

63,1935

In the Privy Council.

No. 27 of 1935.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION.

BETWEEN

NORTHWESTERN UTILITIES LIMITED
(Defendant) - - - - - *Appellant*

AND

LONDON GUARANTEE AND ACCIDENT
COMPANY LIMITED and others (Plaintiffs) - *Respondents.*

RESPONDENTS' CASE.

1. This is an appeal from the judgment of the Supreme Court of Alberta, Appellate Division, dated December 6th, 1934, allowing the Respondents' appeal from the judgment of Mr. Justice Ford at the trial dated February 27th, 1934, and directing judgment to be entered for the Respondents and referring the action back to the trial judge to assess or direct the manner of assessment of the damages. The trial judge had dismissed the Respondents' action. The judgment of the Appellate Division was that of the majority of the Court, Harvey C.J.A., Clarke and McGillivray J.J.A. Mitchell and Lunney J.J.A. dissented.

Record.

p. 795.

p. 778.

pp. 778-786.

pp. 796-807.

10 2. The question at issue is whether the Appellant, which supplies natural gas to the inhabitants of the City of Edmonton, in the Province of Alberta, is responsible for the damage resulting from a fire caused by the escape of its natural gas from one of its mains.

3. Under an agreement made in 1915 between the City of Edmonton and the Appellant's predecessor and confirmed by the Statute of Alberta No. 29 of 1916, the Appellant was authorised to put down, maintain and operate its gas pipe lines along the streets, lanes etc. of the City and was given the exclusive privilege of supplying natural gas to the inhabitants of the City for domestic and heating purposes for a period of twenty years

p. 32, l. 1.

p. 798, l. 22.

Record. and the privilege, but not the exclusive privilege, of supplying gas for manufacturing and power purposes. The penalty for a failure by the Appellant to supply gas was that the privileges granted by the agreement should, so far as they were exclusive, cease and determine.

p. 779, l. 29.
p. 798, l. 17.
p. 804, l. 7.

4. It has been held in both Courts in Alberta that the provisions of the "Act respecting Water, Gas, Electric and Telephone Companies" (Revised Statutes of Alberta 1922, chapter 168) apply to the Appellant and that its statutory privileges are qualified by section 13 of that Act which reads as follows:—

"13. The Company shall locate and construct its gas or 10
water works or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety."

p. 781, l. 6.
p. 798, l. 4.

It is established law in the Province of Alberta that this section imposes an obligation to maintain, as well as to locate and construct, the works so as not to endanger the public health or safety.

5. Certain facts regarding the origin of the fire in question are not now in dispute and are stated in the judgment of the trial judge (Ford J.) as follows:—

p. 778, l. 22.

"On February 21st, 1932, a fire broke out in the basement of 20
the Corona Hotel in the City of Edmonton which burned down the hotel building and caused considerable other damage. The fire was caused by the igniting of a mixture of natural gas and air. The natural gas was that of Northwestern Utilities Limited the defendant, and had escaped from that Company's 12-inch intermediate pressure gas main through a break in a welded joint in the main in the middle of the intersection of 107th Street and the lane in the rear of the Corona Hotel, the gas finding a channel through and along a 8" × 12"
wooden box containing the City of Edmonton's street railway electric 30
return cables, and finding a way through the soil in the rear of the hotel and through openings in the walls thereof . . . The break through which the gas leaked occurred in all probability on the day of the fire"

p. 779, l. 1.

p. 77, l. 1.

p. 77, l. 21.

The Appellant's intermediate pressure mains were used for conducting the gas, at a pressure of about 40 pounds to the square inch, from the high pressure mains (through which the gas was brought from the wells to Edmonton) to the low pressure mains, from which the gas was delivered to customers.

pp. 812-818.

6. The action was brought by persons who suffered loss from the 40
burning down of the hotel and by insurance companies who had indemnified some of the sufferers.

The issue at the trial was limited to the question of the Appellant's liability, the question of damages, if any, being reserved for subsequent determination. Record.
p. 64, l. 28.

