[HIGH COURT OF AUSTRALIA.]

THE NORTH SHORE GAS COMPANY LIMITED APPELLANT;

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1939, *Nov.* 29, 30, *Dec.* 1.

1940, *April* 3.

Rich, Starke, Dixon, Evatt, and McTiernan JJ.

Stamp Duties (N.S.W.)—Exemption—Goods, wares, and merchandise—Sale of undertaking of gas company—Mains and service pipes embedded in soil—Stamp Duties Act 1920-1933 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 12 *of* 1933), *sec.* 41*, *Second Schedule**.

Mains and service pipes forming part of a continuous system of gas reticulation were embedded in the soil of public roads, public places and private land by a gas company under powers conferred upon it by a Private Act whereby a general control over and power at any time to remove such mains and pipes were also conferred upon the gas company.

Held that an agreement for the sale of the whole of the assets and undertaking of the gas company as a going concern was not, so far as it related to the mains and service pipes, an agreement for the sale of "goods, wares, or merchandise" within the meaning of the proviso excepting such an agreement from *ad-valorem* duty contained in the Second Schedule to the *Stamp Duties Act* 1920-1933 (N.S.W.).

Decision of the Supreme Court of New South Wales: *Re North Shore Gas Co. Ltd.*; *Ex parte The Commissioner of Stamp Duties*, (1939) 40 S.R. (N.S.W.) 85; 56 W.N. (N.S.W.) 150, affirmed.

* The *Stamp Duties Act* 1920-1933 (N.S.W.) provides as follows:—Sec. 41: "(1) Every agreement for the sale or conveyance of any property in New South Wales shall be charged with the same *ad-valorem* duty to be paid by the purchaser or person to whom the property is agreed to be conveyed as if it were a conveyance of the property agreed to be sold or conveyed and shall be stamped accordingly. . . (6) If the agreement comprises any goods, wares, or merchandise a claim to the exemption expressed in the Second Schedule to this Act shall not be allowed unless particulars of and the value of

APPEAL from the Supreme Court of New South Wales.

A special case, of which the relevant parts were substantially as follows, was stated by the Commissioner of Stamp Duties for the opinion of the Supreme Court of New South Wales under sec. 124 of the *Stamp Duties Act* 1920-1933 (N.S.W.) :—

2. By a Private Act of Parliament, the *Manly Gas-light and Coke Company (Limited) Act of* 1884, it was enacted, *inter alia*, as follows :—" 1. The Manly Gas-light and Coke Co. (Ltd.) is hereby fully authorized and empowered . . . from time to time to make erect sink lay place fit maintain and repair such retorts gasometers or gasholders meters receivers cisterns engines machines cuts drains sewers watercourses pipes reservoirs buildings and other works and devices of such construction and in such manner as the ' Manly Gas-light and Coke Co. (Ltd.) ' shall think necessary or proper for the purpose of carrying out the operations of the ' Manly Gas-light and Coke Co. (Ltd.) ' in respect of and incidental to the making and supplying of gas in conformity with this Act and the said memorandum and articles of association and also for all such purposes to open and break up the soil and pavement of the several footpaths highways streets bridges roads ways lanes passages or other public place or thoroughfare or of any road way thoroughfare or place dedicated to or used by the public as such or any part or parts thereof within the limits of the town and suburbs aforesaid and to open and break up any sewers drains or tunnels within or under such streets and bridges and to erect posts pillars lamps lamp-irons and other apparatus in or upon the same streets and bridges highways roads streets ways lanes passages and other thoroughfares and places or against any wall or walls erected on or adjoining to any of them and to dig and sink trenches and drains and to lay

the goods, wares, and merchandise in respect of which the exemption is claimed and an apportionment of the purchase money in respect thereof are fully set out in the agreement. The commissioner may exercise any of the powers conferred on him by section sixty-eight with respect to any such claim." Second Schedule : " Provided that any agreement or memorandum under seal, made for or relating to the sale of any goods, wares, or merchandise, is to be charged only with a duty of one pound (for which the parties thereto shall be primarily liable), but so that if the agreement or memorandum comprises also other property it shall be chargeable with the said duty of one pound in respect of the goods, wares, and merchandise only if and when in respect of such goods, wares, and merchandise there are fully set out in it particulars of such property and the value thereof and an apportionment of the purchase money in respect thereof."

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mains and pipes and put stopcocks syphons plugs or branches from such mains or pipes in under across or along such streets bridges roads ways lanes passages and other thoroughfares and places and also with such consent as hereinafter mentioned to do the like in under across or along any private roads ways lanes passages buildings and places and from time to time to cut stop remove alter repair replace and relay such main-pipes stopcocks syphons plugs branches or other apparatus."

3. The Manly Co. by special resolution duly passed in the year 1908 changed its name to the Manly Gas Co. Ltd.

4. By a further Private Act of Parliament, the *Manly Gas Company Limited (Amendment) Act* 1931, it was enacted that: "2. The *Manly Gas-light and Coke Company (Limited) Act of* 1884 shall be read and construed as if all references therein to the Manly Gas-light and Coke Co. (Ltd.) include the Manly Gas Co. Ltd. and its assigns."

6. Shortly after the passing of the Act of 1884, the Manly Co. erected certain gasworks and commenced the business of supplying gas under and in accordance with the said last-mentioned Act. The Manly Co. continued to carry on the said business until the amalgamation provided for by the agreement hereinafter mentioned.

