56. 1932

No. 83 of 1931.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN—

THE CITY OF MONTREAL

(Defendant) *Appellant*

— AND —

MONTREAL INDUSTRIAL LAND COMPANY LIMITED - - - (Plaintiff) *Respondent.*

RESPONDENT'S CASE.

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada (Anglin, Rinfret, and Smith JJ. with Lamont and Cannon, JJ. dissenting) reversing the judgment of the Court of King's Bench (Appeal Side), Province of Quebec, (Dorion, Tellier and Bernier JJ. with Howard and Galipeault JJ. dissenting), which had maintained the judgment of Desaulniers, J., and annulling the assessment roll of the present Appellant, in virtue of which the present Respondent was called upon to pay the cost of paving of a part of Sherbrooke Street, in the City of Montreal, which was originally contained within the limits of the Town of Longue-Pointe.

2. The circumstances giving rise to the present litigation are the following:—

In the year 1910, the Town of Longue-Pointe was annexed to the City of Montreal. The annexation agreement between the two municipalities was sanctioned by the Legislature of the

Province of Quebec by the Statute 1, George V, (Quebec), 1910, chapter 48, article 1, paragraph i, sub-paragraph I, which set forth verbatim the conditions of the agreement, one of which reads as follows:—

> "The City of Montreal shall, within six months, open and macadamize "Vinet and Sherbrooke streets from the western to the eastern limits of "the town of Longue Pointe, including the lands of the St. Jean de Dieu "hospital, belonging to the Sisters of Charity of Providence. Vinet "street shall, on the north side, run alongside the tramway called "the 'Terminal railway', and shall be fifty feet wide in conformity with "the plan of the said town confirmed by the Superior Court on the 19th "May, 1908."

3. Once the annexation was effected, however, the City of Montreal did not conform to the conditions originally stipulated, but caused the delay, within which it was to complete the works in question, to be extended by the Statute 3 George V (Quebec), chapter 54, article 48, which reads as follows:—

> "Without otherwise amending the charter of the city, the latter shall have "until the 1st January 1915 to complete the works it has undertaken to do by "the act 1 George V (1st session) chapter 48 article 1, paragraph e, sections 6, "7 and 8; by paragraph f; paragraph g; paragraph h, sub-paragraphs 8, 9, 10 "and 11; paragraph i, sub-paragraphs I, II and III; paragraph j, sub-para- "graphs I and II; paragraph k, sub-paragraphs 1, 7 and 8; and paragraph 1; "and, until such date, no judicial proceeding by *mandamus* or otherwise shall "be taken or maintained against the city to compel it to execute the said "works.",

further extensions being subsequently provided for by the following Statutes: 5 George V (Quebec), chapter 89, article 20; 8 George V (Quebec), chapter 84, article 53; 10 George V (Quebec), chapter 86, article 14, and 11 George V (Quebec), chapter III, article 10.

4. It was not until the year 1925 that the Appellant decided to pave this part of Sherbrooke Street and on the 20th of July, in that year, it adopted the resolution which has been produced as
p. 53, l. 35. Plaintiff's exhibit No. 1. This resolution recommended that a permanent paving be laid on Sherbrooke Street in the Mercier Ward (formerly the Town of Longue-Pointe) and that the cost of this paving should be charged to the bordering proprietors.

5. The actual work of paving, however, was not begun until
p. 58, l. 8. the 1st of May, 1926, and was completed on the 22nd of December in the same year (Exhibit P.1).

6. In the year 1928 the Statute 18 George V (Quebec), chapter 97 was adopted. Article 15 of this Statute reads, in part, as follows:

"15. Article 455 of the act 62 Victoria, chapter 58, as enacted by the "act 1 George V (1911), chapter 60, section 25, and replaced by the acts 3 "George V, chapter 54, section 29, and 4 George V, chapter 73, section 26, is "again replaced by the following:

"455. 1. Notwithstanding the provisions of article 455 of the act 62 "Victoria, chapter 58, as enacted by the act 1 George V (1911), chapter 60, "section 25, and replaced by the acts 3 George V, chapter 54, section 29, and "4 George V, chapter 73, section 26, the cost of pavings laid since the 1st of "January, 1919, and that of pavings to be laid hereafter on public places, "streets or lanes, shall be charged to the bordering proprietors at the uniform "price of five dollars per square yard, payable cash or in twenty annual instal- "ments, according to the number of frontage feet of the immoveables belonging "to them. In such charge of five dollars per square yard are included all "paving accessories, and more particularly the levelling, gullies, curb, removal "and re-erection of poles, hydrants, *et coetera*.

"The amount which each bordering proprietor shall be held to pay for "shall be determined by multiplying the number of feet of frontage of the "piece of land belonging to him by one-half of the number of feet of the "average width of the street or part of street paved, as described in each "resolution of the council . . . . . ."

7. Acting in accordance with the provisions of this Statute, which came into force on the 22nd March, 1928, the Appellant prepared and caused to be homologated on the 13th of December, 1928, a special assessment roll covering the paving work in question. p. 58. On this roll the Respondent was assessed, as a bordering proprietor, in the amounts of $5,905.44 and $5,888.04 respectively.

8. The Respondent thereupon instituted the present action asking that the resolution of the 20th of July, 1925, as well as the assessment roll and all other proceedings adopted by the Appellant for the purpose of imposing upon the bordering proprietors the whole or any part of the cost of the construction of the paving in question, should be declared null, illegal, and *ultra vires*.

