Privy Council Appeal No. 52 of 1933.

The United Gas and Fuel Company of Hamilton, Limited, and others - - - - - - - - *Appellants*

v.

The Dominion Natural Gas Company, Limited - - - *Respondents*

FROM

THE COURT OF APPEAL FOR ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MAY, 1934.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.
LORD ATKIN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

The main question which their Lordships have to consider in this appeal concerns the effect of the transfer of certain areas in the Province of Ontario from one local government jurisdiction to another upon the rights and powers of a public utility company operating in the areas transferred. Questions relating to the scope and validity of the company's rights and powers are also raised.

In the year 1904 the Dominion Natural Gas Company, Limited, the present respondents (hereinafter called "the Dominion Company") were incorporated under the Ontario Companies Act by letters patent which stated the purposes of the company to be, *inter alia*, "subject to the provisions of the Act respecting companies for supplying steam, heat, electricity or natural gas for light, heat or power, to construct, maintain, complete and operate works for the production, sale and distribution of electricity or natural gas for the purpose of light, heat and power." The Companies Act then in force in Ontario was chapter 191 of the Revised Statutes of Ontario, 1897, and

the Act referred to in the foregoing quotation from the Letters patent was chapter 200 of the Revised Statutes of Ontario, 1897.

The last-mentioned Act authorises the incorporation under the Companies Act of any five or more persons who desire to form a company for supplying, *inter alia*, natural gas for the purposes of light, heat or power in any city, town, incorporated village, township or other municipality. The third section empowers every such company to construct, maintain, complete and operate works for the production, sale and distribution of natural gas for the purposes of light, heat and power, and to " conduct the same by any means through, under and along the streets, highways and public places of the city, town or other municipality ; 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 municipality, and under and subject to any by-law of the council of the municipality passed in pursuance thereof." By the fourth section there are incorporated and applied certain sections of another Act, namely, chapter 199 of the Revised Statutes of Ontario, 1897, entitled " An Act respecting Joint Stock Companies for supplying Cities, Towns and Villages with Gas and Water." Of these incorporated sections it is necessary for the present purpose only to quote in part :—

> " Section 22. The company may break up, dig and trench so much and so many of the streets, squares, highways, lanes and public places of the municipalities for supplying which with gas or water or both the company has been incorporated as are necessary for laying the mains and pipes to conduct the gas or water or both from the works of the company to the consumers thereof. . . ."

These two statutes, chapters 199 and 200, R.S.O. 1897, may be described as being of the nature of Clauses Acts, containing as they do a general code of powers and duties appropriate to the classes of public utility companies to which they relate.

Such being the powers with which by these statutes the Dominion Company was at its inception equipped, it proposed to supply, among other places, the township of Barton, which immediately adjoins the city of Hamilton, with natural gas derived from the extensive gas wells which it controlled in Haldimand County, to the south of Hamilton. In order that it might get access to the streets of the township it was necessary for it, under section 3 of the statute, chapter 200, R.S.O. 1897, above quoted, to enter into an agreement with the municipality and also to conform to any by-law which the council of the municipality might pass in pursuance thereof. The council of the Barton municipality was agreeable, and on the 26th October, 1904, passed a by-law, No. 533, granting to the Dominion Company by article 1 thereof, " the consent, permission and authority of the Township of Barton to enter upon " certain specified " highways in the Township . . . and to dig trenches and lay and

bury therein and to maintain operate and repair mains and pipes of such sizes as the said company may require for the transportation and supply of natural or manufactured gas in and through the said Township of Barton for fuel, heating and lighting purposes." The second article of the by-law provides that " from and after the construction and laying of the pipes on the main line and branches hereinbefore [*i.e.*, in article 1] expressed and duly connecting the said branch lines with the mains but not before," the Dominion Company should " be at liberty to enter upon any and all other highways in the Township of Barton and to dig trenches and lay and bury therein and to maintain and operate and repair mains and pipes of such sizes as the said company may require for the transportation and supply of natural or manufactured gas in the said Township of Barton for fuel, heating and lighting purposes." The by-law, the terms of which are very fully set out in the judgment of the learned Chief Justice of Ontario, proceeds to deal in detail with a number of other matters affecting the gas supply. For the present it will suffice to mention article 22, which required the Dominion Company to commence on or before the 1st May, 1905, and to complete before the 1st November, 1905, a certain specified pipe line (not being one of those mentioned in article 1); and article 21, which provided that the by-law should not take effect or be binding on the Township Corporation unless formally accepted by the Dominion Company within one month by an agreement legally binding it to perform and comply with all the terms of the by-law, which agreement was, after being approved by the Township solicitor, to be executed by or on behalf of the Dominion Company and the Township, whereupon " the terms and conditions of this by-law shall extend to and be binding on the parties hereto, their successors and assigns."

