Supreme Court of Canada
Union Natural Gas Co. v. Chatham Gas Co., (1918) 56 S.C.R. 253

Date: 1918-03-25

The Union Natural Gas Company of Canada *(Plaintiffs) Appellants;*

and

The Chatham Gas Company *(Defendants) Respondents.*

1917: November 7, 8; 1918: March 25.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Supply of gas—Area—Extension of municipal limits—Parties.

The Union Natural Gas Co. are producers of gas and the Chatham Gas Co. is empowered to sell and distribute the commodity to consumers in the City of Chatham. By a contract between the two companies the Union Co. was to supply and the Chatham Co. to take all the gas required by the latter for such sale and distribution.

Held, Anglin J. dissenting, that the Union Co. was not obliged to supply gas for distribution and sale by the Chatham Co. in territory annexed to the city after the contract was made. *City of Calgary v. Canadian Western Natural Gas Co.,* (56 Can. S.C.R. 117,) distinguished.

The Chatham Co. had contracted to supply gas to a sugar company operating in the territory so annexed to the city and the right of the latter to obtain the gas furnished by the Union Co. under its contract to supply the Chatham Co. only for use in the city depended on the construction of said contract as to the area to be served.

Held, per Anglin J., that the Sugar Co. is entitled to be a party to the action, and the order of the Appellate Division for a new trial with liberty to add it should be affirmed. The case is not one in which the power to give a declaratory judgment not accompanied by consequential relief should be exercised.

Judgment of the Appellate Division, (40 Ont L.R. 148), reversing that at the trial, (38 Ont L.R. 488), reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario[1], setting aside the

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[1] 40 Ont. L.R. 148.

judgment at the trial[2], in favour of the plaintiffs and ordering a new trial.

In 1906 the predecessors in title of the Union Natural Gas Co. which owned gas leases in the townships of Raleigh and East Tilbury contiguous to the City of Chatham entered into a contract with the Chatham Gas Co. which supplied the inhabitants of the city. By this contract the Union Co. agreed to supply to the Chatham Co. all the gas required by the latter and to furnish gas to no other person or company in the city so long as the Chatham Co. continued to take it and the latter agreed to take all it needed from the Union Co.

In 1915, while this contract was still in operation, the Dominion Sugar Co. established a refinery on land in Raleigh which, in the following year, was annexed to the city. The Chatham Gas Co. by contract in writing agreed to supply the gas required by the Sugar Co. and claimed that the Union Co. was obliged by its contract to furnish this extra supply. The Union Co. denied this and brought action for a declaration that it was only obliged to furnish gas for distribution in the city according to the limits thereof in 1906 when the contract was made and for an injunction against the Chatham Co. diverting its gas to the annexed territory.

The trial judge was of opinion that the contract of 1906 covered the annexed territory but considered the agreement with the Sugar Co. to be unfair to the Union Co. and granted a qualified injunction against diverting the gas to the territory annexed under the contract with the Sugar Co. or entering into any other contract therefor without the approval of the Court.

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Both parties appealed to the Appellate Division which, without considering the merits of the case, ordered a new trial with liberty to add the Dominion Sugar Co. as a party to the action. The Union Co. then appealed to the Supreme Court of Canada.

[2] 38 Ont. L.R. 488.

When this appeal was called counsel for the respondent moved to quash it for want of jurisdiction, it being an appeal from a judgment ordering a new trial in the exercise of judicial discretion. The motion was directed to stand until the appeal was heard on the merits and by the judgment now reported the jurisdiction of the court was maintained.

Tilley K.C. for the appellants. A municipal franchise does not ex necessitate extend to added territory and there is nothing in the contract between the parties here to make it so extend. See Toronto Railway Co. v. City of Toronto[3]*; Montreal Street Railway Co. v. City of Montreat*[4]*.*

The contractual rights of the parties are not affected by an order of Ontario Municipal and Railway Board. *County of Wentworth v. Hamilton Radial Railway Co.*[5]

[3] *[1907] A.C. 315.*
[4] *[1906] A.C. 100.*
[5] 54 Can. S.C.R. 178.

Hellmuth K.C. and Pike K.C. for the respondents. The Dominion Sugar Co. is a necessary party to the action. O'Sullivan v. Phelan[6]*; Clifton v. Crawford*[7]*; Beament v. Foster*[8]*.*

The contract between the parties extends to the added territory and was so contemplated when it was made. See *In re Toronto Railway Co. and the City of Toronto*[9]; *City of Calgary v. Canadian Western Natural Gas Co.*[10]; *City of Toronto v. Toronto Railway Co.*[11]

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THE CHIEF JUSTICE.—I have read with great care the elaborate and able judgment of Mr. Justice Lennox before whom this action was tried, but as the strength of a chain is its weakest link, so the value of his conclusion depends upon the weakest point upon which it is based. The learned judge has formed the opinion, as surprising to me as I think it is without foundation, that the contract between the appellant's predecessors in title and the respondent for the supply of natural gas to the latter constituted them partners in the respondent's undertaking and operation of its franchise for distributing gas in the City of Chatham; and the learned judge, though going so fully, as I have said, into the case, gives little reason for his opinion on this point beyond a paraphrase of the agreement which does not seem to carry the matter any further than the document itself. The absence of such reason renders unnecessary more than a brief statement of the considerations which have led me to a contrary conclusion.

The learned judge has held that the respondent

> is seized and possessed of a franchise of the same character, and with the same incidents, obligations and duties in the whole of the City of Chatham, as it now is, as this company was seized of and subject to in the area constituting the City of Chatham before and at the date of the annexation,

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[6] *14 Ont. P.R. 278n.*
[7] *18 Ont. P.R. 316.*
[8] *35 Ont. L.R. 365.*
[9] 34 Ont. L.R. 456.
[10] 10 Alta. L.R. 180.
[11] [1916] 2 A.C. 542.

and he continues:

> considering the whole agreement, *i.e.,* between the parties * * * I have come to the conclusion that the proper interpretation is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well.