7. For the purpose of its said business, the Manly Co., pursuant to the powers conferred upon it by the Act of 1884, laid under the surface of certain public roads, streets and other public places and under certain private land pipes leading from the said gasworks to the building alignment of the street opposite to the premises of consumers. All the pipes were laid by the method of digging in the soil trenches or channels of depths considerably greater than the external diameters of the pipes, placing the pipes in the trenches or channels, and, after making the necessary connections, completely covering the pipes with soil and other materials so as to restore the original level of the land and to reinstate the surface as nearly as possible to its previous condition.

8. At the date of the sale hereinafter mentioned, the Manly Co. was using for the purpose of supplying gas a considerable quantity of the pipes as so laid as aforesaid.

9. On 23rd December 1937, an agreement was made by and between the Manly Co. and the North Shore Gas Co. Ltd. for the sale of the whole of the assets and business of the Manly Co. as a

going concern to be carried on by the North Shore Co. By the agreement it was agreed that the Manly Co. should sell and the North Shore Co. should purchase the whole of the assets and undertaking of the Manly Co. upon the terms and conditions therein set forth.

10. By the agreement it was provided, *inter alia*, as follows :— (*a*) The consideration for the sale shall be the total sum at which the undertaking and assets of the Manly Co. are valued in the audited balance-sheet of that company as at 31st December 1937. (*b*) The property to be vested in the North Shore Co. shall be the whole of the undertaking and assets of the Manly Co. comprising, *inter alia* : (ii) All the movable plant mains services machinery and other movable chattels of the Manly Co. . . . The whole of such property for the purposes of assessing the stamp duty payable under this agreement is valued as follows :— . . .

Movable plant mains services machinery and other chattels	£248,776 0 0

The foregoing values are based upon the figures at 30th June 1937 and are subject to adjustment to the corresponding figures at 31st December 1937. (*c*) The purchase hereby agreed upon shall take effect as on 31st December 1937 and all apportionments necessary shall be made as of that date.

12. The value of the Manly Co.'s mains and services was fixed as at 31st December 1937 at the sum of £129,298 3s. 10d. and this sum was the consideration for the sale of the mains and services. The mains and services comprised all the pipes as so laid as aforesaid which on 31st December 1937 were in use for supplying gas in the course of the Manly Co.'s business together with such interest in the land occupied by the said pipes as the Manly Co. had by virtue of its said Private Acts. The last-mentioned sum was arrived at by the parties to the said agreement as follows :—

Original cost of the pipes including the cost of laying same	£157,795 1 3
Less the total of the amounts written off from time to time in the Manly Co.'s books for depreciation in respect of mains and services	28,496 17 5
	£129,298 3 10

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14. The North Shore Co. presented the agreement to the Commissioner of Stamp Duties for stamping, and claimed that in assessing the duty payable thereon exemption should be allowed in respect of the amount of £129,298 3s. 10d., upon the ground that the amount was consideration for the sale of goods, wares, and merchandise within the meaning of the *Stamp Duties Act* 1920-1933.

15. The commissioner claimed that no part of the amount was consideration for the sale of goods, wares, and merchandise within the meaning of the last-mentioned Act.

16. The stamp duty payable upon the agreement if the claim of the commissioner be correct is the sum of £2,006 10s. If the claim of the North Shore Co. be correct the duty is £1,036 15s.

The questions for the decision of the court were as follows :—

1. Whether the mains and services mentioned in par. 12 of the special case were goods, wares, and merchandise within the meaning of the *Stamp Duties Act* 1920-1933.
2. Whether the sum of £129,298 3s. 10d. mentioned in par. 12, or any and if so what part thereof, was consideration for the sale of goods, wares, and merchandise within the meaning of the said Act.
3. What is the amount of the stamp duty to which the agreement is liable ?
4. How the costs of the case should be borne and paid.

The Supreme Court answered the questions as follows :—1. No ; 2. No ; 3. £2,006 10s. ; 4. By the North Shore Gas Co. : *Re North Shore Gas Co. Ltd.* ; *Ex parte The Commissioner of Stamp Duties* (1).

From that decision the North Shore Gas Co. appealed to the High Court.

Weston K.C. (with him *McMinn*), for the appellant. Where a person erects, builds or puts machinery on or places pipes through the land of another the maxim *quicquid plantatur solo, solo cedit* does not apply (*Wake* v. *Hall* (2)). *Glasgow Corporation* v. *M'Ewan* (3) is distinguishable from this case. The fact that persons who have a statutory licence to lay pipes in land are occupiers of the land for

(1) (1939) 40 S.R. (N.S.W.) 85 ; 56 W.N. (N.S.W.) 150.
(2) (1883) 8 App. Cas. 195.
(3) (1900) A.C. 91.

rating purposes (*Borough of Glebe* v. *Lukey* (1)) does not connote that they have any interest in the land as owners (*Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (2)). The pipes in the sense of the metal of which they are made and also in the extended sense of the hollow bored in the pipe remain the chattel property of the Manly Gas Co. and do not become land.

[STARKE J. referred to *Stroud's Judicial Dictionary*, 2nd ed. (1903), p. 825: "goods, wares, and merchandise."]

Cases decided on the *Sale of Goods Act* and the *Stamp Acts* supply the test of what is within the exemption, but do not show its application to this case.