Accordingly, on 19th November, 1904, an agreement was entered into between the Dominion Company and the Corporation of the Township of Barton whereby the Dominion Company accepted the by-law and " for themselves their successors and assigns " agreed to observe all its terms and on or before 1st May, 1905, to commence to lay pipes in the Township and have the lines and branches set forth in the first and twenty-second articles of the by-law completed by 1st November, 1905, and ready to deliver gas to consumers in the Township according to the terms of the by-law, and further undertook to " furnish gas to all parties in the Township (who shall make demand therefor) in accordance with the terms and conditions of said by-law " so soon as the line and branches set forth in the first article of the by-law were completed.

It is necessary to pause here in order to ascertain the powers which the Township of Barton possessed to grant the privileges thus conferred on the Dominion Company. These are to be found in the Consolidated Municipal Act 1903 (Statutes of Ontario,

3 Edw. VII, c. 19) then in force. Under Part VII of that statute—"Powers of Municipal Councils," Title I—"Powers in General," Division XII—"Water, Light and Heat," it is provided by section 566 that by-laws may be passed by the councils of townships, &c.

> "3. For authorizing any gas . . . company to lay down pipes or conduits and other things under streets or public squares subject to such regulations as the council sees fit."

In another part of this Act under Title II—"Powers and Duties of Councils as to Highways and Bridges," Division I—"General Provisions," it is enacted by section 599 that the soil and freehold of highways shall be vested in the Crown; by section 600 that the municipal councils shall have jurisdiction over the original allowances for roads and highways within the municipalities; and by section 601 (under the heading "Possession in Municipalities") that every public road, street or other highway in a township shall be vested in the municipality.

The Dominion Company being thus constituted and empowered and, as it conceived, in a position to begin operations in the Township of Barton, proceeded to lay down mains and a distributing system in the Township and to supply gas to the inhabitants. The question whether and to what extent it strictly fulfilled its obligations under the by-law and agreement in the matter of the construction of mains may in the meantime be postponed.

But the Dominion Company had not long been in the enjoyment of its privileges in the Township when the adjoining City of Hamilton proceeded to annex first one and then another portion of the area of the Township. The first annexation after the advent of the Dominion Company took place on 3rd September, 1908, and this was followed by further annexations in 1909, 1910, 1912, 1914 (2), 1920, 1924, 1925, 1928 (2), and 1929. The area annexed in 1909 was the largest and most important single area absorbed by the City.

The possibility that these numerous transfers of areas from the Township to the City might have the effect of abridging the Dominion Company's rights and duties under the Barton by-law and agreement does not seem to have been adverted to and for many years the Dominion Company continued to supply gas and to extend its distributing system in areas which had ceased to be in the Township of Barton and had become incorporated in the City of Hamilton. The authorities of the City, indeed, so far from raising any objection, repeatedly recognised the presence and operations of the Dominion Company within the annexed areas. The City engineer regularly granted permits to the Dominion Company to open streets and lay mains and pipes in them. There was a short period in 1929-30 during which the City Board of Control decided that such permits should not be granted, while at the same time intimating that they would not interfere with the Dominion Company's operations. On 1st April, 1930, however,

the Board of Control, after taking legal advice, expressly authorised the City Engineer to issue permits to the Dominion Company for the laying of gas mains " in that portion of the City formerly in the Township of Barton wherein the company had franchise rights." In a series of by-laws passed by the City Council in 1921 and relative agreements to which not only the Dominion Company and the Corporation of Hamilton but also the present appellants were parties, and which related to the supply and price of gas, the position of the Dominion Company as a distributor of gas in the eastern portion of the City of Hamilton under the provisions of the Barton by-law No. 533 is consistently recognised.

As a result of the policy thus pursued by the City of Hamilton and the Dominion Company the latter has now in operation an extensive gas distributing system within the present City of Hamilton in areas which were formerly in the Township of Barton, a considerable portion of which system was laid down after the annexation of these areas.

