Privy Council Appeal No. 76 of 1927.

The Corporation of the City of Toronto and another - - *Appellants*

v.

The Consumers' Gas Company of Toronto - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1927.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD WRENBURY.
LORD WARRINGTON OF CLYFFE.
MR. JUSTICE DUFF.

[*Delivered by* MR. JUSTICE DUFF.]

By section 7 of a statute of Ontario passed in the year 1887 (50 Vic. c. 85), under which the capital stock of the respondent company was increased to $2,000,000, it was enacted (*inter alia*) that any surplus of net profit remaining at the close of any fiscal year should, after providing for salaries and dividends, and for the establishment and maintenance of certain specified funds, be applied, in the manner and upon the conditions prescribed by the section, in reduction of the price paid by consumers for gas supplied by the company; and, by the terms of the section, the profit so to be applied was to include "premiums on sales of stock after the rest or reserve fund shall have been established as aforesaid."

In the years 1909 and 1921, by letters patent granted under the authority of legislation passed in the years 1907 and 1908, the capital stock of the company was successively increased to $6,000,000 and to $12,000,000. Of this capital stock shares were sold at prices which produced a surplus over their aggregate value at par amounting to $1,528,374·67 at the commencement of

the action, and to $2,535,502·67 at the date of the trial. The respondent company has dealt with this surplus as if it was outside the scope of the enactment of section 7 affecting " premiums on sales of stock," and requiring that such premiums be treated as profits appropriated under the provisions of that section to the purpose of securing a reduction in the price of gas. The question to be determined on this appeal is whether or not this surplus or aggregate of premiums, or any such surplus arising from the sale of shares authorised by the letters patent, is affected by that enactment and must be so applied.

In the Ontario Courts the Trial Judge, Mr. Justice Logie, held that the question must be answered in the affirmative, and that the appellants the Corporation of Toronto were consequently entitled to succeed in the action. On appeal to the Appellate Division this judgment was reversed, Mr. Justice Riddell dissenting.

The company had been incorporated in 1848, by an Act in the Province of Canada, for the purpose of supplying gas to Toronto with a nominal capital of £25,000 currency, and with power to increase its capital to £50,000, the directors being authorised to declare dividends out of profits " not exceeding 10 per centum per annum." By a statute of 1853 the company was authorised to supply gas outside Toronto. The nominal capital was by a statute of 1855 increased to £100,000, and again by a statute of 1873 to $600,000.

In 1887 the application of the company to the Legislature for authority to increase its capital to $2,000,000 was opposed by the appellant the Corporation of Toronto. The agreement which resulted from the ensuing negotiations is embodied in Sections 4, 6, 7, 8 and 9 of the statute of that year. " There is no dispute," said Lord Macnaghten, in delivering the judgment of this Board in *Johnston* v. *Consumers' Gas Company of Toronto* (1898), A.C. at page 453 :

> " As to the circumstances under which the Act of 1887 was passed. The capital of the company had been increased under the authority of various enactments. It stood at the time at $1,000,000. The dividends had reached the statutory limit of 10 per cent., and the shares were at a premium. The Gas Company applied to Parliament, asking that the capital might be doubled. They proposed that the additional $1,000,000 should be allotted to the existing shareholders at par. The Corporation of Toronto opposed the Bill on the ground that the shareholders were not entitled to so large a bonus. They insisted that advantage should be taken of the opportunity to secure a reduction in the price of gas. Negotiations then took place between the Gas Company and the Corporation, and the Act as passed was the result of a compromise."

The action was originally launched by the Corporation of Toronto as plaintiff, and the status of the Corporation to maintain the action was the theme of much discussion in the judgments in the Ontario Courts. That question is no longer of importance. By an Order in Council of the 27th June, 1927, leave was granted to the Attorney-General of Ontario " to be added as an appellant in the appeal and to be in the same position as if he had been a

party to the proceedings throughout." In consequence of this order, their Lordships are relieved from the duty of examining certain acts of the Corporation relied upon by counsel for the respondent company, as constituting acquiescence in the company's manner of disposing of the premiums under discussion. The question formulated above is the sole question now to be determined, and the decision of that question must be ruled by the true construction of the pertinent legislation. Such acts could be no answer to an action by the Attorney-General praying a declaration as to the duties of the company under its statutes, and they all took place within a period too recent to make it possible to ascribe to them the character or effect of *contemporanea expositio*.

The statutory provisions with which their Lordships are primarily concerned are Sections 4 and 7 of the Act of 1887, which are in these words :—

> "4. All shares to be issued under the provisions of this Act shall be sold by public auction after three weeks' notice in two of the daily newspapers published in the City of Toronto, such shares to be put up in lots of ten shares each, and all surplus realised over the par value of the shares so sold shall be added to the rest or reserve fund of the company, until the same shall be equal to one-half of the paid-up capital stock of the company, the true intent and meaning being that the company may at all times have and maintain a rest or reserve fund, equal to but not exceeding one-half of the then paid-up capital of the company, and which rest or reserve fund may be invested in Dominion or Provincial stock, municipal debentures, school debentures, drainage debentures, debentures of loan companies, and mortgages on real estate.
>
> "7. Any surplus of nett profit from any source whatever, including premiums on sales of stock, after the rest or reserve fund shall have been established and maintained as aforesaid, remaining at the close of any fiscal year of the company after payment of fees to the president, vice-president, and directors of the company (not exceeding in all the sum of $9,000 per annum), after payment of dividend at the rate of ten per cent. per annum on the paid-up capital stock of the company, and the establishment and maintenance of the said rest or reserve fund, and providing for said plant and buildings renewal fund, shall be carried to a special account, to be known as the special surplus account, and whenever the amount of such surplus is equal to five cents per thousand cubic feet on the quantity of gas sold during the preceding year, the price of gas shall be reduced for the then current year, at least five cents per thousand cubic feet to all consumers."