It seems in any case too much to say that "its provisions were intended to extend," since this must depend on the previous finding as a legal conclusion that the franchise did so extend; perhaps at most it could be said that it follows from the previous

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finding that they must be considered to so extend, but indeed the real reason for the judge's interpretation is given in his previous statement as follows:

> If the franchise of this company (the respondent) included the right and obligation to supply gas in territory subsequently acquired, the right to share in the benefit of this franchise was conferred, and the correlative obligation to furnish the additional gas required for customers in the added territory was imposed upon the Union Company by the agreement of 1906. It might not always be so, but it seems quite impossible in the circumstances of this case to hold that "City of Chatham" means one thing as regards area in relation to the rights and obligations of the Chatham Company and the City Corporation, and another thing as regards the rights and obligations of the parties to the agreement of 1906. Why? Because the document of 1906 is in substance and effect a partnership agreement and practically nothing else.

Here we have the real reason for holding that the agreement, whatever its intention, extended to the territory subsequently added to the city. There is no other; for there is no reason that I can find why "the City of Chatham" should not mean one thing as regards the area covered by the respondent's franchise, and another as contemplated by the agreement of 1906 between the parties. On the contrary, I think there are good reasons why this should be so. In granting a franchise within the city, the corporation is naturally dealing with the area subject to its jurisdiction,

whatever that may be, but parties making an agreement as private individuals for the supply of a commercial commodity in a particular area, are dealing with a geographical area and are not concerned with any question of what particular municipal jurisdiction it comes under. In the case of *The City of Calgary v. The Canadian Western Natural Gas Co.*[12], recently heard on appeal to this court and which was referred to in the argument, it was pointed out that between the years 1905 and 1914, the area comprised within

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the municipal boundaries had been extended from 1,800 to 25,000 acres, whilst the population had grown from 12,500 to 90,000. The franchise which was involved in that case was held to extend to the added territory; but it would surely be impossible, in a private contract for the sale of any commodity, to hold, without the plainest evidence of the intention of the parties, that the area within which it was to be supplied was not that covered by the proper description at the date of the contract, but such an enormously increased area as in the instance of the City of Calgary, and because the area within the jurisdiction of the City Corporation, no party to the contract, had been subsequently enlarged. It would be only reasonable to suppose that if the area were to be increased more than twelvefold the intention would be that the parties owning the franchise would have to make quite other arrangements for so changed a subject-matter of the contract. The conditions in the one case not only might, but probably would, be wholly unsuitable in the other.

[12] 56 Can. S.C.R. 117.

As Lord Loreburn said in *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Co.*[13], at page 403:

> A court can and ought to examine the contract, and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist.

If we look at the particular contract, we find that it starts with the recitals:

> Whereas the Chatham Company is the owner of a system of mains and pipes laid through, under and along the streets, squares, highways, lanes and public places of the *City of Chatham* by and with the authority and sanction of the said City, also of certain rights and franchises to distribute and sell gas to the inhabitants of the said City.

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> And whereas the parties hereto have agreed for the supply by the producers (the appellant) to the Chatham Company of natural gas, and for the sale and distribution *in Chatham aforesaid* of the same by the said Chatham Company on the terms and conditions following.

In the first of these recitals there is an identification of the respondent's system of pipes in the City of Chatham as it existed at that time, and the agreement is for the supply of gas by the appellant in Chatham aforesaid. In other words, read as a whole, the contract is merely one by which the appellant agrees to sell the respondent a quantity of natural gas at a certain fixed price, which quantity is determined by the capacity of the system of mains and pipes then laid through, under and along the streets, squares, highways, lanes and public places of the City of Chatham, as it then was. If there be doubt, I presume that the rule laid down by Pothier in his Treatise on Obligations, No. 97, would apply. The contract is interpreted as against him who has stipulated and in favour of him who has contracted the obligation. *City of Toronto v. Toronto Railway Co.*[14]

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[13] [1916] 2 A.C. 397.
[14] [1907] A.C. 315.

And in estimating the probable intention, I do not think we can overlook the facts that the contract contemplates the supply by the appellants of gas outside the city therein mentioned to others than the respondent, and that at the time of its execution the appellants held a ten days old grant of a franchise from the Corporation of the Township of Raleigh which included the area in question here. This franchise, in so far as the 51 acres are concerned at any rate, is still in existence. The appellants moreover hold numerous similar franchises in other neighbouring municipalities. Sec. 33 of the Municipal Act, R.S.O. [1914] ch. 192, provides:—

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> Where a district is annexed to a municipality, its by-laws shall extend to such district * * * and the by-laws in force therein shall cease to apply to it, except those relating to highways * * * and except by-laws in force conferring rights, privileges, franchises, immunities or exemptions which could not be repealed by the council which passed them.

If we conclude that the agreement of 3rd November, 1906, is not as the trial judge finds "articles of partnership" between the parties and there is nothing else to shew that the area as regards the contract is necessarily the same as that embraced in the respondent's franchise, but rather the contrary, then it becomes unnecessary to determine in this action what is the limit of the area covered by the respondent's franchise.

The appellant's claim is for a declaration that it is not bound under the contract of 6th (3rd) November, 1906, to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed; and the consequent relief sought is an injunction restraining the respondent from diverting the gas supplied to it by the appellant to or for the purpose of the respondent's contract with the Dominion Sugar Company, one of its principal customers, whose factory is situated within the territory added to the city.

The trial judge found against the appellant and held that:

> the proper interpretation of the agreement is that its provisions were intended to extend to and include not only the City of Chatham as it was bounded and constituted at the date of the agreement, but land which might thereafter be annexed as well;

and that

> It follows that the respondent will be entitled to obtain from the appellant a sufficient supply of natural gas for its customers on the annexed land.

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And referring to the claim for an injunction the learned judge says:

> this prayer is based on the assumption that it would be declared that the agreement applies only to the city as it then was.

