Privy Council Appeal No. 60 *of* 1916.

The Toronto Electric Light Company (Limited) *Appellants,*

v.

The Corporation of the City of Toronto - *Respondents,*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1916.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD ATKINSON.]

This is an Appeal from a judgment of the First Appellate Division of the Supreme Court of Ontario, dated the 15th March, 1915, whereby the judgment of Middleton, J., in favour of the appellant, the plaintiff in the suit, was set aside and it was ordered that, subject to certain declarations therein set out, the action should be dismissed with costs.

The case is not free from difficulty. This is due in a great degree to the fact that some important transactions which took place between the parties to this appeal were not evidenced by nor embodied in formal written instruments.

The appellant company was incorporated by Letters Patent dated the 20th September, 1883, under the provisions of one of the Revised Statutes of the Province of Ontario, entitled "An Act respecting the Incorporation of Joint Stock Companies by Letters Patent" (R.S.O. 1877, c. 150), and of "An Act respecting Companies supplying electricity for the purposes of light, heat, and power" (45 Vict. (1882) c. 19).

The Letters Patent purported to confer upon the appellant company the following amongst other powers, namely, power—

"To manufacture, produce, use, and sell electric light and power, to erect and construct plant, works, buildings, storehouses, and all other machinery for the production or manufacture of such electric light or power, and to lay down, set up, maintain, renew and remove in and upon and under the streets, squares, and public places of the said city

of Toronto all wires, lines, tubes, pipes, poles, posts, and all other apparatus and appliances to enable said company to supply and distribute such electric light and power, to supply electric light or power to such persons, companies, or corporations as may require the same on such terms as may be agreed. . . . ."

By the second section of the above-mentioned statute (45 Vict., c. 19) it is enacted that—

"Every company incorporated under this Act may construct, maintain, complete, and operate works for the production, sale, and distribution of electricity for purposes of light, heat, and power, and may conduct the same by any means through, under, and along the streets, highways, and public places of such cities, towns, and other municipalities; but as to such streets, highways, and public places, only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively, and under and subject to any by-law or by-laws of the councils of the said municipalities, passed in pursuance thereof."

And by its third section it is provided that sections 50 to 60 and sections 62 to 85 inclusive of an Act of the Revised Statutes of Ontario, entitled "An Act respecting Joint Stock Companies for supplying cities, towns, and villages with gas and water" (1877, c. 157), should be used as part of the above-mentioned statute (45 Vict., c. 19), the word "electricity" being substituted for the words "gas" or "gas or water" or "gas and water"; and the words "wires or conductors" being read after the words "mains and pipes" or "mains or pipes" where these words occur in those sections. On referring to the sections thus incorporated it will be found that compulsory powers are only conferred upon the company in respect of one or possibly two matters. It can undoubtedly under section 82 enter, if necessary, upon land outside but within 10 miles of the city of Toronto, and erect works thereon without the consent of the owner. Provision is made for arbitration on such occasions, and under sections 56, 57, and 58 the company may possibly have compulsory powers where the different parts of a building belong to different proprietors, or are in the possession of different lessees or tenants, to carry their wires or conduits over the property of one or more of those proprietors or tenants to the property belonging to or in the possession of another, or to break up and cut trenches in passages common to neighbouring proprietors or tenants and to erect works thereon or thereunder, making due satisfaction therefor, but in these two cases alone.

The company, however, is by section 69 prohibited from taking, using, or injuring any house or other building, or land set apart for a garden, orchard, yard, park, paddock, or such like, or from conveying from the premises of any person water already appropriated and necessary for domestic use, without the consent in writing of the owner or owners first had and obtained.

This provision thus incorporated into section 3 of the Act

of 1882, touching the consent of the owners in writing, required as a condition precedent, may afford some clue to the proper construction of the immediately preceding section of the same Statute dealing with the streets and highways under the control of municipalities.

The incorporation of a company, such as the appellant company, is, in the province of Ontario, by no means a matter of course. By the Ontario Joint Stock Companies' Letters Patent Act (R.S.O. 1877, c. 150), the Lieutenant-Governor in Council is empowered to grant a charter to any number of persons, not less than five, who shall petition therefor, constituting them, and such others as may become shareholders in the company about to be formed, into a body corporate for the purposes mentioned. Of the granting of the Letters Patent notice must forthwith be published by the Provincial Secretary in the "Ontario Gazette." The company so incorporated may, amongst other things, acquire, hold, alienate, and convey real estate subject to the restrictions and conditions imposed by the Letters Patent, and will also be entitled to all the powers, privileges, and immunities requisite for the carrying on of its undertaking as though it had been incorporated by a special Act of the Legislature embodying all the provisions of this Statute.

