

[HIGH COURT OF AUSTRALIA.]

THE COUNCIL OF THE MUNICIPALITY OF }
KATOOMBA } APPELLANTS;

AND

THE KATOOMBA AND LEURA GAS COM- }
PANY LIMITED AND ANOTHER . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Local Government—Rental charge—Pipes laid under streets—Statutory authority—*
1917. *Permission of council—Local Government Act 1906 (N.S.W.) (No. 56 of 1906),*
sec. 209—Municipalities Act 1897 (N.S.W.) (No. 23 of 1897), secs. 175, 189—
Katoomba Lighting Act 1890 (N.S.W.), sec. 2.

SYDNEY,
August 23.

Barton, Isaacs
and Rich JJ.

By sec. 209 of the *Local Government Act 1906* (N.S.W.) it is provided that
“(1) A council ” of a municipality “may make a fair rental charge upon
persons who have laid or erected, or may, with the council’s permission, lay
or erect, pipes, wires, cables, or rails, on, under, over, or through the public
and other places under the control of the council.”

By sec. 2 of the *Katoomba Lighting Act of 1890* (N.S.W.) certain persons
(called “the promoters”) and their assigns were authorized and empowered
from time to time to erect and construct certain buildings and appliances
for the purpose of making and supplying gas, and for all such purposes to open
and break up the soil of the streets within a certain municipal district, and to
lay pipes thereunder.

Held, that the Council were not empowered by sec. 209 of the *Local Govern-*
ment Act 1906 to impose a rental charge upon the respondents, who were the
assigns of the promoters, in respect of pipes laid under the streets of the muni-
cipal district, either before or after the passing of that Act, pursuant to the
authority conferred by sec. 2 of the *Katoomba Lighting Act*.

Australian Agricultural Co. v. Newcastle Municipal Council, 10 C.L.R., 391,
followed and applied.

Decision of the Supreme Court of New South Wales: *Katoomba Municipal Council v. Katoomba and Leura Gas Co.*, 17 S.R. (N.S.W.), 139, affirmed. H. C. OF A. 1917.

APPEAL from the Supreme Court of New South Wales.

Pursuant to the authority and powers conferred by the *Katoomba Lighting Act* 1890 the Katoomba and Leura Gas Co., who were the assigns of the persons designated in that Act "the promoters," laid gas pipes under the streets within the Municipal District of Katoomba. Eleven miles of such pipes were laid before 1st January 1907, the date when the *Local Government Act* 1906 came into operation, and seven miles were laid after that date. On 23rd October 1916 the Council of the Municipality, purporting to act in pursuance of sec. 209 of the *Local Government Act* 1906 made a rental charge upon the Company in respect of the pipes laid by them under the streets within the Municipality. The Company disputed the amount of the rental charge on the ground that it was excessive. The dispute was referred under sec. 209 to Thomas Bailey Clegg, a Police Magistrate sitting at Katoomba as a Court of Petty Sessions. The Police Magistrate held that the *Katoomba Lighting Act* of 1890, and the powers conferred by it, ousted his jurisdiction. The Council thereupon obtained a rule *nisi* for a mandamus directed to the Police Magistrate to finally settle the dispute between the Council and the Company. The Full Court having discharged the rule *nisi* (*Katoomba Municipal Council v. Katoomba and Leura Gas Co.* (1)), the Council now, by special leave, appealed to the High Court from that decision.

KATOOMBA
MUNICIPAL
COUNCIL
v.
KATOOMBA
AND LEURA
GAS CO. LTD.

Leverrier K.C. (with him *Hammond*), for the appellants. The case of *Australian Agricultural Co. v. Newcastle Municipal Council* (2) is distinguishable from the present case, and, if not distinguishable, should be reconsidered. In that case the appellants had laid rails upon their own land, and before the *Local Government Act* 1906 came into operation had dedicated to the public as roads part of the land upon which rails had been laid, and in respect of the rails upon the land so dedicated the respondents, purporting to act under sec. 209, imposed a rental charge. The High Court held that sec. 209 did

(1) 17 S.R. (N.S.W.), 139.

(2) 10 C.L.R., 391.

H. C. OF A.
1917.

KATOOMBA
MUNICIPAL
COUNCIL

v.
KATOOMBA
AND LEURA
GAS CO. LTD.

not apply to such a case. In their judgments *Griffith* C.J. and *O'Connor* J. did not go further than to hold that sec. 209 did not apply to a case where rails were laid in the exercise of the proprietary rights subject to which the streets were dedicated to the public. *Isaacs* J., however, went further and held that the section would not apply to a case where rails were laid under a paramount authority created by Statute. The words "with the council's permission" in sec. 209 do not apply to the case of pipes laid before the *Local Government Act* 1906 came into operation, and there is no reason for restricting the general words "laid or erected" to cases where such a permission was necessary. Prior to that Act municipalities had no power to give permission to lay pipes under streets. Sec. 175 of the *Municipalities Act* 1897 dealt with the powers of municipal councils over roads and streets within their districts and gave no power to them to grant permission to others to lay pipes under the streets, so that, if the words "laid or erected" in sec. 209 have the restricted meaning, there would be nothing for them to operate upon.

