

22, 1934

In the Privy Council.

No. 52 of 1933.

ON APPEAL  
FROM THE COURT OF APPEAL FOR ONTARIO.

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BETWEEN

UNITED GAS AND FUEL COMPANY OF HAMILTON  
LIMITED AND THE CORPORATION OF THE CITY  
OF HAMILTON - - - - - (*Plaintiffs*) *Appellants*,

AND

DOMINION NATURAL GAS COMPANY LIMITED  
(*Defendant*) *Respondent*.

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CASE FOR THE RESPONDENT.

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1. This is an appeal from the judgment of the Court of Appeal for Ontario delivered on the 24th day of April 1933, dismissing an appeal by the Appellants from the judgment of Mr. Justice Wright of the Supreme Court of Ontario, dated the 8th day of July 1932, dismissing the Appellants' action. RECORD. p. 170. p. 150.

2. The action was brought by the Appellants for a declaration that the Respondent was wrongfully maintaining its gas mains on streets, public squares, lanes and public places of the Appellant City, within the areas of the City which at one time constituted part of the Township of Barton, and was wrongfully supplying gas to the inhabitants thereof; for an injunction restraining the Respondent from continuing to use said streets, squares, lanes and public places of the City and from continuing to supply gas to its inhabitants; for a mandatory order requiring the Respondent to remove its gas mains and other property from the streets, public squares, lanes and public places of the city, and for damages alleged to have been sustained by the Appellant Company. The action was commenced and carried on by the Appellant Company in its own name, and in that of the Appellant City. p. 1.

RESPONDENT'S CASE.

RECORD.  
p. 2.

3. The Respondent's defence is that it is lawfully upon the streets, public squares, lanes and public places of the City, within the areas complained of, and is lawfully supplying gas to the inhabitants of such areas under and by virtue of the franchise granted to the Respondent by By-law 533 of the Township of Barton and an agreement between said Township and the Respondent, the said By-law having been passed and the agreement having been entered into prior to the annexations to the City of the areas above referred to; and that in any event by reason of matters disclosed in the evidence, neither Appellant is entitled to complain of the actions of the Respondent.

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4. The Consolidated Municipal Act (1903) 3 Ed. VII, Cap. 19, sec. 566 (3) provides that by-laws may be passed by councils of Townships :

“(3) For authorizing any gas, water or pneumatic transit company to lay down pipes or conduits for the conveyance of water, gas or merchandise and other things under streets or public squares, subject to such regulations as the Council sees fit.”

p. 186,  
Ex. 41.

5. The Township of Barton, a municipal corporation in the Province of Ontario adjoining the City of Hamilton, by By-law 533 passed on the 26th October 1904, pursuant to the provisions of section 566 (3) of The Consolidated Municipal Act (1903) granted to the Respondent a franchise to distribute and sell gas in the Township. By paragraph 1 of the By-law the Township granted to the Respondent permission to enter on and lay gas mains in certain named highways in the Township, and by paragraph 2 granted to the Respondent the right, after the laying of the pipes on the main line and branches described in paragraph 1 had been completed, to enter on all roads and highways in the Township and to lay and maintain therein mains for the supply of natural or manufactured gas in the Township for fuel, heating and lighting purposes. The By-law further provides, by paragraph 3, that the Respondent leave all highways in good repair; by paragraphs 4 and 5, for regulatory control by the Township over interference with the surface of the highway, and over the location of pipes on the highways; by paragraph 6, that the Respondent shall commence to lay its pipes on or before 1st May 1905, and shall have at least the lines and branches set forth in paragraph 1 completed by 1st November 1905, and that the whole of the said lines and branches shall be completed before the Respondent shall be at liberty to convey gas through or use any part thereof; by paragraph 7, that the Respondent use proper means to prevent leakage of gas, and that the Respondent indemnify the Township from damages by reason of the exercise of the powers and privileges so granted; by paragraph 8, that the rights of the Township and of any other company with respect to the use of the highways in the Township are not to be affected or impaired by any privilege thereby granted to the Respondent; by paragraph 9, that the Respondent shall, on demand, furnish gas to all inhabitants of the Township along its mains and to all others in the Township who shall lay pipes to connect with said mains, or who shall be ready and willing to pay the Respondent the cost of laying such pipes;

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by paragraph 10, that the Respondent shall not charge the Township or consumers of gas more than specified maximum prices, and that the Respondent shall furnish meters free of charge and make no charge for pipes from its mains to the margin of the street; by paragraphs 11 to 19, the manner in which the prices to be charged by the Respondent for gas under varying circumstances are to be arrived at, and the terms under which manufactured gas shall be supplied in the event of a shortage of natural gas. By paragraph 21 it is provided that the By-law shall not take effect until an agreement shall be entered into between the Respondent and the Township binding the Respondent to comply with the provisions of the By-law, and that on such agreement being executed the By-law shall extend to and be binding upon the parties, their successors and assigns. Paragraph 22 of the By-law provides that the Respondent will complete, before 1st November 1905, a line on further named highways in the Township.