The appellant company, in exercise of the powers thus conferred upon it, established an extensive system for the distribution of electricity over almost the entire city of Toronto. It supplied current to private customers and to the respondents for the lighting of the street lamps. The system was in 1912 a composite one, partly overhead, partly underground, but intercommunicating. Much the larger part was overhead. It then covered 370 street miles, the wires being carried on 15,705 poles erected on the streets and public places of the city. These poles, the greater number of which were owned by the appellant company, the remainder used by it with the permission of their owners, carried 1,450 miles of wire. In the great majority of cases each of the poles carried wires supplying current for domestic lighting and power and also wires for street lighting. In a minority of instances the poles and wires were used for one service only, sometimes for street lighting alone, sometimes for domestic service alone.

The underground system at this period consisted of about 350 miles of single conduit laid in 28 to 30 street miles. Many of the circuits of the company are in part overhead and in part underground. At many points the overhead conductors feed the underground, and at many others the process is reversed. The two systems were in 1912 so interlaced, as it was styled, that if the overhead construction were removed, the underground, in some instances, would have no connection with the terminal stations or sub-stations of the company or with any source of power. It was not disputed that the cost of constructing underground conduits so far exceeds that of carrying wires

overhead upon poles, that having regard to the prices obtained for current, the former system is only commercially possible of adoption in a limited and favoured area in the city of Toronto where customers are both large and numerous. In this state of things the respondents, on the 6th February, 1912, passed a resolution, denying amongst other things, (1) the right of the appellant company to lay any underground conduits outside the limits of the city of Toronto as they existed on the 13th November, 1889, and (2) its right to construct pole lines within the city save for the purpose of implementing its contract with the respondents themselves for street lighting. They followed this up about the middle of October 1912 by preventing by force the appellant company from erecting additional poles and wires, and also cut down and removed certain poles and wire, part of the appellants' overhead system, which had been erected and were in actual use for some three years previously. Thereupon the action, out of which this appeal arises, was on the 26th October, 1912, instituted, claiming an injunction restraining the respondents, their servants, agents, and workmen from cutting down, removing, or otherwise interfering with the poles and wires of the appellant company situate on the street and other public places in the city of Toronto, and also claiming damages and further relief.

On the 26th October, 1912, an interim injunction in the terms of the claim was granted by Middleton, J. It was on the 4th November, 1912, continued by him till the trial; and on the hearing of the case was by the order of that learned Judge, dated the 14th May, 1914, made perpetual. It was referred to the Master in Ordinary of the Court to ascertain the amount of damages sustained by the appellant company by reason of the Acts complained of.

On appeal from this judgment to the Appellate Division of the Supreme Court of Ontario, that Court, Garrow, J. A., dissenting, delivered judgment allowing the appeal, and by their Order dated the 15th March, 1915, set aside the judgment and order appealed from, and declared that, save in the cases therein specified, the appellant company had not any right to use any street, highway, or public place within the limits of the city of Toronto, as they then were or might thereafter be constituted, in order to conduct electricity for the purpose of supplying light, heat or power. Nor any right to erect, construct, maintain, complete or operate in, along, over, or upon any of the said streets, highways, squares, or public places any pole, wire, line, tube, pipe, post or other apparatus or appliance whatever for the purpose of conducting electricity. The exceptions mentioned are three in number. First, the right to erect poles and wires for the distribution of electricity on the aforesaid streets and public squares, and public places secured to the appellant company by the terms of an agreement dated the 30th August, 1883, entered into by the respondents and one George D. Morton. Second, the rights secured to it by the provisions of certain agreements made during the years 1901 to

1911 inclusive, giving special permission to erect poles and string wires thereon for certain purposes on certain parts of certain streets or public places in the city of Toronto. And, third, the right under the terms of an agreement made between the appellant company and the respondents, dated the 13th November, 1889, to construct, lay down, and operate, &c., certain underground wires and conduits in any of the streets, lanes, parks and public places in the said city for the distribution and supply of electricity and also the right to distribute the same thereby.