[EVATT J. referred to *M. R. Hornibrook (Pty.) Ltd.* v. *Federal Commissioner of Taxation* (3).]

A pipe belonging to the gas company but unconnected with the gas system comes within the expression "goods, wares, and merchandise"; the nature of a pipe is not altered by the fact that one end is connected with a gasholder and the other end with a retort holder. *Wake* v. *Hall* (4) and this case are exceptions from the rule that everything in the ground is part of the ground. On the application of the test stated in *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 97, par. 107, these pipes are not fixtures. The test laid down in *Australian Provincial Assurance Co. Ltd.* v. *Coroneo* (5) is not the true test of what is a fixture: See *Leigh* v. *Taylor* (6); *Spyer* v. *Phillipson* (7).

[DIXON J. referred to *Melbourne Tramway & Omnibus Co. Ltd.* v. *Fitzroy Corporation* (8); *Pimlico Tramway Co.* v. *Greenwich* (9); *R.* v. *Lee* (10).]

There was no obligation imposed on the Manly Gas Co. by its private Act to continue to supply: See also *Gas (Amendment) Act* 1926 (N.S.W.); *Gas and Electricity Act* 1935 (N.S.W.). If *Parke* B. in *Knight* v. *Barber* (11) meant that the operation of the English section was limited to bona-fide mercantile transactions, the limitation is

(1) (1904) 1 C.L.R. 158.
(2) (1895) A.C. 117, at pp. 121, 125, 129, 131, 132.
(3) (1939) 62 C.L.R. 272.
(4) (1883) 8 App. Cas. 195.
(5) (1938) 38 S.R. (N.S.W.) 700; 55 W.N. (N.S.W.) 246.
(6) (1902) A.C. 157, at pp. 158-161, 164.
(7) (1931) 2 Ch. 183, at pp. 191, 193, 195, 206, 209.
(8) (1901) A.C. 153.
(9) (1873) L.R. 9 Q.B. 9.
(10) (1886) L.R. 1 Q.B. 241.
(11) (1846) 16 M. & W. 66, at p. 70 [153 E.R. 1101, at p. 1103].

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inapplicable in New South Wales, because the history of the legislation in New South Wales—See *Stamp Duties Act* 1898, secs. 25, 38; *Stamp Duties (Amendment) Act* 1914; *Stamp Duties (Amendment) Act* 1920, sec. 41—shows that the scheme differs from the English scheme, as to which see the English *Stamp Act* 1891, sec. 22. If these mains and pipes are chattels, they come within the expression "goods, wares, and merchandise," which includes all tangible property but does not extend to fixtures (*Benjamin* on *Sale*, 6th ed. (1920), p. 201; *Blackburn* on *Contract of Sale*; *Halsbury's Laws of England*, 2nd ed., vol. 29, p. 73, par. 85).

Teece K.C. (with him *Kitto*), for the respondent. The mains and services are not goods, wares and merchandise within the meaning of the *Stamp Duties Act* 1920-1933 because they are fixtures, and a sale of fixtures, while they are affixed to land, is not a sale of goods. Before the passing of the *Local Government Act* 1919 (N.S.W.), sec. 232, the roads on which the pipes were laid belonged to private owners (*Municipal Council of Sydney* v. *Young* (1); *Municipal District of Concord* v. *Coles* (2); *Tierney* v. *Loxton* (3)). Fixtures do not include only chattels that are affixed to land by a tenant or tenant for life (*Crossley Bros. Ltd.* v. *Lee* (4); *Hobson* v. *Gorringe* (5); *Reynolds* v. *Ashby & Son* (6)). Cases on fixtures fall into two classes; those consisting of domestic furniture and those consisting of industrial plant. If machinery is fixed to the soil for the better carrying out of an industrial undertaking, it is a fixture. *Hellawell* v. *Eastwood* (7), which decides to the contrary, was disapproved in *Mather* v. *Fraser* (8), *Longbottom* v. *Berry* (9), *Holland* v. *Hodgson* (10), *Reynolds* v. *Ashby & Son* (6), *Crossley Bros. Ltd.* v. *Lee* (4), and *Craven* v. *Geal* (11). Alternatively, if the mains and services are not fixtures, they are land, and a sale thereof is a sale of land. When soil is excavated and the portion of the space beneath the surface previously occupied by earth is occupied by mains and pipes, that space is land, and a sale thereof is a sale of land (*Southport*

(1) (1898) A.C. 457.
(2) (1905) 3 C.L.R. 96.
(3) (1891) 12 L.R. (N.S.W.) 308; 8 W.N. (N.S.W.) 79.
(4) (1908) 1 K.B. 86.
(5) (1897) 1 Ch. 182.
(6) (1904) A.C. 466.
(7) (1851) 6 Ex. 295 [155 E.R. 554].
(8) (1856) 2 K. & J. 536 [69 E.R. 895].
(9) (1869) L.R. 5 Q.B. 123.
(10) (1872) L.R. 7 C.P. 328, at p. 337.
(11) (1932) V.L.R. 172.

Corporation v. *Ormskirk Union Assessment Committee* (1); *Glasgow Corporation* v. *M'Ewan* (2); *Toronto Corporation* v. *Consumers' Gas Co. Ltd.* (3); *Auckland City Corporation* v. *Auckland Gas Co. Ltd.*; *Auckland Gas Co. Ltd.* v. *Auckland City Corporation* (4)).

