[HIGH COURT OF AUSTRALIA.]

BENNING . . . . . APPELLANT;
PLAINTIFF,

AND

COUNCIL OF THE CITY OF SYDNEY . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 24, 28; *Oct.* 29.

Dixon C.J., McTiernan, Fullagar and Taylor JJ.

Local Government (N.S.W.)—Town of Sydney—Surveyor—Power to lay mains—Roads—Repairs—Liability—Person—Corporation—Australian Gas-light Company—Company created by private statute—Work done at direction of council—Work situated at Alexandria—When originally created Alexandria outside area—Subsequent statutory inclusion in area—Quaere, direction of council obligatory on company—Cost of work—Recoverability—Police (Sydney) Act of 1833 *(N.S.W.), s.* 48*—Australian Gas Light Company's Act of* 1837 *(N.S.W.), s.* 55*—Australian Gas Light Company's Act of* 1958 *(N.S.W.), s.* 5*—Local Government (Areas) Act* 1948 *(N.S.W.), s.* 7.

Section 55 of the *Australian Gas Light Company's Act* of 1837 provides that if it shall at any time or times be deemed necessary or expedient by the surveyor of the town of Sydney or other person or persons having the control direction or superintendence of the said roads streets ways " (and) " lanes . . . respectively, to require the company to alter the situation of any of the main pipes, either by raising or lowering the same or altering their line of direction, the company shall at its own expense within ten days after receipt of the notice in writing carry out the works as requested, and in default of its so doing the said town surveyor or other person or persons aforesaid, were authorised to do the work and reasonable costs and charges of doing it were thereupon to be paid by the company. The said Act was directed generally to making provision for the lighting of the town of Sydney as described in the Government *Gazette* of 11th September 1833, but the Act contemplated that some of the company's plants and mains would be situated and the company would operate outside the town limits. By the *Australian Gas Light Company's Act* of 1858 the purposes of the company as prescribed in the Act of 1837 were enlarged to permit the company to extend its operations and to supply gas to all public streets and highways, and also to all houses etc. beyond the boundaries and limits of the City of Sydney. Section 5 of the 1858 Act provided for the application *mutatis mutandis* of nineteen sections, but such sections did not include s. 55. By the

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Local Government (Areas) Act 1948, the City of Sydney, as it then existed, was united with further adjacent areas and the united area was constituted a city under the name of the City of Sydney, One of the areas thus incorporated in the new city was the Municipality of Alexandria, which had prior to the enactment of that statute never been within the City of Sydney nor the town of Sydney as originally defined. Section 7 of that Act provides that where in any Act other than this Act reference is made to the City of Sydney such reference shall except where otherwise expressly provided by this Act be construed as a reference to the united area referred to in that section or the council of that united area as the case may be. In 1953 the Sydney City Council in purported reliance upon s. 55 of the 1837 Act gave to the Australian Gas Light Co. notice to lower at its own expense the level of certain gas mains in Botany Road, Alexandria.

Held, by *Dixon* C.J., *McTiernan* and *Taylor* JJ., (*Fullagar* J. dissenting) that s. 55 of the 1837 Act when it was enacted, did not extend beyond the boundaries of the then town of Sydney ; the Act of 1858 did not carry the application of s. 55 beyond the boundaries of such town, and the operation of s. 55 was not enlarged by the *Local Government (Areas) Act* 1948. Accordingly the Australian Gas Light Co. was not obliged itself to bear the cost of lowering the gas mains in Alexandria.

Semble : The Council of the City of Sydney is now the person having the control direction or superintendence of the said roads, streets, ways, lanes and other public passages and places respectively within the meaning of s. 55 of the 1837 Act.

Decision of the Full Court of the Supreme Court of New South Wales: *Sydney City Council* v. *Benning* (1957) 2 L.G.R.A. 314, reversed and judgment of *Walsh* J. (1956) 2 L.G.R.A. 318, restored.

APPEAL from the Supreme Court of New South Wales.

This was an appeal by Herbert Francis Benning from the decision of the Full Court of the Supreme Court of New South Wales (1) in an appeal to that court from a decision of *Walsh* J. (2) in an action brought in the Supreme Court of New South Wales as a commercial cause by Benning on behalf of the Australian Gas Light Co. pursuant to the provisions in s. 5 of the *Australian Gas Light Company Act* of 1837—which authorises actions by the company to be brought in the name of the secretary—against the Council of the City of Sydney.

After the issue of the writ an order was made that the action be entered in the list of commercial causes, that pleadings be dispensed with and that the trial be had before a judge sitting without a jury. The issues for trial as subsequently amended were ordered to be the following :—

(a) Whether at the time mentioned in the special indorsement on the writ there was within the meaning of s. 55 of the *Australian Gas Light Company Act of* 1837 (as amended) any surveyor of the town of Sydney or any other person or persons having the control

(1) (1957) 2 L.G.R.A. 314.

(2) (1956) 2 L.G.R.A. 318.

direction or superintendence of the roads, streets, ways, lanes and other public passages and places referred to in that section.

(b) Whether at the time mentioned in the special indorsement on the writ the power conferred by s. 55 of the above-mentioned Act upon the surveyor of the town of Sydney or other person or persons having the control, direction or superintendence of the roads, streets, ways, lanes and other public passages and places referred to in that section to require the Australian Gas Light Co. to raise or sink or otherwise to alter the situation of any of the main pipes, stop-cocks, plugs or branches laid down for the purpose of the said Act, or to alter the situation, line or direction of any main pipe laid contrary to the provisions of the said Act, was exercisable in relation to the company's gas mains situated at Botany Road, Alexandria, a place which was not within the boundaries of the town of Sydney at the date of commencement of the said Act.

