PRIVY COUNCIL.

P. C.*
1904.
May 12, 13.
June 3.

THE BOMBAY TRAMWAY COMPANY (PLAINTIFFS), *v.* THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY (DEFENDANTS).

[On appeal from the High Court of Judicature at Bombay.]

Bombay Tramways Act (Bombay Act I of 1874), section 30—Purchase by Municipal Corporation of Bombay of Tramway undertaking—Notice of intention to purchase—Arrangement by Corporation with third person—Date of purchase for purpose of ascertaining compensation—Liability of Tramway Company for track rent during period between notice and date of purchase.

By an agreement, dated 12th March, 1873, the Municipal Corporation of Bombay (the respondents) allowed certain persons, of whom the Bombay Tramway Company (the appellants) were the assignees, to construct and work tramways in the City of Bombay. Section 30 of the Bombay Tramways Act (Bombay Act I of 1874) gave the respondents the right to purchase the tramways from the appellants "with the plant, stores, rolling-stock and everything connected therewith after the expiration of 21 years from the 12th day of March, 1873, upon declaring their intention so to do within six months after the expiration of the said 21 years," and gave them "a renewed right of purchase at the end of every seven years after the expiration of the said 21 years upon similar notice being given." Notice of the intention to exercise such renewed right of purchase was duly given by the respondents on 14th March, 1901. In a suit by the appellants against the respondents to have their rights under the purchase declared,

Held, by the Judicial Committee (affirming the decision of the Courts below) that the notice was not invalid by reason of the respondents having made an arrangement with a third person who was to find the money for the purchase and work the tramways when acquired by the respondents, it appearing that the respondents were acting as principals in the matter, and not as agents of such third person, and that there was nothing in the Act to prohibit such a transaction or to show that when acquired the respondents were bound to keep the tramways in their own hands, and work them themselves.

By section 30 of the above Act it was further enacted that "the amount to be paid in the event of such purchase shall be the actual *bonâ fide* value (exclusive of any compensation for goodwill, premium, or compulsory sale or other consideration whatsoever) of the tramways and of the works and materials connected therewith and of the lands and buildings and all other the property of the grantees, such value in case the parties do not agree to be decided by arbitration as provided by the agreement of 12th March, 1873; and as compensation for the goodwill, premium, or compulsory sale and other considera-

* *Present:* LORD MACNAGHTEN, LORD LINDLEY and SIR ARTHUR WILSON.

tion the grantees shall be paid an amount equal to 21 years' purchase calculated on the average profits of the previous 3 years next preceding the purchase." The first Court decided that the date of the purchase for the purpose of ascertaining the compensation was the date of the notice, namely, the 14th March, 1901; but both parties appealed from that decision. The High Court on appeal held that the date of the purchase would be the date when the value was ascertained.

Held, by the Judicial Committee, that the proper date to be fixed would have been when the relation of vendor and purchaser was definitely created by the service of the notice of intention to purchase, that is, the 14th March, 1901; but that having regard to the course taken by the parties, neither party without the consent of the other could insist that that date ought to be adopted, and that under the circumstances there were no grounds for disturbing the date fixed by the High Court on appeal, namely, the date of the award fixing the value of the corporeal property of the appellants.

Pending the ascertainment and payment of the purchase-money the appellants agreed to continue to work the tramways on the understanding that they received "the income and profits of the tramway business during such period."

Held, by the Judicial Committee (affirming the decision of the High Court on appeal) that the appellants were liable for track rent during the period they so continued to work the tramways: so long as they took the profits they must pay the ordinary expenses of working them, and the track rent.

APPEAL from a decree (18th February, 1902), of the High Court at Bombay in its appellate jurisdiction affirming with certain variations a decree (26th September, 1901), of the same Court in its ordinary original jurisdiction.

The suit in which the above decrees were made was brought on 13th March, 1901, by the Bombay Tramway Company against the Municipal Corporation of the City of Bombay as first defendant, and against two other defendants who were trustees of a deed executed by the plaintiffs to secrue payment of certain debentures. Against these two defendants no relief was sought and no question concerning them arose in this appeal. The suit sought relief and a declaration of the plaintiff Company's rights with reference to a purchase of their property and business which the Corporation of Bombay claimed to have made under the provisions of section 30 of the Bombay Tramways Act (Bombay Act I of 1874) which is set out in their Lordships' judgment.

The plaint stated that the Bombay Municipal Corporation by agreement, dated 12th March, 1873, granted to W. F. Stearns and G. A. Kittredge and their assigns the right to construct and

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maintain and to use tramways in Bombay upon certain terms contained in the agreement which was afterwards set out in a schedule to Bombay Act I of 1874, an Act passed to enable the grantees and their assigns to lay down and maintain the Tramways contemplated by the agreement and for other purposes connected therewith; that the grantees assigned their rights to a registered Company called The Bombay Tramway Company, Limited, which constructed and used certain tramways, and in 1884 went into liquidation, and that a new Company—the present plaintiff Company—was formed which took over the property and business of the old Company including the tramways; that on 11th March, 1901, the plaintiff Company received from the Municipal Commissioner of Bombay the following notice:—

"That, in exercise of the powers conferred upon it by section 30 of Bombay Act I of 1874 and clause 15 of the Articles of Agreement of the 12th March, 1873, between the Justices of the Peace for the City of Bombay of the one part and William French Stearns and George Alvah Kittredge of the other part, the Municipal Corporation of the City of Bombay hereby declares its intention to purchase at the end of the now current period of seven years from the expiration of the period of twenty-one years mentioned in the said section and clause respectively (and which said period of seven years will expire on or about the 12th March, 1901), the tramways of the abovenamed Bombay Tramway Company, Limited, constructed under the said Act with the plant, stores, rolling-stock, and everything connected therewith.

Dated this 11th day of March 1901."

Two other similar notices dated 12th and 13th of March, 1901, (the latter one being served on 14th March) were received by the plaintiff Company from the defendants.

The plaint further alleged that the defendant Corporation had on the 11th March, 1901, entered into an agreement with Mr. W. G. Bingham "by which the first defendant agreed to make the proposed purchase of the plaintiffs' property and business on behalf of and for and on account of the said Mr. Bingham"; that the abovementioned notices had "all been sent to the plaintiffs by the first defendant by reason of the said agreement with Mr. Bingham and could not have been sent if the said agreement had not been entered into." And the plaintiffs submitted that the Corporation had not "acquired any right to purchase the property and business" of the plaintiff and

that Bombay Act I of 1874 and the agreement of 12th March, 1873, "only contemplated a *bonâ fide* purchase by the Municipal Corporation on its own account and do not authorize a purchase or intention to purchase as the agent of or on account of a third person"; and that under the Act and the agreement of 1873 the Corporation had no power to acquire the said property and business "save in the case of the first defendant's *bonâ fide* intending to acquire the said property and business for the Municipal Corporation of the City of Bombay with the *bonâ fide* intention of carrying on and working the said business themselves"; and the plaintiffs submitted that the Corporation "has no such *bonâ fide* intention."

As to the value of their property and business the plaintiffs claimed under two heads, first, the actual *bonâ fide* value (exclusive of compensation for goodwill, etc.) and secondly, compensation for goodwill, etc., and they desired to have the amount under the second head determined by the Court, but were willing that the amount payable under the first head should be decided by arbitration if the first defendants so desired.