It is next necessary to consider in turn the position of the appellants, the United Gas and Fuel Company of Hamilton, Limited, formerly named the Ontario Pipe Line Company, Limited, whom it will be convenient to call " the United Company " throughout, irrespective of their change of name. On 26th September, 1904, the Council of the City of Hamilton passed a by-law No. 400 granting the consent, permission and authority of the Corporation to the United Company to enter upon the streets of the City, dig trenches, and lay therein and maintain and operate mains and pipes for the transportation and supply of gas in the City. By article 16 the United Company was required to commence laying mains and pipes within the City not later than 1st May, 1905, and within six months thereafter to have at least ten miles of mains laid in the streets and to supply gas to the inhabitants. The privileges granted by this by-law were to subsist until 26th September, 1924, subject to continuance in certain contingencies. As in the case of the Barton by-law in favour of the Dominion Company, the Hamilton by-law imposed an elaborate series of obligations on the United Company and was followed by a similar agreement between the City and the United Company.

The United Company, in order to obtain the gas necessary to fulfil its obligations to the City of Hamilton, entered into an agreement with the Dominion Company on 25th September, 1905, whereby, on the recital that the latter had large natural gas resources for which it desired a market and the United Company had certain rights and franchises granted to it by the City of Hamilton to furnish and sell gas to the inhabitants of the City and desired to secure a supply of gas for this purpose, the Dominion Company undertook to lay an eight-inch pipe from its gas belt to points within the City and deliver gas to the United Company by 1st November, 1905. The period of endurance of the agree-

ment was 19 years, to correspond with the endurance of the United Company's franchise. The Dominion Company thereby agreed to " use due diligence in supplying [the United Company] with a constant and adequate supply of dry natural gas for all consumers it may secure in the corporate limits of the said City of Hamilton as the said limits now exist or may hereafter be established by law."

As the result of these statutes, by-laws and agreements the Dominion Company and the United Company, before the annexations by the City of Hamilton, stood in this position, namely, that the Dominion Company was supplying and distributing gas in the Township of Barton under the Barton by-law No. 533, while the United Company was supplying and distributing in the City of Hamilton, under the Hamilton by-law No. 400, gas which it purchased from the Dominion Company under the agreement of 25th September, 1905. As already explained, notwithstanding the series of annexations by the City of portions of the Township, which began in 1908, no serious question seems for many years to have arisen as to the position of the Dominion Company in relation to the areas transferred from Barton to Hamilton. Nor does any question seem to have arisen between the Dominion Company and the United Company under their agreement of 25th September, 1905, although the Dominion Company thereby undertook to supply the United Company with gas for all consumers it might secure within the City of Hamilton not only as the City limits then existed but as they might " hereafter be established by law," a stipulation which in the circumstances might conceivably have led to difficulties. Apparently both companies in some instances had laid their pipes and were supplying gas in the same streets. A policy of extension and intensified competition initiated by the Dominion Company in 1928 or 1929 in the annexed areas seems to have brought about the dispute which led to the present proceedings.

These arose in this fashion. On 24th March, 1931, the United Company, whose franchise from the City of Hamilton under the original by-law No. 400 and relative agreement had meantime been continued, entered into a new agreement with the City, whereby, in consideration of a reduction in the price of gas, there was granted to it by the Corporation for a period of ten years " an exclusive franchise . . . to conduct, distribute and supply and sell gas in the City of Hamilton and for such purpose to enter upon all streets . . . now or at any other time hereafter within the jurisdiction of the Council." This grant was expressly stated to be subject to the exception 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." By the second article of this new agreement the City Corporation undertook for ten years not to grant any gas franchise

to any company other than the United Company and authorised the United Company to take proceedings against, among others, the Dominion Company for the purpose *inter alia* of determining whether the latter had any existing rights or privileges justifying it in supplying or selling gas within the City, all the rights of the City Corporation in the premises being assigned to the United Company. The execution of this new agreement was authorised by by-law No. 4168 of the City of Hamilton but it was declared that it should not be effective until the Legislature of the Province of Ontario should have enacted a statute confirming and ratifying it and conferring upon the United Company the right to take all action contemplated by the second article of the agreement. On 2nd April, 1931, the requisite statute was passed (1931 Statutes of Ontario, 21 Geo. V. ch. 100) confirming the agreement and declaring it to be legal, valid and binding. By section 4 (2) the United Company was authorised to take in its own name or in that of the Corporation of the City the proceedings contemplated in the agreement, such action to be at the United Company's own expense.