7. The gas main which broke on February 21st 1932, had been laid down in August 1923. The contract for the construction called for and contemplated the Appellant's 12-inch gas main being laid at the bottom of an open trench dug from the surface downward to a depth of at least three feet. A change was, however, made by the Appellant in this respect and the method adopted was to excavate a tunnel across the street under the pavement with openings in the pavement on each side and in the centre of the street and to weld together four lengths of steel pipe, each length being about 19 feet long, and to pull the string of welded pipes through the tunnel. The width of the street is about 77 feet. The pipe (or main) was intended to lie on virgin soil at the bottom of this tunnel and it was not designed to stand any appreciable stress, caused by its bending downwards from its horizontal position. Subsequent examinations showed that the welding by which the pipes were joined together penetrated only to about one-half the thickness of the rim of the pipe and fissures or sharp cracks (called in the evidence "V" notches) appeared penetrating into the welding material. p. 76, l. 11.
p. 846, l. 12.
p. 845, l. 22.
p. 566, l. 41.
p. 280, l. 1.
p. 562, l. 12.
p. 509, l. 39.
p. 495, l. 21.
p. 497, l. 32.
pp. 882-883.

8. The gas main at the point where it broke had sunk down from its horizontal position and broken in consequence of sinking. Immediately after the fire a temporary repair was effected and in the following June a new pipe was installed. The street was then opened throughout its entire width, the gas main was removed and a new welded pipe was laid down. The original pipe was then found to have subsided at the point where it broke to the extent of $6\frac{1}{2}$ inches from its horizontal position. The slope of the pipe downward to this point from each side of the street, was a gradual even drop downward to the street centre presenting the appearance of a very flat "V." The pipe was found to be resting partly if not entirely in or on "back-filling" material, that is to say earth that had been excavated from the tunnel and replaced in it after the string of pipes had been pulled through the tunnel. In this material and about 15 feet east of the breaking point the gas main was found to be resting on a circular piece of wood about 3 inches in diameter lying approximately at right angles to the gas main and about 20 feet to the west of the break the gas main rested on a brick embedded in this material. At the point of the break the main was still about half an inch above the bottom of the tunnel. A "pressure ridge" was found by some of the witnesses where the sinking pipe had forced the "back-fill" up around the sides of the pipe. p. 652, l. 1.
p. 92, l. 23.
p. 92, l. 41,
et seq.
p. 489, l. 27.
p. 331, l. 15.
Ex. 28.
p. 486, l. 39.
p. 492, l. 31.
p. 331, l. 34.
p. 487, l. 9.
p. 493, l. 21.
p. 330, l. 15.
p. 533, l. 2.
p. 334, l. 10.

9. The Appellant's contention is that the subsidence of the gas main was caused by certain drainage works constructed by the City of Edmonton

- Record. in 1931. The relative positions of these works and the gas main in question appear from the diagram appended to this case.
- Ex. 28. When the 12 inch main, as well as a 10 inch low pressure main, were originally laid in 1923 the City's sewer system at the intersection of the lane and 107th Street consisted of sewers radiating from a manhole in the street centre to the north, south, east and west at varying distances below the surface of the street and underneath the Appellant's gas mains. There was also a surface water carrying tile drain radiating from the manhole to the north-east, connected to a catch basin on the east side of the street, part of which was directly beneath the portion of the gas main that broke and 10 which lay between the City's drainage works, the construction of which according to the Appellant's contention caused the subsidence of the gas main as above mentioned and the said gas main. Examination of this tile drain at the time of the trial showed that it had not subsided to any appreciable extent, if at all, from its original position. The Appellant's gas mains were laid in close proximity to the manhole.
- p. 766, l. 16.
p. 776, l. 18.
- p. 317, l. 9.
Ex. 28. **10.** During the Spring of 1931 the City constructed a sewer to connect the manhole mentioned (called Manhole "A") with another manhole (called Manhole "B") then built on the side of the street to the north-east, from which was at that time being constructed a large 20 storm sewer running northward. This sewer was connected to manhole "A" by a cement and brick structure built on to the manhole, the dimensions of which were approximately four feet wide, high and deep, and called a weir chamber. A portion of this weir chamber and a portion of the sewer were directly beneath the portion of the gas main that broke. They are also directly beneath portions of one of the City's sewers and the City's surface water tile drain already mentioned. The City's work on the construction of the storm sewer and weir chamber at this point was active for a period of at least six weeks between February 5th and April 10th or 12th 1931, the work being carried on continuously day and night. 30
- p. 337, l. 21.
- p. 872, l. 14.
p. 873, l. 9.
Ex. 93.
- Ex. 28.
p. 316, l. 45. **11.** In 1926 the City had placed a wooden box conduit to enclose street railway electric cables close to and parallel with the gas mains.
- p. 80, l. 28. **12.** No inspection of the 12 inch gas main in question had been made by the Appellant from the time of its installation in 1923. The Appellant's natural gas is practically odourless but no odorant had been put in the gas to facilitate the detection of leaks and no tests for leaking gas had been made. Since the fire regular tests have been made and the gas has been odorised.
- p. 82, l. 30.
p. 87, l. 32.
p. 870, l. 21.
p. 110, l. 2.
- p. 325, l. 12. **13.** The placing by the Appellant of its gas main within a few inches of the City's manhole resulted during the fire in the escape of gas into 40