RECORD.

6. On November 19th, 1904 an agreement, in accordance with the provisions of the said By-law, was duly entered into between the Respondent and the Township, and thereupon the Respondent and the Township became bound by the provisions of the By-law, and the franchise and rights covered thereby vested in the Respondent. On November 6th, 1905 by resolution of the Council of the Township the time for laying two of the branch lines described in paragraph 1 of the By-law was extended to July 15th, 1906.

p. 192,  
Ex. 41.

7. Early in December 1904, the Respondent commenced to construct the main line and branches on the highways described in paragraph 1 of the By-law, and by August 1905 was supplying gas to inhabitants of the Township of Barton along some of the highways described in the said paragraph, and on certain of the highways referred to in paragraph 2 of the By-law, and has continued to supply gas to inhabitants of the Township from that date to the present time.

p. 98, l. 4-p. 99,  
l. 21; p. 108,  
ll. 8-35.  
p. 109, l. 1-  
p. 110, l. 2.  
p. 115,  
ll. 39-42.

8. The Appellant City, by By-law 400 passed on 26th September 1904, gave a franchise to the Appellant Company to supply gas to the inhabitants of the City. By an agreement entered into between the Respondent and the Appellant Company dated 25th September 1905, the Respondent agreed to sell and deliver gas to the Appellant Company for a term of nineteen years from the date of the agreement. The agreement recited that the Appellant Company proposed to construct a distribution system in the City under its franchise, through which to supply gas to the City and its inhabitants, and desired to secure a supply of natural gas for such purpose. By the agreement the Respondent agreed to construct a pipe line from the gas belt to points in the City limits, and to begin to deliver natural gas to the Appellant Company by November 1st, 1905. The Respondent, by the agreement, reserved the right to use its pipe line to furnish natural gas to such consumers along its line, which it might be compelled to supply with gas by the terms of the rights of way under which the line was to be laid. The Respondent duly constructed the pipe line through the Township of Barton to the limits of the City, and gas was supplied by the Respondent.

p. 176,  
Ex. 15.p. 195, Ex. 43;  
p. 56, ll. 25-28.p. 62, ll. 33-  
37.

RECORD.

to the Appellant Company during the whole term of the agreement, and the extensions thereof hereinafter referred to.

Exs. 2 to 13  
inclusive and  
Ex. 21; pp. 202,  
204, 223, 225,  
227, 229, 240,  
279, 285, 300,  
314, 317, 324.  
Ex. 35, plan;  
p. 39, ll. 7-28;  
p. 40, ll. 14-21;  
p. 116, ll. 18-40.

9. Commencing on 3rd September 1908 and from time to time thereafter parts of the Township of Barton were annexed to the City of Hamilton, and in some of the parts so annexed the Respondent, prior to annexation, had laid its mains and was supplying gas to inhabitants of the Township under its franchise, and after such annexations continued to lay pipes and to supply gas to inhabitants of the annexed areas without objection by the Appellant City or by the Appellant Company.

p. 50, ll. 19-34;  
Ex. 30, p. 238;  
p. 238, Ex. 31;  
p. 239, Ex. 33;  
p. 284, Ex. 45;  
p. 290, Ex. 46;  
pp. 297, 298,  
Ex. 47; p. 302,  
Ex. 50; p. 305,  
Ex. 51; p. 305,  
Ex. 52; p. 306,  
Ex. 56; p. 306,  
Ex. 57; p. 311,  
Ex. 60; p. 311,  
Ex. 61; p. 324,  
Ex. 65; p. 339,  
Ex. 69; p. 344,  
Ex. 73.  
p. 248, Ex. 28.  
p. 134, ll. 36-38.

10. The City from time to time after the respective annexations, on the application of the Respondent, issued more than four hundred and fifty permits to the Respondent to lay mains and install services and make repairs in the annexed areas, and the Respondent, under permits so granted to it by the City, laid many mains on the streets of such areas, installed services and supplied gas to many inhabitants thereof, and from time to time made repairs to such mains. The evidence further shows that on 12th October 1920 the City, by resolution of the City Council, expressly requested the Respondent to put in the necessary gas connections to give a service to a new house in the annexed area, and that throughout the period the City assessed the Respondent for its lines and plant within the City, and the Respondent paid taxes on them. The work done by the Respondent in the annexed areas was done under the supervision of an inspector of the Appellant City, whose services were paid for by the Respondent. The Appellant City from time to time notified the Respondent in writing of its intention to pave streets in the annexed area, so that if the Respondent had work to do on the named streets, it might do such work before the streets were paved. The records in the City Engineer's office of permits issued prior to 1921 were destroyed in the regular course of business, but there is evidence that permits were in fact issued by the City to the Respondent prior to 1921, and the records subsequent to 1921 show that many permits were issued by the City to the Respondent during the period from 1921 to 1932.

p. 82, l. 41-  
p. 83, l. 2.  
p. 74, ll. 14-20;  
p. 236, Ex. 29;  
p. 238, Ex. 32;  
p. 300, Ex. 48;  
p. 302, Ex. 52;  
p. 328, Ex. 63;  
p. 339, Ex. 68;  
p. 350, Ex. 72.  
p. 70, ll. 31-37.

p. 50, ll. 19-34;  
p. 238, Ex. 31;  
p. 239, Ex. 33.

p. 189, ll. 35  
-45; p. 177,  
ll. 27-37.

p. 245,  
Ex. 22.

