Privy Council Appeal No. 18 *of* 1916.

The Corporation of the City of Toronto - *Appellants*

v.

The Consumers' Gas Company of Toronto - *Respondents*

FROM

THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF **THE** PRIVY COUNCIL, DELIVERED THE 1ST AUGUST, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD SHAW.]

The action out of which this appeal arose was brought by the appellants, the City of Toronto, against the respondents, the Consumers' Gas Company, to recover the cost of lowering a 20-inch gas main belonging to the defendants on Eastern Avenue at or near the intersection of that avenue with Carlaw Avenue, both avenues being public streets of Toronto. There is no question of the propriety of the construction by the City of the public sewer on Carlaw Avenue, nor of the fact that such construction necessitated the lowering of the gas main. These operations were not brought about in the interest or for the purposes of the Gas Company, but of the Corporation, which, however, was acting undoubtedly in the public interest. Upon whom—the City or the Gas Company—is the expense of the displacement and replacement of the gas-pipes to fall? This is the question in the case.

The Trial Judge gave judgment in favour of the appellants. Upon an appeal by the respondents to the Supreme Court of Ontario that Court allowed the appeal and dismissed the action. Although the amount involved is small, the question is of importance, and its settlement will regulate the general point of liability as between the City and the Gas Company for the cost of operations of a similar nature.

The Board entertains no doubt that the learned Judges of the Supreme Court have come to a correct conclusion. In the opinion of their Lordships it is within the right of the City in constructing a drain to order the lowering of the gas main, but it is the duty of the Corporation to pay the cost of the operation.

The Gas Company was incorporated in the year 1848 by by 11 Vic., c. 14. Under section 1 of the statute it was given power to purchase, take, and hold

"lands, tenements, and other real property for the purposes of the said company."

By section 13 it was made lawful for the Company, after two days' written notice to the City,

"to break up, dig, and trench so much and so many of the streets . . . . as may at any time be necessary for the laying down the mains and pipes to conduct the gas . . . . or for taking up, renewing, altering or repairing the same."

Provision was made by the same section against unnecessary damage being done and uninterrupted passage being kept through the streets, the work having to be finished and the replacing of the streets accomplished without unnecessary delay. By section 15 of the statute the location of the gas-pipes was dealt with, and it was provided that they should be 3 feet from any other gas-pipes; and, with regard to their situation, if any differences arose on that point, these were to be settled by the surveyor.

Once the pipes were laid by statutory authority, then they, in fact, became *partes soli*. There seems little reason to doubt that in the year 1848, when the Gas Company thus laid down its pipes, the freehold of the ground was in the Crown. Whether this was so or not would not appear to make any difference as to the exact right acquired under the Gas Company Act of 1848; but it is a circumstance worthy of note that the present demand by the Corporation is a demand founded upon a right which vested in it or its predecessors subsequent to those rights which were created by statute in the Gas Company itself.

In the *Metropolitan Railway Company* v. *Fowler*, 1893 A.C., 425, Lord Watson thus dealt with the legal position in reference to a tunnel constructed by that Railway Company under part of the City of London, and he observed, "the tunnel has become *pars soli* in the strictest sense of the words. If it had been constructed by one who was proprietor *a centro usque ad cœlum* it would have passed in the absence of exception with his conveyance of the land. As matters stand the owners of the soil, whoever these may be, are practically divested of interest in that part of it which has been converted into tunnel. They have no right to occupy or interfere with it in any way whatever, and their exclusion is not for a period limited, but for all time." And in another portion of his judgment he said,

"I think the tunnel is as much 'land' as the highway itself or any other part of the soil beneath." The same principle would appear to apply to the gas main in the present case, laid down as it was by virtue of the authority of the Act of 1848.

It is now expedient to see what are the powers relied upon by the appellants as entitling them to charge upon the Gas Company the cost necessarily incurred by them of lowering the pipes of that Company. One ground is thus stated by the learned Trial Judge, whose opinion is that the Corporation "has the paramount duty of providing for the health of the citizens with reference to the construction of sewers on their streets, and that the defendants have only the right to use the streets for their own benefit, subject to that paramount authority." Certain decisions of Courts in the United States Reports in support of this doctrine of paramountcy are quoted.

