

The Montreal Light, Heat and Power Consolidated and others - *Appellants*

v.

The City of Outremont - - - - - *Respondent*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY, 1932.

Present at the Hearing :

LORD TOMLIN.
LORD THANKERTON.
LORD MACMILLAN.

[*Delivered by LORD TOMLIN.*]

The question under consideration in this appeal is whether the appellants or either of them are or is liable to the respondent City of Outremont for municipal and school taxes in respect of gas mains lying under the public streets of the city. The mains are the property of the second appellant. The gas undertaking of the second appellant is operated by the first appellant. The soil of the streets under which the mains lie is not owned by the appellants or either of them.

The mains were laid and are maintained and the supply of gas is given under a contract dated the 24th August, 1904, between the respondent and the second appellant, by which the second appellant agreed upon the conditions therein set out to supply gas in the City of Outremont for the term of 30 years.

The gas works of the second appellant at which the gas supplied under the agreement is generated, and with which the mains are connected, have throughout been and are situate in the City of Montreal.

Under the terms of an agreement dated the 7th June, 1916, the first appellant (then called the Civic Investment and Industrial Company) took over, from the 1st August, 1916, the operation of the undertaking of the second appellant, and has since continued and still continues to operate such undertaking.

For the years ending respectively the 31st October, 1925, the 31st October, 1926, and the 31st October, 1927, the respondents assessed for municipal taxation purposes the gas mains of the second appellant's undertaking lying under the public streets of the City of Outremont and entered in the valuation rolls the name of the second appellant as proprietor of such mains.

School taxes in respect of the same mains for the year ending the 30th June, 1925, were included in the collection rolls of the respondent as the result of certain resolutions of the respondent and of the School Commissioners and School Trustees of the City of Outremont, ratified by the Act 11 George V, c. 114, Section 3, which section was repealed and re-enacted by the Act 16 Geo. V, c. 74.

School taxes in respect of the same mains for the years ending respectively the 30th June, 1926, and the 30th June, 1927, imposed by the Act 15 Geo. V, c. 45, Section 16, as amended by the Act 16 Geo. V, c. 47, Section 1, were also included in the respondent's collection rolls.

The respondent launched an action in the Superior Court against the first appellant to recover the municipal and school taxes on the gas mains in question for the years 1924-25, 1925-26, 1926-27, with interest.

The second appellant was subsequently added as *mis-en-cause*. The Superior Court (Loranger J.) maintained the respondent's action for \$3,262.82 and condemned each of the appellants to pay the said sum with interest at 6 per cent. 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.

The main reasons given by the Trial Judge for his decision were:—(i) That the gas mains were immovable by nature as being buildings, within the meaning of Article 376 of the Civil Code (following *Montreal Light, Heat and Power Consolidated v. The City of Westmount* [1926], S.C.R. 515), and were situate within the territorial limits of the respondent and were taxable by it; (ii) 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; (iii) 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.

The appellants appealed to the Court of King's Bench for the Province of Quebec (Appeal Side) and on the 30th October, 1930, the Court (Tellier, Howard, Letourneau, Hall and Galipeault JJ.) affirmed the trial Judge. Letourneau J., however, dissented in respect that he was of opinion that the first appellant was not liable for the municipal taxes because such appellant was not entered on the valuation rolls and because the mains, in his view, were not "land" within the meaning of Section 534 of the Cities and Towns Act permitting the collection of taxes from the tenant, occupant or other possessor of land.

The matter then came before their Lordships' Board at the instance of the appellants, who contended:—

First, that the gas mains were not liable to taxation unless they were immoveables within the meaning of the term "immoveable" in Section 521 of the Cities and Towns Act, which confers the taxing power.

Secondly, that the meaning of the word "immoveable" in that section was not to be ascertained by reference to the Quebec Civil Code; and that upon the true construction of the Cities and Towns Act without reference to the code the word did not cover the gas mains in question.

Thirdly, that even if the word "immoveable" was to be construed by reference to the Quebec Civil Code, gas mains such as these were not immoveables within the meaning of the Code.

Fourthly, that even if gas mains under public streets were taxable subject matter, they were only taxable as immoveables by reason of the object to which they were attached, in this case the gas works in Montreal, and that therefore they were not taxable in Outremont.

Fifthly, that the first appellant, not being on the valuation rolls as owner, was not liable and could not be attacked as occupant or possessor, because immoveables are not land within Section 534 of the Cities and Towns Act.