The argument on behalf of the appellants emphasises the phrase " including premiums on sales of stock "—a phrase which, it is contended, unequivocally denotes all premiums on sales of any capital stock of the company, whether or not in existence or authorised at the time of the passing of the Act of 1887; and necessarily, therefore, embraces the premiums arising from sales of stock coming into existence under the letters patent of 1909 and 1921.

Their Lordships are not convinced that this is the true effect of the arrangements embodied in the Act of 1887. Primarily section 7 deals with profits as its subject-matter, and their

Lordships think it sufficiently clear that by the terms of that section the premiums derived from the sale of the capital stock authorised by the Act and not required for the purpose of constituting and maintaining a reserve fund under section 4, were to be deemed to be profits within the meaning of section 7. But proceeds of the sale of capital stock, whether the price at which the stock is sold be above or below its par value—being in the economic sense monies paid by the purchaser for an undivided interest in assets actual or potential—are in the nature of capital; and it cannot be doubted, their Lordships think, that the parenthetical definition in section 7 by which for the purposes of that section such proceeds (in so far as they exceed the par value of the shares sold) are constructively brought within the category of profits, must be limited in its application to that which appears to be the real subject-matter of these provisions. Section 4, in providing for the creation of a reserve, deals only with premiums derived from the sale of capital stock authorised by the Act of 1887 itself; and the words of section 7 upon which the appellants rely, "including premiums from sales of stock after the rest or reserve fund shall have been established and maintained as aforesaid" (that is to say, by section 4), are in their Lordships' opinion most naturally read as referring to premiums forming part of the surplus which is the subject of that section.

In the absence of some language more aptly pointing to such an intention, these words of section 7 cannot, with propriety, their Lordships think, be extended so as to embrace proceeds of the sale of shares of capital stock subsequently created under the authority of statutes not yet in existence.

In support of the construction of the Act of 1887 advanced by them, the appellants pray in aid the provisions of sections 5 and 7 of the Act of 1904.

By that statute the company was authorised to create additional capital stock of a par value not exceeding in the aggregate $1,500,000. Sections 5 and 7 are in these words:—

"5. All surplus realised over the par value of the shares sold, as hereinbefore set forth, shall be added to the rest or reserve fund of the company, and the limit, as heretofore authorised, of the said rest or reserve fund shall be enlarged by the amount of such surplus and no more; the true intent and meaning being that the company may at all times have and maintain a rest or reserve fund equal to, but not exceeding the amount of one-half of the then paid-up capital stock of the company for the first $2,000,000 of the said capital stock, together with the amount of the surplus realised over the par value of all shares then sold out of the $1,500,000 capital stock by this Act authorised.

"7. This Act is to be read with and as if forming a part of the Act passed in the 50th year of the reign of Her late Majesty Queen Victoria, chaptered 85, and intituled An Act to further extend the powers of the Consumers' Gas Company of Toronto, and, except in so far as the same are inconsistent herewith, all the provisions of the last-mentioned Act are confirmed and are declared to apply in every respect to the additional capital stock and increased rest or reserve fund hereby authorised and the same are to be read with this Act."

The argument founded on these sections is this. The company is required to add to the reserve fund already established, pursuant to the Act of 1887, all premiums derived from the sale of the additional shares authorised by the Act of 1904; but by the express terms of section 5 the fund is not to be further increased, in other words the company is prohibited from augmenting the fund by assigning to it any part of the proceeds of sales of shares authorised thereafter. Accordingly, it is argued, no part of the proceeds of sales of capital stock authorised by the letters patent can lawfully be so assigned, and it follows, it is said, that, by the combined effect of the legislation of 1887 and that of 1904, all premiums constituting part of such proceeds must be appropriated to the purpose of reducing the price of gas.

In their Lordships' view effect cannot be given to this argument without attributing to the expressions used a much broader scope than the Legislature seems to have intended. The Act of 1904 deals explicitly in section 4 with the reserve fund already established. But its enactments do not deal with the subject of the application of the proceeds of the sale of capital stock to be created in the future. Only in section 7, by which in general terms the provisions of the Act of 1887, except in so far as inconsistent with those of the Act of 1904, are "confirmed," can the application of the proceeds of the sale of shares in reduction of the price of gas be said to be the subject of those enactments. The provisions so "confirmed" include of course those of section 7 of the earlier statute relating to that subject; but as, in their Lordships' opinion, these provisions are limited in their operation to the proceeds of shares authorised by the same statute, their Lordships can find nothing in section 7 of the Act of 1904 to support the contention of the appellants. Their Lordships agree with the view of the majority of the Divisional Court that premiums derived from the sale of shares authorised by the letters patent are not within the purview of either the Act of 1887 or that of 1904.

For these reasons their Lordships think the judgment of the Appellate Division should be affirmed, and their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

THE CORPORATION OF THE CITY OF TORONTO
AND ANOTHER

v.

THE CONSUMERS' GAS COMPANY OF TORONTO.

DELIVERED BY Mr. JUSTICE DUFF.

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