The finding being otherwise, no such injunction as prayed could of course be granted; but the judge has entered into a consideration of the contract made between the respondent and the Dominion Sugar Company and, being of opinion that it was

> not one under which the respondent has a right to divert gas to the Sugar Company against the will of the appellant,

has granted “a qualified injunction” restraining the respondent from so diverting gas under any agreement unless and until it is approved by the court.

Against this judgment both parties appealed, and the Appellate Division, apparently approving the judgment as to the refusal of the declaration sought by appellant, decided that, in view of the Sugar Company not having been a party to the proceedings, there would have to be a new trial with liberty to the appellant to add the Sugar Company as a party defendant.

The judgment on trial being now reversed, there is, of course, no ground on which a new trial could be ordered. The appellant is entitled to the declaration and consequential relief sought.

The appeal will therefore be allowed, and the judgment on trial set aside; and it will be declared that under the contract of the 3rd November, 1906, between Symmes and Coste, the predecessors in title of the appellant and the respondent, the appellant is not bound to supply gas to the respondent except for distribution within the limits of the City of Chatham as it then existed or in special cases with respect to

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which agreements exist. The respondent will be restrained by injunction from diverting gas supplied to it by the appellant otherwise than in accordance with such declaration.

In *Hartlepool Gas and Water Co. v. West Hartlepool Harbour and Railway Co.*[15], the dock company were supplying their own water to their lessees in breach of their covenant to take all their water from the water company. The water company were held sufficiently satisfied with damages for breach of the covenant.

In the present case the defendant is diverting and supplying to strangers gas and water respectively belonging to the plaintiff to which the defendant has no right except under its contracts which do not provide for this.

It is no answer for the defendant to say: We have made a contract with strangers to give them your gas or water to which we have no right, and, therefore, we cannot be stopped appropriating and giving away your goods. Neither is it necessary to hear what the receiver of the misappropriated goods has got to say.

[15] 12 L.T. 366.

Davies J.—I am of the opinion that this appeal should be allowed and the judgment of the Appellate Division should be set aside and that it should be declared that appellant is not bound to supply gas for the territory annexed to the City of Chatham since the agreement in question was entered into, and I am also of the opinion that an injunction should be granted in aid of that declaration.

I concur generally in the reasons for judgment stated by Mr. Justice Idington, costs, of course, to follow the result.

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IDINGTON J.—The appellant as the assignee of the rights of H.D. Symmes and D.A. Coste under a contract made on 3rd November, 1906, between them and respondent, brought an action for the construction thereof, and in the event of appellant's contention relative thereto being maintained, for an injunction restraining the respondent from violating same.

The learned trial judge's construction of the contract failed to maintain the appellant's contention yet he fell far short of satisfying respondent.

Hence both served notice of appeal to the Appellate Division of the Supreme Court of Ontario which, without expressing any opinion on the merits of any of the several contentions set up, set the learned judge's judgment, which had granted an injunction against respondent, aside and directed a new trial with liberty to appellant herein to add the Dominion Sugar Company as defendants.

Upon appeal here from said judgment the objection is raised that it was merely in the exercise of its discretion that the Appellate Division directed a new trial, and hence no appeal would lie here, and further that nothing but questions of practice and procedure were involved in the appeal.

I am afraid that something more is involved, and that we cannot, by that easy way, evade the duty of deciding the questions raised.

In the first place, the then prevalent application of the rule relative to non-interference with the discretion of an appellate court granting a new trial got rather a bad blow from the Judicial Committee of the Privy Council in the case of *Toronto Railway Co. v. King*[16]. We, following what had been the usual

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practice in this court up to that time, of assuming that when the court below in any case had, for one or other apparently good reason, decided to grant a new trial, it had exercised its discretion and hence, under section 45 of the "Supreme Court Act," now involved, no appeal would lie, refused to hear the appeal of *King v. Toronto Railway Company*.

The railway company was unwise enough as the result shewed to appeal to the Privy Council from the judgment of the Ontario Court of Appeal there in question to have the action dismissed, and that ended not only in the company's appeal being dismissed, but also the trial judgment which had been given against the company, being restored. That led to our examining in other cases thereafter the foundation for such alleged discretion as ground for declining jurisdiction instead of assuming it to exist.

When so examined herein, I fail to find any reason for declining jurisdiction. I also fail to find any adequate reason for the court below granting a new trial.

[16] [1908] A.C. 260.

I have considered all the cases cited by Mr. Justice Hodgins and supplemental thereto on the same point by counsel for the respondent in their factums. None of them seem to me to touch what is involved in the alleged necessity for the Sugar Company being made a party to this suit.

The test of whether or not a party is necessary to the due constitution of a suit, was neatly put by Lord Cairns in the case of *Kendall v. Hamilton*[17], where he says, at page 516:—

> I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed.

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Pleas of abatement being abolished, as he had observed, did not prevent the application of the test. Such an objection, if relied upon, may still be taken by objection, in the pleading, to the relief being granted unless and until the necessary party has been added or, I imagine, by a motion in chambers.

No such course was taken and adhered to herein. If so taken and adhered to, it should not have prevailed.

When the nature of the relief sought is such that parties to the original transaction giving rise to the litigation, and thus in privity with him complaining, have obviously a direct interest in having the question correctly decided they may have, though perhaps not actually necessary to the proper constitution of the suit, a clear right to be added.

Some of the cases cited are of this character as, for example, that of a party suing and alleging he sues on behalf of all other shareholders, when in fact he does not.

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[17] 4 App. Cas. 504.

Other cases, such as those concerned in the construction of a will or its validity, have given rise to those concerned being added.

These several cases seem to have been disposed of by application in chambers.

In short, I think the rule was correctly laid down by Buckley J. in the case cited by Mr. Justice Hodgins of *McCheane v. Gyles* (No. 2)[18], at page 917, as follows:

> Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he "ought to have been joined," or that his "presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

I understood it to be admitted in argument that the rule in Ontario is in substance the same as that he

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quoted. And surely if, as in that case, for any reason the absence of a co-trustee of him sued, or the representative of such a co-trustee alleged to have been equally at fault with the one so sued, can furnish no bar to the validity of the proceeding, the absence of one who never had anything to do with the contract in question or the creation of the obligation of which a breach is complained, cannot be heard to complain so long as the one bound by such obligation and answerable in damages is a party and liable also to have the substitutionary relief of an injunction granted against him.