Sixthly, that the second appellant could not be made liable as *mis-en-cause* if the first appellant was not liable.

Seventhly, that there was no jurisdiction in the Superior Court to deal with the case so far as the claim was to recover school taxes, exclusive jurisdiction to deal with school taxes residing in the Circuit Court; and

Eighthly, that the form of the judgment was in any case wrong, inasmuch as under it the respondent could recover the sum sued for twice over, once from each appellant.

The first four points are branches of one principal question, whether these gas mains are taxable subject matter in Outremont, having regard to their nature and to the terms of the statutes conferring the taxing power. These points can therefore be dealt with together.

The power of the respondent to raise municipal taxes depends upon the Cities and Towns Act (R.S.Q. 1925, Ch. 102).

The provisions of the Act directly relevant to the taxing power are those next set out :—

Section 485 corresponds to Art. 5696, 1909 R.S.Q., which by the Act 5 Geo. V, cap. 93, Section 72, was replaced for the respondent by the following :—

“ 5696. The assessors shall, each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, according to its real value. In assessing every property, they shall value separately the land, the buildings thereon erected, and the annual value of such property, and enter each valuation in a separate column of the roll.

“ They shall also enter in the roll the names of all occupants, and the amount of annual rent paid by each of them. The Council may, by resolution, relieve the assessors from the duty of making a valuation roll of the taxable property oftener than every three years ; and in such case, the council shall revise the roll every year, or cause it to be revised by the assessors, as it deems expedient, giving the same notices and delays as for the making of the yearly valuation roll.”

“ 488. The actual value of the real estate in the municipality assessable for purposes of taxation shall comprise lands and buildings, workshops and machinery and their accessories thereon erected, and all the improvements made thereto.”

“ 521 (in part). The Council may impose and levy, annually, on every immovable in the municipality, a tax of not more than 2 per cent. of the real value as shown on the valuation roll.”

There are, however, a number of other sections relating to ancillary matters which are said by the appellants to be relevant as throwing light upon the meaning of the word “ immoveable.” These sections include the following :—

“ 502. After every change of owner or occupant of any lot of land set forth in the valuation roll in force, the council, on a written petition for that purpose, and upon sufficient proof, may erase the name of the former owner or occupant, and enter on such roll the name of the new one.”

“ 520.—(1) The following property shall not be subject to taxation :—

- (a) Lands belonging to His Majesty or held in trust for the service of His Majesty ;
- (b) The property of the Federal and Provincial Governments and the municipal corporation ;
- (c) That belonging to *fabriques* or religious, charitable or educational institutions or corporations, or occupied by such *fabriques*, institutions or corporations for the purposes for which they were established and not possessed by them solely for the purpose of deriving a revenue therefrom ;
- (d) Property possessed and used for public worship, episcopal residences, presbyteries, parsonages and cemeteries, and their dependencies. The presbyteries and parsonages above mentioned include any house occupied as a residence by the priest or minister in charge of any church, whether such house be the property of the *fabrique* or of the religious institution or corporation, the owner of the church, or whether it be occupied by the priest or minister as a tenant, provided that only one presbytery, parsonage or residence for each church shall benefit from the exemption granted by this section ;
- (e) Immoveables used for libraries open to the public free of charge ;
- (f) All educational establishments which receive no grant from the municipality where they are situate, as well as their dependencies and the lands on which they are erected.

“(2) The exemptions mentioned in Subsection 1 of this section shall not apply to persons occupying, under a title other than that of owner, immoveable property belonging to His Majesty or to the Federal or Provincial Government, who shall be assessed as if they were the actual owners of such immoveables, and be liable for the payment of the general and special real estate taxes.

“(3) The owners and occupants of the property mentioned in paragraphs (c), (d), (e) and (f) of Subsection 1 of this section shall nevertheless be bound for the cost of the works required for the maintenance of the streets situate opposite such property in the municipalities where such streets are not, wholly or in part, at the charge and expense of the municipality, under the provisions of this Act. Such properties shall nevertheless be taxable for public lighting, for the purchase and maintenance of fire-fighting apparatus, and for the use of water.

“They shall also be taxable for the opening and maintenance of streets, when such work is wholly or in part at the charge and expense of the municipality, provided that the opening or maintenance work on streets dependent on such property be assumed by the municipality.