the manhole and thence into the City's sewer which served the Corona Hotel. The result of this was a great acceleration of the fire due to explosions of this gas which passed through the sewer system into the hotel and was ignited by the fire in the hotel. Record.
p. 459, l. 8.
p. 419, l. 1.
p. 420, l. 7.

14. The expert witnesses differed as to the cause of the subsidence of 6½ inches in the gas main at the point of fracture.

The opinions of the Respondents' expert witnesses were to the effect that the bending downward or sinking of the gas main was a gradual process extending from the time the gas main was laid and caused by its gradually sinking into the "back-filling" material underneath it due to the weight of the soil resting on the pipe, the weight of the steel pipe itself and the expansive action of the frost crystals formed yearly in the surrounding ground. These factors operating on the gas main which was not constructed to withstand any considerable bending strain and the separate pipe lengths of which were insufficiently welded together caused, in the opinion of these experts, the main to break at one of its insufficiently welded joints. p. 493, l. 40.
p. 515, l. 42.
p. 337, l. 15.
p. 339, l. 25.

The opinions of the Appellant's expert witnesses attributed the bending downward and breaking of the gas main to the shrinkage, drainage and subsidence of ground underneath the gas main caused by the City's constructions at this point in 1931. p. 652, l. 39.
p. 698, l. 36.

15. The Trial Judge held that the cause of the break in the welded joint of the Appellant's main which caused the damage was the City's works constructed in the soil below the gas main in 1931 ; that no negligence was to be imputed to the Appellant in not anticipating and guarding against the injurious effect of the City's operations ; that the question whether the Appellant was liable without proof of negligence depended on whether it had located and constructed its works and maintained them "so as not to endanger the public health or safety" ; that there must have been an appreciable time during which the subsidence causing the bending of the main was going on ; that if the subsidence, brought about by the act of someone over whom the Appellant had no control, had taken place suddenly causing the main to break immediately it could not be said that the Appellant had not maintained its works so as not to endanger the public safety, but that after the break occurred the public safety certainly was endangered. After reviewing some authorities the learned judge said :— p. 779, l. 18.
p. 781, l. 6.
p. 781, l. 37.
p. 781, l. 43.

" I think the true view of the law as to the act of a stranger, both as relieving from initial or original negligence and by way of exception to or as a limitation of the rule in *Rylands v. Fletcher*, is that where the escape of the dangerous article or agency is caused by the act of a stranger over whom the owner or keeper thereof has no control, the happening or the injurious effect of whose act he p. 785, l. 32.

