application for resealing the probate granted to the respondents in England, making in all the sum of £311,343. The commissioner assessed duty on that sum. The duty at the prescribed rate of 10 per cent. amounted to £31,134, 6s. The respondents paid the full amount claimed, but under protest, contending that the interest of the testator in the partnership was an asset to be dealt with in England and not liable to duty in the State of New South Wales. On appeal to the Supreme Court the contention of the respondents was upheld by Darley, C.J., and Cohen, J. (Pring, J., dissenting), and the commissioner was ordered to refund £10,004, 6s., the amount of duty paid in respect of the testator's share in the partnership. Their Lordships agree with Pring, J., who held that the case was covered by the decision of the House of Lords in *Laidlay* v. *Lord Advocate* (15 App. Cas. 468), and the opinion of this board in *Beaver* v. *Master in Equity* (1895), A.C. 251. In both those cases it was laid down that the question to be determined was the local situation of the asset, and that the share of a deceased partner in a business was situate where the business was carried on. All the arguments on which the majority of the Supreme Court relied were advanced in the case of *Laidlay* v. *Lord Advocate*, and either ignored or overruled. No doubt in each of those cases there were special circumstances not to be found in the present case, on which more or less reliance was placed. But the broad rule approved was that enunciated by Sir James Hannen in the case of *In the Goods of Ewing* (6 P. Div. 19), that the share of a deceased partner is situate where the business was carried on at the time of the death. In the present case, though both partners resided in England, there can be no doubt that the business at the time of Mr Salting's death was carried on in New South Wales. Their Lordships therefore will humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Supreme Court reversed with costs, the commissioner's assessment confirmed, and the amount paid by the commissioner under the order of the Supreme Court refunded with interest. The respondents will pay the costs of the appeal.

Appeal allowed.

Counsel for the Appellant—Wise, K.C. (of the Colonial Bar), and Vaughan Hawkins. Agents—Light & Fulton, Solicitors.

Counsel for the Respondents — Danckwerts, K.C.—Austen-Cartmell. Agents—Flower & Flower, Solicitors.

HOUSE OF LORDS.

Tuesday, July 23, 1907.

(Before the Lord Chancellor (Loreburn), Lords Robertson, Atkinson, and Collins.)

MAYOR AND CORPORATION OF DUDLEY *v.* DUDLEY, STOURBRIDGE, AND DISTRICT ELECTRIC TRACTION COMPANY.

(On Appeal from the Court of Appeal in England.)

Railway — Light Railway — Purchase by Municipal Authority—Price to be Fixed by Arbitration—Basis of Valuation.

A corporation agreed to purchase, and a company to sell, a light railway at a price to be fixed by an arbitrator. The agreement did not fix any basis for the valuation. *Held*, in the circumstances of the case, that the arbitrator's duty was to ascertain the value of the railway as a structure *in situ*, and not its value to the company as an income-earning concern.

Appeal from a judgment of the Court of Appeal (Vaughan Williams, Farwell, and Buckley, L.JJ.), who had reversed a decision of Swinfen Eady, J.

The necessary facts are sufficiently indicated by the Lord Chancellor.

Lord Chancellor (Loreburn) — The only question raised by this appeal relates to the principle on which the arbitrator agreed to by both parties ought to fix the price payable by the Corporation for a light railway which they have purchased from the company. This question is raised in the following manner:— In 1898 the Dudley Company was promoting an order under the Light Railways Act 1896 for the construction of various light railways or tramways, seven in number. Six of these were outside the borough of Dudley, except for a small part of one among the six. The remaining railway, called in this case "Railway No. 5," was within the borough, and the Corporation opposed the granting of the order. Nevertheless the Commissioners granted it, and in October 1898 it was awaiting confirmation by the Board of Trade. The Corporation opposed this confirmation. In these circumstances an agreement by way of compromise was made between the Corporation and the company dated the 17th October 1898, and it is upon the true construction of that agreement that your Lordships' decision will, as I think, mainly depend. Under this agreement the Corporation withdrew their opposition to the order. Railway No. 5, when sanctioned by the order, was to be constructed by the company to the reasonable satisfaction of the Corporation. The Corporation was at the expiration of four years from the 11th August 1898 to buy, on the terms of the Tramways Act 1870, all the tramways al-