(c) It is agreed between the parties that if there was any person capable of exercising the power to give the notice referred to in s. 55 of the said Act, or capable of being vested by the defendant with power to give such notice and if further such notice could lawfully be given in respect of the company's gas mains situate at Botany Road, Alexandria, the notice already given was properly and sufficiently given by such person.

(d) It is further agreed between the parties that if the answer to either question (a) or question (b) above is negative, there should be a verdict for the plaintiff for the amount claimed in the writ.

A statement of the facts agreed upon by the parties was substantially as follows :—

1. At all material times prior to 24th May 1954 there were situated beneath the surface of Botany Road, Alexandria, a public street, certain gas reticulating mains which had been lawfully placed by the Australian Gas Light Co. for purposes authorised by the Acts.

2. Botany Road, Alexandria, was at no time within the boundaries of the town of Sydney as defined by a notice dated 6th September 1833 and published in the Government *Gazette* of 11th September 1833, or as otherwise defined.

3. The said road was at no time prior to the coming into operation of the *Local Government* (*Areas*) *Act* 1948, within the boundaries of the City of Sydney as defined by any Act. Prior to the date upon which the said Act came into operation, the said road was within the boundaries of the municipality of Alexandria, but by the operation of the said Act it came and it has since remained within the boundaries of the Council of the City of Sydney as defined by the said Act.

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4. On or about 18th August 1953 the defendant, claiming that it was entitled so to do, demanded that the Australian Gas-light Co. at its own expense should alter the situation of certain of the said reticulation mains by lowering their level.

4A. On or about 18th August 1953 and at the date of the coming into operation of the *Local Government (Areas) Act* 1948 and at all material times thereafter there was in existence the office of the City Surveyor of the Council of the City of Sydney.

5. Upon such demand being made the Australian Gas Light Co. asserted that it was not obliged to do the said work at its own expense or at all but carried it out upon the express understanding that it would thereafter seek to recover from the defendant the reasonable cost thereof.

6. It was agreed between the parties that the amount claimed in the writ represented a reasonable charge for the said work.

7. It was also agreed between the parties that the plaintiff was the proper person to sue on behalf of the Australian Gas-light Co.

Additional relevant facts and statutory provisions appear in the judgments hereunder.

J. D. Holmes Q.C. (with him *J. H. Laurence* and *John D. Maddocks*), for the appellant. Section 48 of the 1837 Act gave power to the company to lay pipes in the roads etc. for the purpose of lighting the town of Sydney; that is the geographical area fixed by the proclamation of 1833. The critical power given to the town surveyor was that which was given to him in s. 48 to consent to the laying of mains and pipes in the town of Sydney. Those are the pipes dealt with in the second proviso to s. 48, and the town surveyor being the person empowered to consent with the approval of the Governor to the laying of the pipes is the person primarily given power to require their alteration. On that view the words "the said roads, streets, ways, lanes and other public passages" in s. 55 are confined to those within the limits of the town of Sydney. Section 55 can have no greater application because there was no power either given or contemplated, to supply gas outside the town. Nowhere does the court below come squarely to the construction of s. 55. Their Honours took the view that the legislature assumed s. 55 would cover a situation outside the town of Sydney after 1858, and in that way gave the section a legal significance which in fact it did not have. The matter in point of construction is referred to in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ltd.* (1). The court below did not construe what was meant in s. 55 by "the

(1) (1952) A.C. 401, at pp. 417, 420, 426.

said roads, streets . . . respectively ". The word " respectively " in s. 55 first of all refers " to the said roads, streets, ways, lanes and other places " and the power which was given to the surveyor of the town of Sydney was a power confined to the said roads etc. respectively, being the roads, streets, etc. in respect of which he had the power to consent to the original opening up under s. 48, and further, that those roads were either the roads within the town or those leading from the gas company's works into the town, but not any others. Any assumption Parliament may have made about it later in 1858 cannot be given effect to because Parliament in 1858 did nothing to extend s. 55. There is no general power but only a limited power in s. 48. The words " other person or persons " were intended to be substitutionary for the surveyor of the town of Sydney; to cover persons having the control, direction and superintendence of the roads in the event of the surveyor of the town of Sydney not having it. Section 55, on its true construction, is confined to roads within the town and possibly those leading from the gasworks to the town. Up till 1833 there was no *Municipalities Act* or local government in respect of anything outside the City of Sydney. Section 55 does not, in terms, refer to the City of Sydney. The 1948 Act can have no operation upon the 1837 Act. The 1948 Act does not touch the other Acts. It is a general Act which does not amend, or in any way affect, the private special Act of the Australian Gas-light Co. That principle is dealt with in *Craies* on *Statute Law*, 5th ed. (1952), pp. 529, 530, 549. The 1837 Act is a special Act; a private Act giving certain powers and imposing certain obligations confined to the town of Sydney. If because of the words " City of Sydney " used in the 1858 Act one can read that back into the first Act and for " Town of Sydney " read " City of Sydney " one still cannot use the 1948 Act to alter by implication the 1837 Act. The words " other person or persons " in s. 55 refer only to a natural person, and do not include corporations. The definition of the word " person " in the present *Interpretation Act* of 1897, s. 21 (c), does not govern the use of that word in a private Act; *Ex parte Backhouse* (1). The *Acts Shortening Act* 1852, being a general Act, would not apply to this Act. The issues (a) and (b) should be answered favourably to the plaintiff.

B. P. Macfarlan Q.C. (with him *G. J. Samuels*), for the respondent. Section 55 of the 1837 Act should be construed as applicable to any mains laid by the company whether within or without the original limits of the town of Sydney. The section in its language

(1) (1864) 3 S.C.R. (N.S.W.) 85.