11. By the terms of their respective franchises the Respondent and the Appellant Company were under obligation to supply gas at maximum prices fixed by the terms of By-law 533 of the Township of Barton, and By-law 400 of the City respectively. In September 1920 both companies represented to the City that gas could not be obtained to supply the requirements of the City of Hamilton and its inhabitants except at a loss, and thereupon an agreement, dated September 29th, 1920, was entered into between the Appellant Company, the Respondent and the Appellant City by which the City agreed that for the period from 1st October, 1920, to 1st April, 1921, the Respondent and the Appellant might charge to their customers in the City increased prices, but that thereafter gas would be supplied by the Respondent and the Appellant pursuant to the terms of the said By-laws. The period during which increased prices might be charged

was from time to time extended by five similar agreements, dated 5th April, 10th May, 28th June, 25th August and 25th October, 1921, respectively. Each of the first four agreements recited that the Respondent was distributing natural gas in the City under the provisions of By-law 533 of the Township of Barton, and the last two agreements were renewals of those previously entered into. All of said agreements were duly authorized by By-laws of the Appellant City. The Respondent was required by the said agreement of 29th September, 1920, to expend substantial sums to increase the supply of gas to the Appellant City, and the Respondent did expend  
 10 such sums, and did increase the supply of gas to the City.

12. When the agreement under which the Respondent was furnishing natural gas to the Appellant Company was about to expire in September, 1924, it was renewed by agreement dated 22nd September, 1924, and further renewed by three similar agreements bearing date respectively 22nd October, 22nd November and 26th December, 1924, and finally terminated on March 26th, 1925. All of the said agreements required the Respondent to deliver gas at the Respondent's meters located at or within the limits of the City of Hamilton, and the evidence shows that to reach one or more of said meters, it was necessary for the Respondent to convey its gas across  
 20 such annexed areas, and its right so to do depended upon its franchise from the Township of Barton.

13. The Appellant Company, on the final termination of said agreement, ceased to take gas from the Respondent, and thereafter obtained its supply from other sources. The Respondent, having expended large sums to construct a gas main from the gas belt, and on its distribution system, it became necessary for it to secure other customers, and the Respondent not only continued to supply gas in the areas which had been annexed, and which were thereafter annexed to the City of Hamilton, but also from time to time made application to the City for permits to lay further mains on  
 30 other streets within the annexed area. Some, at least, of the Respondent's applications for permits stated that they were made in pursuance of the said By-law of the Township, and the City, with full knowledge that the Respondent was acting under the powers conferred on it by the said By-law of the Township, continued, without objection, to issue permits to install mains on streets in the annexed area until the summer of 1929, and at no time took objection to the Respondent continuing to supply gas to the inhabitants of such areas. During part of the summer of 1929, for reasons not disclosed to the Respondent, the City discontinued issuing permits to the Respondent, but requested the Respondent to continue to file applications for laying of  
 40 mains, together with plans showing locations of pipes. The Respondent complied with the request of the City and filed applications for permits, together with plans, and continued to supply gas in the annexed areas and to lay mains therein. All mains were laid under the supervision of the City's inspectors, whose services were paid for by the Respondent. On 1st April, 1930, at the request of the Respondent, the City resumed the issuing of

## RECORD.

p. 253, Ex. 23;  
 p. 257, Ex. 24;  
 p. 262, Ex. 25;  
 p. 266, Ex. 26;  
 p. 269, Ex. 27.

p. 244, Ex. 22;  
 p. 252, Ex. 23;  
 p. 256, Ex. 24;  
 p. 261, Ex. 25;  
 p. 266, Ex. 26;  
 p. 268, Ex. 27;  
 p. 247, ll. 28-39;  
 p. 110, l. 41-  
 p. 111, l. 19.

p. 292,  
 Ex. 43.

p. 294, Ex. 43;  
 p. 296, Ex. 43;  
 p. 298, Ex. 43.

p. 65, ll. 23-  
 41; p. 66,  
 ll. 21-26.

p. 125, ll. 1-  
 7.

p. 309, Ex. 54;  
 p. 310, Ex. 54;

p. 111, l. 39-  
 p. 112, l. 10;  
 p. 254, ll. 18-21,  
 Ex. 23; p. 73;  
 ll. 27-31.

p. 101, ll. 22  
 -36.

p. 337,  
 Ex. 77.

p. 82, ll. 7-  
 36.

p. 82, l. 41-  
 p. 83, l. 2.  
 p. 342,  
 Ex. 76.