9. The Appellant met this action by a defence which was little more than a general denial coupled with the statement that there was no provision in the Statute covering the annexation, which required it to open and pave the streets in question at its cost.

10. The Record consists solely of documentary evidence and of certain admissions made by the parties. p. 6.

RECORD.

11. It is submitted that, in virtue of the annexation act of 1910, the Appellant was obliged to open and macadamize Sherbrooke Street at its own expense and this within a period of six months. Not only is this the natural interpretation of the actual wording of the clause which we have already cited, but such an interpretation is further supported by the fact that, in the year 1910, the Appellant was responsible for the cost of all paving which was done within the limits of the City of Montreal, and this in view of the abrogation, in the year 1908, of the sole provision of the Appellant's charter referring to paving works.

The Appellant's charter, as revised and consolidated by the Statute 62 Victoria (Quebec), chapter 58, contained only one disposition relating to pavements or paving works, namely, article 455 reading as follows :—

> "455. No paving of any street, lane or highway shall be laid or "constructed, unless asked for by the majority of the proprietors in number "and value, whose properties abut thereon; and the cost of such paving shall "be paid as follows:—One-half by the city, and the other half by all the "proprietors whose properties abut on the street, lane or highway so paved; "subject, however, to the provisions contained in articles 453 and 454; but the "council may, by vote of two-thirds of its members, decide to pave any street "or highway in the manner it may judge proper, and to pay for the same out "of the revenues of the city in accordance with the provisions of this act."

This article 455 had, however, been abrogated by the Statute 8 Edward VII (Quebec), chapter 85, article 14. Accordingly, at the date of the annexation in 1910, there was absolutely no provision whatsoever in Appellant's charter covering the question of paving, and we must therefore conclude that, at this date, the cost of any such work was payable by the City out of its general funds.

12. This is the interpretation which has been accepted, not only by the Supreme Court of Canada, but also by the Judge of first instance and by the three Judges of the Court of King's Bench (Appeal Side) who discussed this particular point.

13. It is submitted that this annexation act of 1910 has always remained in force and that the Statute of 1928, 18 George V (Quebec), chapter 97, article 15, upon which the Appellant relies, did not have the effect of abrogating its provisions.

The sole purpose and effect of this Statute of 1928 was to settle the general question of paving and paving works in the City of

Montreal, and it should be noted that when this Statute was adopted, all general paving costs had been payable by the bordering proprietors since the year 1919 (Admission of Parties). p. 6.

It is therefore submitted that the sole object and purpose of this Statute was, first, to determine the amounts to be paid by the bordering proprietors who were chargeable with the cost of all paving work which had been done since the year 1919 and, secondly, to make provision for the payment of such paving works in future and that it cannot have been the intention of the Statute to deprive bordering proprietors in the Mercier Ward of the City of Montreal (formerly the Town of Longue-Pointe) of the rights which had been conferred upon them by the annexation act. On the contrary, the Statute of 1928 expressly declares that it is merely replacing original Article 455 of the Appellant's charter and this Article, which constituted the general paving law for the city, had never repealed the special provisions of the annexation act.

14. It is further submitted that this general law of 1928 could not affect the special annexation act save by express reference thereto and it is clear from its text that it does not abrogate this latter act either expressly or impliedly. Under the general principle "*generalia specialibus non derogant*" the annexation act could only be repealed by a clear and formal disposition of a subsequent law and no such disposition exists. In this connection it might be noted that the Statute of 1928 does not say "notwithstanding the annexation act of 1910" nor "notwithstanding the provisions of any other act" but merely "notwithstanding the provisions of article 455."

15. It is further submitted that if Appellant was under a legal duty to macadamize the street on which Respondent's land fronts, free of charge for Respondent. it is not entitled to escape from that obligation by substituting asphalt or another form of pavement to macadam, even if the form of pavement chosen is more expensive and more advantageous. The city must bear the consequence of having chosen to fulfil its obligation in a manner different from that provided for if this prove more expensive to it and more advantageous to the creditor.

Alternatively, the creditor should be given credit at least for what the paving would have cost in the form originally contemplated, and this has not been done.

RECORD.

Nobody can now say whether or not the decision to pave Sherbrooke Street with the more expensive form of paving would have been taken, had the street, at that time, been recently macadamized.

16. It is submitted therefore that the present appeal should be dismissed and the Respondent's action should be maintained for the following among other

REASONS.

1. Because, in virtue of the act of annexation, being the Statute 1, George V, 1910 (Quebec), chapter 48, article 1, paragraph i, sub-paragraph I, the Appellant was obliged to open and macadamize Sherbrooke Street, at its own cost, within a delay of six months;

2. Because this obligation of the Appellant has not been extinguished and was a valid and subsisting obligation, at the date when the street was paved, and was not affected or annulled by the Statute 18 George V (Quebec), chapter 97, upon which Appellant relies;

3. Because Appellant is not entitled to be released from its subsisting obligation to macadamize the street by substituting to macadam another and possibly more expensive form of pavement.

4. For the reasons given in the judgment of the Supreme Court of Canada.

AIME GEOFFRION.

ARTHUR VALLEE.

No. 83 of 1931.

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CASE FOR THE RESPONDENT.

LAWRENCE JONES & Co.,
Lloyd's Building,
Leadenhall Street,
London, E.C.3.

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