“For the purposes of this Subsection 3, only the actual value of the lands shall be considered, notwithstanding the provisions of Section 488, to establish the tax to be imposed on the property mentioned in paragraphs (c), (d), (e) and (f) of Subsection 1 of this section.”

“530. The cadastral number given to immoveable property upon the official plan and in the book of reference for the territorial division in which such property is situated shall, for taxation purposes, be a sufficient description and identification of such property in the valuation and collection rolls.”

“534. Municipal taxes, imposed on any land, may be collected from the tenant, occupant or other possessor of such land as well as from the owner thereof, or from any subsequent acquirer of such land, even where such tenant, occupant, possessor or acquirer is not entered on the valuation roll.”

“550. Within fifteen days of the order of the council, the clerk shall give public notice of the day, hour and place where the sale by auction will be held. The notice shall contain a description, according to the provisions of Article 2168 of the Civil Code, of the immoveables the sale whereof is so ordered, and it shall be posted up at the places fixed by the council for publication of municipal notices.

“If the publication of municipal notices be made in the newspapers in accordance with Section 373, the clerk shall post up the notice of sale in two public places in the municipality.”

“555. The purchaser shall thereupon be seized of the immoveable adjudged, and may enter into possession thereof, subject to the same being redeemed within the year following, but shall not remove timber nor the buildings therefrom during the said year.”

“556. Within the eight days following the adjudication, the clerk shall transmit to the registrar a list of the immoveables so sold for municipal taxes, with the name of the purchaser of each of such immoveables.”

Before commenting upon the provisions of the Cities and Towns Act it will be convenient to set out also the relevant provisions of the Quebec Civil Code. Such provisions are as follows:—

“374. All property incorporeal as well as corporeal is moveable or immoveable.”

“375. Property is immoveable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law.”

" 376. Lands and buildings are immovable by their nature."

" 377. Windmills and water-mills, built on piles and forming part of the buildings, are also immovable by their nature when they are constructed for a permanency."

" 378. Crops uncut and fruits unplucked are also immovable.

" According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees; they are immovable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled."

" 379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immovable by their destination so long as they remain there.

" Thus, within these restrictions, the following and other like objects are immovable :—

- (1) Presses, boilers, stills, vats and tuns ;
- (2) All utensils necessary for working forges, paper mills and other manufactories.

" Manure, and the straw and other substances intended for manure, are likewise immovable by destination."

" 380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, embedded in plaster, lime or cement, or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.

" Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect."

" 381. Rights of emphyteusis, of usufruct of immovable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes, and rights or actions which tend to obtain possession of an immovable, are immovable by reason of the objects to which they are attached."

" 382. All moveable property, of which the law ordains or authorises the realisation, becomes immovable by determination of law, either absolutely or for certain purposes."

" 2168. When a copy of the plans and books of reference for the whole of a registration division has been deposited in the office for such division, and notice has been given by proclamation in the manner mentioned in Article 2169, the number given to a lot upon the plan and in the book of reference is the true description of such lot, and is sufficient as such in any document whatever; and any part of such lot is sufficiently designated by stating that it is a part of such lot and mentioning who is the owner thereof and the properties coterminous thereto; and any piece of land composed of parts of more than one numbered lot is sufficiently designated by stating that it is so composed and mentioning what part of each numbered lot it contains.

" No description of an immovable in the notice of application for confirmation of title, or in the notice of a sale by the sheriff or by forced licitation, or of any sale having the effect of a sheriff's sale, or in the sheriff's deed, or in the judgment of confirmation, will be deemed sufficient unless it is made in conformity with the provisions of this article.

" As soon as such plans and books of reference have been deposited and notice thereof has been given, notaries passing Acts concerning immovables indicated on such plan are bound to designate such immovables by the number given to them upon such plan and in the book of reference, in the manner above prescribed; in default of such designation the registration does not affect the lot in question, unless there is filed a requisition

or notice indicating the number on the plan and book of reference as being that of the lot intended to be affected by such registration."

Having regard to the terms of the Education Act (R.S.Q. 1925, Ch. 133) and the Protestant School Act (15 Geo. V, c. 45), the taxable subject matters in respect of school taxes are admittedly to be determined by the same considerations as the taxable subjects in respect of municipal taxes, inasmuch as the school taxes under the Education Act are exigible upon "all taxable property in the school municipality," and those under the Protestant School Act are exigible upon "all immoveable property" in the municipality inscribed in the neutral panel.