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is not limited in its operation to the town of Sydney and there is no reason so to confine it. Under the 1837 Act the operation of the section was limited in fact, since the purposes of the company were confined to supplying the town of Sydney with gas. When the area of permitted supply was enlarged by the Act of 1858, s. 55 in terms was capable of application to any of the company's mains laid under the enlarged powers conferred upon it by that Act. For this reason it was unnecessary for the legislature expressly to incorporate s. 55 in the 1858 Act, because it took the view that the operation of the *Acts Shortening Act* 1858 would result in the 1858 Act being read with and as part of the 1837 Act. The surveyor of the town of Sydney or other person or persons having the control etc. of the roads etc. was thus able to give the notice under s. 55 in the instant case and the respondent fulfils the description and may exercise the power. On the assumption, however, that this argument is incorrect and s. 55 relates only to mains laid within the then town of Sydney, nevertheless s. 7 of the *Local Government* (*Areas*) *Act* 1948 operates on s. 55 of the 1837 Act and the result of its operation is to extend the geographical area within which the powers and authorities may be exercised into what is now the united area which embraces the locality here in question. It is not significant that the words " town of Sydney " appear in the 1837 Act and not the " City of Sydney ". Section 7 of the *Local Government* (*Areas*) *Act* covers the situation by using the words " express or implied ". It is the area that is concerned. There is an implied reference in the 1837 Act to the area which afterwards became the City of Sydney, and it is not without significance to this argument to submit that the 1858 Act which uses the expression " City of Sydney " is to be read as part of or at least as amending the 1837 Act. So put, the difficulty which *Walsh J.* found in construing the *Local Government* (*Areas*) *Act* with the Acts of 1858 and 1837 disappears. Again on the assumption made of the limited operation of s. 55 of the 1837 Act the word " person " in s. 55 in this case includes the respondent being the body charged with the duty of looking after the roads. [He referred to *Hedger* v. *Kiel* (1); *Ex parte Backhouse* (2).] The appeal should be dismissed with costs.

J. D. Holmes Q.C., in reply. In the construction of the expression " the surveyor of the town of Sydney or other person or persons ", regard must be had to the use of the word " other " in the general phrase. That word suggests that the persons substituted for

(1) (1949) 80 C.L.R. 106, at pp. 113, 114.

(2) (1864) 3 S.C.R. (N.S.W.), at pp. 87, 88.

the surveyor of the town of Sydney should be persons having similar characteristics and powers. Natural persons are intended. The notice here was given by a corporation, not a natural person. The effect of s. 7 of the 1948 Act is that where that area is referred to in a document, a statute, for that area there should be substituted the united area; but that, of course, is not the area to which the Act of 1837 applied.

Cur. adv. vult.

Oct. 29.

The following written judgments were delivered:—

DIXON C.J., MCTIERNAN AND TAYLOR JJ. This appeal is the product of an action brought by a nominal plaintiff on behalf of the Australian Gas Light Co. against the Sydney City Council. The action was brought to recover a sum of money expended by the company in lowering gas mains in Botany Road, Alexandria. The work was done at the direction of the city council and it appears to be agreed that the cost is recoverable by the company unless the direction of the city council was obligatory upon the company. In the first of the Australian Gas Light Co's. private Acts, an Act of Council of 8 Will. IV, there is a provision authorising the surveyor of the town of Sydney or other person or persons having the control direction or superintendence of the roads and streets to require the company to alter the situation of mains by notice and imposing upon the company the duty thereupon to do so. The question is whether this provision applies. The company says it does not for two reasons; first, because Botany Road, Alexandria, is outside the boundaries of what was then the town of Sydney, and secondly, because the city council does not fulfil the description "surveyor of the town of Sydney or other person or persons having the control direction or superintendence of the roads streets" etc. At the trial of the action before *Walsh* J. without a jury (it was treated as a commercial cause) that learned judge accepted the first of these two reasons while rejecting the second. His Honour therefore entered judgment for the plaintiff, that is in effect for the company, for the amount claimed. On appeal to the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Brereton* JJ.) this decision was reversed and judgment was entered for the defendant city council. The company obtained special leave to appeal to this Court from the decision of the Full Court of the Supreme Court.

The question upon which the Full Court disagreed with the opinion of *Walsh* J. is whether Alexandria, where the mains are situated, is territorially within the application of the material provision of the legislation. Accordingly it is desirable to turn to that question first.

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It was not until the *Local Government* (*Areas*) *Act* 1948 (N.S.W.) (No. 30 of 1948) that the boundaries of the City of Sydney were enlarged to include Alexandria. Needless to say it was outside the boundaries of the town of Sydney as first defined. These boundaries were first defined by a Government *Gazette* published on 11th September 1833. It was done in pursuance of an Act of Council of that year called the *Sydney Police Act*, 4 Will. IV, No. 7, s. 47 of which provided that the Surveyor-General should set out and mark the limits of the town of Sydney subject to the approval of the Governor and upon the description being published in the *Gazette* the same should be deemed to be the limits of the town. The town of Sydney became the City of Sydney in 1842 by the *Sydney City Incorporation Act*, 6 Vict. No. 3; but the boundaries were not affected by the change. They were enlarged by 33 Vict. No. 9 and again by 43 Vict. No. 3, the *Sydney Corporation Act* 1879, but still they did not include Alexandria. The question really is whether the operation of the provision of the company's Act, 8 Will. IV, enabling the surveyor of the City of Sydney *et ceteros* to require the company to alter the situation of its mains extended beyond the boundaries of the town of Sydney when that statute was enacted or, if it did not, whether the *Local Government* (*Areas*) *Act* 1948 enlarged its operation with the result that it now so extends. The provision is contained in s. 55 of the company's Act of 8 Will. IV. The legislation under which the company operates may now be cited as the *Australian Gas Light Company Acts* 1837-1935 (see *Gas and Electricity Act* 1935-1936 s. 34 (5)) but our initial concern is with the Act of 8 Will. IV. The Act is rather a typical example of the private bill legislation of the period authorising the establishment of a public utility. Many of its provisions closely resemble the *City of London Gas Light and Coke Company's Act* of 1817, 57 Geo. III, ch. xxiii, printed at pp. 546 et seq. of the *Statutes at Large*, vol. 57, and that Act may well have been the precedent from which some parts of the plaintiff company's Act were taken. The first part of s. 55 of the latter Act is as follows: "And be it further enacted That if it shall at any time or times be deemed necessary or expedient by the surveyor of the town of Sydney or other person or persons having the control direction or superintendence of the said roads streets ways lanes and other public passages and places respectively to require the said company to raise or sink or otherwise alter the situation of any of the main pipes stop-cocks plugs or branches which shall be laid down for the purposes aforesaid or to alter the situation line or direction of any main pipe which shall have been