The plaintiffs also alleged that important questions of law were likely to arise in ascertaining the average profits of their business, "as to when the three years next preceding the purchase begin and end, and what date is to be fixed as the date of the purchase by the first defendant; as to when the ownership of the plaintiffs' property passes to the first defendant; and as to whether or not the plaintiffs are not entitled to remain in possession of their property and to enjoy the rents and profits thereof until the day of payment by the first defendant of the purchase-money; and, if not, what interest is to be paid to the plaintiffs on the unpaid purchase-money." And the plaintiffs submitted that if it should be held that valid notice had been given by the Corporation, then from the date when such notice was given the agreement of 12th March, 1873, (save clause 15) ceased to be in force, and that in such a case they were not bound by the terms of the agreement. The plaintiffs prayed relief in accordance with their allegations. The written statement of the Corporation submitted that the suit was premature and that any questions arising should when they arose be

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decided by arbitration under clause 23 of the agreement of 1873. This agreement they submitted was not inconsistent with the Act and was still, so far as applicable, binding on the parties. They maintained that the notices given were sufficient and they denied that their agreement with Mr. Bingham affected their rights as regarded the plaintiffs.

Issues were settled raising all the points in dispute. Issues 1 and 2 were as to the validity and effect of the notices: 3, 4, 6 and 7 as to the effect of the arrangement with Mr. Bingham and of the Corporation having no intention to work the tramway themselves: 5 whether the agreement of 1873 came to an end when a valid notice was given, or was still in force: 8 as to the date to be fixed as the date of purchase: 9 as to when the ownership passed: 10 as to when "the three years next preceding the purchase begin and end": 11 as to the proper method of ascertaining the average profits of the said three years under section 30 of the Act, and clause 15 of the agreement of 1873: 12 and 13 whether the plaintiffs were entitled to retain possession of the property and enjoy the profits until payment of the purchase-money, and if not to what interest on the purchase-money were they entitled: 14 as to the respective rights of the parties on the true construction of Bombay Act I of 1874 and the agreement of 1873.

As to the notices served by the Corporation on the plaintiff Company, both the lower Courts held that notice of intention to purchase was given in proper time.

The chief questions argued on this appeal were:—

1. Whether or not the notices were invalid on the ground that they were not given *bonâ fide* on behalf of the Corporation but were given on behalf of Mr. Bingham, or on the ground that the purchase was made with the view of Mr. Bingham taking over and working the tramways?

2. At what time must the Corporation be taken to have made the purchase for the purpose of estimating the compensation payable by the Corporation for the goodwill, premium, or compulsory sale and other consideration?

3. Whether the Corporation is entitled to track rent as long as the Tramway Company is in possession and receives the income and profits derived from working the tramway?

As to the last question (3) the Municipal Commissioner on behalf of the Corporation wrote to the plaintiff Company inquiring whether the "Company will be willing pending the ascertainment and payment of the amounts payable to them under section 30 of the Bombay Act I of 1874, and the handing over charge of the undertaking to continue the working of the tramways" and expressing the desire of the Corporation that no "interruption of the excellent public service" theretofore maintained might occur. In reply the Manager of the plaintiff Company on 12th March, 1901, wrote as follows:—"With regard to the question of the continuance of the working of the tramways my Company will continue to work the tramways pending the ascertainment and payment of the purchase-money on the understanding that they shall receive and enjoy the income and profits of the tramway business during such period. In fact I am advised that the Company is legally entitled to do so. Without prejudice to any of the Company's legal rights I am prepared to come to an agreement with you to the effect that my Company shall continue to work the tramways on the terms aforesaid pending the ascertainment and payment of the purchase-money." On 13th March, 1901, the Municipal Commissioner wrote agreeing to the terms mentioned in the letter of 12th March, 1901, and asking whether the Company would draw up an agreement or whether the Solicitors of the Corporation should do so. The plaintiff Company replied on the same day confirming the agreement and requesting the Municipal Commissioner to have it embodied in a document by the Solicitors to the Corporation. On 2nd May, 1901, a claim for track rent was made on the plaintiff Company by the Corporation, but the Company on 18th May refused to pay it, claiming that their liability ceased on the date of the notice of intention to purchase provided it was held valid.

One of the Judges sitting on the Original Side of the High Court (Fulton, J.) in his judgment in the suit held with reference to the arrangement of the Corporation with Mr. Bingham that it did not constitute the Corporation the Agents of Mr. Bingham in respect of the purchase of the tramways; that "in giving notice of purchase the Corporation are not acting for Mr.

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Bingham, for it is on the Corporation and not on Mr. Bingham that the Legislature has conferred the statutory power"; and that the Corporation in dealing with the Tramway Company were "exercising their own powers" and not powers derived from Mr. Bingham.

On the question as to the date of the purchase the learned Judge held that the 14th March, 1901, was the date of the purchase, the date on which the property passed to the Corporation, and the date on which ended the "three years next preceding the purchase."

As to the question of the liability of the plaintiff Company for track rent, he held that the agreement of 12th March, 1873, came to an end on 14th March, 1901, and that "the provisions of clause 18 which provides for the payment of track rent ceased to be operative," and that track rent therefore ceased on 14th March, 1901, to be payable.

Both parties appealed from that decision, the appeal of the Corporation being No. 1179 of 1901 and that of the Tramway Company being No. 1181 of 1901. The appeals were heard by an Appellate Bench of the High Court consisting of Jenkins, C. J., and Starling, J., who in separate judgments but substantially on the same grounds varied the decree of the original Court, as to the date of the purchase, and also as to the liability for track rent, but agreed with the decision of that Court that the notice given by the Corporation was not invalid by reason of their agreement with Mr. Bingham. The material portions of the judgments were as follows:—

JENKINS, C. J. (in Appeal No. 1181 of 1901):—I now come to the third and last objection urged against the validity of the notice: that it was on its merits not such a notice as the Act authorises. First it is said that the notice was not a declaration of the *Corporation's* intention to purchase but of Mr. Bingham's, and secondly if it was a declaration of the Corporation's intention, it was vitiated by the ulterior purposes in view, that the Corporation was exercising its powers for a collateral purpose outside the limits of its statutory authority and actually for an unlawful purpose. First, then whose was the intention to buy? This is a question of fact, and having regard to the record it has to be determined on documentary evidence alone.

Before Mr. Justice Fulton it would seem that the objection was based principally, if not wholly, on the theory of agency. Before us the suggestion of agency has fallen into the background to give place to the contention that the

purchase was "on account of Mr. Bingham." It is clear and indeed not disputed by the Corporation, that prior to the notice a transfer by the Corporation was intended and arranged, and that without such an arrangement no notice would have been given; but this, it is contended, was a prudent measure and certainly did not involve the consequences for which the Tramway Company contends.

After discussing the evidence relating to this objection, and the terms of the agreement between the Corporation and Mr. Bingham the judgment continued:—

I have now referred to the most material parts of the evidence that bear on the matter now in hand, and I come to the conclusion that it cannot be said that the Corporation was the agent of Mr. Bingham or that the notice was of his intention to purchase and not of the Corporation's. Further than that I hold, notwithstanding the expressions to be found in the documents, that it cannot be said that the purchase was "on his account" in the sense that it cannot be treated as a purchase by the Corporation within the meaning of section 30 of the Act. No doubt it is a part, and an essential part, of the Corporation's scheme to pass on the right of working the tramways to Mr. Bingham or his nominees, but I fail to see that this *per se* or under the facts disclosed in this case makes the purchase any the less the purchase of the Corporation. From the point of view with which we are now concerned, it is not so much that Mr. Bingham is making use of the Corporation, as that the Corporation is making use of Mr. Bingham for the purpose of attaining the end it has in view. It was not Mr. Bingham who inspired the notion of giving the requisite notice, nor was it on his initiative that the Corporation conceived the idea of proceeding under section 30 of the Act, though his co-operation may in the end have enabled the Corporation to bring matters to a practical issue. I however see nothing wrong in this, and, in my opinion, the objection fails.

This however does not exhaust the objection urged against the notice given, for it is contended that even if the purchase is by the Corporation, still it is bad, inasmuch as it is for a collateral purpose and with an illegal object.