RECORD. permits to the Respondent, and continued to so issue permits to the Respon-  
p. 91, ll. 17- dent until after this action was brought.

p. 345,  
Ex. 20.

14. On March 24th, 1931, the Appellant City and the Appellant Company entered into an agreement whereby the City granted to the Appellant Company an exclusive franchise for ten years "except as to and to the extent of any existing rights and privileges that may now be held by the Dominion Natural Gas Company Limited under By-law Number 533 of the Township of Barton and the agreement entered into pursuant to the said By-law," and except as to the rights of certain other named parties, to distribute and sell gas in the City. The agreement provided that if, during the said period, any company, including the Respondent,

p. 346, l. 34  
-p. 347, l. 2.

"shall without due license, permission and authority, conduct, distribute, supply or sell gas within the said limits or shall commence to dig trenches, lay pipes, solicit contracts for the sale of gas, or otherwise prepare to conduct, distribute, supply or sell gas within the said limits, then the company shall have the right to take such action in any court of competent jurisdiction or otherwise as it may be advised to prevent such conducting, distribution, supply or sale of gas and/or to determine or to have the question determined as to whether or not the company, firm or individual (including the Dominion Natural Gas Company Limited or the Manufacturers Natural Gas Company Limited or the Southern Ontario Gas Company Limited, or any of them or any of their successors or assigns), as the case may be, has due license, permission and authority to so conduct, distribute, supply or sell gas and/or has existing rights and privileges which justify it in so doing and all the rights of the City Corporation in the premises are hereby assigned to the company."

It was a term of the agreement that it should take effect on legislation being obtained confirming it, and subsequently, by Statute, 21 George V, Cap. 100, the agreement was confirmed. Section 4 (2) of the said Statute provides that all such actions may be taken by the Company in its own name or in the name of the City, and the Appellant Company had no authority for joining the City as a party apart from such authority as the Statute gave to it.

p. 123, l. 48-  
p. 124, l. 5;  
p. 130, ll. 8-12.

15. The Respondent, prior to 1926, expended very large sums in laying mains from the gas belt to the City of Hamilton, and in the areas annexed to the City, and subsequent to 1926 expended approximately half a million dollars for the laying of pipes and mains and putting in services to supply gas to customers in such areas.

p. 151, ll. 26  
-32.

16. The Appellants, by amendment to their Reply, which was applied for at the trial and granted subsequent to the trial, pleaded that paragraphs 4, 6 and 22 of By-law 533 had not been observed, and contended in the Court of Appeal that observance of the said paragraphs and the construction of the lines described in paragraph 1 of the By-law were conditions precedent to the exercise by the Respondent of its rights under the By-law. The

Respondent contends, first, that the said provisions of the By-law are not conditions precedent; secondly, that the Appellants, if they intended to so contend, must have pleaded them as conditions precedent, which they did not do; thirdly, that the Township of Barton is the only party entitled to raise such contentions, and the Township has not done so; and, fourthly, that in any event if the Appellants were entitled to so contend, which the Respondent does not admit, the onus rested on the Appellants to establish non-observance of these provisions, and not on the Respondent to establish observance thereof, and this the Appellant wholly failed to do. RECORD.

- 10       17. The evidence of the Respondent, however, does establish the following facts; that after the execution in 1904 of the agreement between the Respondent and the Township, the Respondent commenced the laying of the mains on the streets described in paragraph 1 of By-law 533; that the principal lines through the Township to the limits of the City of Hamilton and the branches other than the three last named in paragraph 1 were completed prior to 1st November 1905; that as to two of such branches the time for laying them was extended by the Township to July 15th, 1906, and there is nothing in the evidence to suggest that these two branches were not laid within the extended time; that the Respondent was selling gas in the territory served by one of the three last named branches in August 1905; that the Respondent, in August 1905, had laid mains in the Township on streets other than those described in paragraph 1 of the By-law and was supplying gas to inhabitants of the Township; that the Respondent, subsequent to August 1905, laid mains on streets in the Township other than those described in paragraph 1 of the By-law, and has supplied gas to the inhabitants of the Township continuously to the present time; that in 1908 the Township, by resolution of its Council, requested the Respondent to place gas in a street lamp on a street other than those described in paragraph 1 of the By-law, that in 1920 when there was a shortage of gas the Township obtained consents from the Gas Commissioner to have gas connections made to a number of houses in the Township, and requested the Respondent to install such connections, and that in 1925 the Township, by resolution of its Council, gave permission to the Respondent to lay mains on streets in the Township other than those described in paragraph 1 of the By-law. The only evidence given by the Appellants as to the laying of any of the lines described in the By-law was to the effect that part of the line described in paragraph 22 of the By-law which runs westerly was never constructed, and this is not disputed. Apparently, for reasons not disclosed in the evidence, its construction was not considered necessary, and the Appellants wholly failed to show that the Township had ever objected to such line not having been constructed, or requested that it be constructed.
- p. 98, l. 4-p. 99,  
l. 21.  
  