The way being thus cleared, the United Company, associating the City Corporation with it as a plaintiff, initiated the present action against the Dominion Company. The writ claimed (1) a declaration that the Dominion Company was wrongfully maintaining its mains in the streets of the City and wrongfully supplying gas to the inhabitants of the City, (2) an injunction restraining the Dominion Company from continuing so to use the streets of the City and from continuing to supply gas to the inhabitants; (3) a mandatory order requiring the Dominion Company to remove its mains from the streets of the City; and (4) damages.

The United Company was within its rights in joining the City Corporation as a plaintiff. The City, however, has taken no active part in the action, regarding the controversy as one between the two gas companies, as indeed it is, although the City Corporation might have been expected to show some concern for the citizens whose present gas supply from the Dominion Company the United Company seeks to stop. This may be counterbalanced by the consideration that the United Company, under the agreement of 24th March, 1931, undertook to lower their charges for gas. At any rate the Mayor candidly stated in evidence that he had no notice of the action until he read of it in the newspaper.

The claims advanced by the United Company are formidable. If sustained they would entail the removal of all the Dominion Company's mains and pipes in the annexed areas, both those which it lawfully laid in these areas before annexation and those which it subsequently laid, in many cases under permits granted by the City engineer, and the complete annihilation, without

any compensation, of its undertaking so far as situated and operating in the annexed areas. The fate of the consumers in the annexed areas who at present are supplied by the Dominion Company, some of them at the express request of the plaintiff Corporation, is ignored. It would be remarkable, to say the least of it, if the mere transference of an area from the administration of one local authority to that of another were to be attended by consequences so disastrous to a public utility undertaking operating in the transferred area. It would also, so far as their Lordships are aware, be unprecedented.

The United Company's arguments, however, were well arrayed, and although they failed to convince either the Trial Judge or the Court of Appeal of Ontario, who both dismissed the action, they merit and have received careful reconsideration by their Lordships.

The Dominion Company's position was assailed by the United Company from various points of attack. In the first place it was argued that on construction such rights as were conferred on the Dominion Company by the Barton by-law No. 533 and relative agreement were confined to the Township of Barton as its limits might from time to time be fixed, and that the geographical extent of the Dominion Company's rights was accordingly progressively abridged as Barton lost territory to Hamilton. In other words, the by-law applied only to such areas as were within, and only to those areas so long as they were within, the Township of Barton and subject to its government. In support of this construction, attention was drawn to numerous provisions in the by-law, for example, that works executed by the Dominion Company were to be done to the satisfaction of the Township Corporation; that permits for opening the streets were to be obtained from the Township Corporation; and that the Township Corporation was entitled to appoint an inspector to supervise any street openings. Attention was particularly drawn to the price-fixing provisions in the by-law which instituted a comparison with the price charged in the City of Hamilton. These and other provisions, it was urged could not receive effect according to their terms after annexation, so far as regards the annexed areas, and clearly showed that the by-law intended that the Dominion Company should operate only within the municipal boundaries of Barton. Their Lordships do not accept this argument. The by-law confers rights on the Dominion Company in the Township of Barton and, nothing being said as to future alterations of the Township, the natural reading is that the by-law applies to the Township as it existed at the date of the by-law. By the Ontario Municipal Act a municipality is defined as "a locality, the inhabitants of which are incorporated." When the by-law refers to the Township of Barton as defining the scope of the privileges which the by-law confers their Lordships construe this as referring to the locality embraced in the Township

at the date of the by-law. The argument from the inapplicability of the detailed provisions of the by-law after annexation might be impressive were it not for the fact, as will be seen in the sequel, that the legislature of Ontario certainly contemplates in some cases the continued operation of franchises after annexation, although doubtless in most cases containing similar local provisions. If a franchise is to continue valid after the transfer of the area to which it relates from one local administration to another then its terms must manifestly be adapted to the change and be applied *mutatis mutandis*. The process occasioned no practical difficulty in the present case, as has already been shown. The argument on the construction of the by-law therefore fails.

