They will, therefore, humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Solicitor for appellant: *G. A. King.*
Solicitor for respondents: *Walter F. Currey.*

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[PRIVY COUNCIL.]

HULL ELECTRIC COMPANY . . . . PLAINTIFFS;

AND

OTTAWA ELECTRIC COMPANY AND THE CORPORATION OF THE CITY OF HULL . . . . . DEFENDANTS.

J. C.* 1901 *Dec.* 12, 14. 1902 *Feb.* 22.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Powers of Provincial Legislature—Quebec Act, 58 Vict. c. 69—By-law of Corporation granting Exclusive Rights—Construction.

Under a by-law of the Hull City Council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 Vict. c. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a licence previously granted by the city to the respondents for a similar purpose:—

Held, that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the provincial legislature, and none the less so because it excluded for a limited time the competition of rival traders:—

Held, also, that by the true construction of the by-law the city did not themselves revoke the licence to the respondents under which they were actually supplying electric light to the municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected.

APPEAL from a decree of the Court of King's Bench (Dec. 21, 1899) reversing a decree of the Superior Court for the province of Quebec (Jan. 31, 1899), sitting in review at Montreal, which had reversed a decree of the Superior Court for the province of Quebec district of Ottawa (June 10, 1898) dismissing the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

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appellants' action with costs, and maintaining the intervention of the respondents, the corporation of Hull.

The action was brought in May, 1897, by the appellants and Viau against the respondents, the Ottawa Electric Company, for

(*a*) An order to compel them to remove all poles, wires, and the electrical apparatus occupied, possessed, owned, or used by them for the distribution of electricity or electric light in the city of Hull.

(*b*) An order restraining them from selling or supplying electric light to the said city, the inhabitants thereof, or the industries therein.

(*c*) $20,000 damages, viz., $10,000 to Viau and $10,000 to the appellants.

The action was based on the contention that the appellants and Viau had acquired in May, 1894, and had since then had the exclusive right to supply electricity and electric light in the said city.

The respondents, the Ottawa Electric Company, denied that the appellants and Viau had or were entitled to the exclusive rights claimed, or that they were infringing any of the rights or privileges of the appellants or Viau, and alleged that they were only exercising their strict legal rights in accordance with the resolution of the town council of the city of Hull passed on April 4, 1887.

The respondents, the city of Hull, intervened to dispute the monopoly claimed.

The transactions from which the appellants and respondents respectively claimed and disputed the monopoly in suit are set out in the judgment of their Lordships.

The respondent company was incorporated under Dominion statute, 57 & 58 Vict. c. 111; the appellant company under Quebec statute, 58 Vict. c. 69. Sect. 24 of the latter Act is as follows:—

"The grant to the said Théophile Viau heretofore made by the corporation of the city of Hull and its council of certain franchises and privileges including, amongst others, for a period of thirty-five years, the exclusive right and privilege of constructing and equipping an electric railway in the city of Hull and in and

upon the streets thereof, and of making all erections and works necessary for the same, and also the exclusive right and privilege for the period of thirty-five years of furnishing and supplying electric light to the corporation of the city of Hull and to the inhabitants thereof, and to all industries and manufactories that are established and may be established therein, and of erecting such poles, apparatus, appliances and electric machinery in the city of Hull and the streets thereof as may be necessary for such purposes and for the due development and distribution of such light, and including the right, privilege and franchise of supplying, selling and leasing such heat and motive power generated by electricity, or otherwise to the inhabitants, industries, manufactories and dwellings and other buildings that may require the same, and of making such erections and structures in the city of Hull and in the streets thereof as may be necessary for such purposes, and the exemption of the railway and works, and all machinery, plant and other property movable and immovable, and other things connected therewith or used in connection with the same from municipal taxes and rates for the period of fifteen years, and the by-law containing the same and the provisions thereof, that is to say, By-law No. 61 of the corporation of the city of Hull and its council, are declared to be legal and valid, and the said franchises, privileges, rights and exemptions therein contained are declared legal and binding upon the corporation of the city of Hull."