After referring to the principle invoked as formulated by Lord Cranworth in *Stockton and Darlington Railway Company* v. *Brown*[1] and *Galloway* v. *Mayor and Commonalty of London*[2] that when the Legislature gives powers to persons for a special object, they cannot be allowed to exercise the powers conferred on them for any collateral object as that would be putting into operation their statutory powers for a purpose for which it was not intended they should be exercised, the judgment proceeded:—

(1) (1860) 9 H. L. C. 246 (256). (2) (1866) L. R. 1. H. L. 34 (43).

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Of the existence of the principle there is no doubt; the question is whether the facts of this case invite its application. To determine this it is necessary to see what is the precise position of the Corporation. Clearly it could purchase the undertaking; section 30 leaves no doubt on that head. But having purchased, what could it do with it? The suggestion of the plaint (24) and of the memorandum of appeal (5) is that the Corporation has no power to acquire the right to purchase, save in the case of the Corporation "*bonâ fide* intending to acquire the said property and business for itself with a *bonâ fide* intention of carrying on and working the said business itself." When it was put to Mr. Inverarity whether he adhered to that proposition in its integrity he hesitated to give an unqualified answer in the affirmative, though he was reluctant to abandon the concluding condition of the proposition. I can understand his somewhat negative attitude towards the proposition because it is admirably framed to test the question on which we are now engaged. In the first place then *rebus sic stantibus* can the Corporation carry on and work the tramways it is empowered to acquire? This involves an answer to two questions, first, on the completion of a purchase would the power pass to it, and secondly if it did, would the Corporation's constitution permit of its exercising that power?

It is clear on principle and authority that statutory powers such as are essential to the working of a tramway undertaking are not capable of assignment. In *Beman* v. *Rufford*,(1) it was said by Lord Cranworth "the Oxford, Worcester, and Wolverhampton Company are delegating the functions which the Legislature has given them, to other parties, which they have no possible right to do." This principle has since been clearly established by later decisions. (*Great Northern Railway Company* v. *The Eastern Counties Railway Company* (2), *Winch* v. *Birkenhead Lancashire and Cheshire Junction Railway Company* (3), *Gardner* v. *London Chatham and Dover Railway Company*(4), and *Edinburgh Street Tramways Company* v. *Lord Provost, &c. of Edinburgh* (5).)

Their powers, however, can be exercised, not only by the original grantees, but also by every one within the particular designation contained in the Act. Thus in this case the powers of the Act are exercisable, not only by Stearns and Kittredge, but also by every one answering the designation of grantee, *i.e.*, their executors, administrators, and assigns. Then, again, by section 31 of the Act, it is provided that the grantees may sell their rights and powers to others.

For the Tramway Company it has been contended that the provisions of section 31 do not apply to a sale under section 30, and that the Corporation on a sale under section 30 cannot claim to be assigns and so grantees within the definition of the Act. If this argument be well founded, as to which it is unnecessary that I should at this stage express my opinion, then obviously the

(1) (1851) 1 Sim. N. S. 550 (569).
(2) (1851) 9 Hare 306.
(3) (1852) 5 De. G. & Sm 562.
(4) (1867) L. R. 2 Ch. 201.
(5) (1894) A. C. 456.

Corporation has no power to exercise the powers of "carrying on and working the business." Be this, however, as it may, there is another obstacle in the way of its working the tramways: such a power is outside the Corporation's constitution, and it does not appear to me that it was the intention of the Legislature by the Tramways Act of 1872 to enlarge its constitution in this direction. The purpose of the Act is to sanction the invasion of the rights of the public, and not to extend the Corporation's powers by authorising it to work the tramways.

But if the Corporation has no power to work the tramways, what is it to do when it has purchased the undertaking? It is important in this connection to bear in mind that it is not a body called into existence for the purpose of acquiring the tramways, and that it is not vested with the right to purchase for the purpose of private speculation and adventure, but to safeguard and advance the interests of the Bombay public. It cannot then have been intended that the Corporation was to expend the large sums payable under section 30 for no purpose, or that the whole tramway system of the city should on a purchase under that section come to an end; it must have been contemplated that the undertaking should be continued by those to whom it was transferred or passed on by the Corporation, in case it did not acquire the requisite power of working for itself. This, in my opinion, is the true view of the position, and it follows that the Corporation were within their rights when they made the arrangement they did with Mr. Bingham. They did that which was prudent and proper under the circumstances, and, in my opinion, the notice was not vitiated by the ulterior purpose in view. To me it seems that there is no force in the suggestion that the agreement between the Corporation and Mr. Bingham involves a breach of the provisions of the Penal Code, and so impairs the validity of the notice. Even assuming for the sake of argument that Mr. Bingham or his assigns will not be entitled to exercise the powers contained in the Act, or to work the tramways without further legislative authority, still this would not vitiate what the Corporation has done; that is a matter between the Corporation and Mr. Bingham, and may possibly release the parties to that contract from the liabilities they assumed; it would not make the notice bad as between the Corporation and the Tramway Company.

I have now dealt with and answered all the points alleged against the notice and I hold that the notice is good.

On the question as to the time at which the Corporation must be taken to have made the purchase for the purpose of estimating the compensation payable by the Corporation, the learned Chief Justice said:—

The first question is what is the amount to be paid by the Corporation to the Tramway Company? This is the subject of section 30 of the Tramways Act, and clause 15 of the agreement.

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Now, section 3 of the Act makes it clear that if there is any inconsistency between the agreement and the Act, the latter is to prevail. This would necessarily be so, but the importance is that the Act contemplates that there may be an inconsistency. It follows then that what we have to interpret is the 3rd section of the Act.

Now, that section contemplates the payment of two distinct amounts. First there is the amount which is "the actual *bonâ fide* value of the tramways, and of the works and materials connected therewith and of the lands and buildings, and all other the property of the grantees"; and secondly, there is "the compensation for the goodwill, premium, or compulsory sale and other consideration," being "an amount equal to 21 years' purchase calculated on the average profits of the previous three years next preceding the purchase, 4 per cent. per annum on the *bonâ fide* value mentioned above being first deducted from such profits." The first of these amounts I will for brevity hereafter call "the value," and the second of them "the compensation." The section is clear as to the event in relation to which "the compensation" is to be determined; it is "the purchase" whatever that may be. The Corporation maintain that "the value" too should be determined in relation to the same date. The Tramway Company on the other hand insists that, though the compensation is to be determined in relation to the purchase, the value is to be fixed in reference to the notice to treat. Mr. Justice Fulton held that the property was purchased and actually passed on the notice, and in that view obviously no difficulty arises. Both sides however combine to attack this view. The argument that the notice is the appropriate date, is based on the line of cases dealing with notices to treat under the Lands Clauses Consolidation Act and cognate enactments We have thus been referred to *Adams* v. *The London and Blackwall Railway Company* (1), *Haynes* v. *Haynes* (2), *Metropolitan Railway Company* v. *Woodhouse* (3), *Penny* v. *Penny* (4), *Tyson* v. *Mayor of London* (5), *Ex parte Edwards* (6), and *Wilkins* v. *Mayor of Birmingham* (7); and no doubt it is there laid down that on a notice to treat the parties for certain purposes stand in relation to each other of vendor and purchaser. But the question still remains how far have those cases any bearing on the point now before us? Obviously they are not directly in point for they are based on an Act different in its scheme and in its terms from the Tramways Act. Again the analogy they may be said to furnish is by no means close, for though we have in the Tramways Act the expression "compulsory sale" it refers to a transaction essentially different from the compulsory sale of which the Lands Clauses Consolidation Act treats. The compulsory sale of the English Act is in derogation of rights to all intents and purposes absolute, while that which is the subject of the so-called compulsory sale under the Tramways Act from its very origin was subject to the limitation implied by the Corporation's right to purchase. It is true it is

(1) (1850) 2 Mac. & G. 118 (129).
(2) (1861) 1 Drew & Sm. 426.
(3) (1865) 34 L. J. Ch. 297.
(4) (1868) L. R. 5 Eq. 227.
(5) (1871) L. R. 7 C. P. 18.
(6) (1871) L. R. 12 Eq. 389.
(7) (1883) 25 Ch. D. 78.

called a compulsory sale, but the mere use of that term obviously would not of itself attach the consequences which follow on a sale under the Lands Clauses Act. When regard is had to the fact that the 30th section is substantially a reproduction of clause 15 of the agreement the analogy it suggested is that of a sale in performance of an ordinary conventional option. In the machinery also of the two Acts there is no correspondence; as for example the right to take possession under the circumstances indicated in the English Act, has no place in the Tramways Act. It seems to me then that we must construe this Act on its own words, and that the cases to which I have alluded serve to throw little or no light on its true interpretation.