p. 107, l. 17  
-p. 108, l. 17.  
  
p. 202,  
Ex. 79.  
  
p. 109, ll. 2-38;  
p. 109, l. 39-  
p. 110, l. 2.  
  
p. 115, l. 39-  
p. 116, l. 40.  
  
p. 113, ll. 23  
-30.  
  
p. 249,  
Ex. 80.  
  
p. 113, l. 31  
-p. 114, l. 5.  
  
p. 69, ll. 12-  
22.  
  
p. 304,  
Ex. 49.

18. The Appellants pleaded in their Reply by amendment as aforesaid, that the Respondent's rights, if any, conferred by By-law 533 terminated at the end of ten years, and relied on section 568 of The Consolidated Municipal Act (1903) to support this contention. The Respondent submits that section 568 deals only with the duration of a contract for the supply p. 151, ll. 26  
-32.

RECORD. of gas for public purposes, and is not applicable to a By-law such as By-law 533 of the Township of Barton granting a franchise, and that the Respondent's rights thereunder are perpetual.

19. The relevant section of The Consolidated Municipal Act (1903) Cap. 19, relating to annexation is :

“ 56. In case an addition is made to the limits of any municipality, the By-laws of the municipality shall extend to the additional limits, and the By-laws of the municipality from which the same has been detached shall cease to apply to the addition, except only By-laws relating to roads and streets, and these shall remain in force until repealed by By-laws of the municipality to which the addition has been made.” 10

This was amended in 1913 by 3-4 George V, Cap. 43, section 33 to read :

“ 33. Where a district or a municipality is annexed to a municipality, its by-laws shall extend to such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the Council which passed them.” 20

Some of the annexations from the Township to the City took place prior to 1913 and some thereafter.

The Respondent contends that section 56 aforesaid repeals only by-laws relating to the general government of the municipality from which annexations are made, and has no relation to by-laws or agreements granting franchise rights such as those conferred on the Respondent by By-law 533 of the Township and the agreement entered into pursuant thereto, and, further that section 33 aforesaid only expresses what was the existing law under section 56. 30

p. 145, l. 21  
-p. 146, l. 3. 20. At the trial Mr. Justice Wright held that the right which the Township Council is authorized to grant under section 566 (3) of the Consolidated Municipal Act is a franchise, and that a franchise is a proprietary right or property. As to section 56 of the Statute above quoted, the learned Trial Judge held that the shifting of municipal jurisdiction on annexation did not annul an existing franchise agreement, although it prevented additions or alterations without the consent of those who for the time being had power over the highways. He further held that section 33 as enacted in 1913 only put into words what the law already was and expressly recognized the continuance of existing franchises after annexation ; that By-law 533 could not be repealed lawfully, and that the rights acquired by the Respondent thereunder still exist. As to the construction of the By-law he held that even if the laying of the mains referred to in paragraph 1 thereof were a condition precedent to acquiring the rights under paragraph 2, 40

p. 146, ll. 4-41.  
p. 146, l. 42  
-p. 147, l. 15.  
p. 147, l. 41-  
p. 148, l. 42.



and even if the condition had not been entirely waived, the conduct of the parties had changed it into a condition subsequent, and that the Respondent has, under its franchise, the right to construct and maintain its pipe lines on any highways in the territory which was within the Township when the By-law became effective, whether such highways were established before or after the several areas were annexed to the City, and to supply gas to the inhabitants of such districts. He further held that if there were any doubt as to the scope or extent of the Respondent's rights under the By-law, the Appellants should not be permitted to question the Respondent's rights thereunder after having acquiesced in the construction of the By-law and agreement upon which the Respondent had acted for a long period, and dismissed the Appellants' action with costs.

