reserve fund in its business in the ordinary way. 40

31.—As to the respondents’ Statutes, there is no statutable obligation on the Company to supply any particular person with gas. The Company is not bound to supply gas unless of their free will and pleasure and if gas is taken by any consumer it is in pursuance of a contract, express or implied, made by him with the Company. His rights depend on the provisions of that contract and not on the Statute. Here it is not claimed or pretended by the plaintiffs or

either of them that the Company charged them more than they had agreed to pay nor that they paid the amount of their gas bills under protest or otherwise than voluntarily and without compulsion or that any other claim or demand was made on the Company in respect of them than appears in the Special Case.

The respondents therefore submit that the Judgment of the Court of Appeal ought to be affirmed, for the following reasons:

- 1.—The plaintiffs have not, nor have either of them, any right of action in respect of the money which they or either of them have paid to the respondents as all payments made by them were voluntarily made.
- 2.—There is no right on the part of the plaintiffs, or either of them, to sue on behalf of the other customers of the Company. The rights of each customer with the Company depend on his contract, whatever it may be, and there is no right in common between the customers of the Company which would entitle one or more of them to maintain any action in the interests of the other customers.
- 3.—If the plaintiffs are entitled to maintain the action, there is no ground of complaint against the company, who have faithfully and literally complied with the provisions of the Act in question.
- 4.—The Company's primary purpose was the carrying on of the business of manufacturing and supplying gas and the expenditure or use of any money belonging to them in works for that purpose is not forbidden or unauthorized; but on the contrary expressly permitted and enjoined.
- 5.—The permission given to the Company by the 4th clause of the Act of 1887 to invest the reserve fund is a power and privilege in addition to the authority conferred upon the Company by its Act of Incorporation and "may" is not to be read as if it were "shall," nothing in the context requiring any such interpretation; nor is the permission given by Section 4 to be read in substitution of the authority conferred by the 2nd Section of the Company's Act of Incorporation but in addition thereto, as under the terms of the Act the Company was not authorised to appropriate its Capital to any other object or purpose than the carrying on of the business for which it was so incorporated, nor had the Company authority by it to accumulate a "Reserve Fund."
- 6.—The object of the Legislature has been or will be obtained so soon as the reserve fund reaches its maximum; and there is a surplus after providing for the other authorized expenditure and application of the earnings to be carried to "The Special Surplus Account," and it is a matter of no consequence to any consumer how the money is expended or whether it is expended or invested so long as the earnings are dealt with in the manner prescribed by the Act, so that

when these accumulations reach a certain figure the price of gas will be reduced.

D'ALTON McCARTHY.



**In the Privy Council.**

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FOR ONTARIO.**

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BETWEEN

J. T. JOHNSTON and THE TORONTO  
TYPE FOUNDRY COMPANY  
(LIMITED) . *(Plaintiffs) Appellants*

AND

THE CONSUMERS' GAS COMPANY  
OF TORONTO. *(Defendants) Respondents*

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**RESPONDENTS' CASE.**

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