In the absence of any contrary indication in the section it would not be unreasonable to hold that the valuation ought to be made in relation to the date of the notice; nor do I think it would be any answer to this, as the Corporation urges that it would be difficult now to ascertain the value on that basis. If any such difficulty exists it is of the Corporation's own making, for there was nothing to prevent it at once proceeding to have a valuation made.

I think, however, we have in the Act a clue to the date to which the ascertainment of the value must be referred. In my opinion it is the reasonable view to refer the fixing of the value and the compensation to the same date. Each amount is equally a payment to the Tramway Company in respect of that which it loses as a result of the notice, and I can see no reason why the several amounts should be fixed in reference to different dates. The conclusion then to which I come is that the value and the compensation are to be fixed in reference to the same date. What then is that date? The section provides that the compensation is to be calculated on the average profits of the three previous years next preceding "the purchase," so that we have to fix the time of "the purchase" mentioned in the section.

Now this word "purchase" in section 30 can conceivably refer to any one of the three following points of time, (*a*) the date of the notice, (*b*) the date at which the amount of the value is ascertained, or (*c*) the date of the completion of the purchase.

Mr. Justice Fulton decided in favour of the first of these three dates with the consequence I have stated, but with this neither party is satisfied. The section cannot claim to be free from obscurity, and I am inclined to think that the gentleman to whose pen it is attributed may not have appreciated those niceties of precise legal phraseology, which have been pressed on us in argument, and it may be that he intended the notice to be the crucial date for the purposes both of "the value" and "the compensation." Certainly the words "the purchase" were inserted of set purpose: they were not in the agreement, and doubtless were intended to remedy a defect. The result, however, has not been successful, and the section would seem to merit the description of being "one of those curative measures, not by any means confined to a single branch of science where the remedy is worse than the disease."

We are bound *primâ facie* at any rate to assume that the words in common legal use have in the section their legal meaning. Now if this be so, then the

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notice would not alone amount to a purchase even if we tested the relations constituted by reference to the exercise of an option. The amount of the value is according to the provisions of the Act to be ascertained by a special machinery, by a reference to arbitrators and their umpire, in case the parties do not agree; so that adopting for the sake of convenience the language applicable to contracts, there was not at the date of the notice a contract of sale or purchase for "the price is of the essence of a contract of sale" : *Milnes* v. *Gery*.(1) In the course of his judgment in that case it was said by the Master of the Rolls, Sir William Grant, "upon the principle that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted whether an agreement that did not settle the price was at all binding. Justinian's Institutes and the Code state that doubt, and resolve it by declaring that such an agreement should be valid and complete when and if the party to whom it was referred should fix the price; otherwise, it should be totally inoperative, *quasi nullo pretio statuto*; and such clearly is the law of England." The phraseology too of the section is, in my opinion, opposed to the view that a *notice* under it amounted to a purchase; for, what is provided is that upon notice being given the Corporation shall have a "right of purchase," that is the right of purchasing, which seems to point to a position *anterior* to the purchase.

I therefore think the first of the three theories must be rejected, so it remains to make a choice between the other two. If the case be rested, as the Tramway Company contends, solely on the Act then there is not of course a contract in the strict sense of the word; there is however a relationship to which for convenience the term "quasi contract" has been applied, and in the absence of provision to the contrary the ordinary rules, incidents and phraseology of a contract would apply. There can, I think, be no doubt that the word "purchase" may be legitimately used as a description of the position while the matter is still in contract. What was said by the Lords Justices in *Long* v. *Millar* (2) makes that clear. This too is in conformity with ordinary legal parlance, for though the words "purchase" and "purchaser" may technically imply an acquisition of property otherwise than by descent, in relation to a sale of land they are commonly used as appropriate to the stage prior to actual completion by conveyance or transfer. "Sale" and "purchase" are co-relative terms and we find them both so applied. Thus, in the old common law court for the purchase-money of land it was in the form "money ..... for a messuage and land *sold and conveyed by the plaintiff to the defendant*" (see Bullen and Leakes' Precedents of Pleading). So in our Court conditions of sale it is provided that the highest bidder shall be the *purchaser*, and provision is made for the *purchaser* doing a number of things prior to completion, while the last condition provides that if the "purchaser shall not pay his purchase money ... . an order may be made ..... for the resale of the property." This is in accordance with the phraseology of the common form

(1) (1807) 14 Vesey (Jun) 400 (408).

(2) (1879) 4 C. P. D. 450.

conditions of sale. So again in the Transfer of Property Act we find in section 55 the parties described as buyer and seller prior to completion. Similar instances could easily be multiplied, but it is unnecessary, for those I have cited show the sense in which the words "purchase" and "purchaser" and cognate expressions are commonly used. It is nothing to the purpose that section 54 of the Transfer of Property Act provides that a contract for the sale of immoveable property does not of itself create any interest in such property; the Act could have no direct application here. If for no other reason, because it did not come into force in this Presidency till 1893. It has been argued too that the expression in an earlier part of the section "in the event of such purchase" points to the words "the purchase" being used in sense other than the completion of the purchase; I am not, however, satisfied that this expression throws much light on the subject.

I have indicated what appears to me to be the ordinary meaning of the word "purchase" in a context like the present, and I have now to see whether there is any sufficient reason in this case, for referring it to the completion of the purchase.

In the first place it is an objection to that view that one has to add words that are not there, the words "the completion of." Then again if I am right in the opinion I have already expressed that the value and the compensation must be determined in relation to the same date, to hold that "purchase" means the date of completion would lead to a difficulty; for the compensation cannot be calculated until the value is ascertained, and if, as the Tramway Company contends, and as apart from special circumstances, I think is the case, the compensation must, as well as the value, be paid before completion there are all the materials for an obvious deadlock. This is so manifest as not to need elaboration. I do not say that completion would be impossible, but the position would certainly be one that lent itself to effective obstruction if there were a desire on either side to impede the transaction. I do not suggest that this is conclusive, but it at least shows that to treat "purchase" here as referring to completion has not the recommendation of convenience for what that may be worth.

In my opinion, therefore, the date of the purchase is the time when the amount of the value is fixed. It is true that the amount of the compensation may not then be ascertained, but that in my opinion would not prevent there being a purchase. There seems to me to be a clear distinction in this respect between the value and the compensation. There is no purchase until the former is ascertained because the amount is by the Legislature expressly made dependent on the arbitrament of certain individuals. It is otherwise as to the compensation, for the Act makes no provision for its ascertainment (in case the parties do not agree) otherwise than by the Court. The difference between the two cases is that in the one the Legislature has made the ascertainment of the quantum by arbitrators and their umpire of the essence of the transaction, and in the other the quantum is ascertainable by the Court. This distinction

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is pointedly drawn in *Milnes* v. *Gery*.(1) I may in conclusion point out that the construction I have placed on the Act involves no deadlock or even difficulty. If the date of the "purchase" is the ascertainment of the value then the compensation can be calculated afterwards in relation to that date.