ready existing in Dudley, and "the Corporation shall also purchase, and the British Electric Traction Company shall sell, the railway No. 5, at a price to be settled in case of difference by the Board of Trade." That is the third clause. The fourth clause runs as follows:—"Upon the acquisition by the Corporation of the said tramways and railway, they shall grant a lease thereof to the British Electric Traction Company for twenty-one years from the date of purchase, upon terms to be settled unless otherwise agreed, by lay arbitrators appointed by the Board of Trade." I do not think that any other clauses of the agreement are material. When the time came the Corporation did purchase, and the question here is, what price ought to be paid for this railway? An arbitrator to fix the price was substituted by agreement for the Board of Trade, and he found that if the railway was to be paid for "as a railway *in situ* capable of earning a profit," as the corporation contended, the price payable was £16,548. If, on the other hand, as maintained by the company, the proper basis of valuation was "the value to the company of the railway as an income earning concern," then the price payable was £32,576. In argument before us the difference between these rival contentions was treated as amounting to this. In the first contention the structure alone was to be valued; in the second contention the structure with the power and right attached of an exclusive use of the rails and of taking tolls was the thing to be valued. I think that your Lordships will take into consideration the order of the Light Railway Commissioners in reference to which this agreement was made. If there be ambiguity in the agreement, the order may help to clear it up. Taking the two together, I am of opinion that the thing which the corporation agreed to buy was the structure itself, and not the structure with the exclusive power of working it attached, for the simple reason that the structure was the only thing which the company was able to sell. The company, though entitled itself to this power, was not entitled under the order to transfer it. On the contrary, as soon as the company sold Railway No. 5, this, together with all other powers in respect of it, were to be transferred by section 65 to the purchaser. This provision would be unnecessary if the agreement could effect the transfer. It was argued that section 65 did not apply to this agreement at all, but it was apparent, if not admitted at the end of the argument before your Lordships, that the section does for some purposes at all events apply. If for some purposes, why not for all? And when it is remembered that the scheme of the order and agreement is that the company is to contruct this railway on roads belonging to the corporation, to retain the property in it only for four years, and then to sell it to the corporation and take a lease of it for twenty-one years, this view is confirmed. It is difficult to see why a company which is limited to an occupation for twenty-five years shall be paid for an easement in perpetuity over land belonging to the purchasers. The conclusion arrived at by Swinfen Eady, J. is consistent with the previous decision in *Edinburgh Street Tramways Company* v. *Lord Provost of Edinburgh* (1894), A.C. 456), and *Stockton and Middlesburgh Water Board* v. *Kirkleatham Local Board* (1893), A.C. 444); and it carries out what seems to me to be the real intention of the parties, namely, that the company should be reimbursed its outlay, with proper allowances for depreciation, and then be allowed for twenty-one years to enjoy under a lease the occupiers' profits of this undertaking; for it is clear that what the corporation can lease and take rent for under clause 4 of the agreement is simply that which it has bought and paid for under clause 3. No doubt the corporation must also give to its lessees the necessary powers of working, taking tolls and so forth, to carry out the purpose of the agreement; but the rent can only be for that which it has bought under the one clause and leased under the other, for the subject matter dealt with by both clauses is the same and described in the same words. Accordingly, I am of opinion that the judgment of Swinfen Eady, J. was right, and that this appeal must be allowed.

LORD ROBERTSON—I agree with the opinion of the Lord Chancellor.

LORD ATKINSON—The question for decision in this appeal turns upon the construction to be put upon the final portion of clause 63 of an order dated the 1st November 1898 made by the Light Railway Commissioners, and confirmed by the Board of trade under the provisions of the Light Railways Act 1896. The provisions have been already stated. The appellants contend that what is to be purchased under this clause is the physical structure "Railway No. 5." The respondents on the other hand contend that by "Railway No. 5" is meant the going concern, and the value is to be paid for it as such. This is the matter in controversy. The expressions "the railway" and "the railways," are by clause 2 of the order defined to mean, unless the context otherwise requires, the railways and works by the order authorised, and the expression "the undertaking" to mean an undertaking by the order authorised. The respondents relied mainly on the following passage from the judgment of Lord Watson in *Edinburgh Street Tramways* v. *Lord Provost of Edinburgh* (*ubi sup.*): "I see no reason to doubt that the words 'the tramway' are capable of being so employed as to indicate that they embrace the use and occupation of the fabric as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill of a tramway undertaking." But they seem to me to ignore somewhat the passage immediately following that which I have quoted: "But in their primary and material sense the words appear to me to denote nothing more than its fabric of the tramways lines upon which