laid contrary to any of the provisions hereof the said company shall at their own expense within ten days next after being so required to do by notice in writing to them given by the said surveyor or other person or persons aforesaid raise or sink or alter the situation line or direction of such main pipes stop-cocks plugs or branches according to such notice and in default thereof it shall be lawful for the said town surveyor or other person or persons aforesaid to cause such main pipes cocks plugs or branches to be raised or sunk or the situation line or direction of such main pipe to be altered as the case may require and the reasonable costs and charges of doing the same shall immediately thereafter be paid by the said company . . . ." There follows the grant to the surveyor of a remedy by way of distress if the company fails to pay. Section 55 is very like s. 9 of the *City of London Gas Light and Coke Company's Act* of 1817. But the words in the Sydney Act " the surveyor of the town of Sydney, or other persons having the control direction or superintendence of the said roads " etc. are represented in the London Act by the words " the Commissioners of Sewers of the City of London or Westminster or the Commissioners or Trustees for paving or repairing the said streets " etc.

The " surveyor of the town of Sydney " was appointed under statute. An Act of Council called the *Police* (*Sydney*) *Act* 1833, 4 Will. IV, No. 7, by s. 48 empowered the Surveyor-General of the colony to appoint one or more fit and proper persons as surveyor or surveyors of Sydney. Various powers and duties in the superintendence of the streets were given to the town surveyor by that Act, by the *Alignment of Sydney Streets Act* 1834, 5 Will. IV, No. 20, and by the *Alignment of Sydney Streets* (*Amendment*) *Act* 1835, 6 Will. IV, No. 9. Not long before the passing of the *Australian Gas Light Company's Act* of 1837 an Act of Council had been adopted called the *Sydney Surveyor Act* 1837 which empowered the Governor of New South Wales to appoint the surveyor or surveyors of the town of Sydney but in 1840 this Act was disallowed: see table following the statutes in " *The Public General Statutes of New South Wales* 1824-1837 " (published 1861).

It is impossible to believe that s. 55 when it was enacted operated outside the town of Sydney. The Act of which it forms part opened with a recital of the advantages of lighting the town of Sydney with gas, the preamble spoke of " laying down mains and pipes in the said town of Sydney ". Section 11 established the company for the purpose of producing inflammable air or gas and supplying with gas all public places and so on and also all private houses and so on " within the said town of Sydney ". The powers

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of the company with respect to the undertaking are dealt with by provisions beginning with s. 48. It is true that these sections are not expressly limited in operation to the boundaries of the town of Sydney and it is further true that s. 48 as it was originally enacted contained a proviso that nothing therein contained should authorise and empower the company to make erect sink place or fix any gasometer or other apparatus for the purpose of producing any such inflammable air or gas as aforesaid within the then present limits of the town of Sydney. This restriction was removed by s. 13 of an Act passed two years later: 3 Vict. "An Act to amend an Act for lighting with gas the Town of Sydney". But the proviso may be used as an aid to construction. Conceding so much, however, it cannot extend the scope of the statute. For the powers are all directed to the purpose of supplying the town of Sydney with gas. If the proviso to s. 48 already mentioned requires any qualification of the reading of s. 55 which treats its operation as confined to the town of Sydney, the qualification can extend no further than the mains etc. connecting the intended gasometer with the town. But there seems to be no sufficient reason for regarding the "town surveyor or other person or persons having the control direction or superintendence of the said roads" etc. as concerned in the position of mains outside the town. The "said roads" etc. must include, if not mean only, the roads etc. within the town and the "other person or persons having control" etc. of such roads are not persons whose authority lay outside the town of Sydney. Section 48 contains another proviso which says that nothing the section contains shall be deemed to authorise the company to lay mains across or along any such places streets ways lanes or public passages except with the consent in writing of the surveyor of the town of Sydney. Here no reference occurs to other persons having control etc.; it is limited to the town surveyor. Section 49 authorises the company to contract for the supply of gas for street lighting. What it says, so far as material, is that it shall be lawful for the company to contract with the commissioners trustees surveyors or persons having control direction or management of the highways or any of them *within the limits of the Act* for supplying etc. Sections 50 to 54 deal with the powers and responsibilities of the company in relation to the interference with streets roads pavements etc., the laying and maintenance of pipes, the provision of light and matters of that kind. They do so without express reference to locality but at various points the surveyor of the town of Sydney is mentioned for the purpose of requiring his consent or placing some control or authority in his hands. To read the Act

and, in particular, s. 55, as confined in its application to the town of Sydney seems on its face to be a natural course. This, it is hardly necessary to say, does not mean that like a local by-law the statute is not an operative law outside the locality. It means that its provisions are directed to establishing a public utility for the supply of gas in and for the town of Sydney and should be read accordingly when there is a question of the operation of powers authorities duties and obligations that are conferred or imposed by the Act. Indeed many provisions show that it must be so. It is enough to mention s. 61 referring to an escape of gas " from any pipes which shall be laid down in any market street square lane public passage or place within the said town of Sydney " ; s. 62 relating to contaminating water or waterworks " serving the town of Sydney " ; s. 64 making it an offence to allow waste or washings to flow into fresh streams but directed only to the case of " making furnishing or supplying any gas used burnt or consumed within the said town of Sydney " ; and s. 66 again using the expression " within the limits of this Act ".