On the question of the liability of the Tramway Company for track rent the judgment of the learned Chief Justice was as follows:—

In Appeal No. 1179 of 1901 three points have been submitted for our decision: (1) when does the ownership in the purchased assets pass? (2) On the notice did the agreement of 1873 come to an end? And (3) If not, did the Tramway Company's liability to pay track rent under the agreement cease in consequence of the correspondence between the Municipal Commissioner and the Tramway Company? The first of these questions calls for no discussion now as it is agreed on both sides that the ownership does not pass until conveyance; so I will pass on at once to the second topic of discussion, did the agreement come to an end? Mr. Justice Fulton has held in the affirmative. In support of this conclusion the Tramway Company has principally relied on the first sentence of clause 15 and the concluding words of clause 16 of the agreement. The implication of those two passages, it is said, is that in the event of the Municipality declaring its intention to purchase the property, the terms of the contract come to an end. This point derives its importance from the fact that the Tramway Company, on the footing that the agreement has come to an end, claims exemption from all track rent subsequent to the notice, and the consequence of this is that not only is there a loss of the track rent which comes to about Rs. 50,000 a year, but the average profits on which the compensation has to be calculated will be proportionately increased with the result that the amount of the compensation may be augmented by a sum of 10 lacs, or so. It is not therefore a matter of surprise that this point has been hotly contested before us. The Tramway Company's case is shortly this, the track rent is only payable under the agreement, the agreement has come to an end; if not, then the liability to pay track rent was released by the Municipal Commissioner; the Municipal Commissioner was entitled to give this release, if not, the Corporation is estopped from denying his power.

The first question is whether we ought at this stage to give any decision on the point. I am of opinion that in the view Mr. Justice Fulton took of the date of "the purchase," the question did not arise for decision. Further than that I think that as he considered it necessary to rely on the doctrine of estoppel as against the Corporation, he had not before him materials on which that estoppel could be based. This is practically conceded by the Tramway Company, who has applied to be allowed to adduce evidence on this point. In the view, however, that I take of the date of "the purchase," the determination of the

(1) (1807) 14 Vesey (Jun.) 400 (406).

tramway's liability for track rent does arise as it is essential to the account of profits that has been directed for the purpose of ascertaining the amount of the compensation. The only question has been, whether we should at this stage decide the matter or allow it to remain over until an application is made to vary the Commissioner's report; either course was open to us according to the practice of this Court. Having regard, however, to the probable destination of this suit, we thought the former would be the better course, it became therefore necessary to deal with the Tramway Company's application to supplement its evidence as to estoppel.

The Tramway Company before Mr. Justice Fulton protested against the determination in this suit, or at any rate at this stage, of its liability for track rent for it was a case not made or (having regard to the dates) capable of being made in the pleadings, and as a result the Tramway Company was not prepared with the requisite evidence. Under the circumstances we thought their application a reasonable one, and that it should be granted.

The Tramway Company has accordingly supplemented its evidence on the head of estoppel. What has happened is that subsequently to the notice of the Corporation's intention to purchase, the Tramway Company has continued to work the undertaking, and first I propose to consider what is its position in so doing under the Act and the agreement apart from the correspondence with the Municipal Commissioner. I have already stated the general character of the Tramway Company's argument and the import ascribed to clauses 15 and 16 of the agreement. The correctness of this view has been strenuously combated by the Corporation: it is urged that it is contrary to the Tramway Company's claim for exemption of its horses, carriages and vehicles from municipal taxation under section 12 of the Tramways Act, and that the concession in respect of which the yearly rent is reserved by clause 18 of the agreement is still enjoyed. For the moment, however, I will assume that the sense the Tramway Company seeks to impose on the 15th and 16th clauses is correct, in so far as it would read into the sections the meaning that the agreement is to come to an end on the happening of an event not mentioned but indicated in the 16th clause. But then we have to see what that event is. The event actually mentioned is the Municipality's failing to declare its intention "as above provided"; the event therefore to be implied is the Municipality's declaring its intention "as above provided" *i. e.*, as provided in the agreement. But according to the argument advanced by the Tramway Company in another connection it was not under the agreement but under the Act that the Municipality declared its intention. If this be the true view then it affords a complete answer to the Tramway Company's argument. But it is not enough that the Tramway Company advanced that argument in another part of the case: we must be satisfied that it is right, and that I will now consider. Substantially the 15th clause and the 30th section are in the same terms though there are certain minor differences; thus the first sentence of the clause is absent from the section while the clause does not contain the words "*the purchase*" so much discussed in Appeal No. 1181. Turning to the

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Corporation's resolutions, I find in them no reference to the agreement but only to the Act. The resolution of 28th February, 1901, was that the Municipal Commissioner "be authorized . . . . . to give legal notice to the Bombay Tramway Company of the Corporation's intention to exercise the right of the purchase of the tramways given to them by section 30 of the Bombay Tramways Act I of 1874, which intention the Corporation hereby declare": while the resolution of the 11th March was "the Corporation further authorize and direct the issue and service on the Bombay Tramway Company, Limited, of all necessary notices declaring the intention of the Corporation to exercise the power of purchase of the tramways pursuant to section 30 of the Bombay Tramways Act, 1874." It is true that the Municipal Commissioner's notice mentions the agreement as well as the Act, but to that extent it went beyond the resolution and on the whole I think that so far as the Municipality is concerned, the only intention declared was under the Act. Further, I do not think a declaration under the agreement would have been of any use. In the first place it is at least doubtful whether the right of purchase contained in the agreement was not bad on the ground that it created a perpetuity; for it may be that so far as the matter rested on contract a decision by arbitrators was not necessarily of its essence. [*London and South-Western Railway Co.* v. *Gomm* (1) and *Manchester Ship Canal Company* v. *Manchester Racecourse Company* (2)] Next, I am aware of no power vested in the Corporation that would enable it to purchase otherwise than under the special authority of the Tramways Act. The validity, therefore, of clause 15 is at least open to question. But in any case I am of opinion that the clause was superseded by section 30 of the Act: the Act does not purport to keep it alive: it substantially reproduces its terms as an independent provision, and in my opinion it must have been intended that the imperfect rights under the agreement so far as they had any existence, should be merged in, and extinguished by, the rights created by section 30 of the Act.

So far I have proceeded on the assumption of the interpretation that the Tramway Company seeks to put on clauses 15 and 16 of the agreement, but I do not wish it to be supposed that I accept that view, for I have not been as yet convinced by the arguments advanced in support of it. The rent was reserved in consideration of the concession expressed to be granted by the agreement; that concession was based on the property or interest the Corporation's predecessors had in the soil on which the physical structure of the tramways was laid; that property or interest is now vested in the Corporation, and the benefits of the concession are being enjoyed by the Tramway Company, and it would require very clear language to determine the obligation to pay rent during the continuance of that relationship. I can find no such language in the agreement or the Act. In my opinion, therefore, there is nothing either in the Act or agreement which under the circumstances operated to determine the Tramway Company's liability for track rent as a consequence of the notice given.

(1) (1882) 20 Ch. D. 562. (2) (1900) 2 Ch. 352 (362); (1901) 2 Ch. 37.

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But then it is said that the correspondence with the Municipal Commissioner exempted the Tramway Company from this liability.