It is not necessary to determine the question here of whether or not, for purposes of discovery, for example, or otherwise, some third party or stranger to the creation of the obligation in question,

[18] [1902] 1 Ch. 911.

yet who has improperly intervened in thwarting the due observance of the obligation by those who were parties to its creation, might properly have been made a party defendant. The distinction between those who may properly be made parties and others who must, is old and often found applicable.

One rather curious feature of this case is that it has not been suggested that the Kent Company, an incorporated holding company possessed of all respondent's shares, except some held by its directors for qualification purposes, and which seems to have manipulated the whole business transactions now complained of and is to protect the Sugar Company in event of litigation, is a necessary party.

And yet the agreement between that company and the Sugar Company expressly provides for the defence of respondent in case of litigation in some features of its dealings through that company being handed over to the Sugar Company if it so desire.

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I imagine the legal mind that constructed some of the devices in question had not the same view of the law requiring those conspiring to defeat a solemn obligation directly resting upon others than themselves being necessary parties to litigation arising thereout, that the judgment of the Appellate Division implies.

I conclude that such like parties are neither necessary parties to this suit nor entitled as of right to intervene and hence no new trial is necessary.

Moreover this is not a common law action, but essentially a judicial proceeding in the nature of suits or proceedings in equity within the meaning of the excepting part of section 45 of the

"Supreme Court Act." And as we held in *Clarke v. Goodall*[19], a case may present both common law and equity features, and latter have to be observed in this connection.

I have therefore no doubt of our jurisdiction to hear the appeal and give the judgment which the court appealed from should have given.

I cannot agree with the learned trial judge's construction of the contract as being that which was within the contemplation of the parties. Nor am I free from doubt as to the form of the judgment granting an injunction.

I am of the opinion that the respondent has violated and threatens to continue violating its covenants with the assignors of the appellant which it is entitled to claim the observance of and, under the circumstances in question herein, to have that observance enforced by an injunction of the court.

The agreement of the 3rd November, 1906, between the respondent and Messrs. Symmes and Coste, provided that the latter should for a term of years,

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yet unexpired, furnish the former, from sources therein referred to, with natural gas.

I shall presently deal with the questions raised as to the extent of the supply intended by the contract, but meantime think it well to dispose of another aspect of the case presented.

The said agreement, by clauses 10 and 11 thereof, provided as follows:—

[19] 44 Can. S.C.R. 284.

10. It is further agreed that the net prices to be charged and collected from consumers of natural gas in Chatham shall be as follows: 25 cents per thousand cubic feet for consumers using natural gas for heating, cooking and other purposes during the months of October to March inclusive; 35 cents per thousand cubic feet for consumers using said gas for heating, cooking and other purposes during the months of April to September inclusive; 35 cents per thousand cubic feet all the year round for consumers using natural gas for cooking, but not for heating, and 15 cents per thousand cubic feet for consumers using 250,000 cubic feet per month or more, excepting what gas shall be used by the Chatham Company at their own works, for which the net price to be paid the producers shall be 7½ cents per thousand cubic feet.

11. It is further agreed that for all gas furnished hereunder the Chatham Company shall pay the producers as follows: As long as the gross recepts from the sales of gas are less than $60,000 a year, 60 per cent. of the gross receipts shall be paid by the Chatham Company to the producers, and as soon as the gross receipts from sales of gas amount to over $60,000 per year, then the Chatham Company shall pay 66⅔ per cent. of the gross receipts to the producers and settlement to be made at the end of the year from the time said natural gas is supplied by the producers or at the end of each following year at the same date whenever said receipts have proven to be more than $60,000.

It then further provided for the keeping of the necessary meters, books and records, and rendering of accounts whereby the observance of said agreement should be carried out. The binding nature of the limitations upon the prices to be charged was of the essence of the contract.

That was fully recognized by respondent for many years in many ways, and especially by several agreements made between itself and others who had become the assignees of the said Messrs. Symmes & Coste,

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varying the prices and classification thereof either in general or in reference to the supply to particular individuals or companies.

For some reason or other they were unable to agree in like manner with regard to the Sugar Company's request for a supply, and in consequence thereof the respondent most unjustifiably proceeded by indirect means to supply the Sugar Company at a lower rate than it was entitled to serve any one in its class under above quoted clauses or any modification thereof.

That was attempted moreover to be put in execution by a deceptive and circuitous method which if maintained would be destructive of the efficacy of the contract.

The Kent Company, above referred to, as holding all the shares in respondent company, save such as needed to qualify the directors of the respondent, seemed to have such a curious conception of the obligations of a contract that it undertook to circumvent the provisions of that in question herein, and imagined that it could do so by a juggling of words to accomplish its end.

It was content to have the directors of the respondent as its puppets pretend in words it was observing the terms of the contract, whilst it, the real master, behind, was emasculating the vital efficiency thereof by handing back to the Sugar Company the rebate that reduced these words to a nullity.

In my opinion such a scheme was conceived in fraud, and is destitute of any legal defence to maintain it in face of the powers of a court of equity which has long exercised the jurisdiction of suppressing fraud.

I think the appellant is entitled to an injunction so framed as to prohibit the violation by the respondent,

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directly or indirectly, of the terms of its contract in question.

What I am inclined to doubt, but express no opinion upon, especially in the absence of argument directed to the point, is whether or not the injunction granted by the learned trial judge does not go so far as to exercise a supervision over the execution of the respondent's business in a way that courts of equity have uniformly declined to accept the burden of in granting injunctions.

In the view I have reached and am about to express I need not, if agreed to by a majority of the court, form such a definite opinion as might otherwise be necessary on this point.