The view of the Act which treats its intended operation as concerned only with the town of Sydney and especially that view of s. 55 must surely gain confirmation from the enactment twenty years later of a statute described in its title as " An Act to enable the Australian Gas Light Company to extend their works to places beyond the boundaries of the City of Sydney ". This was an Act of the Parliament of New South Wales of 22 Vict. passed on 7th October 1858. The preamble said that the purpose of the company was the lighting and supply of gas within the town of Sydney. Section 1 provided that it should be lawful for the company to light and supply with gas all public streets highways etc. and buildings and also all private houses shops etc. beyond the boundaries and limits of the city of Sydney, to continue and extend the existing mains and pipes of the company and to erect additional works. By s. 5 of this Act it was directed that certain provisions in the original Act should, *mutatis mutandis*, in all respects extend and apply to places beyond the boundaries and limits of the city of Sydney and should be read and construed for the purposes of the Act as if they were therein repeated. Although the provisions so extended included s. 52 which deals with breaking up pavements and streets and the like, and s. 58 which relates to the damaging of the company's mains by strangers, s. 55 was omitted from the catalogue. So were ss. 53, 54 and 56. All four sections have this in common, namely, that they expressly refer to the surveyor of the town of Sydney. One requires a notice to him, two others a demand

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from him, and the fourth, s. 55, of course, depends upon a notice by him or another person or persons having control direction or superintendence of the streets, etc. No doubt s. 52 requires a consent from one or other of a catalogue of persons beginning with the town surveyor and yet it is expressly included. But it is to be observed that all the persons mentioned are not so definitely associated with the town and in any case the words "*mutatis mutandis*" in s. 5 of the Act of 1858 make it possible to apply such a provision by analogy. The same may perhaps be said of ss. 53, 54, 55 and 56, but the point is that they were not included and one may be sure deliberately not included. It seems reasonably certain that these provisions were considered to concern the town of Sydney and to be restricted to it. For that reason, one may assume, it was thought neither necessary nor appropriate to carry the application of the provisions beyond the boundaries of the city. From this interpretation of the Acts it follows that s. 55 has never had any application in Alexandria unless it obtained such an application from the provisions of the *Local Government* (*Areas*) *Act* 1948.

In the Supreme Court this view, which is in accord with that of *Walsh* J., was not accepted by the Full Court. *Street* C.J. and *Owen* J. after a close examination of the legislation adopted an interpretation which gave an indefinite territorial operation to provisions not expressly confined to the town of Sydney and treated the omission of such section as s. 55 from the list in s. 5 of the Act of 1858 as due to a legislative belief that they were unrestricted in their territorial application. For the reasons already stated the better interpretation would seem to be that the operation of the original Act was in and for the town of Sydney so that the application of the provisions of the Act went beyond the boundaries only in so far as was incidental to the effectuation of its declared purpose, which related to the supply of gas for the town. It is important to bear steadily in mind that the Act of 1858 was extending the operation of the Act beyond the boundaries of the city, the same boundaries as of the town of Sydney. It was not extending the boundaries of the city. That remained to be done later. There may well have seemed to be no point in extending the operation of s. 55. At all events it was not expressly done and the more natural inference is that it was not done because the extension was not then thought desirable or appropriate. *Brereton* J. took a view of the meaning of the original Act differing somewhat from that of *Street* C.J. and *Owen* J., leading however to the same result. It was that the Act did not refer to the town of Sydney in the sense of the precisely bounded area gazetted under s. 46 of the *Police* (*Sydney*)

Act of 1833, 4 Will. IV, No. 7, but in a much looser or indefinite sense, and that the phrase in s. 55 " or other person or persons having the control direction or superintendence of the said roads " etc. was intended to describe not a substitute for the town surveyor but persons having the like responsibilities outside the defined area. The difficulty in this view lies in the use by the Act of an expression, viz. town of Sydney, which had been given a very definite legal meaning. By gazetting new boundaries the area of the town might legally change, and with it the application of s. 55. But the statute had fixed the meaning, one would think, for legal purposes and, there being no new boundaries gazetted, the old defined the town for all statutory purposes. In the second place it may be suggested, with all respect to his Honour's view, that in 1837 it would be unlikely that more would be in mind than to provide for the town of Sydney and the mention of the alternatives for the town surveyor do not imply more than that within the town alternatives might exist or arise.

It is necessary therefore to turn to the possibility of the *Local Government* (*Areas*) *Act* 1948 effecting the transfer or extension of the operation of s. 55 which is indispensable to the case of the defendant council. By Pt. II of the *Local Government* (*Areas*) *Act* 1948 certain areas adjoining a number of municipalities respectively in New South Wales were incorporated in those municipalities. We are now concerned, of course, only with the municipality of Sydney. The effect of s. 5 in relation to Sydney was to group certain municipalities including Alexandria with the then existing City of Sydney. Each group was united by s. 6 (2). This having been done and the separate councils of the constituent areas having been dissolved by s. 6 (2), s. 7 (1) (a) proceeded, in the case of Sydney, to form a united area constituted by the union of the constituent areas as a city described as the City of Sydney. The second paragraph of s. 7 (1) (a) is as follows : " Where in any Act other than this Act or in any ordinance, regulation, by-law, proclamation or in any instrument or document, reference either express or implied is made to the ' City of Sydney ' or to ' the Municipal Council of Sydney ', such reference shall, except where otherwise expressly provided by this Act be construed as a reference to the united area referred to in this subsection or to the council of that united area, as the case may be." The argument for the respondent is that this paragraph of s. 7 (1) (a) operates to make s. 55 of the Act of 1837 applicable throughout the City of Sydney as constituted by and under the Act of 1948. An examination of the language of the second paragraph of s. 7 (1) (a) of the Act of 1948