[McTIERNAN J. referred to *Law Quarterly Review*, vol. 32, p. 70.]

The Private Act contains no implied declaration that these pipes shall remain chattels. The view that the gas company acquired only an easement in the soil is erroneous (*Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (5); *Auckland City Corporation* v. *Auckland Gas Co.* (4)). The Manly Co. was given a right of exclusive user of the land by virtue of these pipes and, accordingly, was given ownership (*Reilly* v. *Booth*, (6); *Metropolitan Railway Co.* v. *Fowler* (7))—See also *Borough of Glebe* v. *Lukey* (8).

[DIXON J. referred to *Minshall* v. *Lloyd* (9) and *Mackintosh* v. *Trotter* (10).]

Even if the mains and services retain the character of chattels the appellant is not entitled to exemption from duty, because there was no apportionment of the purchase money in respect thereof: the consideration money of £129,298 was the purchase money not only of the mains and service pipes but also of such interest in the land as the gas company had, and even if it was not the owner of the land it had some interest therein (*Lavery* v. *Pursell* (11); *In re Samuel Allen & Sons Ltd.* (12); *In re Morrison, Jones & Taylor Ltd*; *Cookes* v. *Morrison, Jones & Taylor Ltd.* (13); *London and Westminster Loan & Discount Co.* v. *Drake* (14); *Cory* v. *Bristow* (15)). These pipes are not goods, wares, and merchandise (*Benjamin* on *Sale*, 6th ed. (1920), ch. 2, pp. 198, 201, 206, 207, 211)—See also *M. R. Hornibrook (Pty.) Ltd.* v. *Federal Commissioner of Taxation* (16); *R.* v. *Lee* (17).

(1) (1894) 1 Q.B. 196.
(2) (1900) A.C. 91.
(3) (1916) 2 A.C. 618.
(4) (1919) N.Z.L.R. 561.
(5) (1895) A.C. 117.
(6) (1890) 44 Ch. D. 12, at pp. 21, 22, 25, 26.
(7) (1893) A.C. 416.
(8) (1904) 1 C.L.R. 158.
(9) (1837) 2 M. & W. 450 [150 E.R. 834].
(10) (1838) 3 M. & W. 184 [150 E.R. 1108].
(11) (1888) 39 Ch. D. 508, at p. 513.
(12) (1907) 1 Ch. 575.
(13) (1914) 1 Ch. 50.
(14) (1859) 6 C.B. N.S. 798 [141 E.R. 664].
(15) (1877) 2 App. Cas. 262.
(16) (1939) 62 C.L.R. 272.
(17) (1866) L.R. 1 Q.B. 241.

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Weston K.C., in reply. *Auckland City Corporation* v. *Auckland Gas Co.* (1), *Toronto Corporation* v. *Consumers' Gas Co.* (2), and *Glasgow Corporation* v. *M'Ewan* (3) are distinguishable. Moreover, *Wake* v. *Hall* (4), which was a decision in which the precise point arising in this case was dealt with, was not cited in those cases. These pipes are in neither of the two classes into which fixtures may be divided. By virtue of sec. 41 (6) of the *Stamp Duties Act* 1920-1933 (N.S.W.) all that is necessary in order to claim the exemption is that the parties should have segregated something which answers the description goods, wares, and merchandise and apportioned something to that. If the gas company had an interest in the land surrounding the pipes, that did not pass under clause 2 (ii) of the agreement.

Cur. adv. vult.

1940, April 3.

The following written judgments were delivered :—

RICH J. This is a case stated to the Supreme Court of New South Wales under sec. 124 of the *Stamp Duties Act* 1920-1933 (N.S.W.). The facts are fully set out in the case and I need not repeat them at length. The Manly Gas Co. agreed to sell to the North Shore Gas Co. the whole of its assets and business as a going concern to be carried on by the North Shore Co. Mains and service pipes form part of these assets, and the question for decision before the Supreme Court was whether this agreement, so far as it relates to these mains and service pipes, fell within the exemption as an agreement relating to the sale of "goods, wares, or merchandise" contained in the proviso in the Second Schedule of the *Stamp Duties Act* 1920-1933, which charges agreements for sale the same duty as on a conveyance of the property. That proviso reads as follows : "Provided that any agreement or memorandum under seal, made for or relating to the sale of any goods, wares, or merchandise, is to be charged only with a duty of one pound (for which the parties thereto shall be primarily liable), but so that if the agreement or memorandum comprises also other property it shall be chargeable with the said duty of one pound in respect of the goods, wares, and merchandise

(1) (1919) N.Z.L.R. 561.
(2) (1916) 2 A.C. 618.
(3) (1900) A.C. 91.
(4) (1883) 8 App. Cas. 195.

