

THE CONSUMERS GAS COMPANY } APPELLANT; 1897  
 OF TORONTO (PLAINTIFF)..... }  
 AND \*Mar. 15, 16.  
 \*May 1.  
 THE CITY OF TORONTO (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Assessment and taxation—Exemptions—Real property—Chattels—Fixtures—Gas pipes—Highway—Title to portion—Legislative grant of soil—11 V. c. 14 (Can.)—55 V. c. 48 (O)—“Ontario Assessment Act, 1892.”*

Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the “Ontario Assessment Act of 1892” and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act.

The enactments effected by the first and thirteenth clauses of the company’s Act of incorporation (11 Vict. ch. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings, where pipes may be laid are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation.

The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city ought to be separately in the respective wards of the city in which they may be actually laid, as in the case of real estate.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the decision of the Queen’s Bench Division (2), which dismissed the plaintiff’s action with costs.

\*PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) 23 Ont. App. R. 551.

(2) 26 O. R. 722.

1897  
THE  
CONSUMERS  
GAS CO. OF  
TORONTO  
v.  
THE  
CITY OF  
TORONTO.

The action was brought to test the validity of the assessment for taxes of the appellant's mains and pipes laid under the surface of the public places, roads and tramways, of the city of Toronto, and used to supply gas to consumers. The questions were raised by suit to recover \$7,940, amount of taxes paid by appellants under protest upon such assessment for the year 1894.

The parties to the action agreed upon a special case which was in effect as follows:—

The appellant has the right to lay mains and pipes upon and under the streets and highways of the city of Toronto, as provided by its Act of incorporation and the Acts amending the same, and thereby to convey gas manufactured by it at its works situate in ward 2 of the said city, to the consumers upon properties fronting or abutting upon the various streets and highways of the said city, and the said company, pursuant to such powers, did lay such mains and pipes from its works, which mains and pipes were in the year 1893 of at least the value of \$500,000.

During the year 1893 the Board of Assessors of the city of Toronto assessed the said company, for 1894, in the Assessment Roll, for said ward 2, as shewn in the Assessment Roll, and in the sum of \$653,000, (increased by County Judge to \$717,590,) set out under the column headed "Value of Buildings" was included the sum of \$500,000 in respect of the said mains and pipes so laid as aforesaid, some of which are situated in each of the six wards of the city of Toronto.

The company appealed against the assessment to the Court of Revision, which confirmed the same, and the company then appealed to the proper County Judge against the decision of the Court of Revision.

On the hearing of the last mentioned appeal it was admitted by the said company that the assessment upon its building was \$64,500 less than their true value,

and it consented to the assessment being increased by that sum. The County Judge was then asked to consider, and consider only, the question of whether the mains and pipes belonging to the said company and laid in the city streets, and attached to the said plant and buildings, were exempt from taxation, and after hearing the arguments for the company, and for the defendant, the County Judge decided that the said mains and pipes were assessable, and confirmed the assessment, but at the request of the said company specially showed that the mains and pipes were assessed at \$500,000, and amended the Roll accordingly.

The rate of taxation for the year 1894 was fixed at sixteen mills in the dollar, and the company, on 10th July, 1894, after demand and under protest, paid \$7,940, being the taxes upon the said assessment of \$500,000 upon the said mains and pipes after allowing a discount of \$60, on the last instalment of said taxes.

The said company invests the principal part of its means in gas works, within the meaning of subsection 2 of section 34 of the Assessment Act.