the traffic is conducted." Assuming then that the principle of Lord Watson's judgment applies to the present case, the burden is, I think, thrown upon the respondents, especially having regard to the definition clause of the order, of showing that the words "Railway No. 5" are to be read in a sense other than and different from their primary and natural sense. By clause 15 all these railways must be completed within three years from the date of the order, or within such extended time as the Board of Trade may allow. An examination of some of the other clauses of the order furnishes some reason for construing those words in their natural sense; for instance, take clauses 60, 61, and 62, which, as is admitted by the respondents, apply to railway No. 5. Under these clauses, if at any time the working of the whole or any part of the railway No. 5 be discontinued for three months, or if, after the opening of it for public traffic the company became insolvent, so as to be unable to maintain and work it, the Board of Trade may make an order that the powers of the company shall cease and determine on a certain day to be named in the order. If nothing be done in the interval, then, on the arrival of that day, the local authority may, with the sanction of the Board of Trade, remove the railway, and the company (the respondents) become liable to pay the costs of removing it and making good the road. If the company make default in paying this amount the local authority may sell and dispose of the materials removed, and after reimbursing themselves out of the proceeds of the sale pay the balance to the company. But it is competent for the local authority in either of these cases, in the interval between the service of the notice and the day named for the cesser of the company's powers, to purchase "the railway." If the local authority should purchase, the notice ceases to operate and the powers of the company are not determined. It is admitted that these powers are transferred to the local authority not by the contract of sale and purchase but by clause 65, and it is also admitted that under clause 62 the price to be paid is the price of the physical structure, and of that alone. It seems to follow that in these three clauses, 60, 61, and 63, the word "railway" must mean the physical structure. It certainly would be a strange result if in a sale under clause 63 the company should be paid for its railway as a going concern, and only be paid for the physical structure in the case of a sale under clauses 60 or 61. The respondents endeavoured to meet this objection by suggesting that clauses 60 and 61 are penal clauses. I confess that this does not appear to me to furnish any sufficient reason for depriving the company of what, if the figures in this case be right, would amount to half the value of their property. That would be an extravagant penalty to impose. But if the word "railway" in clause 63 had the same meaning attributed to it as it must necessarily bear in clauses 60 and 61, then the different provisions would be consistent with each other, and the company would get the same price under whichever provision of the Act the sale took place. No doubt under clause 63 a better price is to be paid for the purchase of any of the light railways other than No 5 than would be given in case the sale was brought about by discontinuing to work, or insolvency, but then the sale of these under that clause only takes place after a period of working, presumably without either insolvency or discontinuance, for a period of twenty-five years duration. On referring to the agreement mentioned, it will be found that the Corporation of Dudley opposed the granting to the company of the order to make this railway No. 5, and that they withdrew their opposition upon certain terms which I need not repeat. Of course, it is the fabric which the company have to construct. They have three years, or such extended time as the Board of Trade may give, to construct it. At the expiration of four years the company must sell. They would then have been working but a very short time. It appears to me to be but reasonable to hold that what they construct that they sell, and that what the corporation buy, possibly within a year or less after its construction, that they lease for a period of twenty-one years, which will exactly synchronise with the time when under clause 63 of the order the local authority may buy all the light railways in their respective districts. Under such a construction of the agreement as this the company would be paid the value of the fabric which they constructed. They would get a lease of that fabric at the rent proper to be paid for it for a period of twenty-one years, and, having been thus recouped the capital sunk in the construction of the line, would be entitled to receive for their own use and benefit all the profits during the period of twenty-one years. This result is a rational and just result, and it follows from giving to the word "railway" in each portion of the agreement the same meaning, its normal and natural meaning, the meaning assigned to it in the definition clause. When the order contemplates the payment of more than the price of the fabric it makes special provision for it, as in the earlier part of clause 63. In my opinion the respondents have failed to show that the word "railway" is in the purchase clause of their agreement to be interpreted in any but its normal and natural sense, as indicating the fabric. The burden of showing that it should be interpreted in a different sense lay upon them. They have in my opinion failed to discharge it, and the appeal should therefore be allowed, with costs.