only if and when in respect of such goods, wares, and merchandise there are fully set out in it particulars of such property and the value thereof and an apportionment of the purchase money in respect thereof." In *Knight* v. *Barber* (1), Baron *Parke*, commenting on the words goods, wares, or merchandise in 55 Geo. III., c. 184, schedule, part 1, title "Agreement", adopts the construction which had been already placed on the words goods, wares, and merchandise in the 17th section of the Statute of Frauds, and said that "the exemption was intended to protect bona-fide mercantile transactions of the sale and purchase of goods." Assuming that "the movable plant mains services machinery and other movable chattels" vested in the North Shore Co. by the agreement are goods, wares, and merchandise, it is admitted that sec. 41 (6) of the *Stamp Duties Act* has been complied with and that the particulars and value and an apportionment of the purchase money in respect thereof are fully set out in the agreement. The question for our consideration is the correctness or incorrectness of the assumption. I take it that if a sale of the things to which the controversy relates would have been within the 17th section of the Statute of Frauds, then to that extent it falls within the proviso. The "movable chattels" doubtless would come within sec. 17, and apparently there is some part of the plant and machinery which would do so. But the mains and services are clearly embedded in the soil, and the Supreme Court has decided that they do not constitute goods or chattels personal. The sale is of the undertaking as a going concern and does not contemplate any severance or removal of any fixed apparatus. The mains and services have been placed in the ground for no temporary purpose, but to serve the end for which they are designed. In other words, they will remain in the soil until they have exhausted their useful lives, and then only will they be removed. They remain, however, the property of the company. They are placed in roads and other public places not belonging to the company and there they lie *in alieno solo* but in contemplation of law owned and possessed by the company. If they are to be classed as land they cannot form a subject of exemption as goods, wares, and merchandise, but if they remain personal chattels there is no reason why they should not form such a subject.

(1) (1846) 16 M. & W., at p. 70 [153 E.R., at p. 1103].

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Rich J.

The problem here is not the usual one arising from the purpose and degree of the annexation of the freehold, as for instance in a case of mortgagor and mortgagee (*Longbottom* v. *Berry* (1); *Holland* v. *Hodgson* (2); *Reynolds* v. *Ashby & Son* (3)). The degree of annexation is very great and the purpose undoubted. The pipes are buried to serve as a permanent or quasi-permanent means of conveying and supplying gas from reservoirs or containers to the various points of consumption. The problem arises from the provisions of the company's Private Act, which authorizes it to place the pipes in the soil of the roadways and other places, to remove them, to control them and to retain the ownership and in effect the possession of them. In other words, the Act of Parliament negatives entirely the principle expressed by the maxim *quicquid plantatur solo, solo cedit.* Does this result in their continuing to belong to the legal category of personal chattels in which they fell before they were placed in the ground? On the whole I think that we should hold that they lost that character. They were dealt with in a fashion which, apart from specific legislative provision, would give them the same legal character as the soil in which they were placed for the purpose of the classification of things into chattels personal and realty. The statute prevents many of the consequences which would ensue from such a transition from the category of chattels personal to that of land, but it stops short of preventing the transition itself. We should, in my opinion, say that the mains and services are no longer chattels personal, and therefore are not goods, wares, or merchandise.

For these reasons I think the appeal should be dismissed.

STARKE J. Appeal from a judgment of the Supreme Court of New South Wales upon a case stated under the *Stamp Duties Act* 1920-1933 of New South Wales.

Under that Act every agreement for the sale or conveyance of any property in New South Wales shall be charged with the same *ad-valorem* duty as if it were a conveyance of the property agreed to be sold or conveyed. Provided that any agreement or memorandum under seal made for or relating to the sale of any goods,

(1) (1869) L.R. 5 Q.B., at p. 137. (2) (1872) L.R. 7 C.P., at p. 335.
(3) (1904) A.C., at p. 474.

wares, or merchandise is to be charged with a duty of one pound, but so that if the agreement or memorandum comprises also other property it shall be chargeable with the said duty of one pound in respect of the goods, wares, and merchandise only if and when in respect of such goods, wares, and merchandise there are fully set out in it particulars of such property and the value thereof and an apportionment of the purchase money in respect thereof (Act, sec. 41 and 2nd schedule). Further, sec. 41 (6) of the Act provides, "If the agreement comprises any goods, wares, or merchandise a claim to the exemption expressed in the Second Schedule to this Act shall not be allowed unless particulars of and the values of the goods, wares, and merchandise in respect of which the exemption is claimed and an apportionment of the purchase money in respect thereof are fully set out in the agreement." In the case of agreements under hand only (*Chadwick* v. *Clarke* (1)) and not otherwise specifically charged, there is a similar exemption of agreements made for or relating to the sale of any goods, wares or merchandise.

The expression "agreement . . . made for or relating to the sale of any goods, wares, or merchandise" has a familiar ring. The well-known seventeenth section of the Statute of Frauds (1677) provided that no contract for the sale of any goods, wares, or merchandise shall be allowed to be good, except in certain cases, and the *Stamp Act* of 1815, 55 Geo. III., c. 184 (reproduced in the *Stamp Act* 1891) exempts from stamp duty any memorandum letter or agreement made for or relating to the sale of any goods, wares, or merchandise. Decisions under these Acts will afford a guide to the meaning of the phrase in the New South Wales *Stamp Duties Act*.

The phrase "goods, wares, and merchandise" comprehends all tangible movable property (*Blackburn* on *Contract of Sale*, 1st ed. (1845), p. 9). And *Platt* B. said in *Sadler* v. *Johnson* (2), that the exemption in the *Stamp Act* was for the purpose of protecting commerce and ought therefore to receive a liberal construction. But it is well enough settled that it does not include fixtures, nor scrip certificates, nor shares, and so forth: See *Chitty's Statutes*, *Stamps*, 2nd ed., vol. III., p. 1251.

(1) (1845) 1 C.B. 700 [135 E.R. 717].
(2) (1847) 16 M. & W. 775, at p. 777 [153 E.R. 1403, at p. 1404].