21. The Appellants appealed from the judgment of the Trial Judge to the Court of Appeal of Ontario, which dismissed the appeal with costs. The Honourable the Chief Justice of Ontario in whose judgment the other members of the Court of Appeal concurred held that the Township had authority under section 566 (3) of The Consolidated Municipal Act (1903) to enact By-law 533. As to the meaning to be given to the words "Township of Barton" as used in the By-law, he held that the words "Township of Barton" mean the area embraced within what were the actual boundaries of that Township when the By-law was passed; that clause 9 of the By-law entitles all persons in the "Township of Barton" to be furnished with gas at prices and on terms set out in the By-law, and that there being no provision in the By-law disentitling those persons in the areas subsequently annexed to the City to the benefits and safeguards provided in the By-law, the By-law is not open to the construction that consumers in the Township lost such benefits and safeguards when the area concerned became annexed to the City. As to the effect of annexations, he held that annexations only transfer municipal control of the Respondent's operation from the Council of the Township to that of the City; that while the By-law enabled the Council of the Township to enter into the agreement with the Respondent dated 19th November 1904, it was by virtue of the agreement that the Respondent acquired its rights, and upon its being entered into it continued binding upon both parties as would any such agreement between two natural persons; that the passage of a By-law by the Council of the Township purporting to repeal By-law 533 could not cancel the agreement, nor could annexation; that section 56 of the Act of 1903 neither repeals By-law 533, nor empowers the Council of the City to so repeal it or to impair the rights acquired under the agreement, of the Township or of its inhabitants or of the Respondent, and that the By-law is in full force in the annexed areas. As to the Appellants' contention that the rights conferred by the By-law terminated at the end of ten years, he held that section 568 of The Consolidated Municipal Act (1903), on which the Appellants relied, deals only with the duration of a contract for the supply of gas for public purposes, and not with the granting of a franchise, and that if section 568 throws any light on the intention of the Legislature as expressed in section 566, it is that

RECORD. while the duration of a contract within the meaning of section 568 is limited, the duration of a franchise granted under section 566 (3) is perpetual, or for such duration as the Council in its discretion may determine, and that the grant in question was in perpetuity. He further held that the provision of paragraph 10 of the By-law fixing the price of gas during the first five years, then for the next ten years, a lesser price, and "thenceforth" a still lesser price indicated a definite period, namely, perpetuity; that the right to lay pipes in highways and maintain and use them is an interest in land and a grant of such a right to the Respondent is, without words of limitation, a grant in fee; that the grant of such a right was in the nature of an easement, and having been acted on by the Respondent at considerable cost, became an irrevocable right; and that it is a circumstance to be considered that the By-law contains no provision entitling the Respondent to remove its mains and pipes; and that the very nature of the contract to lay in the ground mains and pipes for the supply of gas suggests perpetuity, and that such was the meaning of the agreement in question. He held that if there were any doubt as to whether the Respondent's franchise was perpetual, it would be for the Appellants to satisfy the Court that it was not; that the Respondent, having entered into possession of certain highways, and the Appellants having asserted that by virtue of a subsequently acquired title they are entitled to dispossess the Respondent, it is for them to establish their contention that the Respondent's right to remain in possession has come to an end. On the question as to whether there is any limitation as to the highways in the Township in respect of which the Respondent has the right to exercise the franchise, he agreed with the learned Trial Judge that the Respondent's rights extend over all highways in the Township whenever established; that the By-law contemplated a scheme for the supply of gas through the whole Township to all who at any time might be inhabitants thereof, whether along then existing highways or highways later established, and referred to the language of paragraph 9 of the By-law obligating the Respondent to deliver gas to all inhabitants as clearly indicating that such was the intention of the By-law.

p. 164, l. 19-  
p. 165, l. 10.

p. 165, ll. 11  
-38.

p. 165, ll. 39  
-47.

p. 166, ll. 1-  
28.

p. 169, ll. 11  
-33.

**22.** The learned Chief Justice further held as to the Appellants' contention that the Respondent did not construct all the lines mentioned in paragraph I of the By-law, and that because of paragraphs 2 and 6 it has no right to maintain pipes or supply gas in the annexed areas; that the onus of showing non-performance was upon the Appellants; that neither in their statement of claim nor in their Reply did the Appellants allege non-performance of the condition referred to as a condition precedent as required by rule 146 of the Rules of Practice; that not only do the circumstances detailed in evidence operate as an estoppel as against the Appellant City with respect to all lines theretofore laid down by the Respondent, but also as an election both by the Township and by the City to waive the fulfilment of all conditions precedent to the right of the Respondent to operate throughout the area which constituted the Township in 1904. He further held that even assuming that the Respondent did not lay all

the mains called for by the By-law, the Appellant City is estopped by its conduct from now questioning the rights claimed by the Respondent; that the Respondent had substantially complied with the requirements of the By-law, but had failed to lay mains in certain portions of the highways where they would be of little value; that the Township, though entitled to repudiate the agreement, had not done so, but, on the contrary, had elected to treat the agreement as executed whereby, as against the Township, the condition precedent was waived. He further held that the conduct of the Township is not impugned in this action and binds all parties interested in the agreement, and that the Appellants, not being parties to the agreement, have no status entitling them to allege non-performance of the condition in question.

RECORD:

p. 169, ll. 34  
-37.

**23.** The Respondent respectfully contends:—

(1) That By-law 533 of the Township of Barton and the agreement entered into between the Respondent and the Township pursuant to and in accordance with the said By-law, conferred on the Respondent a valid and perpetual franchise.

(2) That there is nothing in the By-law or in the Statute under which the By-law was passed, to support the Appellants' contention that the Respondent's rights terminated at the end of ten years.