LORD COLLINS—I have the misfortune to differ from the opinions just delivered, and as my view accords with that of the Court of Appeal, I feel bound to express it. The question is, what is the meaning of "Railway No. 5" in paragraph 3 of the agreement of the 17th Oct. 1898, between the British Electric Traction Company and the

Corporation of Dudley, providing for the purchase of it by the latter, and in section 63 of the Dudley and District Order of 1898 giving legal validity to the agreement? It must not be forgotten that the bargain was made by the parties themselves, and its first provision is that the order promoted by the company and opposed by the corporation shall be allowed to go through "subject in all respects to the provisions of the agreement." The agreement, therefore, is one of their own making, confirmed but not super-imposed upon them by the subsequent order. It is not disputed that the words are capable of connoting the undertaking with all its incidents, embracing "the use and occupation of the fabric as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill"—(see per Lord Watson in the *Edinburgh Tramways* case, *ubi sup.*). On the other hand, there is a complete absence of any words of description capable of being interpreted as limiting the thing to be sold and paid for to the bare fabric itself, such as were so much relied on in the *Kirkleatham* and *Edinburgh* cases (*ubi sup.*). The whole argument of the appellants is really reduced to the inference which, as they contend, is raised by section 65 of the order, which, on the sale of the undertaking or part of it, transfers to and vests in the persons to whom the same has been sold the rights, powers, authorities, and obligations of the company in respect of that which is sold. Even assuming that the section applies to railway No. 5 at all, as to which there was some difference of opinion in the Court of Appeal, it does not of itself, in my opinion, suffice to cut down the meaning of "the railway" in the context in which it occurs in the agreement to anything less than "the undertaking." It may well have been introduced, as the Court below thought, *ex abundanti cautela* as a part of the machinery for implementing, not as a statutory alteration of the bargain. The subject-matter of the bargain was the railway "proposed to be authorised" (see clause 2 of the agreement) that is to say the railway with the powers of working it involved in the order being "allowed to proceed," and it seems unreasonable to suppose that the Legislature would carry out this bargain by, in the first instance, making a free gift to the buyer of half the subject-matter of the sale, and leaving the price of the residue only to be ascertained as provided and paid by the buyer. It seems to me that the *a priori* presumption here is that by "the railway" the undertaking was meant. We are dealing with a railway and not a tramway, and there is a presumption of permanence in the former which there is not in the latter, and the Legislature shows by its express provision as to the terms of purchase in the case of the other railways, as to which there had apparently been no antecedent agreement between the parties, what I think must be taken to be its view of what are fair terms of purchase. I agree with Buckley, L.J., that the argument from *expressio unius* based upon the absence of any similar provision as regards the sale of railway No. 5, is entirely displaced by the fact that as to the latter the Legislature treated the parties as having made their own bargain, and contented themselves with giving statutory effect to it without putting an interpretation upon it. I think that the clause, so far from founding an argument against the company, furnishes a strong one in their favour. It shows that the Legislature, apart from special agreement between the parties, thought that the proper terms of purchase after twenty-five years of full enjoyment of all the rights and privileges of the undertaking were its market value as a going concern. But for the standard thus expressly laid down by the Legislature, all the arguments used by the appellants drawn from section 65 in favour of valuation of the structure only without the rights and powers attached to it would have applied with equal force to these railways whose enjoyment for twenty-five years before sale would be practically equivalent to four years before sale followed by a twenty-one years' lease at a rent measured by fabric value only. No reason has been suggested why the Legislature should have been less generous or less just in the case of railway No. 5. It seems to me almost conclusive that the Legislature did not consider that section 65 had the effect of cutting down the value of the railway, as contended by the appellants. The whole question therefore comes back to the meaning of the expression "the railway" in its context, and I agree with the reasoning of the Court of Appeal, that it is used as equivalent to the "undertaking" in the order itself. We are therefore I think relieved in this case from the unpleasant duty of forcing the company to put up with what in my judgment would be something less than justice. I think that the appeal should be dismissed.

Appeal allowed.

Counsel for the Appellants — Balfour Browne, K.C.—Vesey Knox, K.C. Agents —Sharpe, Parker, Pritchards, Barham, & Lawford, Solicitors.

Counsel for the Respondents—Cripps, K.C. — Sargant. Agent — Sydney Morse, Solicitor.