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Starke J.

The main question in the present case is whether certain gas mains and service pipes were goods, wares, and merchandise within the meaning of the *Stamp Duties Act* 1920-1933. The Manly Gas Co. Ltd. was authorized by statute to construct gas works within and about the borough of Manly, and to lay mains and pipes in under across or along public or private streets and to remove alter repair replace and relay such mains pipes and other apparatus and to make contracts for the supply of gas. Under these powers, pipes were laid under the surface of public and private streets leading from the gas works to the alignment of the street opposite to the premises of consumers. All the pipes were laid by the method of digging in the soil trenches or channels of depth considerably greater than the external diameters of the pipes, placing the pipes in the trenches or channels, and, after making the necessary connections, completely covering the pipes with soil and other materials so as to restore the original level of the land and to reinstate the surface as nearly as possible to its previous condition. The Manly Gas Co. Ltd. and the North Shore Gas Co. Ltd. amalgamated pursuant to powers conferred upon them and with the sanction of the Executive Government in New South Wales. By an agreement of December 1937 the Manly Co. sold and the North Shore Gas Co. Ltd. purchased the whole of the assets and undertaking of the Manly Co. including all the movable plant, mains, services, machinery and other movable chattels of the Manly Co. The movable plant, mains, services, machinery, and other chattels were valued for the purpose of assessing stamp duty under the agreement at £248,776, but the case states that the value of the Manly Co.'s mains and services was fixed as at the 31st December 1937 at the sum of £129,299 in round figures, and this sum was the consideration for the sale of the said mains and services, arrived at by the parties to the agreement as follows :—

Original cost of the pipes including the cost of laying the same	£157,795
Less the total amount written off for depreciation of mains and services	£28,496

But the agreement only contains the figure £248,776, and the latter figures are not mentioned in it.

The North Shore Co. presented the agreement to the Commissioner of Stamp Duties for stamping, and claimed that in assessing stamp duty payable thereon exemption should be allowed in respect of the amount of £129,299, upon the ground that the amount was consideration for the sale of goods, wares, and merchandise within the meaning of the *Stamp Duties Act* 1920-1933. But it is plain that the mains and pipes form part of the gas works and undertaking of the North Shore Co. and have never been separated or detached from them. They form part of an integral whole. Long and learned arguments were addressed to the question whether these mains and pipes were or were not fixtures and whether the gas company would or would not be ratable in respect of the occupation of land by means of its mains and pipes and so forth. But the widest meaning of the words "goods, wares, and merchandise" cannot and does not include mains and pipes attached to and unsevered from the works and undertaking of a public utility or franchise created by statute such as belongs to the appellant the North Shore Gas Co. Ltd. A merchant, I am afraid, would be pained to hear a gas works, its mains and service pipes, described as goods, wares, and merchandise, but it was argued that the law compelled us to reach that conclusion. It was all very interesting and instructive, but very unreal and unconvincing. Moreover, the agreement in the present case does not, as it seems to me, comply with the conditions of the exemption required by the Act in sec. 41 and the schedule, but it is wiser perhaps to reserve that question for another day.

The appeal should be dismissed.

DIXON J. In New South Wales an agreement for the sale of any property is chargeable with stamp duty as if it were a conveyance of the property. It is an *ad-valorem* duty. But an exception is made in favour of agreements for the sale of goods, wares, or merchandise. Such an agreement is to be charged only with a duty of one pound. If an agreement includes other property as well as goods, wares, and merchandise, then in respect of the latter the duty of one pound, and not an *ad-valorem* duty, is chargeable if, but only if, the agreement fully sets out particulars of such property

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and the value thereof and an apportionment of the purchase money in respect thereof: Cf. *Stamp Duties Act* 1920-1933, sec. 41 and 2nd schedule, title "Agreement," par. 2.

The question for decision in this appeal is whether the exception in favour of goods, wares, and merchandise covers the mains and service pipes of a gas company which, for the purpose of amalgamating its business with that of another company, has entered into an agreement with the latter for the sale and transfer of its undertaking as a going concern.

The undertaking so to be transferred is that of the Manly Gas Co. Ltd.

The mains and service pipes of the company had been laid in the usual manner in the streets, thoroughfares and other convenient places in the area which it supplied with gas. This was done under the authority of a special Act, which conferred upon the company ample powers to open streets and other public places for the purpose of laying, repairing, replacing or removing mains and other gas pipes and to maintain therein its pipes and apparatus.

The agreement of amalgamation contained an enumeration of the various descriptions of property forming the undertaking to be transferred by the Manly Gas Co. The mains and service pipes were included in a category of chattels described as "all the movable plant mains services machinery and other movable chattels of the Manly Co." The same clause of the agreement stated that for the purpose of assessing stamp duty the various descriptions of property were valued at amounts set out. The "movable plant mains services machinery and other chattels" were valued together, that is as one item, at £248,776. If the things included in this description all fell within the exception in favour of goods, wares, and merchandize, it was conceded that there was a sufficient compliance with the requirement that the agreement should fully set out the particulars of the property falling within the exception and the value thereof and an apportionment of the purchase money in respect thereof. But the Commissioner of Stamp Duties contends that the mains and service pipes are not goods, wares, and merchandise, and ought not to be included. He and the company agree that of the sum of £248,776 an amount of £129,298 represents the value of the mains

and service pipes, including any interest in the land occupied by such pipes to which the company may be entitled under its statute. If his contention is well founded, the commissioner claims additional stamp duty, amounting to £970, not in respect of the whole £248,776, as possibly he might, but in respect of the £129,298, representing the mains and service pipes.