Coming to the question which, beyond all others, the parties concerned seemed most anxious to have decided, of whether or not the contract bound the appellant's assignors, and hence it, to furnish natural gas to serve those needing such service beyond the bounds of the city as they existed at the date of the contract, I desire at the outset to remove any impression that may be derived from the mutual course of conduct which was observable throughout in serving consumers beyond the said limits.

If a contract is ambiguous the surrounding circumstances must be considered by way of illuminating that which may have been imperfectly expressed.

In other words, if we would understand what men have expressed we must realize the business they were about.

That cannot be extended beyond the immediate acts following the signing of their contract.

I, therefore, exclude all that was done by way of subsequent contracts, evidenced only by the conduct of the parties, in the interpretation or construction of the contract in question.

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Such subsequent transactions must stand or fall on their merits.

The construction of the contract in question depends upon the meaning to be attached to the words “City of Chatham” used therein, at the time it was executed.

Stress has been laid upon the word “customers” and it has been connected in argument with the existence of a customer or customers outside the bounds of the city at the time of the making of the contract, as indicative of some intention to operate beyond the then city limits and hence to extend to any obtainable customers.

It is also pointed out that in the first clause the producers were bound to furnish a high pressure line of sufficient capacity for all the requirements of the Chatham Company and its consumers. The subsequent clauses make clear what is meant. The requirements of the company were specially referred to and a lower price therefor charged than to others, being its customers. Again the producers are restrained in clause 4 from furnishing gas to any one outside Chatham excepting the supply shall be greater than that required by the company for itself and its consumers for all purposes.

And again in clause 6 the company is bound to take and supply the gas to its consumers in Chatham.

Inasmuch as the contract is clearly intended to be reciprocal this provision and the entire absence of any provision for outside customers, seems to put beyond peradventure what was meant by the word “customers.” Clearly it was only those within the city that were actually provided for.

The supply to any others outside must depend upon collateral contracts and whether these were *intra vires* or not does not concern us here.

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The scope and purpose of the written contract was the sale of gas in the City of Chatham to customers to be found therein and served there.

All other more or less irrelevant issues being eliminated, we have to determine whether it was only the then City of Chatham or also a future greater Chatham that was within the contemplation of the parties in thus framing their contract.

The plain literal meaning of the words surely limits the contract to that which was then existent just as much as if the supply contracted for had been for a given factory or block of buildings. What right would any one so bound have to extend it beyond the then present limits? What right have we to extend it beyond?

Suppose the city had so decayed, or grown in another direction than anticipated, as to render it expedient for purposes of its municipal government to have the limits changed and a part of it cut off, and in that cut off part there was a single factory to which a service pipe of the respondent had extended, could it be said that the appellant might then refuse to furnish gas for that factory, simply because the boundaries of the city had been changed for municipal purposes?

I put the converse case in order to bring out clearly what is involved in the contention of respondent. I venture to think no court would heed very much such a contention as assumed on the part of appellant in the case I put.

Moreover there may occur at any moment in a rapidly growing city the annexation of a suburban village already equipped with a plant of its own, or a service supplied by a gas or water company;

could the contracting parties serving, just as here, the rapidly growing city, pretend they had as of course in such a

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contingency thereby the right to serve the village annexed and discard what existed there for the like service? That seems inconceivable, yet it is what had happened and been contended for unsuccessfully in the analogous case of street railways in Detroit.

I cannot help thinking that the process of reasoning which rests upon the application of by-laws enacted for the general good government of a municipality to any new annexation thereto, and pressed on us as being relevant to and of necessity governing the determination of the contractual rights either of the municipality or those ancillary companies contracting for the service to be given the inhabitants thereof, is essentially unsound.

I submit there is a confusion of thought in such a mode of reasoning. The promiscuous mingling of the governmental jurisdiction of a council with the contractual relation of the corporate body does not help to anything but to confuse and mislead. And none the less so when we know that the mode of entering into a contract must be by by-law and the legislative function must also be discharged by a by-law.

To apply that mode of reasoning as sought herein must inevitably lead to unjust and possibly in some cases disastrous consequences.

Whatever may be said and there is much in favour of the reasonable expectation of a local company incorporated under and by virtue of the statute whereby respondent was first and secondly constituted, being liable to be defeated by the narrower construction of the said statutes than respondent contends for, is to my mind far outweighed by the consequences liable to flow from the maintenance of such contention.

It is to be observed that this sort of corporate companies are by the statutes enabling their creation so

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limited as to capital and time of existence as to shew they were only intended as a temporary expedient.

And, as if anticipating the very argument set up herein derivable from their creation by by-law and the enactment that in case of annexations the by-laws of the annexing municipality are to prevail, the statute has been amended to read as follows:—

> Section 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.

I call attention to the excepting part of this new clause which I may be permitted to suggest is of very doubtful import.

Clearly it was intended to prohibit the very conflict I have suggested as possible by virtue of annexations of villages to towns or cities.

Evidently the draftsman did not suppose that such a conflict was in law possible by a claim on the part of those supplying a service to the larger and annexing municipality, as here in question.

The “Municipal Franchises Act,” 2 George V., ch. 42, seems on the facts presented to be an impassable barrier in the respondent’s way herein, unless its contention that by virtue of the annexation it obtained by force of its charter a right to serve the annexed part is maintainable.

I have suggested all I need say in that regard.

My opinion is that the instrument before us is but a contract which related to a limited period and only contemplated a service for the purposes of the City of Chatham as it existed at the date thereof.

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The like reasoning which supported that part of the judgment of this court in the case of *Toronto Railway Co. v. Toronto*[20], and the court above in the same case[21], relative to the boundaries of the city at the date of the contract being the governing line and limit of the operation of the contract, seems to me to support the opinion I express.

I recognize, however, that as has been so often said, decisions upon one contract may be of little service in determining the meaning of another. As illustrations, however, they are no doubt useful.

