Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Johnston and the Toronto Type Foundry Company, Limited, v. *The Consumers' Gas Company of Toronto, from the Court of Appeal of Ontario; delivered the* 1st *April* 1898.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Respondents the Consumers' Gas Company of Toronto were incorporated in 1848 by an Act of the Parliament of Canada 11 Vict. cap. 14. The preamble of the Act stated that the great and increasing extent of the city of Toronto and the great demand for a cheap and effective mode of lighting the streets and places of the city as well as the houses shops and other buildings therein rendered it desirable that more than one Company should be established for the purpose of furnishing a further supply of gas for lighting the city. It also stated that the Corporation of Toronto had signified their assent to the establishment of the Company and to their having the necessary powers connected with the establishment and construction of the necessary works.

The Appellants who were Plaintiffs in the action complained that they had been over-

charged by the Company for gas consumed in the business of the Toronto Type Foundry Company Limited. The Appellant Johnston is the managing director of the Type Foundry Company and the person with whom the contract for the supply of gas was made. The Plaintiffs sued on behalf of themselves and all other consumers of gas furnished by the Consumers' Gas Company. They did not name or indicate any particular sum as the amount of overcharge nor did they suggest that they had paid more than they had contracted to pay. Their case was that the Gas Company had violated or neglected obligations imposed upon the Company by an Act passed in 1887 and intituled "An Act to further extend the powers of the "Consumers' Gas Company of Toronto." They alleged that if those obligations had been fulfilled some reduction would have been made in the price of the Company's gas. They insisted that the Company's accounts from the date of the Act of 1887 should be reviewed and recast by the Chancery Division of the High Court of Justice. And they claimed that the Gas Company should be declared to be trustees for them of all sums found to have been misapplied by the Company and which ought to have been allowed to the Plaintiffs in reduction of the price of gas.

The Gas Company demurred generally but the demurrer was ordered to stand over to the trial. In the meantime the parties agreed upon a special case setting forth a number of figures which however were not to be binding on either party in case the Court should think fit to direct a reference. On the special case and the pleadings the Court was asked to determine in the first place whether the Plaintiffs or either of them had a right to maintain the action. In the event of that question being answered in the

affirmative a variety of points were suggested for the consideration of the Court in relation to the Company's accounts and the conduct of its affairs.

The trial Judge held the Plaintiffs entitled to relief. He thought the suit properly constituted. He pronounced an elaborate decree containing ten declarations on the points suggested by the Special Case and directing no less than fifteen separate accounts with the view of ascertaining the true position of the Company having regard to the requirements of the Act of 1887. The accounts to be taken would, he said, "necessarily "be accounts comprehending the whole business "of the Defendants done since the passing of that "Act including the surplus profits in the hands "of the Defendants at the time that Act was "passed."

The Gas Company appealed to the Court of Appeal for Ontario. The appeal was allowed and the action was dismissed with costs. From that decision the present appeal has been brought.

It was admitted at the Bar very properly that the Plaintiffs were not entitled to sue on behalf of other consumers of gas furnished by the Gas Company and that the action must be treated as brought by them in their individual capacity.

The only question argued was whether the Court of Appeal for Ontario were right in holding that the Plaintiffs had no cause of action. The answer to that question must depend solely on the Act of 1887. It was not suggested that the action could be maintained on any other ground.

There is no dispute as to the circumstances under which the Act of 1887 was passed. The capital of the Company had been increased under the authority of various enactments. It stood at the time at $1,000,000. The dividends had

reached the statutory limit of 10 per cent. and the shares were at a premium. The Gas Company applied to Parliament asking that the capital might be doubled. They proposed that the additional $1,000,000 should be allotted to the existing shareholders at par. The Corporation of Toronto opposed the Bill on the ground that the shareholders were not entitled to so large a bonus. They insisted that advantage should be taken of the opportunity to secure a reduction in the price of gas. Negotiations then took place between the Gas Company and the Corporation and the Act as passed was the result of a compromise.

It is not necessary to state the provisions of the Act in any detail. Whatever the facts may be their Lordships assume for the purposes of this case that the Company has not fulfilled its statutory obligations.