(3) That the Respondent's rights under the said By-law and agreement extend to all highways whenever and wherever established within the geographical area of the Township of Barton as it existed at the time the By-law was passed.

(4) That such rights were not interfered with or curtailed by annexation of parts of the Township to the City, and that neither section 56 of the 1903 Statute nor section 33 of the 1913 Statute repealed or empowered the City of Hamilton to repeal, said By-law, or to in any way impair the rights and privileges of the Respondent under the said By-law and agreement, with respect to the annexed area, and the said By-law is in full force in respect to such areas.

(5) That throughout the entire period the said By-law and agreement have been interpreted by the Appellants and by the Respondent as granting to the Respondent a franchise extending to all streets at any time opened in the areas annexed to the City of Hamilton from the Township, and that the Appellants should not now be permitted to question the rights of the Respondent under the By-law and the agreement in such area after having acquiesced in the interpretation thereof upon which the Respondent has acted for many years.

(6) That the Appellants have not pleaded that the Respondent did not comply with the provisions of paragraph 1 of the By-law as a condition precedent to acquiring other rights under the By-law as required by Rules of Practice so to do, and further that there is no evidence to support the Appellants' contention that the Respondent has failed to perform the condition or conditions (if any) upon which

RECORD.

the Respondent's franchise depends; that if there has been any such failure on the part of the Respondent, the failure has been waived; and that in any event, if there has been any such failure, the Appellants are not entitled to take advantage thereof.

(7) That under the provisions of the Statute, 21 George V, Cap. 100, section 4, the Appellant Company was not authorized to take this action in its own name and in the name of the Appellant City, but should have elected whether it would proceed in its own name or in that of the City; and that the Appellant is not entitled to any relief beyond such relief as could have been granted to it if the City had not been joined as a Plaintiff. 10

(8) That the claim of the Appellant City against the Respondent (if any) is not assignable in law, and the Appellant Company has not pleaded or claimed in this action that it has acquired or obtained any of the City's rights in the premises; and that the Appellant Company is not entitled to any relief other than such as it may be entitled to under the Statute irrespective of any right of the City in the premises.

(9) That in the alternative, even if the said By-law and agreement do not extend to the annexed areas, the Respondent has laid its mains on and is in occupation of streets in the City in such areas, under the leave and license granted to it by the City, and, by reason of the expenditures made by the Respondent on the faith of such leave and license, with the knowledge and approval of the City, such leave and license has become irrevocable; and, further, that even if such leave and license of the City is revocable, it has not been revoked. 20

24. The Respondent submits that the judgment of the Court of Appeal for Ontario is right and ought to be affirmed, and that the appeal therefrom ought to be dismissed for the reasons stated in the Reasons for Judgment delivered by the Honourable the Chief Justice of Ontario, and by the Honourable Mr. Justice Wright, and for the following, among other 30

### REASONS.

1. Because the Township of Barton had power under The Consolidated Municipal Act (1903) to grant to the Respondent a perpetual franchise to lay mains in the streets of the Township, and to distribute and sell gas to the inhabitants thereof, and By-law 533 and the agreement entered into in accordance therewith did grant to the Respondent such a franchise;
2. Because the franchise so granted by the By-law and agreement is unlimited in time, and there is nothing in the nature of the subject matter thereof, or in the position of the parties, inconsistent with the franchise of the Respondent being a perpetual franchise; 40

3. Because the terms of the By-law show that the franchise of the Respondent was intended to be a perpetual franchise, and there is nothing in the By-law or in the Statute under which the By-law was passed to support the Appellants' contention that the Respondent's rights terminated at the end of ten years;
4. Because the right to lay pipes in highways and there to maintain and use them is an interest in land, and a grant of such a right to the Respondent without words of limitation is a grant in fee.
5. Because the grant to the Respondent of the right to lay its mains and pipes for the purpose of carrying on the business of supplying gas was in the nature of an easement, and the Respondent, at considerable cost having acted upon the leave so conferred upon it, and constructed works of a permanent character for the purpose of carrying on such business, the Respondent's rights became irrevocable and perpetual.
6. Because the words "the Township of Barton" as used in the By-law mean the geographical limits of the Township as they existed at the date of the By-law, and the franchise covers and applies to all highways at any time opened within the area covered by the franchise.
7. Because the By-law contemplated a scheme for the continuous supply of gas throughout the whole Township to all who at any time might be inhabitants thereof and who desired it, whether they lived along the then existing highways or highways later established.
8. Because the Respondent gave valuable consideration in return for the privilege to supply gas through the entire area comprised in the geographical limits of the Township as they then existed, and the rights so acquired are impartible and extend to the whole of such area.
9. Because annexation of parts of the Township to the City transfers only municipal jurisdiction over the annexed areas, and does not extinguish property rights.
10. Because the franchise granted to the Respondent is a property right, and is an interest in land and is not extinguished by annexation.
11. Because section 56 of the 1903 Statute only makes applicable to the annexed territory the general By-laws of the municipality to which the territory is annexed, and repeals as to such territory the general By-laws of the municipality from which the annexation is made, and in no way affects franchise rights, and the Respondent's rights were not affected by the annexations to the City of Hamilton.