The question for the decision of the Board is in effect which of these two orders, that of Middleton, J., or that of the Appellate Division is right. To determine that question it is necessary, in the first instance, to decide what is the true meaning of the words: "Only upon and subject to such agreement in respect thereof as shall be made between the company and the said municipalities respectively," as used in the second section of the Statute of 1882 (45 Vict., c. 19). It is admitted by the respondents that this agreement need not be under seal. It is not expressly required even to be in writing. They contend, however, rightly their Lordships think, that it must be at least a formal agreement as distinguished from mere silent acquiescence or implied consent, and the one thing apparently certain about it is that by the use of the words "only upon" its existence is made a condition precedent, which must be fulfilled by the company before it becomes entitled to enter upon the streets and public places of the city to construct its works.

A provision somewhat analogous to this is to be found in the 69th section of the Act of 1877, incorporated into the third section of the Act of 1882, dealing with the owners of private property. It enacts that "nothing contained in this Act shall authorise any such company, or any person acting under the authority of the same, to take, use, or injure for the purposes of the company, any house or other building or any land used or set apart as a garden, orchard, yard, park, paddock, plantation," &c., or "convey from the premises of any person any water already appropriated and necessary for his domestic uses without the consent in writing of the owner or owners thereof first had and obtained." The owner or owners could, of course, attach any conditions they pleased to their consent. It would be strange indeed if the second section of this Statute should confer upon municipalities, in respect of the streets and highways over which they had authority and control, protection altogether less effective than the succeeding section confers on the owners of the hereditaments thus mentioned, and that silent acquiescence or implied permission should be held sufficient to satisfy section 2 but insufficient to satisfy section 3. By holding that the actual making of a formal agreement is a condition precedent in the first case, just as the obtaining of consent in writing is a condition precedent in the second, the

two sections are made to harmonise, and the construction which makes them do so is, in their Lordships' opinion, the true construction of the Statute.

It is next necessary to determine what is the character of the rights and powers, the nature and width of the so-called franchise conferred upon the appellant company by the Letters Patent and this Statute of 1882 taken together. Upon this point the parties are at right angles. Sir Robert Finlay contends on behalf of the corporation that, whatever the nature of the agreement mentioned in section 2 of this Statute, his clients have an absolute right to prohibit and prevent the company from constructing, maintaining, or operating any works under, along, or upon the streets, highways, or public places of the city of Toronto for the production, distribution, or sale of electricity for any purpose whatever. While Sir John Simon contends on behalf of the company, on the other hand, that the franchise which it possesses entitles it to do all these and the other things mentioned in the Letters Patent and this Statute, and that the right of the respondents is confined to merely prescribing and regulating the mode and manner in which the franchise is to be exercised and enjoyed. He insists that, should the respondents absolutely refuse to permit his clients to exercise their so-called franchise, they could, by suit at law, restrain the corporation from so doing, and compel them to confine themselves to their proper function of merely regulating the mode and manner in which the franchise should be exercised and enjoyed. That contention appears to their Lordships to mean, in effect, this: That the powers conferred upon the company are, in relation to this matter, really compulsory. But it is admitted that the Letters Patent do not, *per se*, confer compulsory powers; that they are only enabling in character and merely determine what is *intra vires* of the company, as would a memorandum of association determine it in this country in the case of a limited liability company under the Companies Act. The language of section 2 of the Act of 1882 is permissive, not compulsory. It provides that companies incorporated under that Act "*may*" construct, maintain, complete, and operate works, &c., &c. And by the Interpretation Act of Ontario (R. S. O., 1877, c. 1) it is provided that in any of the revised Statutes of Ontario the word "shall" is to be construed as imperative, the word "may" as permissive, when not inconsistent with the context and object of the particular Statute. Again, some of the sections of the Act of 1877, incorporated into the 3rd section of the Act of 1882, confer, as has already been pointed out, compulsory powers; but these powers are confined to the matters already mentioned. In no other cases have the company compulsory powers.

Their Lordships cannot, therefore, find anything in the Act of 1882 which would require the word "may" in the 2nd section of that Statute to receive other than its permissive meaning. The very fact that special provision is made in the 82nd section