- Record.
p. 786, l. 20. could not reasonably be expected to anticipate, such owner or keeper is not liable for the escape and its results.”
- p. 786, l. 22. He thought that the Appellant ought to have known, even if it did not, that the City’s operations of 1931 were going on because of the length of time they were carried on and their conspicuous and public nature ; that the Appellant had the right to rely upon the City Engineer seeing that the work was done in such a way that the result which happened would not occur ;
- p. 786, l. 33. that the injurious effect of the City’s operations was one which the Appellant could not reasonably be expected to anticipate ; that the City was a stranger over whom the Defendant had no control and that its act which caused 10 the injury was such an independent cause as relieved the Appellant from liability except upon proof of negligence. He accordingly on the 27th February, 1934, gave judgment dismissing the action.
- p. 795. **16.** The Respondents appealed to the Appellate Division of the Supreme Court and that Court, by a judgment dated the 6th December, 1934, allowed the appeal.
- pp. 796-801.
p. 798, l. 29. Harvey C.J.A., with whom Clarke and McGillivray JJ.A. concurred, considered that the Water, Gas, Electric and Telephone Companies Act applied to the Appellant ; that on the learned trial Judge’s finding of the facts it was difficult to see how it could be said that even the effect of the 20 City’s operations could not have been anticipated ; that the expert evidence on which that finding was based involved the conclusion that the settlement of the earth would or might be the consequence of the City’s operations and therefore that it could have been reasonably anticipated ; that it was not, however, necessary to invoke the doctrine of Rylands v. Fletcher in order to attach liability to the Appellant ; that the care which the law imposes upon persons having control of dangerous substances and agencies was one of high degree ; that it could not be otherwise than apparent to the Appellant that there would from time to time be operations in the streets and lanes that might affect its pipes and their security ; that he 30 could not think that the Appellant performed its full duty to the public when it failed to inspect City operations which might affect the security of its pipes and to take such steps as might be necessary to protect them ;
- p. 799, l. 16. that if the evidence of the Respondents was accepted the Appellant would be liable on the principle of Rylands v. Fletcher ; that if the Appellant’s own evidence was accepted then it was, in his opinion, negligent in not taking proper precaution to prevent the injurious result occurring ; that the Appellant was dealing with a very dangerous substance and was called on to exercise a high degree of care yet took no steps to apprise itself of excavations in the streets and lanes where its pipes were, and which it 40 must have known would frequently be made, and in which in many cases an injurious consequence to its pipes might be apparent and that in this failure was disclosed negligence in the duty the Appellant owed to those who might be injuriously affected.
- p. 800, l. 7.
- p. 800, l. 16.
- p. 800, l. 32.
- p. 800, l. 37
to p. 801,
l. 3.

17. Mr. Justice Mitchell, in a dissenting judgment, concurred with the findings of fact of the Trial Judge, other than the finding as to the Appellant's knowledge of the City's 1931 operations, as to which he says that, while it cannot be said there was no evidence upon which such finding could be made, he is not convinced either that the Appellant had express notice of the doing of the City's work or that conditions surrounding such work were of such a character as to suggest that the Appellant's gas mains were likely to be affected or interfered with by it either then or later. He agreed that the statutory authority of the Appellant to lay its gas mains was limited by the provisions of the Water, Gas, Electric and Telephone Companies Act as to its works not endangering the public health and safety, but he nevertheless considered that the enterprise of the Appellant in respect of its services " may be taken as in a position analogous to a ' public local government body ' " insofar as a consideration of its legal rights and duties is concerned. So concluding the learned Judge held that the Appellant was not within the rule of liability enunciated in *Rylands v. Fletcher* because of the exception thereto arising from " common interest." He also agreed with the Trial Judge in applying the excuse of the intervening act of the City as taking the Appellant out of the rule in *Rylands v. Fletcher*; and as regards those Plaintiffs who had entered into contracts with the Appellant for a supply of gas, he was of opinion that these contracts barred recovery by such Plaintiffs.

Record.
p. 803, l. 28.
p. 806, l. 24.
p. 804, l. 7.
p. 806, l. 9.
p. 806, l. 13.
p. 807, l. 33.