12. Because section 33 of the 1913 Statute, which expressly excepts franchises from its operation, only expresses what was the existing law under section 56.
13. Because the By-law and the agreement entered into in accordance therewith could not have been lawfully repealed or annulled by the Township.
14. Because the Appellant City, the Appellant Company and the Respondent have throughout the entire period interpreted the By-law and agreement as conferring on the Respondent a franchise extending to all the areas of the Township of Barton annexed to the City of Hamilton subsequent to the passing of such By-law. 10
15. Because the Respondent, acting on the interpretation so placed on the By-law and the agreement by the parties, has expended large sums of money on the faith of such interpretation, with the knowledge and acquiescence of the Appellants.
16. Because the Appellant Company, by the agreement between it and the Respondent of 1905, and by the renewals thereof from time to time made, expressly recognized the Respondent's franchise as extending to the annexed areas. 20
17. Because the Appellant Company stands in no higher position than the City, and neither Appellant will now be permitted to question the Respondent's rights in the annexed area.
18. Because the Appellant Company was bound to elect whether it would bring this action in its own name or in the name of the City, and is not entitled to any relief beyond such as could have been granted to it if the City had not been joined as a Plaintiff.
19. Because the Appellant Company is not entitled to any relief by reason of joining the Appellant City as party Plaintiff, as the City's claim (if any) is not assignable in law, and the Appellant Company has not pleaded or claimed that it has acquired or obtained any of the rights of the City in the premises. 30
20. Because the Appellants have wholly failed to show that the Respondent has not complied with the conditions (if any) upon which the Respondent's franchise depends.
21. Because the Appellants did not in their pleadings allege that the laying of mains on the highways described in paragraph 1 of the By-law was a condition precedent to the Respondent acquiring rights under paragraph 2, as they were required by Rules of Practice to do, and they are not now entitled to contend that the laying of such mains was a condition precedent, and was not observed. 40

22. Because the evidence establishes that the lines described in paragraph 1 were duly laid in accordance with the terms of the By-law and of the resolution of the Township extending the time for the laying of certain of said lines.
23. Because even if the laying of the mains on the highways described in paragraph 1 of the By-law was a condition precedent to the Respondent acquiring rights under paragraph 2 thereof, and the Respondent has not complied therewith, the Township has waived such condition, and even if there has not been such a waiver, the conduct of the Township and of the Appellants has changed the condition (if any) into a condition subsequent.
24. Because the Township has always recognized the By-law as being in full force, and has at no time questioned the Respondent's rights under the By-law, and the Appellants have no status entitling them to allege non-observance of conditions precedent (if any) to the exercise of such rights; and even if the Appellants have a status entitling them to allege non-observance as aforesaid, the onus is on the Appellants to establish that such condition precedent was not observed, and this they have not done.
25. Because the Respondent is and has for many years been in occupation of the streets in the Township other than those described in paragraph 1 of the By-law, and will be presumed to be lawfully in occupation thereof.
26. Because paragraphs 4, 6 and 22 referred to in the Appellants' reply are not conditions upon which the Respondent's rights depend.
27. Because, in any event, if paragraphs 4, 6 and 22 were conditions precedent, and have not been observed, the Appellants are estopped by their conduct from so contending, and the conduct of the parties has changed them into conditions subsequent.
28. Because the Respondent has the right under By-law 533 and the agreement to lay mains and distribute and sell gas in the annexed areas, and the Appellant Company's franchise under the agreement between it and the City, dated 24th March, 1931, is subject thereto.
29. Because, in the alternative, even if the Respondent's rights under its franchise do not extend to the annexed areas the Respondent has laid mains in and is in occupation of streets in the City in such areas under the leave and license of the City, and such leave and license has by reason of expenditures made by the Respondent on the faith thereof become irrevocable; and, further, even if such leave and license of the City is revocable, it has not been revoked.

N. W. ROWELL,  
GEO. LYNCH STAUNTON,  
E. SWEET.

In the Privy Council.

No. 52 of 1933.

ON APPEAL  
FROM THE COURT OF APPEAL FOR  
ONTARIO.

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BETWEEN

UNITED GAS AND FUEL COMPANY OF  
HAMILTON LIMITED AND THE CORPORA-  
TION OF THE CITY OF HAMILTON,  
*(Plaintiffs) Appellants,*

AND

DOMINION NATURAL GAS COMPANY  
LIMITED,  
*(Defendant) Respondent.*

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CASE FOR THE RESPONDENT.

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LAWRENCE JONES & CO.,  
Lloyd's Building,  
Leadenhall Street,  
London, E.C.3.