of the Act of 1877 for dispensing with the consent of the owner of land outside the city and referring the matter to arbitration, furnishes a strong argument for holding that in all other cases the powers of the company are not compulsory. On the whole, their Lordships are of opinion that the Letters Patent, coupled with the Statute of 1882, confer upon the respondents the right to refuse, with absolute impunity, to permit the appellant company to erect any poles or wires for the production, distribution, sale, &c., of electricity on the streets, highways, or public places in the city of Toronto; and that the contention of the company on this point cannot be sustained. These conclusions necessitate a brief examination of the dealings of the appellant company and the respondents touching the supply of electricity to the city of Toronto from the year 1883 to the date of the removal of the poles of the former in the year 1912. The agreement of the 30th August, 1883, mentioned in the order appealed from, was made between the respondents and the promoters of the appellant company, and was adopted by the company after incorporation. It begins with a recital that the promoters had applied for a charter of incorporation of a company under the name of "The Toronto Electric Light Company," but that same had not yet been granted; that the promoters were the provisional directors to be named in the charter of incorporation when issued; that they were desirous of making all provisions and agreements necessary to enable them to proceed with the erection of poles and wires and all other apparatus for supplying electric light on the streets and public places, and in buildings, public and private, in the city of Toronto, so that the same might be in operation during the Annual Exhibition of the Industrial Exhibition Association of Toronto; and that they had applied to the respondents for permission to erect such poles and wires in the public streets and places of the city as might be necessary for those purposes. It then further recited that the respondents had held a meeting, and on the 6th August passed a resolution that permission be granted to the Toronto Electric Light Company to erect poles and wires temporarily, for the purpose of testing the electric light, within an area about 1 square mile in extent, bounded as therein described, upon condition that the poles be erected under the supervision of the city engineer, be not less than 150 feet apart and 30 feet high, and that they and all other appliances and apparatus erected on any of the public streets and places within the described area should be subject to removal after three months' notice from the respondents, until otherwise provided by special agreement. And it then provides that the permission be given to erect these poles and other apparatus within the area described for the purposes mentioned in, and in conformity with the terms of, the resolution; and that the respondents should allow the Toronto Electric Light Company, when incorporated, to erect, subject to the provisions and conditions therein contained, "upon or in the public streets,

squares, and other public places within" the aforesaid area, all such poles, wires, and other apparatus as the company might require for the purpose of lighting such streets, squares, public places, and public and other buildings within the same. It lastly provided that that agreement was only an interim agreement until the appellant company should receive its charter of incorporation, and should have duly executed an agreement similar to the present one in all its terms and conditions.

The appellant company having been incorporated on the 23rd September, 1883, in the month of December 1883 applied to the respondents, through their Fire and Gas Committee, for permission to erect poles within the area of the city for electric lighting purposes, and where necessary to replace those already erected with poles of greater height. This Committee made a report on this application recommending that permission should only be granted to place poles on Front Street as far west as Bathurst Street "on the same terms and conditions as the privileges already accorded" to the company. The respondents adopted this report with some amendments (not disclosed in the record), and an extract from it containing its substance was on the 13th December forwarded by the city clerk to the appellant company with an intimation that the respondents had adopted the report of their Committee. Now stopping there for a moment it is, in their Lordships' view, clear that the right asserted by the respondents in these early transactions with the appellant company was the absolute right to give or withhold permission for the erection on the streets, squares, and public places in this city of all poles and other appliances for the supply or distribution of electricity for the purposes of lighting the streets or any buildings, public or private, and to have any of these poles when erected removed when they so desired, on giving three months' notice. The appellant company do not appear to have ever challenged this right or asserted, as is now asserted on their behalf, that the right and power of the respondents was confined to the mere regulation of the mode and manner in which the company's franchise should be exercised. The requirement that poles actually erected should be removed without any permission being given to replace them with others seems inconsistent with the limited authority now contended to belong to the respondents, but is quite consistent with the absolute power they claim to possess. On the 8th March, 1884, less than six months after the incorporation of the appellant company, the respondents advertised for tenders for lighting the streets of the city. On the 28th March, 1884, the appellant company, in answer to this advertisement, sent to the chairman of the respondents' Fire and Gas Committee a tender for the work mentioned. That tender was on the 30th August accepted by the respondents; and on the 6th September, 1884, the first of a long series of contracts in writing for street lighting was entered into between the appellant company and the respondents.