Then the validity of the by-law is next attacked. It was argued that the Dominion Company did not in 1904 obtain any franchise from Barton, but merely an agreement such as is contemplated in section 3 of chapter 200 of the Revised Statutes of Ontario, 1897 (quoted above in part in the third paragraph of this judgment), giving it power only to open up streets and lay pipes. This section 3 was repealed by chapter 34 of the Statutes of Ontario, 1907, Edw. VII, and with this repeal the powers of the Dominion Company, it was said, came to an end. There are several answers to this. That the Barton by-law and relative agreement conferred what is correctly designated a " franchise " on the Dominion Company is reasonably clear. The rights so conferred are referred to by the plaintiff Corporation as " franchise rights " and the rights conferred in very similar terms on the United Company by the plaintiff Corporation by by-law No. 400 in 1904, are also described as a " franchise " in the agreement of 1905 between the Dominion Company and the United Company. In chapter 42 of the Statutes of Ontario, 1912, 2 Geo. V, which is entitled " an Act respecting the granting of franchises by municipal councils," the term " franchises " is defined to " include any right or privilege to which this Act applies," and the Act expressly deals with rights of occupation of highways by gas and other public utility undertakers. In Canadian local government law the term is not used with the technical signification which it possesses in other connections, but is employed so as to include just such rights and privileges as those with which this case is concerned.

As regards the repeal of section 3 by the subsequent statute of 1907, that statute by section 211 (1) saves any by-law made under any enactment thereby repealed, and if this saving, as may be the case, does not cover a municipal by-law such as is here in question, then section 46 of the Interpretation Act sufficiently protects the Dominion Company rights, providing as it does that no repeal of an Act is to affect any right or privilege acquired under the Act repealed. Finally, in their Lordships' view, the source from which the Barton by-law derived its authority and the Dominion Company its powers is not the repealed section 3 of ch. 100,

R.S.O. 1897, but section 566 (3) of the Consolidated Municipal Act, 1903, quoted above. The statute of 1897 is a Companies Act not a local government act; it sets out what a company if otherwise duly authorised may lawfully do, but does not authorise a municipality to confer any power on the company. The United Company's attack on the validity of the Barton by-law, therefore, also fails.

It was next argued that the Dominion Company could not lawfully supply gas in Hamilton without a by-law of the Council of the City authorising it to do so, and that, as there was admittedly no such by-law, the Dominion Company was disabled from supplying gas within the City. Reference was made to the requirements of various statutes on the subject, and among others to chapter 75 of the Statutes of Ontario, 1909, 9 Edw. VII and chapter 42 of the Statutes of Ontario, 1912, 2 Geo. V. The latter of these two statutes, which repeals and re-enacts the former, provides in section 2 that the council of a municipality shall not grant to any company the right to use or occupy any of the highways or to construct or operate any public utility in the municipality unless and until a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted has been assented to by the electors of the municipality. But the Dominion Company's claim to supply gas in Hamilton is founded on the Barton by-law (which was passed before the enactment of the statute just mentioned) and on that by-law having become binding on the Council of the City as regards the annexed areas. The argument of the United Company would preclude the exercise of any public utility franchise after the annexation of the area to which it is applicable unless a fresh by-law was passed by the annexing authority and assented to by the electors. If after annexation the Dominion Company's Barton by-law remained effective and became binding on the City of Hamilton as regards the annexed areas—a point still to be dealt with by their Lordships—then, in their Lordships' opinion it was not necessary, in order to enable the Dominion Company to continue to exercise its franchise in the annexed areas, that the Council of the City of Hamilton should pass and obtain the assent of the electors to a by-law empowering the Dominion Company to supply gas in the annexed areas.

On yet another ground the Dominion Company's powers were challenged by the United Company. It will be recalled that the Barton by-law No. 533, by its second article provided that the Dominion Company should not be entitled to enter upon or lay their mains and pipes in any other highways of the Township of Barton until they had first laid the mains and pipes in certain highways mentioned in the first article of the by-law. The United Company maintained that the Dominion Company had failed to prove that it had performed this condition precedent to the exercise of the powers conferred by the by-law as regards the highways

other than those specified. There was some discussion as to the onus of proof in this matter, but their Lordships are prepared to take it that one at any rate of the mains specified in the first article of the by-law was not laid before the Dominion Company proceeded to enter upon and lay their mains in other highways. On the other hand, it was not disputed that all the mains specified in the first article of the by-law have now been laid in the highways mentioned. That being so, it is not, in their Lordships' opinion, now open to the United Company to seek to defeat the Dominion Company's rights by founding upon what was at most a breach of the contractual programme prescribed by the Township of Barton for the Dominion Company's operations, which breach has since been remedied without objection, either by the Barton or by the Hamilton municipality.