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and a comparison with s. 55 will show that there is no logical basis for the contention. In the first place, s. 55 of the Act of 1837 in so far as it refers to Sydney is referring to the town of Sydney. In s. 7 (1) (a) the words " City of Sydney " are placed in quotation marks because they are referring to exact references in statutes whether the references be express or implied. But the distinction between the town and the city may perhaps be passed by ; for s. 55 is not dealing with the City of Sydney or the Municipal Council of Sydney whether under the term " Town " or " City ". It is dealing with the duty of the company within an area over which s. 55 operated. When the area of the City of Sydney was enlarged by 33 Vict. No. 9 and again by 43 Vict. No. 3, the *Sydney Corporation Act of* 1879, s. 55, for the reason already given, did not proceed to spread, so to speak, into the enlargement. It still operated in relation to the area for which it was originally designed. Section 7 (1) (a) is not framed in such a way as to give s. 55 a new or larger operation than it had at that time. There is no question of construing a reference to the City of Sydney as a reference to the united area ; still less of construing a reference to the municipality of Sydney as a reference to the council of the united area. No such question arises under s. 55. The defendant city council therefore obtains no assistance from s. 7 of the *Local Government* (*Areas*) *Act* 1948.

In what has been said it has been assumed that the Supreme Court was right in adopting the view that where s. 55 does apply the city council is now the person having the control direction or superintendence of the said roads streets ways lanes and other public passages and places respectively within the meaning of that section. In the Supreme Court that view was reached by applying to s. 55 the direction contained in s. 6 of the *Acts Shortening Act*, 1852, 16 Vict. No. 1, and reading person to include corporation: cf. now s. 21 (c) of the *Interpretation Act of* 1897. In *Ex parte Backhouse* (1), s. 6 of the *Acts Shortening Act* was held to apply to past enactments and apparently that has been regarded ever since as the proper construction of the provision. Having regard to the view expressed as to the area covered by s. 55 the question ceases to be material to the rights of the parties. But there seems to be no reason to disagree with the view of the Supreme Court that in that section " person " must now be taken to include the city council: see further *Pharmaceutical Society* v. *London & Provincial Supply Association Ltd.* (2).

(1) (1864) 3 S.C.R. (N.S.W.) 85.

(2) (1880) 5 App. Cas. 857.

For the foregoing reasons the appeal should be allowed, the judgment of the Full Court of the Supreme Court of New South Wales discharged and in lieu thereof the judgment of *Walsh* J. should be restored.

FULLAGAR J. In this case I agree substantially with the judgment of *Street* C.J. and *Owen* J., and I am of opinion that the appeal should be dismissed.

I am disposed to think that the form in which the case was presented to *Walsh* J. was apt to be misleading and to disguise the true nature of the question involved. It was presented in the form of two "issues", which were not issues in any real sense but arguments submitted by the plaintiff on the construction of a statute. The single question in the case was and is whether s. 55 of the *Company's Act* of 1837 on its true construction authorised the Council of the City of Sydney to give the notice of 18th August 1953, and subsequently, having done the required work in Botany Road, Alexandria, to recover the cost thereof from the company. This is the correct way of stating the question, although in actual fact the work was done by the company in pursuance of an agreement that, if the giving of the notice should be held not to be authorised by s. 55, the council would pay to the company the amount expended by it.

In support of a negative answer to the above question the plaintiff puts forward two arguments. The first is that the Council of the City of Sydney does not fall within the description of persons authorised by s. 55 to give the notice, and, if it is not obeyed, to do the work and recover the cost. The second is that, in any case, Botany Road, in which the pipes in question are laid, does not fall within the description of streets and roads to which s. 55 relates. I speak, for the sake of simplicity, of Botany Road as a whole, though probably the relevant locality consists only of a part of the total length of that road.

The first argument may be briefly disposed of. *Walsh* J. and all the members of the Full Court were in agreement that it could not be sustained. The Council of the City of Sydney is a body corporate, which, by virtue of s. 249 of the *Local Government Act* 1919, as amended, has the "care control and management of every public road" within its municipal area or district, and Botany Road is a public road within the municipal area or district of the Council of the City of Sydney. The council, therefore, is the "person having the control" of Botany Road, and, if Botany Road falls within the description of roads and streets mentioned in s. 55, the council was

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authorised to give the notice. The whole question in the case thus resolves itself into this:—Was Botany Road at the date of the giving of the notice within the description of roads and streets mentioned in s. 55? It is important to remember that that is the question and the whole question, and it is important also to remember that we are directly concerned with the powers of the municipal authority and only indirectly, if at all, with the powers of the company.

It is necessary to consider first the effect of s. 55 of the Act of 1837 apart altogether from the Act of 1858, but, before doing so, it is desirable to look for a moment at the general scheme of the Act of 1837 and to note certain features of it. The Act (apart from four miscellaneous sections at the end) may be divided into three parts. The first part consists of ss. 1 to 47 inclusive. These sections relate to the establishment and constitution of the company (which is not incorporated), to its capitalisation and management, and to its general objects and powers. They correspond with the provisions which are found in the memorandum and articles of association of a modern trading corporation. Of these sections it is for present purposes necessary to mention specifically only s. 11. This section states the general objects and purposes of the company, and in it is found the local limitation which is imposed on the company's operations. It declares (to put it shortly) that the company is to be established for the purpose of producing gas and for lighting and supplying with gas all public places roads and streets and all private houses shops and buildings within the town (which later became the City) of Sydney, and for disposing of by-products of the manufacture of gas. It is to be noticed that the local limitation is imposed by reference to the places and buildings to be supplied with gas for lighting. Section 11 does not mean that the company can do nothing outside the town of Sydney. Indeed we find later that the company is expressly forbidden by s. 48 to erect any gasometer or apparatus for producing gas at any place "within the present limits of the town of Sydney". The company, therefore, *must* conduct the most vital part of its operations outside the town of Sydney, and must lay pipes to carry its gas from the place of manufacture outside to places and buildings inside the town of Sydney. In fact the prohibition against manufacturing or storing gas within the town was removed by s. 13 of the Act of 1839, but the company is not forbidden to have gasometers or production apparatus outside the boundaries of the town, and the concluding words of s. 13 clearly contemplate that it may henceforth have them either inside or outside those boundaries.