And in closing I may be permitted to say that I have a great reluctance to extending by implications, unless so clear as to be necessary to execute the purpose of the parties as expressed, that which is not expressed in a contract, and especially so when that contract is one in common use likely to bring undesirable consequences as the result of such treatment. I have more faith in parties being able to express what they want than in any guess a court is likely to make.

[20] 37 Can. S.C.R. 430.
[21] [1907] A.C. 315.

The respondent argues that its charter by its very nature shews it was intended to operate in the whole of the municipality whatever might be its bounds and the company to serve all the inhabitants thereof.

I have already illustrated how such a contention if upheld might produce undesirable results and attempted to shew thereby how doubtful the proposition may be in law.

The tendency of these several statutory changes I have just cited as illustrative of the minds of legislators relative to such a contention, rather suggests that the view put forward as to the scope of such like charters has not been generally accepted and hence cannot

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fairly be said to have been one of the things which inevitably must have been present to the minds of Messrs. Symmes & Coste in framing the contract, and hence necessarily within the contemplation of the parties.

It may well be that the powers of a corporate company must form in arriving at an agreement the subject of due and full consideration in some cases. But it does not in this sort of case necessarily go beyond attention being paid to the actual fact of its having power to do that which the parties contracting with it have presented to their minds.

And if the respondent had clearly the widest sort of corporate power entitling it to go far beyond the bounds of the city in carrying on its business, that fact could not expand the plain literal meaning of the words used.

There is far more force in the counter argument of appellant that this unexpected demand upon its material appliances and resources would render it necessary to double its capacity.

That, however, is a contingency that possibly might have arisen had chance brought the Sugar Company to locate within the bounds of the city as they existed at the date of the contract.

Neither argument seems to me entitled to much weight relative to the construction of the contract.

The lastly mentioned one, however, does bring added force to the appellant's case by emphasizing the unjustifiable conduct of the respondent in seeking to destroy the efficacy of the contract relative to the rates to be charged.

I conclude that the parties having, in framing this contract, had in contemplation only a service for the inhabitants of the city as then delimitated, it should be so declared and an injunction be granted as prayed, and

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alternatively that in any event the appellant is entitled to have the respondent enjoined against departing from the terms of the contract as modified.

The appeal should be allowed and the injunction granted as prayed for with costs to the appellant throughout.

DUFF J.—I am of opinion that the appeal in this case should be allowed in part.

ANGLIN J. (dissenting)—The foundation for, as well as the occasion of, this action is alleged contravention by the defendant of its contractual obligations to the plaintiff involved in a contract for a supply of natural gas made by the defendant with the Dominion Sugar Company. No other breach of the contract between the plaintiff (assignee of Symmes & Coste) and the defendant is

suggested in the statement of claim. In addition to a judgment declaratory of the rights of the plaintiff and defendant *inter se* as to the area within which the latter is entitled to distribute natural gas supplied to it by the former, the plaintiff expressly prays for an injunction restraining the defendant from supplying to the Sugar Company natural gas furnished by it.

The learned trial judge held that upon the proper construction of the contract between the plaintiff and the defendant the situation of the Sugar Company's refinery did not preclude the defendant from supplying it with gas furnished by the plaintiff. In his opinion, however, the contract between the defendant and the Sugar Company was unfair to the plaintiff and such that the defendant was not entitled to require the plaintiff to supply gas to enable it to be carried out, in that, although to provide means of furnishing the quantity of

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gas which the Sugar Company might need would entail a duplication of the plaintiff's plant at great expense, there was no obligation on the part of the Sugar Company actually to take more than a trifling quantity of gas, and that a collateral agreement for a rebate gave that company an undue preference over other Chatham consumers, and was also contrary to the bargain as to prices to be charged by the defendant to its customers fixed by its contract with the plaintiff. He granted an injunction restraining the defendant from diverting gas supplied by the plaintiff to the Sugar Company under the existing agreement between that company and the defendant and under any other agreement that might be made or other conditions that might arise until sanctioned by the court.

The Appellate Division, expressing no opinion upon the construction of the contract between the plaintiff and defendant as to the area within which gas furnished under it might be supplied by the defendant to its customers, but disapproving of the order disabling it from making any agreement with the Sugar Company except with the sanction of the court, was unanimously of the opinion that in the absence of the Sugar Company the action was not properly constituted. The course suggested by the court, that that company might be added with its own consent and that of the

present parties and the case determined on the record so amended, having for some reason been found unacceptable, the judgment of the trial judge was set aside, and a new trial ordered, with liberty to the plaintiff to add the Sugar Company as a party defendant. From that judgment the plaintiff now appeals.

It is obvious that the first matter for consideration is whether the appellant is entitled *ex debito justitiœ* to obtain the relief which it seeks without the Sugar Com-

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pany being brought before the court, or whether, either because that company is a necessary party, or because judicial discretion would be properly exercised in directing that it should be added as a defendant, in order that it may have an opportunity of upholding any rights which its contract with the defendant purports to confer before it should be determined that those rights are non-existent, the order pronounced by the Appellate Division should be sustained.

Under its contract with the defendant it is natural gas furnished by the plaintiff that the Sugar Company is to receive. The obligation of the defendant to supply and that of the Sugar Company to take is to

> continue so long as natural gas can be obtained or secured by the Gas Company (the defendant) under and pursuant to the terms of the agreement between the Gas Company and the producers (the plaintiff)."

It may at least be arguable that if the plaintiff is unwilling and cannot be compelled to furnish gas to the defendant for delivery to the Sugar Company there is a failure of the subject matter of the contract between the defendant and the Sugar Company, and that consequently an action by the latter against the former for damages for breach of contract would not lie. As Mr. Justice Hodgins points out, we are not dealing with the ordinary case of "a contract for the supply of a commercial

article," in respect of which, upon his vendor's failure to deliver, a sub-purchaser would have the ordinary recourse in damages.