18. Mr. Justice Lunney, who also dissented, did not consider that the evidence warranted the finding of the Trial Judge that the Appellant knew or ought to have known that the City's operations in 1931 were going on because of the length of time they were being carried on and the conspicuous and public nature thereof. He thought it important to note " that although the pipe line had been constructed in 1923 it had, apparently, remained in suitable position until shortly after the operations of the City in the construction of the weir chamber." Otherwise he agreed with the conclusions both of fact and law arrived at by the Trial Judge.

p. 801, l. 20.
p. 802, l. 12.
p. 802, l. 24.
p. 803, l. 20.

19. The Respondents, on their appeal to the Appellate Division, submitted that, in the event of the appeal not being allowed on other grounds, there should be an order for a new trial on the grounds set out in the notice of appeal. These include the following :—

pp. 791-792.
pp. 575-580.

(1) The refusal of the Trial Judge to permit the Respondents, without the consent of the Appellant, to give evidence in reply by making, with the consent of the City authorities, excavations at the place where the breaking of the main occurred for the purpose of showing from the actual state of the soil, whether or not the subsidence had been caused by the City's operations in 1931.

Record.
p. 767, l. 19.
p. 776, l. 41.

(2) The refusal of the Trial Judge to permit the Respondents' expert witnesses to give in reply their reasons for asserting that the ascertained condition of the City's six inch and eight inch pipes, which lay below the Appellant's twelve inch gas main and above the City's works constructed in 1931, negated the theory that the subsidence of the gas main had been caused by the City's works.

p. 124.

(3) The refusal of the Trial Judge to admit evidence of other fires or explosions in the City of Edmonton caused by the escape of gas from the Appellant's mains.

On the view taken by the majority of the Appellate Division it was unnecessary to consider this submission; but the Respondents submit that, unless the present appeal is dismissed, there ought to be an order for a new trial for improper rejection of evidence.

20. The Respondents submit that the judgment of the Appellate Division of the Supreme Court of Alberta is right and ought to be affirmed for the following amongst other—

REASONS.