Their Lordships, having traversed these various arguments submitted on the construction and validity of the Barton by-law No. 533, now pass to the consideration of what is really the cardinal question in this appeal, namely, the effect of the Hamilton annexations on the Barton by-law. On the one hand it was submitted that the legal result of annexation was to abrogate the Barton by-law so far as regards the annexed areas; on the other hand, it was submitted that after annexation the by-law remained effective as regards the annexed areas, and that the rights and liabilities of the parties under it remained as before, except that, as regards the annexed areas the rights and liabilities of the municipality of Barton passed to the municipality of Hamilton.

The legislation of Ontario relating to the annexation of administrative areas is expressed in very general terms, and does not deal in any detail with the consequential results of the transference of an area from one local administration to another as affecting public utility services in the area or, indeed, many other important matters of local concern. In 1908, when the first of the annexations in question took place, the Consolidated Municipal Act, 1903 (chapter 19 of the Statutes of Ontario, 1903, 3 Edw. VII) was in force. Section 24 (1) of that statute, as altered by the Municipal Amendment Act, 1906 (chapter 34 of the Statutes of Ontario, 6 Edw. VII) and added to by the Municipal Amendment Act, 1908 (chapter 48 of the Statutes of Ontario, 8 Edw. VII) reads as follows :—

> " 24—(1) In case the council of any city or town by resolution declare that it is expedient that any portion of an adjacent township should be annexed to the city or town and in case the majority of the ratepayers in any such portion of such township petition the Lieutenant Governor in Council to add such portion to such city or town, and after due notice of such resolution and petition has been given by such city or town to such adjacent township, the Lieutenant-Governor may by proclamation, to take effect on some day to be named therein, annex to the city or town such portion of the adjacent township upon such terms and conditions as to taxation, assessment, improvements or otherwise as may have been agreed upon or shall be determined by the Lieutenant-Governor in Council."

Section 56 is in the following terms :—

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

By the Railway and Municipal Board Act, 1906 (chapter 31 of the Statutes of Ontario, 6 Edw. VII) section 53, the powers of the Lieutenant-Governor in this matter became exerciseable by that Board, and each of the annexations with which this appeal is concerned was effected by an order of the Board. These orders state the terms and conditions of the respective annexations in detail, and deal with the adjustment of debt, cost of improvements and so forth, but so far as their Lordships' attention has been drawn to them they do not deal with existing by-laws or franchises in any instance before the orders of the 11th September, 1928, and the 28th February, 1929, in each of which there is an article vesting in the Corporation of the City of Hamilton all right, title and interest of the Township of Barton in the highways and streets in the annexed area, and all right, title and interest in any franchises or agreements heretofore given or made respecting these highways and streets. Incidentally, it may be noticed that the Board evidently did not regard the continued operation of a franchise after annexation as presenting any practical difficulty. The new local authority was merely to be substituted for the original local authority.

Under section 56 of the Act of 1903 just quoted, the by-laws of the municipality of Barton, it will be observed, ceased to apply to areas annexed to Hamilton, except only by-laws relating to roads and streets, which were to remain in force until repealed by by-laws of Hamilton. The question is whether this enactment is applicable to the Barton by-law No. 533 and had the effect of abrogating it so far as regards the areas annexed to Hamilton. Their Lordships have reached the conclusion that the by-laws which the statute was intended to affect are the general administrative by-laws of the municipality, and that by-laws of a contractual character conferring franchises on particular individuals or companies do not, on a sound construction, come within the enactment at all. Were it otherwise, all the franchise by-laws of Hamilton would, on annexation, automatically apply to the annexed areas, even although by their terms they might be strictly confined to the City's limits as at the date of grant. The immediately preceding section 55 indicates that there are different kinds of by-laws for it distinguishes between those which a municipal council can, and those which it cannot, legally repeal. The by-law which the Dominion Company procured from the municipality of Barton was followed and made effectual by an agreement between the parties, and it would be strange if the by-law were to be abrogated as regards the annexed areas,