The First Court's decree proceeded on the ground that, while the city council might have the control over the placing of posts, wires, and other apparatus on its streets for the purpose of supplying electric light, it had no power to prohibit or restrict the supplying of electric light; that electric light is a commercial commodity, the regulation of the trade in which is within the exclusive competence of the Parliament of Canada; and that thus the confirming Act was beyond the competence of the legislature of Quebec; that the exclusive powers created by the by-law and Act as to the use of the streets are only accessories to the exclusive power of supplying electric light; and that, the principal grant being void, the accessories fall with it, and are also void.

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The principal reasons of the judgment in review were that the by-law granted an exclusive right to establish a system of electric light and heating in the city; and for that purpose an exclusive right to use the city streets for the placing of the necessary posts and apparatus; but did not grant an exclusive right to supply electricity; and, in consequence, other persons might furnish such supply, not using the streets for the purposes of posts and wires.

It was considered that the city had power to concede the exclusive right above described, and that thus no question of unconstitutionality could be maintained.

It was further considered that the licence to Ahearn and Soper, the predecessors of the respondent company, by resolution only and not under by-law was in its essence revocable, and that it was incompatible with the exclusive grant to Viau; that the effect of the grant was to enable Viau to insist on the revocation of the former licence, without which result he could not enjoy his exclusive rights, and that the licence had been revoked.

The Court in effect found that the use of the city streets for the purpose of placing posts, wires and apparatus was necessary to the establishment of the contemplated system of lighting and heating in the city.

The Court of Queen's Bench restored the decree of the First Court. They held that the city by-law, in granting the exclusive privilege for thirty-five years of establishing a system of lighting and heating, had created a monopoly beyond its charter powers; that the confirmatory Act was ultra vires; that the by-law, even if valid, had not given the Hull Company the use of the streets; that the servitude claimed by the Hull Company in the streets did not entitle it to the removal of the Ottawa Company's posts and wires; and that the Ottawa Company had the right to place its posts and wires on the streets, in virtue of the licence to Ahearn and Soper, which had not been revoked.

Blake, K.C., for the appellants, contended that the decree of the Review Court was right and should be affirmed. On the

true construction of the by-law, it gave to Viau and the Hull Company, as his representatives, the exclusive privilege for thirty-five years of using the city streets for the purpose of therein placing, maintaining, and employing posts, wires, and apparatus for the supply of electric light and heat in the city. The confirmatory Act interpreted and validated the by-law in that sense. That Act was within the competence of the provincial legislature. The city in its intervention did not plead that the by-law or Act was wholly void, but only that it was ultra vires so far as it created a monopoly. No exclusive right, however, was given to furnish light or heat to any person or corporation. All that was given was an exclusive right to establish a system of lighting by electricity, and an exclusive right to use the streets in a particular way for that purpose. That scheme did not involve an exclusive right to supply, and was a purely local undertaking within the competence both of the local legislature and the corporation; even assuming that the grant of an exclusive right to supply the corporation with electric light and heat would have been ultra vires, a point which does not arise. It is unnecessary for the appellants' case to contend that the statute enlarged the effect of the by-law. The privileges granted by the law cannot be treated as subordinate to those granted by the resolution of 1887. The latter must give way. No time limit was fixed for the exercise of the rights which it conferred. It was, therefore, revocable at any moment. The passing of the Act operated as a revocation, of which the Ottawa Company was bound to take notice. Their rights under the resolution were incompatible with the appellants' rights under the by-law and Act. It was contended that at the least the Ottawa Company should be restrained from using or maintaining for the purpose of supplying electric light or heat the posts and wires placed in the city streets—more especially the posts and wires which were placed, and the supply which had been extended, after the creation of the rights of Viau, or after the date at which the licence of 1887 should be deemed to have been revoked.

Haldane, K.C., *L. N. Champagne, K.C.*, and *Loehnis*, for the respondents, the City of Hull Corporation, contended

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that the judgment appealed from was right. The main question at issue was as to the due construction of the by-law and statute. The corporation had never revoked the resolution of 1887, under which the Ottawa Electric Company had acted and claimed until revocation to act. The by-law and statute did not derogate from that right, and were not intended to do so. They did not intend to exclude the exercise of the rights of the company granted by the resolution and acquired by them from Ahearn and Soper. They did not purport to grant to the appellants an exclusive use of the streets of the city. All that the by-law purported to give was an exclusive privilege of establishing a system of lighting by electricity, natural gas, or otherwise. That privilege might be used or neglected. No obligation was imposed on the appellants to establish such a system or to find any capital for that purpose. If the statute in terms gave more, it was controlled by the preamble, which limited its operation to confirming what had been done by the corporation. The only claim which the appellants might have to an exclusive use of the streets would be for the purposes of an electric tramway. The monopoly claimed by the appellants must result from a strict construction of the by-law, and cannot be created by inference.