This contract, after reciting the advertisement for tenders and the sending in and acceptance of that of the respondents, contains a covenant by the appellant company to supply for a term of five years from the 15th May, 1884, all the electric lights required by the respondents for street lighting purposes and for the lighting of public parks, squares, and other public places in this city. It also provides that the respondents may, on giving six months' notice, discontinue the use of any lights until their number is reduced to fifty; may upon a like notice cancel the contract; and, further, that the appellant company shall on receiving six months' notice (presumably on the cancellation of the contract) remove, at their own expense, all their wire cables, poles, and other appliances from off the streets and other public places within the limits of the city, and restore these streets and public places to as good a condition as they were in when these poles and appliances were erected, and, further, that all the street lighting should be done to the satisfaction of the city engineer or such other officer as the respondents should appoint for the purpose. This agreement did not run its course. It was superseded by another agreement of the 14th January, 1886. It is quite true that the company commenced their commercial lighting before their street lighting. They began to receive revenue from the former in the months of February 1884, and not from the latter till June 1884, and the entire revenue obtained from the former in that year amounted to $7,323·61 and from the latter $4,805·62. As, however, the agreement of 1884 was not made till the 6th September more than half the latter sum, and more than two-thirds of the former must have been earned during the currency of the Morton Agreement adopted after incorporation. Mr. John Joseph Wright, who has been manager of the company for twenty-six years, was examined on this point. He stated that when he first became connected with the company about forty or fifty street lights were in operation; that for ten to fifteen years the company put up its poles and carried its wires to any customer who wanted electric light; that in the year 1901, when litigation was threatened between the parties, and the respondents apparently wished to get rid of the appellant company on the ground that it had amalgamated with another company, permission for the erection of poles for private lighting was for the first time required, and that from that time forward it was generally, if not quite invariably, required. All this may well be. In Toronto, as in most other places presumably, electric lighting was looked upon as a boon, and those who provided it as public benefactors. Their Lordships are quite convinced that the respondents were perfectly cognizant of the loose practice which prevailed. They knew all about it. That is apparent from the reports of their City Engineer from the year 1890 to the year 1900. And if the implied consent of the respondents during this period to the erection by the appellant

company of poles and apparatus to supply private customers was all the latter required to sustain their title to erect and indefinitely maintain them for that purpose, their case might be a strong one; but the former practice was practically abandoned during the eleven years from 1901 till 1912, and contemporaneously with its abandonment written agreements were entered into between the parties in reference to street lighting asserting the right of the corporation to insist on the removal of poles erected for that purpose, most of which poles, according to the finding of Middleton, J., served for the purposes of both public and private lighting. It will only be necessary to examine the provisions of three of these agreements at any length. That of the 14th January, 1886, provided for the supply by the appellant company of electricity for from 100 to 200 lights, as might be required by the respondents for street lighting and for the lighting of public parks, buildings, squares, and other public places in the city of Toronto for a period of four years and six months from the 1st July, 1886, on the terms set forth in the specification therein mentioned. By it the company was bound to erect and place electric lights when and where they should be, by notice, required so to do, and at all other places in the said city besides the places where the same were then set up. The agreement, unlike that of 1884, does not contain any provision for the removal of the necessary poles and apparatus after termination of the contract. Sir Robert Finlay contends, however, that this provision is implied, as the permission was only given to erect apparatus for the purposes of the contract, and therefore terminated with the contract.

That agreement was followed by an agreement of a somewhat different character, entered into between the same parties on the 13th November, 1889. It begins by reciting that the company had been engaged in the business of producing and supplying electric light in the city of Toronto, on the overhead system, and had plant poles and material in use therefor, under which light was then being supplied to the city and to individual citizens thereof; that the company desired to extend their works for the production and supply of electricity for light, heat, and power, and for other purposes, and had applied to the respondents for the *right* to lay down underground wires, conduits, and appliances for the further distribution and supply of electricity throughout the city, and that the corporation had agreed to grant such right. It is to be observed that both the Letters Patent authorise the laying down and maintaining *under* the streets, squares, and public places of the city, of tubes, pipes, and all other apparatus and appliances for the supply and distribution of electric light and power to such persons, companies, and corporations as may require the same; and that section 2 of the Act of 1882 also empowered the company to construct works for the distribution of electricity for the purposes of light, heat, and

power by any means, *under, as well as* through and along the streets, highways, and public places of the city. The agreement proceeds to provide that the respondents thereby gave and granted to the company the right (in addition to their other works and plant in operation for the use of the city and individuals as aforesaid), to construct, and lay down, and operate underground wires, conduits, and appliances for the distribution and supply of electricity for the purposes already mentioned, with the right to take up, renew, alter, and repair the same. And further provides that the respondents should have the right at the expiration of thirty years from the date of the agreement, on giving one year's previous notice in writing, to purchase all the interests and assets of the appellant company, comprising plant, buildings, and materials used or necessary for carrying on its business. And that in case the respondents should fail to exercise this right of purchase at the expiration of the said period of thirty years they should have the right to exercise it at each succeeding period of twenty years on giving a like notice.