What may be regarded as the second part of the Act of 1837 consists of ss. 48 to 66 inclusive. These sections (which include, of course, s. 55) deal in detail with various specific powers, rights, duties and liabilities of the company. It is not necessary to refer in detail to them, but it is necessary to make certain observations on some of them. Section 48 gives to the company *inter alia*, its power to erect gasometers, etc., to break up the soil and pavement of streets and to lay pipes therein. The powers so given are not limited by reference to the boundaries of the town, and, of course, could not be so limited without more or less stultifying the scheme of the Act. There is, however, a proviso which forbids the company to lay any main pipe in or under any street without "the consent in writing of the surveyor of the town of Sydney". Since the surveyor of the town of Sydney would have jurisdiction only within the local limits of the town of Sydney, I would read this proviso as applying only to streets within those limits. There is nothing in s. 7 of the Act of 1839 to justify giving it any wider application. It might well be thought curious that there should be no corresponding provision with regard to breaking up streets and laying pipes outside the limits of the town, but, when we turn to s. 52 (which on any view overlaps s. 48) we find that the company is forbidden to break up a street for laying main pipes without the consent in writing of "the town surveyor commissioners surveyors trustees or other persons having the control of" such street. Sections 48 and 52 thus appear to cover between them the whole ground. Section 53 again appears to cover much the same ground, but there is serious confusion in it, for it requires the notice to be given to "the said surveyor of the town of Sydney", and the payment in default of notice to be made to "the said town surveyor *or other persons having the control*" of the street.

Section 49 refers to highways etc. "within the limits of this Act". This clearly, I think, means "within the local limits of the town of Sydney". The limitation is natural and correct, because the highways etc. referred to are the highways etc. which are to be lighted by means of the company's gas, and it is clear that the company is not intended to be empowered to light highways or buildings (apart perhaps from buildings of its own) outside the limits of the town of Sydney. Section 54, which requires the company to relay pavements broken up and to remove rubbish etc., contains nothing to confine its operation to streets within the town of Sydney. The work must be done to the satisfaction of "the commissioners surveyor or trustees or other person or persons having the control direction or superintendence of the street". I postpone

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consideration of s. 55. What I have said of s. 54 is equally true of s. 56. No local limit of operation is imposed upon ss. 57, 58, 59 or 60. There are references to the town of Sydney in ss. 61 and 62, but they do not appear to me to have any significance for present purposes. Section 66 is a curious section from more than one point of view. It requires the company to supply gas which will afford "a better light than could be obtained from oil lamps". The words "within the limits of this Act" appear, where they occur, to be otiose, because, as I have said, it is clear that the company is not authorised to supply gas to lamps outside the town of Sydney.

What may be regarded as the third part of the Act consists of ss. 67 to 79 inclusive. These sections relate to offences penalties and remedies, and may be described as mainly procedural in character. For example, s. 70 deals with the recovery of penalties, s. 71 prescribes a form of conviction for an offence, s. 74 gives a right of appeal to quarter sessions against a conviction, and s. 75 provides that proceedings for an offence must be taken within three months. The sections contained in this third part of the Act have one feature in common, to which I will refer when I come to deal with the Act of 1858.

Having made this brief general survey, I turn to s. 55, with a view to seeing what are the roads, streets, etc., in relation to which the municipal authority is empowered to give the notice in question. The actual words of the section are "*the said* roads streets ways lanes and other public passages and places". In so loosely drawn an Act it may well be suggested that no great importance should be attached to the words "the said", and I would myself be disposed, without looking further, to read the words quoted as referring to all roads, etc. in which pipes have been lawfully laid by the company. But this view is in fact confirmed if we pay attention to the words "the said". For these words do naturally send us to look back for an antecedent reference to roads etc., in order to see what roads etc. are intended. And we at once find what we are looking for in the immediately preceding section, which is s. 54. That section refers to "*any* road street way lane or other public passage or place". The important point is, of course, that there is no local limitation by reference to the town of Sydney. It may be conceded that the only roads etc. in which the company may lawfully lay pipes under the Act outside the town of Sydney are roads etc. which are reasonably necessary for the conveyance of gas from gasworks outside to consumers inside the town of Sydney. But the fact remains that the company *may* under the Act lawfully lay pipes in roads etc. outside the limits of the town of Sydney, and the language of s. 55, like that of s. 54, is quite general and must be

taken to refer at least to all roads etc. in which the company has lawfully laid pipes. I can indeed see no reason why that language should not be read as covering any street or road in which the company has in fact laid pipes whether lawfully or unlawfully—and, if unlawfully, whether deliberately or, for example, by inadvertent omission to fulfil a condition precedent. Such cases, however, need not be considered. It has been assumed throughout this case that the pipes in question were lawfully laid in the first place, and it is impossible, in my opinion, to read s. 55 as referring to anything *less* than all streets and roads in which the company has lawfully laid pipes.

