14. 1932

No. 45 of 1931.

In the Privy Council.

ON APPEAL

FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC

(Appeal Side).

BETWEEN:—

MONTREAL LIGHT, HEAT & POWER CONSOLIDATED (Defendant) and THE MONTREAL LIGHT, HEAT & POWER COMPANY (Mis-en-cause) - *Appellants*

— AND —

THE CITY OF OUTREMONT (Plaintiff) *Respondent.*

CASE FOR THE APPELLANTS.

RECORD.

1. This is an appeal from a Judgment of the Court of King's Bench for the Province of Quebec (Appeal Side) dated 30th October, 1930, confirming (Letourneau, J., dissenting in part) a Judgment of the Superior Court dated 14th October, 1929, which maintained, with costs, the action of the Plaintiff (the present Respondent) for $3.262.82 with interest at 6% from 1st December, 1926, for municipal and school taxes for the years 1924-25, 1925-26 and 1926-27. p. 109. pp. 46-59.

2. On the 24th August, 1904, the Respondent, acting under the authority of its By-law No. 65, entered into an Agreement with the Mis-en-cause executed before A. C. Lyman, Notary, providing for the supply, for a term of 30 years, of gas to the Respondent to light the streets and public places therein and to the citizens thereof for domestic and manufacturing purposes and the laying of mains and pp. 147-152. pp. 152-160. pp. 156-8.

p. 159, ll. 1-10. service pipes in certain specified streets. By this Agreement the Mis-en-cause was bound at the request of the Respondent to lay mains and service pipes in other streets whenever it could derive a net revenue of 6% on the outlay or if it were guaranteed a certain
p. 159, ll. 30-4. number of consumers per unit length of main. The Respondent exempted from taxation and license for a period of 20 years all property of the Mis-en-cause in the municipality forming part of the system for supplying gas therein and assigned and transferred to the Mis-en-cause all rights in connection with the supply of gas
p. 159, ll. 36-44. in the municipality, the Mis-en-cause being subrogated in such rights during a period of 30 years and the Respondent agreeing not to lay or permit others to lay gas pipes in its streets or public places. The gas mains in question were laid pursuant to this Agreement.

pp. 173-9. **3.** By Agreement dated 7th June, 1916, the Defendant (then called "The Civic Investment & Industrial Company") took over the operation of the Mis-en-cause from 1st August, 1916, and still operates it.

4. The Respondent, which, except for minor special provisions, is governed by the Cities and Towns' Act, R.S.Q. 1925, Cap. 102, purported to assess the gas mains of the Mis-en-cause in the streets for the years ending 31st October, 1925, 1926 and 1927, entering them in the valuation rolls in the name of the Mis-en-cause as proprietor.

pp. 213-5.

pp. 190-3. **5.** Under the authority of resolutions of the School Commissioners and the School Trustees of the City of Outremont and of the Respondent, ratified by the Act 11, George V, Cap. 114, sec. 3, school
pp. 204-6. taxes upon these gas mains for the year ending 30th June, 1925, were included in the collection rolls of the Respondent and school taxes on the mains for the years ending 30th June, 1926 and 30th June, 1927, which were imposed by the Act 15 George V, Cap. 45,
pp. 207-12. sec. 16, amended by 16 George V, Cap. 47, sec. 1, were also included in the Respondent's collection rolls.

pp. 9-10. **6.** The Respondent brought action against the Defendant as proprietor, holder and in possession of the gas mains in question for municipal and school taxes for the three years mentioned above with interest from 1st December, 1926, and asked that its privilege therefor be declared good and valid and affecting the property sought to be taxed.

pp. 22-5. **7.** After examining the Assistant Secretary-Treasurer of the
pp. 12-3. Defendant on discovery the Respondent moved to amend its writ
p. 36. and declaration by adding thereto as co-Defendant the Mis-en-cause. The Judgment on this motion permitted the Respondent to

join Montreal Light, Heat and Power Consolidate (sic). The Respondent's amended writ and declaration described the Mis-en-cause as "mise-en-cause comme co-défenderesse suivant jugement "de cette Cour du 22 mars 1927". The Mis-en-cause then moved by way of exception to the form. This motion was dismissed, the judgment merely correcting the clerical error, and an appeal from the judgment was dismissed by the Court of King's Bench. pp. 13-6. p. 16. pp. 37-8. p. 39.