Belcourt, K.C. (*Haldane, K.C.*, with him), for the Ottawa Electric Light Company, also contended that the effect of the by-law and Act was only to grant to the appellants such rights as the corporation possessed and could grant, and to except from the grant the rights and franchises previously granted to the predecessors of the company. There was no intention to impair those rights, according to any reasonable construction of the by-law. The right given was an exclusive privilege to establish a system of lighting by electricity; that is, that if the appellants acted upon it and established such a system, no future competitor would be authorized to interfere with them. But it was not a necessary or a reasonable construction that an existing system, of which they had notice that it was in full operation, and of the cancelment of which nothing was said, should be forthwith abolished, to the injury of the public as well as the company. An exclusive privilege to establish a

system hereafter is quite consistent with the respondents' continuing to work the system which they had already established and which had been in operation for several years. That construction of the by-law is to be preferred which will protect the existing rights and position of these respondents in the absence of a clear intention that they should be revoked or destroyed. Even if the use of the streets was given to the appellants, it was not an exclusive use, but one concurrent with the respondents' user of them: see *Hill* v. *Tupper*. (1) [*Blake, K.C.*, referred to *Nuttall* v. *Bracewell*. (2)] The respondent company was incorporated by Dominion Act, 57 & 58 Vict. c. 111, and its property, business, and franchises became vested in it. It thereupon took over its system of electric lighting, and has ever since operated the same, with the consent, authority, and co-operation of the city. With regard to the effect of this Act and the permanent, irrevocable nature of the privilege granted to the respondents, see *La Compagnie pour l'Eclairage au Gaz de St. Hyacinthe* v. *La Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe* (3); *Liggins* v. *Inge* (4); *Winter* v. *Brockwell* (5); *Morgan* v. *Lailey* (6); Hardcastle on Statutory Law, pp. 275, 276; *Bernardin* v. *Municipality of North Dufferin*. (7) Unless the power to revoke the franchise or licence is reserved, such licence or franchise cannot be revoked, especially if a large outlay has been made to the knowledge and with the consent of the city on the faith of its continuance. And in any view a revocation has not been expressly made; what is relied upon is an implied delegation of the power to revoke, and an implied exercise by the appellants of a power so delegated.

Blake, K.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In March, 1887, Ahearn and Soper applied to the mayor and aldermen of the city of Hull, stating that they had organised a company for the purpose of supplying

(1) (1863) 2 H. & C. 121.
(2) (1866) L. R. 2 Ex. 6.
(3) (1895) 25 Sup. Ct. Can. 168.
(4) (1831) 7 Bing. 682; 33 R.R. 615.
(5) (1807) 8 East, 308; 9 R.R. 454.
(6) (1874) 33 Q. B. (Can.) 369.
(7) (1891) 19 Sup. Ct. 581.

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the city with electric light, and asking for permission to erect their poles in the streets. On April 4, 1887, the city council passed the following resolution: "That the petition of Mr. Ahearn and Mr. Soper asking that they be permitted to erect within the limits of the city poles for the establishment of their system of electric light be granted under such restrictions and regulations as are observed in Ottawa and subject to the instructions of the committee on streets and improvements as to the places where these poles shall be erected." The company on whose behalf Ahearn and Soper were acting was the Chaudière Electric Light and Power Company, Limited. They transferred their rights and assets to the respondents, the Ottawa Electric Company, hereinafter called the Ottawa Company.

Under the permission granted by the foregoing resolution the Chaudière Company established a system of electric lighting in the city of Hull. It was continued and extended by the Ottawa Company, and is still in operation.

In 1894 one Viau, described as a contractor, presented a petition to the city council setting forth the importance of establishing a line of electric cars connecting the city with certain neighbouring places, and also the advantage of establishing a system of lighting and heating for the city by electricity, natural gas, or otherwise, and praying for special privileges in the shape of exclusive rights for a certain term of years, and a temporary exemption from taxes in order to enable him to carry out his enterprise.

On May 7, 1894, the city council, under its corporate seal, passed a by-law, known as By-law No. 61, in reference to Viau's scheme.