Their Lordships are of opinion that there is no such doctrine of paramountcy in the abstract, and that unless legislative authority, affirming it to the effect of displacing the rights acquired under statute as above described by the respondents, appears from the language of the statute book, such displacement or withdrawal of rights is not sanctioned by law. In this, as in similar cases, the rights of all parties stand to be measured by the Acts of Parliament dealing therewith; it is not permissible to have any preferential interpretation or adjustment of rights flowing from statute; all parties are upon an equal footing in regard to such interpretation and adjustment; the question simply is—What do the Acts provide?

Before dealing with the statute specifically founded upon as justifying the position and claim of the City, namely, that of 1913, it may be convenient to state that in 1834, by 4 William IV, c. 23, the limits of the town of York were extended, and the town was erected into a city under the name of the City of Toronto. Under section 22 of that statute, it was given full power with regard to the surface of the streets and with regard to the repair, &c., thereof. There was in that statute no vesting with regard to the soil.

In the year 1849, by the Act 12 Vic., c. 80, re-enacted by c. 81, it was provided by section 31 that the Corporation had power to make bye-laws for the erection, construction, or repair of such drains as the interest of the inhabitants required to be erected, &c., at the public expense. This Act was subsequent in date to the Gas Company's statute. It was repealed by 22 Vic., c. 99, but under the latter statute power was given to make regulations "for sewerage or drainage that may be deemed necessary for sanitary purposes." It was, however, not until that date, namely, 1858, that by that statute all roads, streets, and highways were vested in the municipality.

This brief historical sketch has been ventured upon in order to make it clear that the position of the Gas Company

cannot in any sense be looked upon as having been in the nature of encroachment upon existing rights, statutory or otherwise, of the City of Toronto.

The Act put forward, however, in support of the respondents' case is the existing Municipal Act of 1913. By section 325 (1) of that Act it is provided :—

"Where land is expropriated for the purposes of a Corporation, or is injuriously affected by the exercise of any of the powers of a Corporation or of the Council thereof, under the authority of this Act, or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the Corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected."

It is, however, extremely important to ascertain what the word "land" here mentioned embraces. Unless a careful attention be given to this point the danger might be incurred of applying principles laid down in England, which extend and were meant to apply solely to land with the specific limitations of definition in the English Lands Clauses Act to cases where these specific limitations are not found or where the definition is different.

Under the English Lands Clauses Act, section 3, the definition is : "The word 'lands' shall extend to messuages, lands, tenements, and hereditaments of any tenure." In the present case the definition of "land" is contained in section 321 (*b*). The whole of that section dealing with not only land, but the terms "expropriation" and "owner" is important. The section reads in this way :—

"In this part :

"(*a.*) 'Expropriation' shall mean taking without the consent of the owner, and 'expropriate' and 'expropriating' shall have a corresponding meaning.

"(*b.*) 'Land' shall include a right or interest in, and an easement over, land.

"(*c.*) 'Owner' shall include mortgagee, lessee, tenant, occupant, and a person entitled to a limited estate or interest in land, a trustee in whom land is vested, a committee of the estate of a lunatic, an executor, an administrator, and a guardian."

The reasons have already been assigned for holding that the space occupied by the gas mains and the gas mains themselves of the appellants are of the nature of land in its ordinary sense. It must however, be added, that in any view the definition of "land" in the Municipal Act unquestionably includes them. For it can hardly be denied that the words "a right or interest in, and an easement over land" would embrace the right of the Gas Company to have their pipes remain, and to have the interest and use of them, and the space occupied by them undisturbed ; nor can it be doubted that the

Company falls within the definition of owner as just cited. It thus appears plain that the taking, without the consent of the owner, of this right or interest becomes subject to those provisions contained in section 325.

One of these provisions is that compensation is to be made where the land (thus including a right or interest in the land) is injuriously affected by the exercise of such powers. The Corporation is accordingly liable in respect of such injurious affection. All that is asked in the present case is that the displacement and replacement of the pipes shall be paid for. Without compensation the City would not be empowered to make such displacement, and the measure of injurious affection, namely, the cost of the operation, would seem to be fully covered accordingly by the terms of the Act of Parliament.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed. The appellants will pay the costs.

In the Privy Council.

THE CORPORATION OF THE CITY OF TORONTO

v.

THE CONSUMERS' GAS COMPANY OF TORONTO.

DELIVERED BY LORD SHAW.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1916.