8. The Defendant and Mis-en-cause both denied that they were liable for the taxes in question and that the Superior Court had any jurisdiction as regards school taxes, and set up that all rolls and proceedings in respect of the taxes claimed were null and void and *ultra vires* insofar as they purported to value or assess taxes upon the gas mains in question, that the Respondent was not authorized to value or assess the mains and that the assessments thereof were null and void, that they were not proprietors, holders or in possession of any land within the municipality and that the mains were laid at the request of the Respondent under the terms of the Agreement of 24th August, 1904, the Mis-en-cause further setting up the provisions of that Agreement particularly and pleading that unless the Defendant were condemned the Mis-en-cause could not be condemned having been called into the action only as an incident thereof. pp. 17-9.

9. It was proved that neither of the Appellants was the owner of any land in the territory of the Respondent, that except for the purpose of supplying gas the mains in question were worthless even as scrap and that all extensions had been laid at the Respondent's request and under pressure on its part. p. 32, ll. 6-10. p. 33, ll. 48-50. p. 32, ll. 32-8. p. 33, ll. 11-5.

10. The Superior Court (Loranger, J.,) maintained the Respondent's action for $3,262.82 (the demand having been reduced to that amount at the hearing) and condemned each of the Appellants to pay the said sum with interest at 6% from 1st December, 1926, and declared their immoveables situated in the territory of the Respondent affected by the Respondent's privilege for the payment of the taxes in question, the whole with costs. p. 58, ll. 49-50. p. 59, ll. 1-6.

11. The main reasons given by the Trial Judge for his decision were:—

(a) that the gas mains were immoveable by nature as being buildings; within the meaning of art. 376 of the Civil Code (following *Montreal Light, Heat & Power Consolidated v. The City of Westmount*, C. L. R. 1926, Supreme Court, p. 515) and were situate within the territorial limits of the Respondent and were taxable by it; pp. 49-50.

pp. 50-1. (b) that the Mis-en-cause was the owner of the gas mains and that the Defendant was in possession thereof as owner and was the lessee and in possession thereof and that both were liable for the tax imposed;

p. 51, ll. 23-6. (c) that both Appellants were owners of immoveables in the municipality Respondent;

pp. 51-3. (d) that the terms of the Agreement of 24th August, 1904, did not prevent the imposition of taxes on the mains after the expiration of 20 years from its date; and

pp. 53-8. (e) that the Superior Court had jurisdiction in respect of the school taxes on the ground that they were merged with the municipal taxes, the demand affected future rights and was subject to evocation to the Superior Court and the exclusive jurisdiction of the Circuit Court did not pertain where the claim was made by the municipality.

12. The Appellants' appeal from this judgment was dismissed by the Court of King's Bench (Tellier, Howard, Letourneau, Hall and Galipeault, JJ.), the formal judgment containing no reasons.
p. 109.

13. Tellier, J., gave as reasons for judgment:—

p. 111, ll. 37-47. (a) that under the Westmount Case referred to above the gas mains were immoveables;

p. 111, ll. 48-50. p. 112, ll. 1-4. (b) that the Agreement of 24th August, 1904, did not prevent the imposition of taxes after the period of 20 years;

pp. 112-4. (c) that the Superior Court had jurisdiction in respect of the school taxes partly on the ground that the exclusive jurisdiction of the Circuit Court was limited to cases where the action was brought by the school commissioners or school trustees themselves and partly on the ground that the action was not a purely personal one;

p. 114, ll. 31-50. (d) that the Defendant was liable for the taxes as lessee, occupant or possessor of the gas mains; and

p. 115, ll. 1-5. (e) that the Mis-en-cause had been regularly joined in the case as co-defendant and could be condemned.

14. Hall, J., gave the following reasons for judgment:—

p. 123, ll. 1-22. (a) that the gas mains were immoveable by nature as being buildings;

pp. 123-4. (b) that the terms of the Agreement of 24th August, 1904, did not preclude the Respondent from imposing taxes upon the mains;

pp. 124-7. (c) that the Superior Court had jurisdiction in respect of the school taxes on the ground that the latter were incorporated in and with the municipal taxes;

(d) that the Defendant could be condemned partly on the ground that the Agreement of 7th June, 1916, was an emphyteutic lease and partly on the ground that the Defendant enjoyed all the rights of an owner; and pp. 127-31.

(e) that the Mis-en-cause was a joint defendant and must be found responsible whether or not the Defendant was condemned. p. 131, ll. 10-20.