It is to be observed that in regard to the question now being considered the appellants' case involves an impeachment of the conclusions reached by the Supreme Court of Canada in *Montreal Light, Heat and Power Consolidated v. The City of Westmount* [1926] S.C.R. 515. In that case gas mains and electric poles and wires were held to be taxable in the municipality in which they were situate.

Their Lordships, after full consideration, are of opinion that the reasoning of the majority of the Court contained in the judgment in the last-mentioned case delivered by Anglin C.J.C. is well founded.

The word "immoveable" in Section 521 of the Cities and Towns Act must, in their Lordships' view of the construction of that Act, bear the meaning given to it by the Quebec Civil Code. It is true that there is in the Cities and Towns Act a lack of precision in the use of terms which renders the task of construction unnecessarily difficult, but there is nothing in that Act to restrict the meaning attributed to the word "immoveable" by the Civil Code. The words "land" and "lands" are in the Cities and Towns Act used in a sense wide enough to cover immoveables (*see* and compare Subsection (1) (a) of Section 520 and Subsection 2 of the same section), but this use of "land" and "lands" does not restrict the meaning of immoveables. Nor does the reference in Section 530 to the cadastral number given to immoveable property have the effect of excluding from immoveables those immoveables which have not or cannot have any cadastral number. Section 530 only renders a reference to the cadastral number, where there is one, a sufficient description of the immoveable.

What then is an immoveable under the Civil Code? A gas main laid in the earth is an immoveable in the sense that it is physically a construction fixed in the earth, though the individual pipes of which it is made up were moveable before they came to form part of the construction.

Of the four means specified in Section 375 of the Civil Code by reason of which property is to be treated as immoveable, three can certainly be excluded. The gas mains are not immoveable by destination, because the soil in which they are placed does not belong to the appellants. They are not immoveable

by reason of the object to which they are attached. Into that category fall only things in themselves moveable which are permanently attached to an immoveable. The gas mains were never moveables, though constructed out of things which were moveables. It is not suggested that the gas mains are immoveable by determination of law. There therefore remains only the category of immoveables by their nature. These are in Section 376 defined in the words "Lands and buildings are immoveable by their nature."

It is said that gas mains are not buildings (*bâtiments*) within the meaning of that term as used in Section 376, and an argument based upon Article 523 of the Code Napoleon, which makes "*tuyaux*" immoveable, was addressed to their Lordships in support of that view. Their Lordships are of opinion that the term buildings (*bâtiments*) covers constructions such as these gas mains, and that these mains must be regarded as immoveable by their nature in the territory in which they are physically situate, and are therefore taxable subjects in the City of Outremont.

With regard to the fifth point, it has already been indicated that the term "land" in the Cities and Towns Act includes immoveables, and this being so, their Lordships think that the first appellant is liable for the taxes under Section 534 of the Act as occupant or possessor of the mains. In these circumstances the sixth point does not arise, and the second appellant is liable as owner, whose name is on the rolls.

The seventh point raises a matter of jurisdiction. Could the school taxes be recovered in the Superior Court?

Section 48 of the Code of Civil Procedure provides that the Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court or of the Exchequer Court of Canada.

Section 54 of the same Code is, so far as material, as follows:—

"54. The Circuit Court has ultimate jurisdiction, to the exclusion of the Superior Court:—

(1) * * * * *

(2) In all suits for school taxes or school fees, and all suits concerning assessments for the building and repairing of churches, parsonages and churchyards, whatever may be the amount of such suits."

The school taxes for the first year of assessment (*viz.*, 1924–25) of the three years under consideration were exigible under the provisions of the Education Act.

That Act empowered the School Commissioners and Trustees to cause to be levied by taxation the taxes necessary for the support of the schools under their control.

Section 398 of the Act was as follows:—

"The local council of any city, town, village, or rural municipality, when required by the school board of a school municipality situate wholly or partly in its territory, shall collect the taxes of such school municipality at the same time as its own."

The Cities and Towns Act contained the following provisions with regard to the collection of school taxes :—

“ 537. The council shall, on the requisition of the school commissioners or trustees of any school municipality situated with the municipality, accept the school assessment roll or the certified extract therefrom presented by them, and order the treasurer to collect such taxes, in the same manner and at the same time as municipal taxes.”

“ 539. If the municipal council has ordered, by resolution, that the collection of school taxes be made at the same time and in the same manner as municipal taxes, the treasurer shall enter in the general collection roll the amount of such taxes, collect them and remit them forthwith to the secretary-treasurer of schools. In such case actions to recover taxes shall be taken by the municipal corporation.”