Under these circumstances, if the construction should be placed upon its contract with the defendant for which the plaintiff contends, the effect might be to determine that the Sugar Company has no rights whatever against the present defendant. Such a determination of the Sugar Company's rights and position behind its back, though not binding upon it as *res judicata,*

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could not but prove prejudicial to it in any future contest over the same question. Moreover, unless the Sugar Company should be deterred by the practical effect of an adverse judgment rendered in this action from seeking to enforce its contractual claims, a second litigation of the same question (its right as a customer of the defendant within the present limits of the City of Chatham to be supplied with natural gas furnished by the plaintiff) must ensue—a result which it is now the policy of the courts to obviate, when that may be done without seriously prejudicing or embarrassing the plaintiff, by adding parties not otherwise necessary, but proper to be added within the limits prescribed by the rules. *Clifton v. Crawford*[22]; *Cornell v. Smith*[23].

[22] 18 Ont. Pr. R. 316, 318.
[23] 14 Ont. Pr. R. 275, 276.

While an injunction forbidding the present defendant from delivering to the Sugar Company gas received from the plaintiff would not bind the Sugar Company so as to render it technically liable for a breach thereof because it would not be enjoined from receiving the gas, yet it would be just as effectively prevented from taking gas furnished by the plaintiff as if it had been so enjoined because such taking, with knowledge of the injunction, would be "assisting in setting the court at defiance"—would "obstruct the course of justice"—would "contumaciously set at naught the order of the court"—and would therefore properly render the Sugar Company punishable for contempt. *Seaward v. Paterson*[24], at pages 554 *et seq.; Scott v. Scott*[25], at page 457.

The case of *Hartlepool Gas & Water Co. v. West Hartlepool Harbour & Rly. Co.*[26], cited by Mr. Justice Hodgins, is indistinguishable in principle from that at

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bar. In alleged violation of an agreement with the plaintiff, the defendant in the *Hartlepool Case*[26] supplied its lessees (P.S. & Co.) with water not obtained from the plaintiff. Kindersley V.C., although he thought, as then advised, that the defendant could be restrained from doing this, was

> quite satisfied that the court cannot express any such opinion in the absence of P.S. & Co. so as to deal with them in such a manner as most materially to affect the important interests of those absent parties. * * * If the defendants had not entered into any lease or contract with P.S. & Co., I should grant the injunction, but inasmuch as they have entered into this lease or contract, I cannot grant an injunction without doing such prejudice to P.S. & Co. as ought not to be done to an absent party. It is not because the defendants would not (*sic*) be liable to an action by P.S. & Co. or to any inconvenience which might arise but it is because the court, on principle, will not ordinarily and without special necessity interfere by injunction, where the injunction will have the effect of very materially injuring the rights of third persons not before the court.

[24] [1897] 1 Ch. 545.
[25] [1913] A.C. 417.
[26] 12 L.T. 366.

The interests of their lessees (P.S. & Co.) in that case would have been affected by an injunction against the defendants precisely in the same manner as those of the Sugar Company would be affected by an injunction against the present defendant.

It is, no doubt, quite within the power of the court to determine the construction of the contract between the parties to it in this action as now constituted. In that sense the Sugar Company is not a necessary party. If it rests on the contrary view, the judgment of the Appellate Division, even were this not an equitable action, would not be non-appealable under section 45 of the "Supreme Court Act." Yet, having regard to all the circumstances, and particularly to the obvious prejudice to the Sugar Company's contractual claims which must result from a judgment adverse to the defendant, to the occasion for and object of the present action, the form which it has been given, the allegations

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of the statement of claim and the relief sought, and to the desirability of having an adjudication in it which will preclude a second action upon the same issue, in my opinion, the order directing a new trial and giving the plaintiff liberty to add the Sugar Company as a defendant may well be supported as one that might have been made in the exercise of a judicial discretion which could not be held to have been erroneous.

For these reasons it would seem to me to be improper to grant relief by injunction in the absence of the Sugar Company; relief by way of damages for breach of contract is not asked and would scarcely be appropriate; and the circumstances are not such that the discretionary power of the court (*In re Berens*[27]*),* to pronounce a declaratory judgment unaccompanied by consequential relief, which, wide as it is (*Guaranty Trust Co. v. Hannay & Co.*[28], at pages 562, 564), is always acted upon "with extreme care and caution" (*North Eastern Marine Engineering Co. v. Leeds*

[27] [1888] W.N. 95.
[28] [1915] 2 K.B. 536.

Forge Co.[29]); *Faber v. Gosworth Urban District Council*[30], and usually only if it does not involve "interfering with the rights of other persons" (*Austen v. Collins*[31]), should be exercised.

In England, where the provision for pronouncing declaratory judgments, formerly contained in the statute 15 & 16 Vict. ch. 86, sec. 50, is now found in an extended form in a Rule of Court (O. XXV., r. 5), its validity in this latter form has been upheld by the Court of Appeal on the ground that it does not confer jurisdiction in the sense that without it the court would lack "power to deal with and decide the dispute as to the subject-matter before it," but merely enables it to

[29] [1906] 1 Ch. 324, 329.
[30] 88 L.T. 549, 550.
[31] 54 L.T. 903, 905.

do so “in a different manner, under different circumstances and when brought before it by a different person,” and that it is therefore “only dealing with practice and procedure.” *Guaranty Trust Co. v. Hannay & Co.*[32], at pages 563-4, 570. In Ontario the former Chancery Order, No. 538, which corresponded with the former Imperial statute (15 & 16 Vict. ch. 86, sec. 50) is now replaced, likewise in an extended form, by sec. 16 (*b*) of the “Judicature Act,” which is identical with the present English O. XXV., r. 5. Under the Ontario statute, as under the English Rule of Court, whatever may be the proper view as to the scope and character of the provision itself, the propriety under any given set of circumstances of exercising the power which it enunciates cannot be other than a matter of practice and procedure—just such a matter as it has been time and again decided should be finally determined by the Appellate Court of the province in which it arises, and, without questioning our jurisdiction, has been held not to be a proper subject of appeal to this court. *Emperor of Russia v. Proskouriakoff*[33]; *Green v. George*[34]; Cameron's S.C. Practice 85; *Arpin v. Merchants Bank*[35].