After reading the correspondence, the learned Chief Justice continued:—

As Mr. Justice Fulton held that the agreement had come to an end, he approached this correspondence from a different standpoint from that which I start. He had to see whether the correspondence imposed a liability which otherwise would not exist; I have to enquire whether the correspondence exempts the Tramway Company from a liability which would otherwise exist. But before dealing with the correspondence there is one matter to which I must briefly allude. In the course of the argument there was a suggestion that there had been that which amounted to fraud on the part of the Tramway Company in connection with this correspondence. We did not permit this point to be pursued, because no such case had been alleged before, but it is only right that I should say that in my opinion there is absolutely no foundation for the suggestion; the conduct of the Tramway Company and its manager, Mr. Rimington, has throughout been straightforward and wholly free from anything reprehensible. But to return to the matter in hand, what is there in this correspondence which gives the Tramway Company the exemption it claims? No doubt in its letter of the 12th the Tramway Company stipulates that the agreement is without prejudice to any of its legal rights. That would have been of value if apart from the correspondence the liability had ceased, but as I have held otherwise the argument has no force. What precisely was the effect of the words "without prejudice to any of the Company's legal rights" is not clear; for the Tramway Company was forced to assert that the agreement did interfere with its right to discontinue work, as otherwise there would be no consideration to support the agreement, and it is on this asserted curtailment of its rights that the Tramway Company relies. Then stress was laid on the stipulation that the Tramway Company was to receive and *enjoy the income and profits* of the Tramway business during the agreed period. So we have to see what is the meaning of those words. In *Lawless* v. *Sullivan* (1) it was laid down by their Lordships of the Privy Council that "there can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year." In *Mersey Docks* v. *Lucas* (2) Lord Selborne deals thus with the expression "profits of the concern": "if we had nothing more than that, I should have thought that we were to consider, not the application of the moneys which the Mersey Board received when they had received them, but the 'profits of the concern' in the sense of the produce or value which could properly be described as 'profit of the concern' and that surely would be all the net proceeds of the concern after deducting the necessary out-

(1) (1881) 6 App. Cas. 373 (378).

(2) (1883) 8 App. Cas. 891 (903).

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goings without which those proceeds could not be earned or received." I do not cite these opinions as authorities binding in this case, for I am conscious that they were expressed in relation to a different subject-matter from that now before us, and in a different context, but I refer to them as weighty opinions as to the ordinary meaning, first of the word 'income' and next of the word 'profit.' That meaning is in each case opposed to the Tramway Company's contention. But then it is urged that here we have the two words in collocation and that some force should be given to that. It is a common practice to couple the word 'profits' with cognate words: thus the expression "rents and profits" is in common use, and it would take much to convince me that the use of the word 'profits' in conjunction with the word 'income' in this letter means gross profits so as to entitle the Tramway Company to an exemption it would not otherwise possess.

I feel the more strongly in this case that this cannot be the force of the word 'profit' as here used, from the rest of the correspondence. Thus the use of the words 'continue' and 'continuance' suggests an adhesion to the old terms, and to my mind there is the strongest indication in the Tramway Company's letter of the 12th that this was to be so. After stating the Tramway Company's willingness to continue the work on the understanding that it is to receive and enjoy the income and profits of the Tramway business, the letter proceeds: "In fact, I am advised that the Company is legally entitled to do so." What that advice was does not appear. This letter was an offer by the Tramway Company, and it was accepted by the Municipal Commissioner. The question then is what was hereby offered? To determine this what we are concerned with is not so much the real as the manifest intention of the parties, or in other words, their intention as disclosed by the language used. The reasonable construction to place on the words is that the Tramway Company's offer was to continue working in accordance with their legal rights and responsibilities, and in my opinion the Municipal Commissioner was justified in accepting the words in that sense, nor is it suggested he did not. What then, apart from the correspondence, were those legal rights, and what responsibilities? On that I have already given my decision, and I must, for the purposes of this judgment, assume that it is correct. The result is that in my opinion there is nothing in the correspondence to exempt the Tramway Company from payment of track rent. This is the view I take of the correspondence, but even if it be not correct I still think the Tramway Company's contention must fail; for to adopt the language of the Privy Council in *Falck* v. *Williams* (1) it was the duty of the Tramway Company to make out that the construction which it put on the correspondence is the true one. In that it must fail if the offer was ambiguous, as I hold it to be, in case it does not bear the sense I have imposed on it.

Under these circumstances it is unnecessary to consider how far the Municipal Commissioner had authority to bind the Corporation in relation to the track rent, or whether the Corporation is estopped from disputing his authority.

(1) (1900) A. C. 176 (181).

18th February 1902.

We have heard further argument as to the date in reference to which the value is to be ascertained and as to the incidence of costs here and in the first Court.

On the first point I adhere to the opinion I originally expressed, that the value must be ascertained in reference to the date of the valuation. The Act is not specific on the point, but on a consideration of all the circumstances that is, in my opinion, the most reasonable period to which to refer the valuation, more especially if the Tramway Company is entitled (as I think it is) to continue working under the Act notwithstanding the notice.

The Corporation having waived all claim to assets acquired after the date of their notice on the 14th March, 1901, the valuation will be of the rest of the assets, *i.e.*, the tramway and the works and materials connected therewith, and the lands, buildings, and all other property of the tramway in existence at the date of valuation, exclusive of those acquired after the 14th March, 1901, and the value must be ascertained as at the date of the valuation, *i.e.*, of the award declaring the value.

The result, then, is that the suit must be dismissed so far as it seeks a declaration that the Corporation has failed to exercise its option of declaring its intention to purchase the Tramway Company's property and business, and is not entitled to exercise such option for a period of another seven years after the 12th May, 1901, and also so far as it seeks a declaration that the Corporation has not acquired the right to purchase the Tramway Company's property and business and consequential relief. Mr. Justice Fulton's decree must be varied so far as it declares that the 14th day of March, 1901, is the date of the purchase, and that the ownership of the property passed to the first defendant on the 14th of March, 1901, and that the three years next preceding the purchase ended on the 14th of March, 1901, and in substitution thereof there should be a declaration that the date of the valuation is the date of the purchase, and that the ownership of the property will pass on the assurance thereof and that the three years next preceding the purchase will end on the date of the valuation.

We vary Mr. Justice Fulton's finding on the fifth, twelfth, and fourteenth issues by declaring that the plaintiffs' liability to pay track rent did not cease on the 14th of March, 1901.

STARLING, J.:—The next point to be considered is whether the notice of purchase is not bad in law owing to the purchase being made with the intention of resale, the power of resale not having, it is urged, been given to the Municipality by the Act. This depends upon the construction which is to be put on sections 30 and 31 of the Act. These two sections were doubtless suggested by sections 43 and 44 of the English Tramways Act, 1870, but they were not copied from them as argued on behalf of the Tramway Company. Mr. Inverarity drew our attention to the fact that in the English Act power was given in section 43 to the purchasing authority to deal with