The Act of 1858 did nothing, in my opinion, to alter this position in any material respect. That Act is a short and, on any view, ill-conceived and ill-drawn enactment. It recited that the company was desirous of carrying on its undertaking "beyond the boundaries and limits of the City of Sydney" and s. 2 authorised the company to light and supply with gas all roads etc. and all private premises beyond those boundaries and limits. Section 3 gave to the company much the same powers, to be exercised outside those limits, as s. 48 of the Act of 1837 gave to be exercised within those limits. If s. 3 had stood alone, the power given by s. 3 might or might not have been subject to the restriction imposed by the second proviso in s. 48 but the effect of making them so subject was achieved by expressly making s. 52 of the Act of 1837 applicable to them. This was done by s. 5 of the Act of 1858, to which I shall have to refer in a moment. Section 52 would, in my opinion, have been applicable in relation to the new powers even if it had not been expressly mentioned. Section 4 of the Act of 1858, practically speaking, reproduced in shorter form s. 54 of the Act of 1837. One would have thought that a preferable course, if any doubt was felt as to the applicability of s. 54 in relation to the enlarged powers of the company, would have been to make s. 54, like s. 52, expressly so applicable.

I have still to consider s. 5 of the Act of 1858. But, subject to that, the position seems to me, in spite of much loose drafting, to be clear. The Act of 1858 did not repeal the Act of 1837 or any part of it. The earlier Act, except so far as it was modified expressly or by necessary implication, stood intact, and the two Acts must be read together. In particular s. 55 of the earlier Act stood intact, and must be read together with the later Act. The only effect which the later Act had upon s. 55 was indirect. It enlarged the potential scope of s. 55, because it enlarged the power of the company to lay pipes in streets and roads outside the limits of the town (now the City) of Sydney. Whereas previously that power had been

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limited to the laying of pipes reasonably necessary to convey gas from works outside those limits to places to be lighted inside those limits, it now became quite general. But the effect of s. 55 was after 1858, as it had been before 1858, to confer powers upon a municipal authority in relation to pipes lawfully laid by the company in any street or road. Botany Road was and is such a street or road. It follows that in relation to pipes laid in that road the municipal authority has the powers and rights which s. 55 gives.

There is, in my opinion, nothing in s. 5 of the Act of 1858 to affect this conclusion in any way. Section 5 provides that certain sections of the Act of 1837 "shall *mutatis mutandis* extend and apply to places beyond the boundaries and limits of the City of Sydney and shall be read and construed for the purposes of this Act as if the said sections were herein repeated". The sections referred to are ss. 52, 57, 58, 59, 65 (which are in what I have regarded as the second part of the Act) and all the thirteen sections in what I have regarded as the third part of the Act. It is seen that s. 55 is not included, and it is said that the maxim "*Expressio unius exclusio alterius*" must be applied with the result that s. 55 is held to be inapplicable in relation to roads outside the limits of the City of Sydney.

It is impossible, in my opinion, to sustain this argument. There are many judicial statements to the effect that the maxim must be applied with great caution. As *Wills* J. said in *Colquhoun* v. *Brooks* (1), "The failure to make the 'expressio' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind" (2). And see *Gregg* v. *Richards* (3). In the present case it is, I think, clear that no inference whatever can be drawn from the omission. Not only does the passage in question occur in a very ill-conceived and badly-drawn statute, but it is in itself almost unintelligible. Most of the provisions mentioned are, as I have pointed out, of a procedural character in which there is no element of locality. There is literally no sense in saying that a provision giving a right of an appeal to quarter sessions shall apply *mutatis mutandis* to places beyond the boundaries of the City of Sydney.

In any case, what is the implication to be made if we are to apply the maxim? If we apply it as the appellant would apply it, the result must be that s. 55 is left to apply (a) to pipes laid down in roads within the City of Sydney and (b) to pipes laid down in roads outside the City of Sydney which are reasonably necessary for the

(1) (1887) 19 Q.B.D. 400.
(2) (1887) 19 Q.B.D., at p. 406.
(3) (1926) Ch. 521, at pp. 527, 528.

purpose of bringing gas from works outside the City of Sydney to places to be lighted inside the City of Sydney—but does *not* apply (c) to pipes laid down in roads outside the City of Sydney for the purpose of supplying gas to places to be lighted outside the City of Sydney. The maxim cannot be used for the affirmative purpose of creating such an absurdity.

Actually (although this does not really affect the view which I take of the case) I think it is possible up to a point to discern what the draftsman was seeking in a very muddled and inept way to achieve by s. 5. In all except one (s. 76) of the sections contained in the third part of the Act of 1837 there are references to " this Act ". " This Act " is, of course, the Act of 1837. There are such expressions as " offences against this Act ", " proceedings in pursuance of this Act ", " sums of money levied under the authority of this Act ", and so on. In s. 76 there is no express reference to " this Act ", but it may well have been thought that the words " requisite or necessary " would be read as meaning " requisite or necessary by virtue of the provisions of this Act ". If the provisions of the third part of the Act of 1837 were simply left standing, it was probably, I think, feared that these ancillary and procedural provisions might be held not to be applicable in respect of matters arising under the new Act. On any possible view there is hopeless confusion in s. 5, but what I have said does serve to explain to some extent the otherwise inexplicable words " *mutatis mutandis* ". What are regarded as the *mutanda* are the expressions in which the words " this Act " occur. So far as s. 5 of the Act of 1858 refers to sections (apart from s. 52) of the Act of 1837 which are outside the third part of that Act, I can only regard it as completely senseless. No " *mutanda* " can be found in any of them, and each of them must have, and continue to have, precisely the same scope, meaning, and effect, as it would have had if it had not been " repeated " in the Act of 1858.

For the above reasons I am of opinion that this appeal should be dismissed.

Appeal allowed with costs. Discharge the order of the Full Court of the Supreme Court. In lieu thereof order that the appeal to that court from the judgment of Walsh *J. be dismissed with costs.*

Restore the judgment of Walsh *J.*

Solicitors for the appellant : *Perkins, Stevenson & Linton.*

Solicitor for the respondent : *The City Solicitor, J. H. Dawes.*

J. B.