I would therefore be disposed to dismiss this appeal without any expression of opinion upon the construction of the contract between the plaintiff and the defendant.

In deference however to the contrary opinion on this aspect of the case held by the majority of the court, I proceed to state briefly my view upon the proper construction of the contract between the plaintiff and defendant as to the area within which the defendant is entitled to distribute natural gas supplied by the plaintiff.

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The contract requires that the producers (the plaintiff) shall furnish to the defendant natural gas

[32] [1915] 2 K.B. 536.
[33] 42 Can. S.C.R. 226.
[34] 42 Can. S.C.R. 219.
[35] 24 Can. S.C.R. 142.

> through a high pressure line or lines of sufficient capacity for all the requirements of the Chatham Company and its consumers:

that they shall so

> furnish to the Chatham Company natural gas in sufficient quantities at all times for the purposes of the Chatham Company's present and future consumers, and the Chatham Company's own use * * * and shall use due diligence at all times in prospecting and drilling wells for gas so that the supply may be continuous for all the purposes of the Chatham Company, and * * * shall make any reasonable expenditure that may be necessary to make the supply continuous:

and that they

> shall not furnish natural gas in Chatham during the continuance of this contract to any person or corporation other than the Chatham Company so long as the Chatham Company continues to take its supply from the producers.

It requires the Chatham Company to take its supply from the producers (the plaintiff), unless they are unable to deliver it, and forbids the producers supplying any person or corporation outside the city, except

> customers along their high pressure line, between the field and Chatham, unless the supply from time to time shall be greater that that required by the Chatham Company for itself and its consumers for all purposes.

It requires the Chatham Company to maintain and operate

> a system of mains, pipes, fixtures and apparatus suitable and sufficient to distribute the gas to be supplied under this contract to any person, firm or corporation in the said City of Chatham desiring to use the same.

Two features stand out as essential and predominant in this contract—the defendant is obliged to take all its gas from the plaintiff (so long as it can furnish sufficient for the defendant's business)

and to provide for its distribution to every person in Chatham desiring to use it; the plaintiff is obliged to supply (as far as it can or as due diligence and reasonable expenditure will enable it to do so) all the gas required by the defendant

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for itself and all its customers. The franchise of the defendant to distribute, and the obligation of the plaintiff to furnish gas (within the limitation stated) would therefore appear to be co-extensive and coterminous and to have been intended to remain so during the term of the contract between the plaintiff and the defendant. The limit of the plaintiff's obligation is the requirements of the Chatham Gas Company within its franchise.

The Chatham Gas Company was constituted in 1872, under a power then enjoyed by municipal corporations (C.S.C., ch. 65) enabling them to incorporate companies "for supplying cities, towns and villages with gas and water," by a by-law of the Town of Chatham which recited the desirability of "lighting with gas the streets and buildings of the said town" and gave it authority for that purpose to "lay down pipes or conduits under any of the streets or public squares of the town." It was "re-created and re-constructed" under the same statutory authority (R.S.O., [1877] ch. 157) by a by-law passed in 1884, and its corporate existence was formally recognized and declared by the Ontario statute 48 Vict. ch. 81. The right to substitute natural gas for artificial gas, if it did not already possess it, was conferred upon it by a by-law in 1906, when its agreement with the plaintiff was made.

It was the obvious purpose in creating this corporation that its franchise and its functions should be territorially co-extensive with the area of the municipality. The creation of such a company was the means provided by the legislature for the carrying on of a public utility under municipal authority and control for the benefit of an entire city, town or village. It was intended that the Chatham Gas Company should supply the needs of all citizens. Its franchise was

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perpetual. It would seem to follow that, as the municipal limits should extend, the franchise of the Gas Company with its co-related powers and obligations should also extend. If not, it would lose its municipal identity and the purpose of its creation would be defeated.

When the territory within which the refinery of the Dominion Sugar Company is situated was brought into the City of Chatham, the franchise, powers and obligations of the Chatham Gas Company, in my opinion, automatically extended to the area so annexed, subject, it may be, to any existing right or franchise of the plaintiff or any other company within the annexed territory. R.S.O. [1914] ch. 192, sec. 33; *Wentworth v. Hamilton Radial Electric Railway Co.*[36] There was no exclusive gas franchise in this annexed territory.

Moreover, assuming that the contract should be construed as the plaintiff contends, I am by no means satisfied that it is entitled in this action as now framed to a declaration that its contractual obligation with the defendant is restricted to supplying gas to be distributed within the limits of the City of Chatham as it existed at the date of the contract, the 6th November, 1906. The plaintiff well knew that at that time the defendant was supplying gas to a considerable number of consumers outside the limits of the city and it has since continued, with the knowledge and acquiescence of the plaintiff, to supply these and other outside consumers with natural gas furnished by the plaintiff. The plaintiff has for upwards of ten years under the terms of the contract knowingly taken its 60%, or 66⅔% of the defendant's receipts from such customers. If granted the declaration it seeks, the plaintiff would be

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entitled now to require the defendant to cut off all these customers. A general injunction restraining it from supplying consumers outside the limits of the city as they were in 1906 would have that effect and would seem to be open to the objections that it would be unfair to many

[36] 54 Can. S.C.R. 178.

persons not represented and also *ultra petita,* the only injunction asked being to restrain the supplying of gas to the Sugar Company. It may be worthy of the plaintiff's consideration whether there should not also be representation of other outside consumers.

In the absence of the Dominion Sugar Company the only observation I desire to make upon other features of its contractual relations with the defendant referred to in the judgment of the learned trial judge is that, at all events without some explanation not in the record, at least one of them—that providing for a rebate through the medium of a holding company—savours of methods which a court of justice cannot countenances.

If required now to dispose finally of the present action I should dismiss it.

Appeal allowed with costs.

Solicitors for the appellants: Kerr & McNevin.

Solicitors for the respondents: Wilson, Pike & Stewart.