15. Howard, J, concurred in the reasons of Tellier and Hall, JJ., and Galipeault, J., gave no reasons. p. 115.

16. Letourneau, J., agreed with Hall, J., except as to the liability of the Defendant on which point he was of opinion that it could not be held liable for municipal taxes as it was not entered on the rolls and the exception of Section 534 of the Cities and Towns' Act permitting collection from the holder, occupant or other possessor applied only in respect of *land*. p. 115, ll. 40-50. pp. 116-7.

17. The Appellants respectfully submit that the courts below were wrong in holding that the gas mains are immoveables by nature as being buildings within the meaning of Article 376 C.C. which reads:—"Lands and buildings are immoveable by their nature", and that the decision of the Supreme Court of Canada in *Montreal Light, Heat & Power Consolidated v. City of Westmount*, C.L.R. 1926 Supreme Court, p. 515, followed by the courts below in the present case was erroneous.

18. The Appellants further submit that even though the gas mains were to be considered as constituting a separate immoveable by nature yet they are not subject to the taxes claimed. The words "immoveable property" in the Act 15 George V., Cap. 45, Sec. 16 and the word "immoveable" in the Cities and Towns' Act, Sec. 521, in which the taxing power of the Respondent lies, are not defined in the Statutes in which they appear and it is obvious that the words cannot extend to everything declared by the Civil Code to be immoveable (*Breakey v. The Township of Metgermette*, 61 S.C.R. at p. 248). Therefore it is necessary to determine their meaning by reference to the other provisions of the Cities and Towns' Act as regards municipal taxes and the Education Act, R.S.Q., 1925, Cap. 133 as regards school taxes, and it is clear from the provisions of these Acts, including the definition of "immoveable" contained in Sec. 2, sub-sec. 15 of the Education Act, that what is taxed in each case is the same, viz: land with its accessories and not buildings or accessories apart from the land.

19. The Appellants further submit that the Superior Court has no jurisdiction in respect of the school taxes as none of the statutes

under which these taxes were collectable by the Respondent purported to confer any jurisdiction with respect thereto upon the Superior Court.

20. The Appellants further submit that the word "land" in Sec. 534 of the Cities and Towns' Act must be given its ordinary and natural meaning with the result that municipal taxes could not be collected from the Defendant as the tenant, occupant or other possessor of the gas mains.

21. The Appellants further submit that the contractual relationship between the Mis-en-cause and the Respondent precluded the latter from imposing taxes upon the gas mains.

22. The Appellants further submit that if the Defendant be not found responsible for the taxes in question the Mis-en-cause cannot be condemned as it was merely joined in an action brought against the Defendant as an incident thereof.

23. The Appellants further submit that the judgment of the Superior Court should not be maintained inasmuch as it condemns each of the Appellants separately with the result that there is a double condemnation for the amount claimed.

24. The Appellants therefore respectfully submit that this Appeal ought to be allowed and the judgments of the Court of King's Bench (Appeal Side) and the Superior Court reversed for the following among other

REASONS.

(1) Because the property sought to be taxed is not immoveable property.

(2) Because even if the gas mains were immoveable it was not within the power of the Respondent or the School Commissioners or School Trustees of the City of Outremont to impose taxes thereon and no taxes were imposed thereon by the Act 15 George V, Cap. 45, sec. 16 and all rolls and proceedings with respect to the taxes which it was sought to impose are *ultra vires*, null and void.

(3) Because the Superior Court had no jurisdiction in respect of the claim for school taxes.

(4) Because the Defendant is not entered in the valuation or collection rolls of the Respondent.

(5) Because the property sought to be taxed is not *land* and therefore municipal taxes thereon cannot be collected from the Defendant as tenant, occupant or other possessor.

(6) Because under the terms of the Agreement of 24th August, 1904, the Respondent could not impose taxes upon the gas mains of the Mis-en-cause, even after the expiry of the twenty year period.

(7) Because if the action be dismissed as against the Defendant it cannot be maintained against the Mis-en-cause.

(8) Because the Appellants could not each be condemned separately to the payment of the amount claimed.

(9) Because the judgments of the Court of King's Bench (Appeal Side) and Superior Court are wrong and the Respondent's action is unfounded.

WARWICK CHIPMAN.

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— AND —

THE CITY OF OUTREMONT (*Plaintiff*) (*Respondent*).

CASE FOR THE APPELLANTS.

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