Under the 1st and 2nd paragraphs of this by-law Viau obtained an exclusive privilege of constructing and maintaining a railway worked by electricity or any other motive power, except steam or horse power, connecting the city with certain neighbouring places, and passing over one or more of the city streets.

Paragraphs 3 and 4 were in the following terms:—

"3. From the date of the publication of the present by-law

the said Theophilus Viau, whether personally or with other persons with whom he shall think fit to associate himself and his or their heirs or legal representative, shall have an exclusive privilege during 35 years to establish in the city of Hull a system of lighting and heating by electricity or by natural gas or otherwise.

"4. The city of Hull by the present by-law grants to the said Viau individually, or through the society or company which he may think fit to form later, the exclusive rights mentioned in paragraphs 1 and 3 such as it possesses and as it has the right to grant this day."

Then followed among other provisions a provision to the effect that, in case the proposed works were not commenced within two years from the date of the publication of the by-law, the concession should become null and void.

The Hull Electric Company, hereinafter called the Hull Company, was promoted for the purpose of working Viau's concession. It was incorporated by an Act of the Legislature of Quebec, 58 Vict. c. 69, passed on January 12, 1895. By this Act, By-law No. 61 and the provisions thereof were declared to be legal and valid, and the franchises, privileges, rights, and exemptions therein contained were declared legal and binding upon the corporation of the city of Hull.

After some delay, but within the time limited by the by-law, the Hull Company commenced their works. They proceeded to construct the proposed railway, and also established a system of lighting by electricity in competition with the Ottawa Company.

The Hull Company, finding that the operations of the Ottawa Company interfered with their profits, issued a written protest dated March 17, 1897, and thereby required the Ottawa Company to remove their appliances and to desist from supplying electric light by means of their system. The protest proved ineffectual, and on May 10, 1897, the Hull Company commenced the action which has led to this appeal.

This action, in which the city of Hull intervened with the view of supporting the Ottawa Company, was tried before the Superior Court. The trial judge, Lavergne J., dismissed the

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action with costs, holding the by-law bad and the Quebec Act void on the ground that electric light is a commercial commodity, and that therefore the regulation of trade in it falls within the exclusive competence of the Parliament of Canada.

The Superior Court, sitting in review, reversed this judgment, and ordered the Ottawa Company to remove their posts and wires, and to pay $200 as damages accrued during the period which elapsed between the date of the protest to the institution of the action. They held that the city had power to grant Viau's concession; that the by-law properly construed was not invalid; and that the Quebec Act was not unconstitutional. They further held that the licence to Ahearn and Soper was revocable; that it was incompatible with the exclusive grant to Viau; that the effect of that grant was to enable Viau to insist on the revocation of the former licence, and that the licence had in fact been revoked either by the Quebec Act, or at latest by the protest of March 17, 1897.

The Court of Queen's Bench on December 31, 1899, reversed the judgment of the Court of Review, and restored the judgment of the Superior Court. The judgment in the Queen's Bench was given by Lacoste C.J. The decision was rested on two grounds. In the first place, agreeing with the Superior Court, the Court of Queen's Bench held the by-law bad and the Quebec Act unconstitutional. In the second place, the Court considered that the licence granted to Ahearn and Soper did not require the formality of a by-law, and that the resolution of April 4, 1887, was valid for the purpose in view. They doubted whether such a licence was revocable, at all events without compensation. They thought that at any rate an express revocation was necessary. The city had not in their view delegated to the Hull Company any power of revocation. Their conclusion, therefore, was that the Hull Company could not prevent the Ottawa Company from supplying electric light, or using for that purpose the posts and wires which it had placed in the streets of Hull under the permission accorded by the resolution of April, 1887.

The first ground on which the Chief Justice bases his decision may be laid aside. It was abandoned at the bar by

the leading counsel for the respondent. It is obviously untenable. The scheme in favour of which By-law No. 61 was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the provincial legislature, and not the less so because in such cases it is usual and probably essential for the success of the undertaking to exclude for a limited time the competition of rival traders.

Nor is there any difficulty with respect to the resolution of April, 1887. Ahearn and Soper asked for nothing more than a permission in its nature revocable. Nothing more was given to them. There seems to be no reason why such a permission should not be granted by a simple resolution and recalled in a similar manner.