The Act authorized the Company to increase the capital to a sum not exceeding $2,000,000. All new shares were to be sold by auction. All sums received on sales over the par value were to be added to the reserve fund until it equalled one-half of the paid-up capital. The reserve fund was not to exceed that limit and it was to be drawn upon only for certain purposes specified in the Act. Another fund was to be created and maintained by the Company to be called the "Plant and Buildings Renewal Fund." To it were to be charged "all usual and ordinary "renewals and repairs." The Act then goes on to provide that any surplus of net profit from any source whatever after the payments therein mentioned and the establishment and maintenance of the Reserve Fund and the Plant and Buildings Renewal Fund shall be carried to a special account to be known as the "Special Surplus "Account" and it declares that "whenever the "amount of such surplus is equal to 5 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 5 cents per thousand cubic feet to all " consumers."

After these provisions there comes a clause which seems to their Lordships to have an important bearing on the question before them. It is in the following terms :—

"9. The Company shall give not less than " two weeks' written notice by registered letter " to the Mayor of the City of Toronto for the " time being of the time of commencing the " annual audit of the books and accounts of the " Company and it shall and may be lawful for " an auditor to be appointed by the Mayor of " the Corporation of the City of Toronto should " he deem it advisable to make such appointment " to be present at such annual audit and for the " purpose of verifying the Company's annual " statement to have access at the Company's " office to all books accounts and papers neces- " sary for such purpose."

It cannot of course be disputed that the Gas Company is under an imperative obligation to create and maintain the several funds specified in the Act of 1887 in accordance with the directions of the enactment. Nor is it open to doubt that the machinery of the Act was designed for the benefit of all the Company's customers. At the same time it is to be observed that no pecuniary penalty is imposed for default nor is a right of action expressly and in terms given to persons aggrieved. Now it is perfectly true as was observed by Lord Tenterden that if a statutory "obligation is created but no mode of " enforcing its performance is ordained the " Common Law may in general find a mode " suited to the particular nature of the case."

(*Doe. dem. Bishop of Rochester* v. *Bridges*, 1 B. & Ad. 859.) But it is equally true that the question whether an individual who is one of a class for whose benefit such an obligation is imposed can enforce performance by an action at law must depend to use Lord Cairn's words " on " the purview of the Legislature in the particular " statute and the language which they have " there employed." (*Atkinson* v. *Newcastle Waterworks Company*, 2 Ex. Div. 441.) It is especially so, as His Lordship observes, when the Act in question is not an Act of public and general policy but is rather in the nature of a private legislative bargain with a body of undertakers incorporated for purposes which Parliament considers of public or general utility.

We know the history of this legislation. It is difficult to suppose that the Gas Company would wittingly have consented to place themselves at the mercy of every customer who might fancy he was paying more than the Company was entitled to charge. On the other hand a Chancery Suit involving all necessary and proper accounts and enquiries is at best not a handy mode of obtaining redress for a trifling overcharge in a gas bill. Some people might think the cure worse than the disease. At any rate it may be doubted whether a remedy which is commonly supposed to be neither expeditious nor economical would have commended itself to Parliament as the best way of protecting ordinary householders and ordinary shopkeepers from the rapacity of a wealthy and powerful Company.

What then was the intention of the legislature? What security was provided to ensure observance of the statutory requirements? The answer is to be found in Section 9. The Gas Company was originally established with the assent of the Corporation. The Corporation were large cus-

tomers if not the largest customers of the Company. The ratepayers therefore were interested in keeping down the price of gas. On behalf of their constituents and on behalf of the public the Corporation came forward to oppose the bill of 1887. They procured the insertion of clauses designed to cheapen the supply of gas. They obtained authority to check the Company's accounts. They were given the fullest power of investigation. If they should find the Company wilfully disobeying the Act of Parliament they certainly would have no difficulty in compelling obedience by process of law. To them and not to every individual customer who may fancy himself aggrieved, Parliament has confided the duty of seeing that the Act is obeyed.

There seems to be no reason to suppose that the Corporation have neglected the duty which they voluntarily undertook. It appears by the Company's balance sheets annexed to the Special Case that in every year except the year immediately preceding the commencement of the action the Corporation appointed an auditor who examined verified and signed the accounts. The accounts for 1893 are not signed by an auditor on behalf of the City. No explanation is given of the omission. It may be that the Corporation thought it unnecessary to examine the accounts for that year or they may have considered it not desirable as it certainly was not required by the Act that their officer should give his formal sanction to the Company's accounts. However that may be whether the Corporation have or have not been remiss it seems to their Lordships to be perfectly plain that no individual customer can have a right of action against the Company for non-compliance with the provisions of the Act of 1887. The present action is entirely misconceived.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The Appellants will pay the cost of the appeal.