This was the origin of the appellant company's underground system. It was not disputed that an absolute indefeasible right was by this agreement conferred upon the company to maintain, use, and enjoy their underground system until the respondent should exercise their right of purchase, but it was resolutely contended by the appellants that owing to the presence in the agreement of the words in brackets, namely, "in addition to their other work," &c., and to the provisions touching the purchase of all the "interest and assets" of the company, comprising plant, buildings, and material, a right equally absolute and indefeasible was conferred upon them to use, maintain, and enjoy their overhead system for the same period. This appears to their Lordships to involve a rather forced construction of the language of the agreement; but even if this were its true construction it would, of course, be competent for the parties by a subsequent agreement to rescind the agreement so far as its provisions relate to the overhead system, and to give up the rights claimed to be acquired by it in reference to that system. It is therefore necessary to refer to some of the subsequent agreements to ascertain whether or not this has been done.

Of the many contracts entered into between the parties that of the 10th December, 1900, may be taken as a specimen. It is signed by the President and Secretary of the appellant company, and by the Mayor and Treasurer of the Corporation. It begins by reciting that the respondents have by advertisement called for tenders for certain electric lighting for the streets and other public places of the city for five years from the 1st January, 1901, in accordance with certain printed specifications marked A, and that the appellant's tender had been accepted. It then provides that the appellants shall for five years from the above date supply such number of electric

lights, not exceeding 1,100, as may from time to time during the contract be ordered in writing by the secretary of the Fire Department or other duly appointed officer, same to be located on the streets, squares, parks, and lanes of the city as may from time to time be specified by the said secretary, and also shall erect such additional arc electric lights over and above the 1,100 when and where required as therein mentioned in other places and streets in the city besides "where the same are then already set up," that all poles (if any) erected or maintained for the purposes of the contract should be located and erected under the supervision of the secretary of the Fire Department, and that the location of any lights shall be changed from one place to another as directed by this officer. It was not suggested that these 1,100 lights did not include the lights supplied by the overhead system existing on the 13th November, 1889. An altogether new provision is then introduced (paragraph 12), to the effect that in case the appellant company should amalgamate with or enter into any pooling arrangements with the Consumers' Gas Company, the contract should be altogether forfeited. On referring to the specification it will be found that it is provided (paragraph 30) that at the expiration of the contract all poles and other appliances used by the contractor upon the city streets shall, at the option of the respondents, be removed by the contractor, and the road-bed and sidewalks restored as though the poles had not been erected thereon, or shall be purchased by the respondents at a price to be agreed upon or determined by arbitration, and if not purchased, that the respondents should, within three months after the expiration of the contract, be at liberty to remove the same at the expense of the contractor, in this case, the appellant company. These provisions, which manifestly applying to the overhead system existing on the 13th November, 1889, as well as the subsequent additions to it, are wholly inconsistent with the notion that by the agreement of that date the appellant company had acquired an absolute, indefeasible right to maintain and use the overhead system of supply then existing for a period of thirty years thence ensuing.

If such a right was conferred by that agreement it was by this later agreement of 1900 absolutely abandoned, and the right of the respondents again asserted to require the overhead system to be removed if they so pleased. The specification for the succeeding agreement, that of the 29th December, 1905, touching the supply of electricity for street lighting for five years from the 1st January, 1906, similarly requires that all the poles used by the contractor shall, at the expiration of the contract, be removed, or, at the option of the respondents, purchased. The absolute right conferred upon the respondents by the second section of the Act of 1882 to permit or prohibit the erection or maintenance of an overhead system of wires for electric supply on the streets, squares, and public places of their city, has thus been asserted, guarded, and preserved, and in their

Lordships' opinion the provision touching the purchase of overhead plant contained in the agreement of the 13th November, 1889, means no more than this, that the respondents shall be entitled to purchase, when they purchase the underground system, such poles and plant of the overhead system as may be then found lawfully erected on the streets and public places of the city. No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights. It may well be that the appellant company never anticipated that the respondents would insist upon the removal of posts carrying wires, erected with their implied consent but not in pursuance of any formal agreement. With the hardships (if any), or the moralities of the case this Board has no concern. It deals with the legal rights of the parties and those alone, and having regard solely to them their Lordships are on the whole case of opinion that the judgment appealed from was right and should be affirmed and this appeal be dismissed, and they will humbly advise His Majesty accordingly. The appellant company must pay the costs of the appeal.

In the Privy Council.

THE TORONTO ELECTRIC LIGHT COMPANY (LIMITED)

v.

THE CORPORATION OF THE CITY OF TORONTO.

DELIVERED BY LORD ATKINSON.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1916.