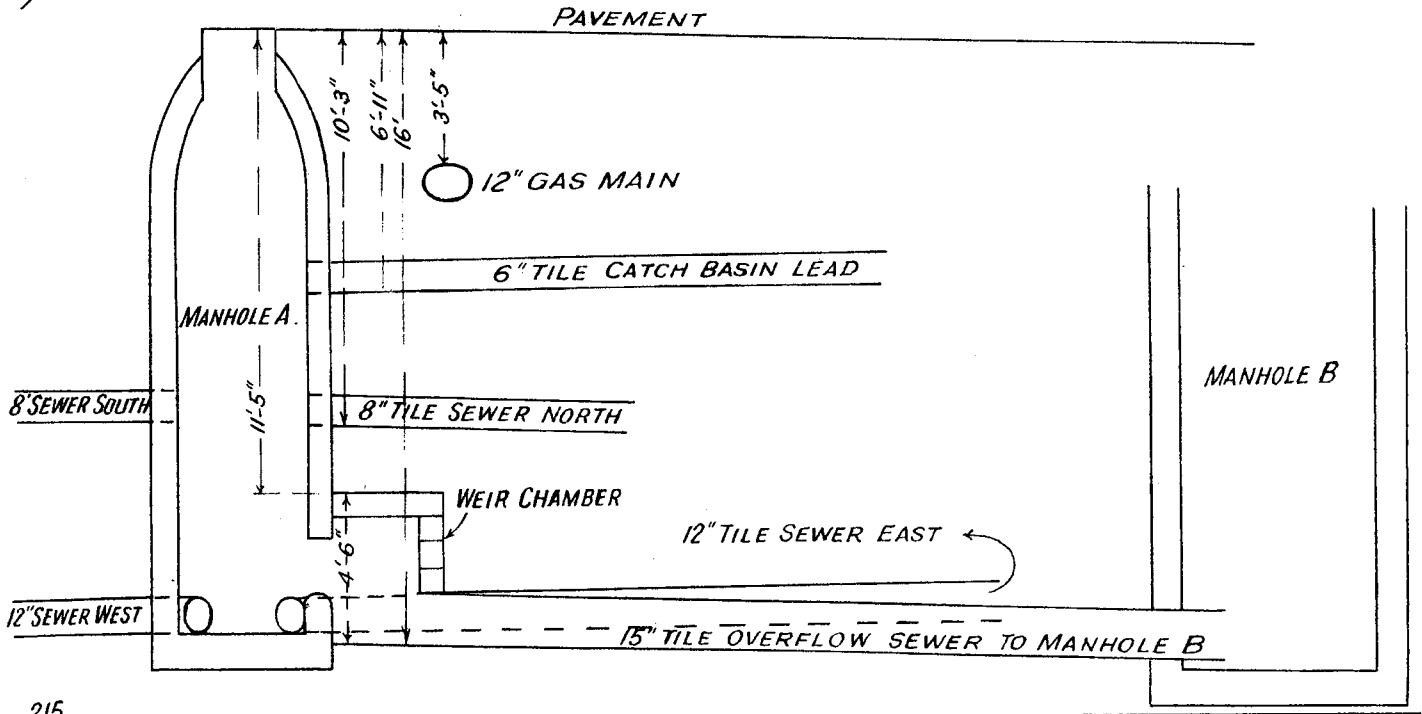
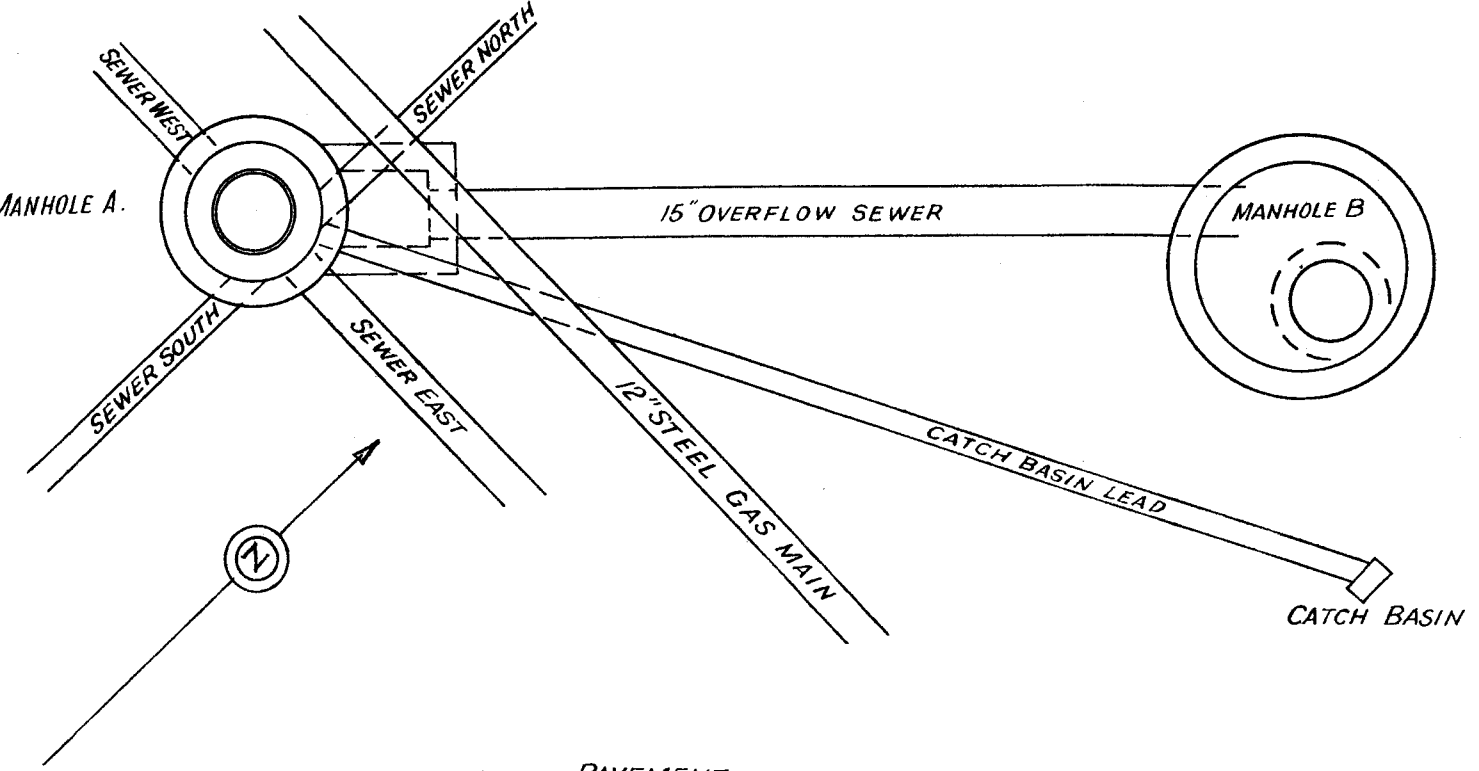
- (1) BECAUSE, as found by both Courts in Alberta the cause of the damage was the escape of the Appellant's natural gas owing to the subsidence and consequent breaking of the Appellant's twelve inch gas main. 20
- (2) BECAUSE the escape of gas was due to the Appellant's negligence.
- (3) BECAUSE the subsidence and breaking of the gas main is sufficient evidence of want of due care.
- (4) BECAUSE the subsidence of the main at the street crossing where the break occurred was due to stresses caused by frost and other physical agencies and the Appellant's gas main was not designed or constructed to resist such stresses. 30
- (5) BECAUSE the Appellant's natural gas is a dangerous thing and the Appellant, having allowed the gas to escape, is answerable for the resulting damage.
- (6) BECAUSE the act of a third party does not relieve from liability where such act was known and there was ample opportunity to avoid the consequence.
- (7) BECAUSE both Courts have found that the Appellant was aware or ought to have been aware of the construction by the City in 1931 of drainage works underneath the main and, if such works could or might 40