The special case so agreed upon provided that if the court should be of opinion that the assessment of the mains and pipes was illegal, then judgment should be entered for the plaintiff for \$7,940, with interest and costs, or if the court should be of opinion that the assessment was in part illegal, by reason of all of the mains and pipes being assessed in ward 2 or otherwise, then it is to be referred to the County Judge to ascertain the value of the mains not assessable under such assessment, and to fix what part of said taxes should be returned to the plaintiff, based upon the reduced assessment so ascertained by him, the portion of said \$7,940 so fixed to be payable to the company, with interest; costs in such case to be in the discretion

1897  
 THE  
 CONSUMERS  
 GAS CO. OF  
 TORONTO  
 v.  
 THE  
 CITY OF  
 TORONTO.  
 —

1897  
 THE  
 CONSUMERS  
 GAS Co. OF  
 TORONTO  
 v.  
 THE  
 CITY OF  
 TORONTO.

---

of the County Court Judge; or in case the court should be of opinion that the assessment was legal, then the action was to be dismissed with costs.

*McCarthy* Q.C. and *Miller* Q.C. for the appellant. Our courts have held that rails laid on the streets are not assessable as real estate; *Toronto Street Railway Co. v. Fleming* (1); and gas pipes are in the same position. See also *Hay v. Edinburgh Water Co.* (2); *Chelsea Waterworks Co. v. Bowley* (3).

The assessment was only valid, in any case, as to ward 2. *Rex v. Brighton Gas Co.* (4).

*Robinson* Q.C. and *Fullerton* Q.C. for the respondent referred to *Metropolitan Railway Co. v. Fowler* (5).

THE CHIEF JUSTICE.—I have read the judgment of Mr. Justice Gwynne, and entirely concur in it, so far as it goes.

Apart altogether from the enactment contained in the Act incorporating the appellant company relied on by Mr. Justice Gwynne, I am, however, of opinion that the judgment of the Chancellor, except so much of it as relates to the mode of assessment, was right and ought for the reasons given by him, to be affirmed.

By section 6 of the Ontario Assessment Act of 1892, it is enacted that :

All municipal, local or direct taxes or rates shall, where no other express provision has been made in this respect, be levied equally upon the whole ratable property real and personal of the municipality, or other locality according to the assessed value of such property, and not upon one or more kinds of property in particular, or in different proportions.

Section 7 of the same Act is as follows :

- (1) 35 U.C.Q.B. 264; 37 U.C.Q.B. 116. (3) 17 Q. B. 358.  
 (4) 5 B. & C. 466.  
 (2) 12 Court of Sess. Cas. 2 ser. 1240; 1 Macq. H. L. 682. (5) [1893] A. C. 416.

All property in this province shall be liable to taxation, subject to the following exemptions.

None of these exemptions have any bearing on the present case.

Section 9 enacts that :

All real property situate within, but owned out of the province, shall be liable to assessment in the same manner and subject to the like exemptions as other real property under the provisions of this Act.

By the interpretation clause, section 2, the following definitions are given :

Land, real property and real estate respectively shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land and land covered with water, and all mines, minerals, quarries, and fossils in and under the same except mines belonging to Her Majesty.

I am of opinion that the gas pipes of the appellants laid under the streets of the city were under this Act real property belonging to them, and as such liable to assessment. I regard the case of *The Metropolitan Railway Company v. Fowler* (1), as conclusively showing that these pipes are not to be considered as chattels placed beneath the public streets and highways, in the exercise of a mere easement, but being affixed to the land, as actual real property within the meaning of the interpretation clause. No matter in whom the fee in the soil of the surface of the streets was vested, so much of the subsoil as is occupied by the appellant's pipes must be held to constitute part of the land, unless we are altogether to disregard the decision of the House of Lords in the case cited.

As is clearly and forcibly stated in the judgment of Lord Watson, the pipes must be considered as much land as the highway itself. I can see no difference between the case of pipes thus placed on the highway,

1897  
 THE  
 CONSUMERS  
 GAS CO. OF  
 TORONTO  
 v.  
 THE  
 CITY OF  
 TORONTO.  
 The Chief  
 Justice.

(1) [1893] A. C. 416.