[*Knox* K.C.—That section gives power to councils to adopt such means as may seem to them desirable for lighting and to make contracts for lighting. That would give them power to grant permission to lay pipes under the streets, and so would afford a field of operation for the words "laid or erected" if these words are limited to acts which require the permission of the council.]

Under the *Municipalities Act* 1897 persons who had laid pipes under streets under statutory authority were ratable as occupiers in respect of those pipes (*Borough of Glebe v. Lukey* (1)). Under the *Local Government Act* 1906 rates could be levied only upon owners and such persons were no longer ratable in respect of these pipes. Sec. 209 was intended to enable a council to make a rent charge in lieu of a rate in respect of such charge. By sec. 189 of the *Municipalities Act* 1897 power was given to councils to lay pipes under their streets, and that indicates that they had no power to give permission to others to do so. In that view, the words "laid or erected" in sec. 209 would be so limited in their operation that their effect would almost vanish.

Knox K.C. and *Watt*, for the respondent Company, were not called on.

H. C. OF A.
1917.

KATOOMBA
MUNICIPAL
COUNCIL

v.
KATOOMBA
AND LEURA
GAS CO. LTD.

BARTON J. In this case the Supreme Court dismissed a rule *nisi* for a mandamus to a Police Magistrate to settle a dispute as to the amount of the fair rental charge made by the appellants, in assumed pursuance of sec. 209 of the *Local Government Act* 1906, in respect of the pipes of the respondent Company, which dispute he would have had jurisdiction to settle if the matter had properly come before him. The Supreme Court held that to use its discretion in favour of granting a mandamus would be a useless, in fact a futile, act in view of the decision of this Court in the case of the *Australian Agricultural Co. v. Newcastle Municipal Council* (1), for they held that the present case is concluded by that decision. On this appeal it was first argued on behalf of the appellants that this Court should with a fuller Bench reconsider that decision. I see no reason for doing so. The question remains whether that decision can be distinguished. I do not think it can be, or at any rate that it has been, distinguished, and, notwithstanding some expressions in the judgment of *O'Connor* J. which point the other way, it is enough to say that the judgments of the learned Chief Justice and of my brother *Isaacs* are quite sufficient to cover this case, and I have no doubt of the concurrence of those two judgments. If they are accepted as covering a case like this, where parliamentary authority has been given by a private Act before the institution of the particular municipal council, it seems to me there is no more to be said, except this, perhaps, that *Mr. Leverrier* has called attention to the words "who have laid or erected" in sec. 209 and has said that there is nothing for them to operate upon if the view taken by the Supreme Court is adopted, or, rather, that the necessity for giving some force to those words has not been fully considered. I think that those words do not stand in the way of a judgment for the respondents in this case. In sec. 175 of the *Municipalities Act* 1897, the concluding part of the first paragraph gives a sufficient field of operation to the words of sec. 209 to which I have referred. On the whole, therefore, I think that the appeal should be dismissed with costs.

H. C. OF A.
1917.
KATOOMBA
MUNICIPAL
COUNCIL
v.
KATOOMBA
AND LEURA
GAS CO. LTD.
Isaacs J.

ISAACS J. I am of the same opinion. I do not desire to add anything to the reasoning that is found in my judgment in the *Australian Agricultural Co's Case* (1). That case has stood now for several years and Parliament has not thought fit to alter the law as it was there declared. I would add that if Mr. *Leverrier* were right this result would follow:—By sec. 2 of the *Katoomba Lighting Act* the promoters are authorized and empowered from time to time to make and erect certain plant, &c., for supplying gas, and for such purposes to open and break up streets within the municipality and to lay gas-mains and pipes thereunder. That is a standing parliamentary authority to lay down gas-pipes, and is not in any way qualified by the *Local Government Act* 1906, and for that purpose the Company do not require the permission of the Council. Not only is it clear that they could put down gas-pipes after 1906, but it appears that they have done so and without the permission of the Council. For the pipes laid down after 1906, the Company would manifestly not be liable under sec. 209. Is it to be supposed that they are made liable for the pipes laid down before that time under precisely the same authority? As I said in my judgment in the previous case, the spirit of the thing would rather tell in favour of a decision preserving their freedom for pipes laid down before that time. That consideration seems to strengthen the former decision very much.

RICH J. I agree.

Appeal dismissed with costs.

Solicitors for the appellants, *Hughes & Hughes*.

Solicitor for the respondents, *C. A. Coghlan*.

B. L.