cause subsidence, it was the duty of the Appellant to inspect them and to take any steps necessary to protect its main from damage.

- 10
- (8) BECAUSE the Appellant's statutory authority to supply gas in the City of Edmonton was permissive only and was qualified by the statutory provision that it was not to be exercised in such a manner as to endanger the public health or safety.
- (9) BECAUSE the construction of the main which broke was such as to endanger the public health or safety.
- (10) BECAUSE a statutory authority which is permissive merely is not exercisable in prejudice of the common law right of others.
- (11) BECAUSE the Appellant created a nuisance by allowing its gas to escape and the Appellant's statutory authority did not authorise the creation of a nuisance.
- 20
- (12) BECAUSE the opinions of the Respondents' expert witnesses as to the cause of the subsidence and breaking of the pipe in question are to be preferred to the opinions of the Appellant's expert witnesses.
- (13) BECAUSE the learned trial Judge erred in finding that the cause of the subsidence was the City's construction in 1931 and in holding that the Appellant could not reasonably be expected to anticipate the injurious effect of such construction.
- (14) BECAUSE the judgment of the majority of the Appellate Division of the Supreme Court of Alberta is right and ought to be affirmed.

W. N. TILLEY.

S. B. WOODS.



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CITY OF EDMONTON. ENGINEERING DEPT.

PLAN SHOWING

SECTIONAL ELEVATION OF SEWERS & GAS MAIN

AT LANE S. OF JASPER AND 107 STREET.

Scale: 1 Inch = 5 feet.

(Sgd) A. W. Haddow
 City Engineer - - - 2nd April 1934.

In the Privy Council.

No. 27 of 1935.

*On Appeal from the Supreme Court of
Alberta Appellate Division.*

BETWEEN

N O R T H W E S T E R N
U T I L I T I E S L I M I T E D

(Defendant) *Appellant*

AND

L O N D O N G U A R A N T E E
A N D A C C I D E N T C O M -
P A N Y L I M I T E D a n d
o t h e r s

(Plaintiffs) *Respondents.*

RESPONDENTS' CASE.

BLAKE & REDDEN,

17 Victoria Street, S.W.1.