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the purchased undertaking in the same way as the promoters were entitled to do, a power which was omitted from section 30, and argued therefrom that if the Municipality bought the tramway they would have no power to work or sell it. It would require very strong proof to induce me to hold that the Legislature deliberately intended to give the Municipality power to buy the tramway, paying a very large sum for it as a going undertaking and to prevent them doing anything with it but sell the land and the stock and the rails as old materials. It is to be remarked, however, that section 30 of the Bombay Act omits other provisions of the English Act, section 43 among others. The section in the English Act contains a provision requiring the promoters to sell the undertaking to the local authority which section 30 does not contain, and consequently it might be said that although the Municipality had the right to buy, the Tramway Company could not be compelled to sell. The latter, however, had already agreed to sell, and there was no necessity for a provision to that effect in the Act. Again, in section 44 of the English Act power was given to the local authority to purchase at any time under certain conditions if the promoters were willing to sell, and this provision is not repeated in section 31 of the Bombay Act. Therefore I hold that the fact that section 30 omits the provisions of section 43 of the English Act enabling the local authority purchasing at the end of certain periods to deal with the undertaking in the same way as the promoters could, does not show that when the Municipality buy the tramway undertaking they can neither work nor resell it. The Court must look at the Bombay Act as it stands without reference to the English Act, and find out from the words used and the surrounding circumstances what it means. Looking at these two sections in this way, it seems to me that section 30 gives power to the Municipality to buy the tramway undertaking on certain terms. Mr. Inverarity called it a compulsory purchase, but it is not so. The Act only ratifies and gives legislative sanction to the prior agreement which had already been entered into between the grantees and the Justices of the Peace by which the grantees had agreed that the Municipality should be at liberty to buy the tramway undertaking at certain times. Section 31 then gives power to the grantees to sell, not only to the Municipality, but to any one including of course the Municipality. Mr. Inverarity argued that this only applied to voluntary sales, and that if the present was to be considered a voluntary sale the Tramway Company would refuse to sell, but they had already agreed to sell under certain conditions and when those conditions were fulfilled the sale was a voluntary one which they could not refuse to perform. Under these circumstances I hold that the latter part of the section transferring the powers and rights of the grantees to the purchaser gives the Municipality power to work and power to resell. Supposing, however, that this is a compulsory purchase given by the Act. The Act is the charter of incorporation of the Tramway Company, has been accepted by them and they have been working under it. Consequently they must be held to have agreed to this liability to compulsory purchase being imposed on them. In my view of these two sections, section 30 gives the power to the Municipality to purchase at certain times, and section 31 gives the Tramway Company power

to sell then or at any other time and to sell to the Municipality or to any other corporation or person. Consequently, whichever way you look at the matter, the Municipality has power under the latter portion of the 31st section to work or resell the undertaking, and the notice of their intention to purchase is not bad because it is given with the intention of reselling.

It was then urged that the notice was not given on behalf of the Municipality, but as agents for someone else. It does not seem to me that this is the case. The Municipality had power to purchase and resell. They wanted electric traction to be introduced on the tramway and they also wanted electric light and power to be introduced into the City and they considered that to get some person or body to take up all three matters would be the best thing to be done. It is not strongly urged that assuming the Municipality had power to resell, it would have been illegal for them to have bought the tramway and immediately afterwards sold it to a company who would have introduced electric traction, light and power, but it is argued that it was illegal for them to arrange beforehand to get this done and then, in pursuance of an agreement to that effect, give notice of purchase to the Tramway Company. It seems to me that there is no illegality in this procedure and that it was the most prudent thing the Municipality could do and that in principle the matter is covered by the decision of the House of Lords in *Galloway* v. *Mayor and Commonalty of London*.(1)

The notice served on the 14th March, 1901; this being a good notice what was the effect of it? Mr. Inverarity argued that it defined the undertaking of the Tramway Company as it stood on the 14th March as the subject-matter of the intended purchase and that the undertaking was, in estimating the price to be paid for it, to be valued as it stood on that day. To this argument Mr. Lowndes, as I understood him for the Municipality, assented. If this be so there is on this point nothing for the Court to decide, but I wish to guard myself from it, being thought that, without further argument, I agree to this proposition. The notice itself, however, does not effect a purchase of the undertaking, for the contract cannot be complete until a price has been fixed, and that cannot be done until the value has been ascertained by arbitration under the terms of section 30. When that has been ascertained the date of its ascertainment by the arbitrators will be the date of purchase [see *Regent's Canal Company* v. *Ware* (2)]. That date will consequently be the time up to which the profits for the three years next preceding the purchase will have to be calculated. These two sums, namely, the value of the undertaking and the compensation, are the price which is to be paid for the purchase and on payment or tender thereof the Municipality will be entitled to possession of the undertaking and to a conveyance thereof, on which the property will pass to them.

The last question to be dealt with is that of track rent since the 14th March last. In this suit the Court cannot pass any decree for the payment of track

(1) (1866) L. R. 1. H. L. 34. (2) (1857) 23 Beav. 575.

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rent as the question is not raised in the pleadings; but both parties having assented to the amount of compensation being determined by the Commissioner of this Court, it becomes necessary for the Court at some time or other to give him directions as to some of the items which he will have to take into account in estimating the profits made by the Tramway Company during the three years next preceding the purchase by the Municipality. One of those items, the interest on debentures, has been decided by the lower Court and has not been appealed against. Another which this Court has to decide is whether the Company is liable to pay track rent since the date of the notice to purchase. On this point Mr. Inverarity in argument endeavoured to separate between the agreement and the Act, and argued that although the Act was still in force the agreement ceased to be in operation from the date of the notice to purchase. I must confess that if his agruments have any weight I have failed to appreciate them. The agreement was first made and was a necessary step to be taken as the roads were vested in the Justices, but it could not be acted upon without legislative authority; consequently the Legislature passed the Tramway Act which to my mind incorporates, though not in so many words, the agreement, except so far as it may be inconsistent with the Act. The Act confers the right to make and maintain certain tramways subject to the provisions of the agreement, and so long as the Company are in possession of the tramway I do not see any reason why the agreement should not be held to be in full force. The concession is a concession of the right to make and maintain tramways, so far as the Justices were able to grant it, over the roads vested in them, and although an Act of the Legislature was necessary to enable the tramway to take full advantage of that concession, yet I take it that the Legislature would not have granted the full power without the sanction of the Justices. Consequently in my opinion so long as the Municipality do nothing to prevent the Company maintaining the tramway, the concession is in force and consequently the agreement to pay track rent. But it is argued that the notice to purchase puts an end to the concession because the Company cannot after it do as they like with the undertaking. It does not interfere with their maintaining and working the tramway and taking the profits thereof so long as the Municipality does not put itself in a position to demand possession of the undertaking, and so long as they maintain and work the tramway it is only right that they should pay track rent. What would be the result if the Company said they would not maintain or work the tramway I do not pause to enquire, as the undertaking is a highly profitable one, and such an event is not likely to occur. There is no provision in the agreement as to the time when it is to come to an end, nor is it even provided therein that it is to come to an end when notice to purchase is given, and the agreement is so loosely drawn that it is, to my mind, impossible to say that, because clause 16 provides that if no notice is given the contract shall continue in force, therefore if notice is given it is no longer to be in force.

Then does the correspondence which took place between the Municipal Commissioner and the Company between the 11th and 13th March, 1901, in any

way alter the liability of the Company to pay track rent? It is to be noted that with reference to the future action of the Company both sides use the words "continuance of working," "will continue to work," which certainly point to a maintaining of the *status quo ante*, and in my opinion any business-man reading those words would infer that everything was to go on as it had been before the notice, including payment of track rent. Does, then, the use of the words "income and profit" alter the significance which is to be given to the word "continue?" I think not. Income may mean gross income, gross receipts, but it more ordinarily means what is received and available after the payment of all charges and expenses. There has been no suggestion anywhere as far as I can remember that at the time Mr. Rimington wrote the letter of the 12th March he deliberately intended by the word "income" to mean "gross receipts." If it were so proved I should hold that that word as used was not apt to convey to the mind of the Municipal Commissioner that the Company claimed no longer to pay track rent. It is clear the Commissioner did not so understand it, and under the circumstances there would be no agreement that the Company should no longer pay track rent, and the Company would be remitted to their position under the original agreement. Consequently in taking an account of the average profits for three years the Commissioner will have to take into account the amount of track rent payable by the Company to the Municipality. Our finding in respect of the payment of track rent being against the Tramway Company both on the agreement and the letters, the question as to whether the agreement contained in the letters was binding on the Corporation does not arise and there is no necessity to discuss the evidence given at the end of the hearing of these appeals.

This case has now been re-argued on the question of the time at which the valuation of the undertaking is to be made, and although there are difficulties which are sure to arise whichever date is taken, I am of opinion that the one which is open to the least objection is the date of valuation, *i.e.*, the date on which the arbitrators make and publish their award, and that the tramway undertaking as it existed on the 14th March, 1901, or so much thereof as is still in existence at the time of the valuation being made should be valued as of the date of valuation.