In the year 1919 certain resolutions were passed by the School Commissioners and School Trustees of Outremont and by the City Council of the City of Outremont providing for the collection by the City of the school taxes.

These resolutions were confirmed by 11 Geo. V, c. 114 (repealed and re-enacted by 16 Geo. V, c. 74), whereby the following articles were added for the respondent to the provisions of the Cities and Towns Act :—

“ 5748A. The city may, under agreement with the school commissioners or trustees of any school municipality situated within the municipality, upon resolution to that effect passed by said school commissioners or trustees, as the case may be, and by the city council, acquire the school assessment roll or a certified extract therefrom presented by said school commissioners or trustees, and pay the said school commissioners or trustees the amount mentioned on such school assessment roll or certified extract therefrom, less the amount of a commission of not more than 1 per cent., at the dates and in the manner agreed upon.”

“ 5748B. The resolution passed by the school commissioners of the municipality of the city of Outremont, in the county of Westmount, on the 10th day of March, 1919, the resolution passed by the school trustees for the municipality of the city of Outremont, in the county of Westmount, on the 11th day of March, 1919, and the resolution passed by the city council of the city of Outremont on the 2nd day of April, 1919, are hereby declared legal and valid for all intents and purposes.”

“ 5755. The payment of municipal taxes and of school taxes, in cases provided for in Articles 5748, 5748A and 5748B, may be also claimed by an action brought in the name of the corporation before the Magistrate's Court, or the Circuit Court for the county or district, or before the mayor, or two or more councillors acting *ex-officio* as justices of the peace, or before the recorder's court if there be one.”

The Courts in Canada have taken the view that under the statutory provisions referred to above the municipality could recover the school taxes in the Superior Court. On such a matter of domestic procedure their Lordships' Board would be reluctant to differ from the conclusions reached by the Courts in Canada, unless such conclusions were clearly shown to be wrong. Their Lordships are, however, satisfied that upon the true construction of these provisions the municipality are empowered to sue for the school taxes in the Superior Court. The words “ in the same manner and at the same time ” in Section 537 of the Cities and Towns Act, read with the words “ may be also claimed ” in

Article 5755, introduced by 11 Geo. V, c. 114, render it clear, in their Lordships' view, that the municipality were empowered to recover school taxes in the Superior Court, and that to that extent the provisions of Section 54 of the Code of Civil Procedure were repealed. This point of the appellants, therefore, fails so far as the school taxes for the year 1924-25 are concerned.

The school taxes for the years 1925-26 and 1926-27 were exigible under the Protestant School Act, which provides as follows :-

" 16.—(2) From and after the 1st of July, 1925, in the various cities, towns or other local municipalities mentioned in paragraph 1 of this section, there is hereby imposed a uniform tax, [to be entitled the Protestant School Tax (see sub-sec. 1)], at the rate of 12 mills in the dollar, upon all the immoveable property inscribed in the neutral panel of each such city, town or local municipality. . . .

" (5) The taxes above mentioned shall be levied and collected by the proper municipal authorities, at the same time as the municipal taxes, and, notwithstanding any special or general provision of law governing any such municipality, the amount of the said Protestant school tax so levied and the share of the said tax upon the neutral panel accruing for the benefit of Protestant education, shall be paid over to the Central Board by the proper municipal authorities"

Their Lordships are of opinion that upon the true construction of these provisions the municipality had the same powers for recovering the taxes under this Act as they had for recovering the municipal taxes, including a power to sue for them in the Superior Court, and that to that extent the provisions of Section 54 of the Code of Civil Procedure were repealed. In regard, therefore, to the school taxes for the two last-mentioned years the conclusion must be the same as with regard to the school taxes for the first of the three years in question.

With regard to the eighth point, their Lordships having heard and taken note of the statement of the respondent's Counsel that the respondent did not desire to treat, and could not treat, the order which has been made as entitling them to recover more than the one sum of \$3,262.82 and interest on the footing of the joint and several liability of the appellants, their Lordships do not think it necessary to take the point into consideration.

In the result, therefore, in their Lordships' judgment the appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty accordingly.

The appellants must pay the respondent's costs of this appeal.

In the Privy Council.

THE MONTREAL LIGHT, HEAT AND POWER
CONSOLIDATED AND OTHERS

v.

THE CITY OF OUTREMONT.

DELIVERED BY LORD TOMLIN.

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