The words "goods, wares, and merchandise," by which the exception from the *ad-valorem* duty is expressed, come from the seventeenth section of the Statute of Frauds. The exception itself originates in the English *Stamp Act*, 55 Geo. III., c. 184, schedule, Part 1, title "Agreement." It is evident that the purpose was to exempt from the *ad-valorem* duty instruments required to satisfy the seventeenth section of the Statute of Frauds, and it seems to me that the expression "goods, wares, or merchandise" in the exception should be interpreted as co-extensive with the words "goods, wares, or merchandise" in the Statute of Frauds. The words were understood to include all tangible movables; that is to say, they covered all chattels personal not being choses in action or *indicia* of title thereto. If the mains and gas pipes now in question had not been assembled and embedded in the ground they would have come within the denotation of the words. They form, however, part of a continuous system of gas reticulation which runs under the earth and is attached to plant and buildings fixed to the soil. The question for decision is, I think, whether the pipes and mains, considered as *in situ* and as part of such an undertaking, have no longer the quality of chattels personal. It must be steadily borne in mind that the agreement relates to the undertaking as a going concern. It contemplates a transfer of the mains and services as they lie in the ground; not as separate or detachable articles, but as an integral part of an undivided plant or system and actually in use.

Ordinarily when the chattel elements by which a permanent system or apparatus is formed are assembled and embedded in the soil or established as part of a building they lose their independent nature and for the purpose of the law take on the character of land. Thus, if the land in which the mains were laid had belonged to the company for an estate in fee simple or for any less estate or interest and the company had not acted under its special statutory powers,

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the mains until removed would have formed part of the realty. At common law they would not have been larcenable—Cf. *R.* v. *Dowsey* (1) : they would have passed upon a conveyance or transfer of the company's estate in the land, and, if the company was a tenant for years, subject to the company's right if any to remove them during the term, they would have passed upon a conveyance or transfer of the reversion—Cf. *Hobson* v. *Gorringe* (2) ; *Reynolds* v. *Ashby & Son* (3) ; and writing would be required to create an equitable charge over them, because it would amount to an interest in land (*Jarvis* v. *Jarvis* (4)).

The peculiarity of the present case consists in the fact that under the company's statutory powers the mains and service pipes are placed in soil in which the company has no estate or interest and it retains both the property in and the control of the mains and pipes.

The primary consequence of so fixing such things in the soil that they are treated as forming part of it is that ownership of the articles follows ownership of the land. Though removable tenants' fixtures may during the term be detached and become chattels belonging to the tenant, yet the better opinion appears to be that unless and until the tenant exercises his right of removal they form part of the realty —See *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 97, note *o* and *Foa, Landlord and Tenant*, 6th ed. (1924), p. 771—and for this reason, subject to the exercise of the tenant's right to convert them again into chattels, pass with the land. The company's statute prevents some of the consequences which ordinarily ensue from identification with the soil, viz., loss of absolute property in and possible loss of control of the things embedded in or attached to the soil. Does it preserve their quality or character of chattels personal ? The answer to this question is not, I believe, the subject of any definite authority. I am unable to agree with the contention made on behalf of the company that in *Wake* v. *Hall* (5) Lord *Watson*, Lord *Bramwell* and Lord *FitzGerald* gave a chattel character to the machinery and buildings there in question, which had been erected upon the surface under the authority of local mining customs reduced to statutory expression. Their Lordships decided, I think, no more

(1) (1903) 29 V.L.R. 453 ; 25 A.L.T. 149.
(2) (1897) 1 Ch. 182.
(3) (1904) A.C. 466.
(4) (1893) 69 L.T. 412 ; 9 T.L.R. 631.
(5) (1883) 8 App. Cas. 195.

than that the erections did not pass to the owner of the land under the principle *quicquid plantatur solo, solo cedit*. On the other hand, some of the language used by Lord *Blackburn* is consistent only with the view that the buildings erected by the miners, though subject to removal by them and remaining their property, yet pending removal took on the character of land : See the report (1). The Commissioner of Stamp Duties for his part relied on the decision of the Privy Council in *Toronto Corporation* v. *Consumers' Gas Co.* (2). The question in that case was whether the gas company was entitled to compensation from the municipality, which had required the company, in order to make way for a sewer, to lower a gas main in the public street under a statutory power almost indistinguishable from that of the Manly Gas Co. Their Lordships held that the company was entitled to compensation. Lord *Shaw*, who delivered the judgment, gave two reasons. The first was that the gas main became *pars soli*. The second that under a statutory provision giving compensation for the expropriation or injurious affection of land by the municipality, " land " was defined to include a right or interest in, and an easement over, land. His Lordship summarized the Board's conclusion as follows :—" The reasons have already been assigned for holding that the space occupied by the gas mains and the gas mains themselves of the respondents are of the nature of land in its ordinary sense. It must, however, be added that in any view the definition of ' land ' in the Municipal Act unquestionably includes them. For it can hardly be denied that the words ' a right or interest in, and an easement over, land ' would embrace the right of the gas company to have their pipes remain, and to have the interest and use of them and the space occupied by them undisturbed ; nor can it be doubted that the company falls within the definition of owner as just cited " (3).