and yet the agreement were to stand, and equally strange if the agreement were held to be consequentially abrogated, although the enactment says nothing about such agreement. The effect of annexation is to transfer an area from one local government jurisdiction to another, and it is appropriate that after annexation, the annexed area should cease to be subject to the regulations of the municipality which it has quitted, and become subject to the regulations of the municipality which it has joined. But it would require very clear language to abrogate on annexation, without compensation, all the contractual engagements applicable to the transferred area which happened to have been authorised by by-laws. It was suggested that the by-law might be saved as falling within the exception of by-laws relating to roads and streets, but here again an indication is given of the kind of by-laws contemplated by the enactment; the by-laws relating to roads and streets are to remain in force until repealed by by-laws of the annexing municipality. Plainly this refers to general administrative by-laws relating to roads and streets which may be altered from time to time. Existing by-laws relating to roads and streets are continued in force till the annexing municipality repeals them and substitutes its own by-laws. In their Lordships' opinion the Barton by-law No. 533 is not a repealable by-law of this character, and is not a by-law within the meaning of either the rule or the exception in section 56. This is also the view of the learned Chief Justice of Ontario and his colleagues, with whom their Lordships find themselves on this point in entire agreement.

The legislation on the matter remained as above quoted until 1913 when the Municipal Act of that year was passed (Statutes of Ontario, 3–4 Geo. V, chapter 43) and provided as follows :—

> "33. Where a district or a municipality is annexed to a municipality its bylaws shall extend to such district or annexed municipality and the bylaws 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 bylaws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them."

The subsequent annexations were governed by this enactment. Its terms are instructive. For one thing it recognises the distinction which their Lordships and the Court of Appeal have drawn between general administrative by-laws and by-laws which confer privileges on particular persons. It also recognises that there are by-laws of such a character that they cannot lawfully be repealed, notwithstanding the general statutory power possessed by municipalities to repeal, alter and amend their by-laws. If it be suggested that the introduction in the enactment of 1913 of words saving franchise by-laws from repeal on annexation implies that such by-laws fell within the repealing words in

the previous legislation, the answer is to be found in section 51 of the Interpretation Act, 1907 (Statutes of Ontario, 7 Edw. VII, chapter 2), which reads as follows :—

> "51. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by the Legislature to have been different from the law as it has become under such Act as so amended."

In their Lordships' opinion the enactment of 1913 in saving franchise by-laws from repeal on annexation merely declared and made explicit an exception which was implicit, on a sound construction, in the previous legislation.

Numerous cases were cited in the course of the argument, but their Lordships do not find it necessary to discuss them. They turned to a large extent on the terms of special statutes and agreements and only incidental passages had any bearing on the present case. Such passages so far as they go tend to support the view which has commended itself to their Lordships in disposing of the present problem.

It remains to add that their Lordships do not think that any distinction should be drawn or can logically be drawn between mains and pipes of the Dominion Company which were laid in the annexed areas before annexation and those which have been laid in these areas after annexation. Nor do they regard the Dominion Company's franchise as limited to the use of highways in existence or already occupied by them at the time of annexation. The franchise is available to the Dominion Company alike in the portions of their original area which remain in Barton and in the portions which have now been incorporated in Hamilton and in both the franchise extends to all highways whenever formed. On these points also their Lordships find themselves in agreement with the views of the learned Judges of the Court of Appeal.

The result is that in their Lordships' opinion the Barton By-Law No. 533 and relative agreement conferred upon the Dominion Company a valid and perpetual franchise, not subject to repeal, which on a sound construction applied to the whole geographical territory which at the date of the by-law was comprised in the Township of Barton ; that on the annexation by the City of Hamilton of various areas forming parts of that territory the franchise remained effective in and applicable to these annexed areas ; and that in the annexed areas the municipality of Hamilton after annexation took the place *mutatis mutandis* of the municipality of Barton to all intents and purposes as regards the rights and obligations created by the by-law and relative agreement.

Their Lordships will accordingly humbly advise His Majesty that the order of the Court of Appeal for Ontario of 24th April, 1933, be affirmed and the present appeal be dismissed. The Dominion Company will have its costs of the appeal.

In the Privy Council.

THE UNITED GAS AND FUEL COMPANY OF HAMILTON, LIMITED, AND OTHERS

v.

THE DOMINION NATURAL GAS COMPANY, LIMITED.

DELIVERED BY LORD MACMILLAN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1934.