On this appeal,

Mr. Jardine, K. C., and *Mr. G. E. A. Ross* for the appellants contended, first, that the notice given by the respondents was not such a notice as was contemplated by section 30 of Bombay Act I of 1874. That section was taken from section 43 of the English Tramways Act, 1870, but by the section of the English Act power was given to the purchasers to deal with the tramway undertaking when they had purchased it, in the same way as the vendors (the promoters of the undertaking) had been entitled to do, and that provision was omitted from section 30 of the Bombay Tramways

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Act of 1874, so that the respondents had under that section no power to purchase the tramways with the view of transferring the undertaking to others. But the notice of intention to purchase was given under an agreement with, and with the object of transferring the undertaking to, Bingham. The respondents have thus exceeded their powers under Act I of 1874, and the decision appealed from was wrong in finding that the notice with the above object and intention was good and that the respondents had not acted illegally.

Secondly, it was contended that the Appellate Bench of the High Court was wrong in holding that the fixing of the value and the compensation were to be referred to the same date; and it was submitted that the period of three years enacted by section 30 of Act I of 1874 for calculating the profits of the appellants for the purpose of ascertaining the amount to be paid for compensation should have been held to have ended on the date of the "completion of the purchase." This would be a later date than that fixed by the High Court which was the date of the "purchase", and this was held to be the date when the amount of the value was fixed.

Thirdly, it was contended that the Court below was wrong in holding that the appellants were liable to pay track rent after the date of the notice of intention to purchase. The liability to pay track rent, it was submitted, came to an end when the agreement ceased to be in force; and by clause 16 of the Agreement if no notice were given the agreement was to remain in operation: the effect of the notice therefore was impliedly to terminate it. The agreement was not superseded by section 30 of Act I of 1874. Even if this were not so the liability to pay track rent would, at any rate, cease after the agreement had been come to by which the appellants agreed to work the tramways until the completion of the purchase; in other words, the effect of the correspondence which constituted that agreement was to release the appellants from payment of the track rent. Under that agreement the appellants were entitled to "receive and enjoy" the income "and profits" of the tramway business; and it was submitted that the expression "income and profits" meant the "gross profits" without deduction.

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Mr. Cohen, K. C., *Mr. Haldane*, K. C., and *Mr. A. Phillips* for the respondents were not heard.

Mr. G. D. Lynch watched the case on behalf of the trustees of the debenture-holders.

The judgment of their Lordships was, on the 3rd June, 1904, delivered by—

LORD LINDLEY:—The questions raised by this appeal arise out of a purchase by the Corporation of the City of Bombay of the undertaking of the Bombay Tramway Company. The purchase was made under the provisions of section 30 of the Bombay Tramways Act, 1874 (Bombay Act I of 1874). This section is as follows:—

"The said Municipal Corporation of the City of Bombay shall have the right of purchasing the said tramways with the plant, stores, rolling-stock and everything connected therewith after the expiration of twenty-one years from the 12th day of March, 1873, upon declaring its intention so to do within six months after the expiration of the said twenty-one years, and shall have a renewed right of purchase at the end of every seven years after the expiration of the said twenty-one years upon similar notice being given; the amount to be paid in the event of such purchase shall be the actual *bonâ fide* value (exclusive of any compensation for goodwill, premium, or compulsory sale or other consideration whatsoever) of the tramways and of the works and materials connected therewith and of the lands and buildings and all other the property of the Grantees, such value in case the parties do not agree to be decided by arbitration as provided by the said Agreement of the 12th day of March, 1873; and as compensation for the goodwill, premium, or compulsory sale and other consideration, the Grantees shall be paid an amount equal to twenty-one years' purchase calculated on the average profits of the previous three years next preceding the purchase, 4 per cent. per annum on the *bonâ fide* value mentioned above being first deducted from such profits."

On the 11th March, 1901, the Corporation served notice of their intention to purchase the Tramway Company's undertaking; but there being some doubt whether this notice was regular in point of time two other notices, dated respectively the 12th and 13th March, 1901, were afterwards served, and it is now admitted that no objection on the ground of date has to be considered.

The Tramway Company, however, contend that the notice is altogether invalid because the Corporation are acting beyond their powers, *viz.*, not for themselves but for and on behalf and

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on account of a person named Bingham. When the facts are investigated it appears that although the Corporation have made arrangements with Bingham by which he is to find the money for the purchase, and to work the tramways when acquired by the Corporation, yet the Corporation are acting as principals and not as Bingham's agents. There is nothing in the Tramways Act which expressly or impliedly prohibits such a transaction; nothing to show that if the Corporation exercise the power conferred on them by section 30 and acquire the tramways, they are bound to keep them in their own hands and to work them themselves. Whether they can carry out their agreement with Bingham without obtaining further powers is a matter which does not concern the Tramway Company. This point was elaborately dealt with both by the Judge of First Instance and by the learned Chief Justice of Bombay; and their Lordships think it unnecessary to say more than that they are satisfied that on this point the judgment appealed from was perfectly correct.

Then another question was raised by the Tramway Company which was that the date to be fixed as the date of taking the purchase ought to be later than that mentioned in the judgment. If the proper date had to be determined by their Lordships unembarrassed by what took place in India, their Lordships would have thought that the proper date to be fixed would have been when the relation of vendor and purchaser was definitely created by the service of a proper notice to purchase, *i.e.*, in this case the 14th March, 1901. This was the view taken by the Judge of First Instance, Mr. Justice Fulton. But for some reason, which their Lordships do not appreciate, both parties appealed against his decision and contended before the Appellate Court for a different date. Having regard to the course taken by both parties in the Court below, their Lordships do not consider that either party without the consent of the other can fairly insist now that the above date ought to be adopted. Under these circumstances their Lordships see no reason for disturbing the date fixed by the Appellate Court, *i.e.*, the date of the award fixing the value of the corporeal property of the Tramway Company. As pointed out both by Mr. Justice Fulton and the Chief Justice, to fix the date of the execution of the conveyance

would lead to great practical difficulties. The profits would vary from day to day and the average profits for three years could never be ascertained.

Another point contended for by the Tramway Company was that what is called track rent payable to the Corporation ought to cease on the 14th March, 1901. This contention is, however, disposed of by the fact that in March, 1901, it was expressly agreed between the Tramway Company and the Corporation that the Tramway Company would continue to work the tramways pending the ascertainment and payment of the purchase-money on the understanding that they received "the income and profits of the tramway business during such period." It is plain that so long as the Tramway take the profits, they must pay the ordinary expenses of working and the rent in question.

Their Lordships will therefore humbly advise His Majesty to dismiss this appeal and the appellant Company must pay the costs of the Corporation.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Blount, Lynch and Petre.*

Solicitors for the respondents—*Mr. Edm. Ward Oliver* (for *Messrs. Crawford, Brown, Bayley & Dunlop, Bombay.*)

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

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ANTONE VALAD ZUJE PREL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* ADMINISTRATOR GENERAL OF BOMBAY, AS ADMINISTRATOR OF THE ESTATE AND EFFECTS OF HAJI TYAB GUNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Bombay Civil Courts Act (XIV of 1869), section 32—Civil Court—Jurisdiction—Suit against Administrator General.

A suit against the Administrator General as representing the estate of a deceased private individual must be brought in the District Court and not in the Court of a Subordinate Judge, by virtue of section 32 of the Bombay Civil Courts Act (XIV of 1869).

SECOND APPEAL from the decision of D. G. Gharpure, Additional Joint First Class Subordinate Judge, Appellate Powers, at Thána,

* Second Appeal No. 539 of 1903.