This reasoning, though perhaps not decisive, appears to me to lend some real support to the view that the gas mains and service pipes lying in the soil of the highways are not chattels personal. But the same conclusion finds a sufficient basis in principle.

The mains and service pipes are embedded in the soil of the streets as a permanent means of providing the gas supply of the frontagers. The reticulation forms an artificial but normal or ordinary adjunct of the suburban street. There is therefore no doubt about the

(1) (1883) 8 App. Cas., at pp. 201, 204.
(2) (1916) 2 A.C. 618.
(3) (1916) 2 A.C., at p. 624.

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purpose, the degree nor the enduring nature of fixation of the pipes or their identification with the soil. So much of the earth as the pipes displace formed a space in the occupation of the company and that space constitutes land. The company's occupation of the space is as of right and is exclusive.

The right to remove the pipes arises from a particular statutory power. Unless it is exercised the pipes must remain *in situ* as part of a widespread system or apparatus which can be transferred only as an entirety. It is interconnected and radiates from a plant consisting of fixtures. Every physical characteristic, therefore, tends to place the mains and service pipes in the same category as the soil from which, without disintegration or disconnection, they are inseparable. Two legal qualities belong to the pipes which ordinarily do not belong to part of the soil, viz., the existence of independent ownership in another person and removability. But these qualities arise from statutory provisions, and removability at all events is a well-known characteristic of tenants' fixtures, which until removal are considered part of the realty. I do not think that these statutory legal qualities are enough to put the buried apparatus out of the classification to which otherwise it would belong.

The mains and service pipes are fixtures, and in my opinion are not chattels personal.

An agreement relating to the sale of fixtures is not within the exception from *ad-valorem* duty of goods, wares and merchandise (*Wick* v. *Hodgson* (1)).

The appeal should be dismissed with costs.

EVATT J. The appellant claims that the agreement for sale to it of the assets of the Manly Gas Co. Ltd., so far as such agreement concerned the " mains and services " was a sale of " goods, wares, and merchandise " within the meaning of the second schedule of the *Stamp Duties Act* 1920-1933 of the State of New South Wales.

Under sec. 41 (6) of the Act, an exemption cannot be allowed unless particulars of and the value of the goods, wares, and merchandise in respect of which the exemption is claimed and an apportionment of the purchase money in respect thereof are fully set out

(1) (1827) 5 L.J. (O.S.) C.P. 55 ; 12 Moore C.P. 213.

in the agreement. Clause 10 of the present agreement contained assessments of the groups of property to be transferred. Under the clause, the " mains and services " were not valued as such, but they were included in the group described as " movable plant mains services machinery and other chattels " and assessed at the value of £248,776. Plainly, the selection of this larger group of assets is accounted for by the fact that it was intended to assert that the entire group consisted of " goods, wares and merchandise." Sec. 41 (6) gives the commissioner, in relation to claims for exemption of goods, wares, and merchandise, power to review the parties' assessment of values (sec. 68) ; and, acting under this power, the value of the " mains and services " has been finally fixed at £129,298 3s. 10d., and the sole question remains : Are such " mains and services " to be regarded as " goods, wares, and merchandise " ?

The fact is that the Manly Gas Co., acting in pursuance of its statutory powers, had placed the mains under the surface of public roads, public places and private land. In order to lay the mains, trenches were dug, pipes placed therein, the necessary connections were made, and the pipes were covered with soil, etc., so as to restore the original level of the land and to reinstate the surface.

The Act of Parliament dealing with the matter is the *Manly Gas-light and Coke Company (Limited) Act* 1884-1931. It gave the company the power to lay down the pipes and other apparatus, and power to remove the pipes for replacement purposes. It is clear that the pipes remained throughout the property of the company. Before being placed in the ground, the pipes were " goods, wares, or merchandise," and the appellant, relying on the statute, contends that it is entirely consistent with the theory that the pipes never lost their character as personal chattels.

In my opinion, this case can be decided without any review of the Full Court's reasons for judgment.

Clause 12 of the special case shows that the " mains and services " transferred included such interest in the land occupied by the pipes as was conferred by the private Act. I regard the phrase " such interest in the land occupied by the said pipes as the Manly company had by virtue of its said Private Acts " not as precluding the appellant from contending that the Act did not confer upon the

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company a strict legal interest in such land, but I do regard the paragraph as declaring that, in valuing the "mains and services," there has been included the statutory right or privilege of having the pipes embedded in certain lands while such pipes are in use.

These statutory rights or privileges in relation to the land occupied by the pipes are obviously of some material value, and it has been found impossible to value the "mains and services" without the inclusion therein of the privilege of having such "mains and services" in a particular *situs*, the owner of the soil being prevented from interfering with such privileges. It is impossible to hold that such associated statutory rights or privileges are themselves "goods, wares, or merchandise," therefore, the bundle of assets which included them *and* the pipes cannot be regarded as "goods, wares, or merchandise," even although, considered *in abstracto*, the pipes might still be regarded as personal chattels.

It follows that the appeal should be dismissed.

McTIERNAN J. In my opinion, the appeal should be dismissed. I agree with the reasons for judgment of my brother *Dixon*.

Appeal dismissed with costs.

Solicitors for the appellant, *Norton Smith & Co.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J.B.