1897  
 ~~~~~  
 THE  
 CONSUMERS  
 GAS CO. OF  
 TORONTO  
 v.  
 THE  
 CITY OF  
 TORONTO.  
 ———  
 The Chief  
 Justice.  
 ———

and pipes or mains placed or affixed under the surface of land, the property of which might be in a private owner. The Court of Appeal were no doubt embarrassed by their previous decision in the case of *Fleming v. The Street Railway Company* (1).

The Chancellor attempted to distinguish that case from the present, but I confess I do not think it is susceptible of distinction. I was a party to that decision, but I do not hesitate to say that I now think the rails were "things affixed to the land," and as such liable to assessment as real property, and that that case was consequently wrongly determined. I agree with Mr. Justice Gwynne that the assessment ought to have been made as in the case of real estate and land generally, in the separate wards of the city. Therefore, the mode of assessment adopted was illegal and in accordance with clause 15 of the special case it must be referred to the county judge to ascertain the amount to be returned to the appellants. And it will be for the County Judge to make such order as may seem to him proper as to the costs, not merely in the first instance, but in the Court of Appeal and in this court.

GWYNNE J.—The appellants are a gas company in the city of Toronto incorporated by Act of the provincial legislature and by that Act are authorized to lay mains and pipes upon and under the streets and highways of the city. They have been assessed for the year 1894 in the sum of \$500,000 for "mains under public streets or roads" and \$217,950 for buildings and plant.

The question before us is solely as to the validity of the assessment as to the mains and pipes and comes up on a special case, and the question is whether that assessment is or is not valid under the Ontario Con-

solidated Assessment Act of 1892 (55 Vict. ch. 48), as coming within the terms "land" and "real property" made liable to the assessment by that Act.

The question appears to me to be determined by the appellant's Act of incorporation, 11 Vict. ch. 14. The 1st section of that Act conferred upon the company power to purchase, take and hold lands, tenements and other real property for the purposes of the said company and for the erection and construction and convenient use of the gas works of the company.

Then by section 13 the company is empowered to break up, dig and trench so much and so many of the streets, squares and public places of the city as may at any time be necessary for laying down the mains and pipes to conduct the gas from the works of the company to the consumers thereof or for taking up, renewing, altering or repairing the same when the said company shall deem it expedient, doing no unnecessary damage, etc., and making the said openings in such parts of the said streets as the City Surveyor under the direction of the Council shall permit and point out. Now, this 13th section operates, I think, clearly as a legislative grant to the company of so much of the land of the said streets and below the surface as it shall find necessary to take and hold under section 1 *for the purposes of the company* and for the convenient use of the gas works, and when the places are designated by the corporation where the mains may be laid, and they are placed there, the land occupied by such mains is land taken and held by the company for the necessary purposes of the company and the convenient use of the gas works, and is therefore liable to assessment as land under the provisions of the assessment Act relating to land and real property.

1897  
 THE  
 CONSUMERS  
 GAS CO. OF  
 TORONTO  
 v.  
 THE  
 CITY OF  
 TORONTO.  
 Gwynne J.

1897  
 ~~~~~  
 THE  
 CONSUMERS  
 GAS CO. OF  
 TORONTO  
 v.  
 THE  
 CITY OF  
 TORONTO.  
 \_\_\_\_\_  
 Gwynne J.

The appellant, however, claims exemption under section 7, subsection 6 of that Act, which exempts from taxation every public road and way or public square—whether the public streets wherein the mains are laid are vested in the Crown or in the municipality of the city for the public use is of no importance, for in neither case would they in the absence of this subsection be subject to taxation by the city who is bound to maintain them for the use of the public; so that this subsection would seem to have no application except to streets, roads or squares the soil and freehold of which is vested in some private person or corporation, and which would be liable to be assessed against the owner but for the exemption contained in this subsection.

The property in question being assessable as land must be assessed in the several wards of the city and the case therefore must be referred back to the County Judge in the terms of the special case.

SEDGEWICK, KING and GIROUARD JJ. concurred in the opinion of the Chief Justice.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Mulock, Miller, Crowther & Montgomery.*

Solicitor for the respondent: *Thomas Caswell.*

---