The real difficulty of the case lies in determining the true meaning and effect of By-law No. 61. In approaching the question it must be borne in mind that at the time when that by-law was passed the Ottawa Company had, in accordance with the resolution of April, 1887, and by the express permission of the council, established a system of electric lighting in the city of Hull, and that they were actually supplying the municipality with electric light under a contract which was only terminable by a notice to be given on a distant day in the current year, and which if not so terminated would run on from year to year until terminated by a like notice on the same day in some following year. Viau, of course, was quite aware of the position of the Ottawa Company. Indeed, it is not disputed that paragraph 4 of the by-law was intended to place on record the fact that the Ottawa Company had at the time a system of electric lighting in operation in the city. At first sight, no doubt, the grant to one person, or to one body of persons, of the exclusive right to establish a system of electric lighting within a particular area seems hardly consistent with the continuance within the same area of a similar system of lighting in the hands of another body carrying on operations under a revocable licence from the very same grantors. But the two things are not incompatible. Now, it seems quite clear that it was not intended that the licence granted by the resolution of 1887 should be revoked off-hand by the by-law

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itself. An immediate revocation would have exposed the municipality to a serious liability for breach of contract; and it would have caused no little inconvenience to the municipality and the private customers of the Ottawa Company. There was no other source of supply available; there was no immediate prospect of obtaining a supply through Viau's scheme. Moreover, it is to be observed that the by-law itself provided that in the event of the proposed works not being commenced within two years the concession should drop, and, even if the works were commenced within the prescribed period, it would not follow that Viau's system of electric lighting would ever be established. Viau and his associates might find it more to their advantage to confine their operations to the electric railway. Then if the by-law did not of itself revoke the licence of 1887, when and under what circumstances was revocation to take place? The by-law is silent on the point. There are only two alternatives. Either the power of revocation remained in the hands of the council, or it passed to Viau and his associates. It certainly was not given to them expressly. Was it given to them by necessary implication? Even assuming that the licence of 1887 was to continue unrevoked, By-law No. 61 was anything but a prudent or business-like arrangement. Viau was not a man of substance. He had not the control of any water-power. He had no one at his back. Apparently he was without any means of carrying his scheme into effect except what he could get by pledging the concession. For the concession itself he paid nothing. By accepting it he came under no obligation to do anything of any sort or kind. He gave no security to the council. He was not bound to supply electric light to the city or to those of the inhabitants who might require it. Nor was he placed under any restriction as to the amount of the charges which he and his associates might make. He and they were left at liberty to charge as much as they pleased or as much as they could get, and they were left at liberty to grant or withhold the supply at their pleasure. In these circumstances, the claim of the appellant company that no other person or body of persons shall supply electric lighting to the city during the period of their

concession is not one that commends itself to favourable consideration. It seems to their Lordships that it would have been an act of incredible folly on the part of the council to give Viau and his associates the right to terminate the licence of the Ottawa Company at their will and pleasure. Unless the by-law admitted of no other construction, their Lordships would certainly hesitate to come to the conclusion that the council of the city of Hull had so utterly neglected their duty. Their Lordships, however, agree with the Court of Queen's Bench in thinking that the by-law admits of a more reasonable construction. Their Lordships think that the real meaning of the transaction was this: The city of Hull granted to Viau an exclusive right of establishing a system of electric lighting for a certain term of years—that is to say, by their grant to him they bound themselves during that period not to grant such a right to anybody else; but at the same time they said to Viau, "You must remember that we have granted permission to the Ottawa Company to establish a system of electric lighting in the city of Hull, and that system is now in operation—we bind ourselves not to convert that permission into a right, but we do not bind ourselves to revoke that permission at your bidding. We keep the power of revocation in our own hands." Possibly the consideration that the Ottawa Company was to be left to carry on its operations in Hull until the council saw fit to revoke its licence may account for the singular fact that in passing By-law No. 61 the council did not think it necessary either to impose on Viau and his associates any obligation to furnish a supply of electric light to the municipality or to those of the inhabitants who might require it, or to place any restriction upon the charges which Viau and his associates might demand.

In the result, therefore, their Lordships agree in substance with the second ground of the decision of the Court of Queen's Bench, and they will humbly advise His Majesty that this appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Norton, Rose, Norton & Co.*
Solicitors for both respondents: *Harrison & Powell.*