DANIEL M. FINNIE (PLAINTIFF)... } APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT)..... } RESPONDENT;

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*Feb. 25, 26.

*May 15,

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Pledge—Deposit with Tender—Forfeiture—Breach of Contract—Municipal Corporation—Right of Action—Damages—Compensation and set-off—Restitution of thing pledged—Arts. 1966, 1969, 1971, 1972, 1975, *C. C.—Practice on appeal—Irregular procedure.*

C. on behalf of J. C. & Co., a firm of contractors of which he was a member, deposited a sum of money with the City of Montreal as a guarantee of the good faith of J. C. & Co. in tendering to supply gas for illuminating and other purposes to the city and the general public within the city limits at certain fixed rates, lower than those previously charged by companies supplying such gas in Montreal, and for the due fulfilment of the firm's contract entered into according to the tender. After the construction of some works and laying of pipes in the public streets, J. C. & Co. transferred their rights and privileges under the contract to another company and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit which was refused by the city council which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by J. C. & Co. of their contract. After the transfer, however, the companies supplying gas in the city reduced the rates to a price below that mentioned in the tender so far as the city supply was affected, although the rates charged to citizens were higher than the price mentioned in the contract.

Held, that the deposit so made was a pledge subject to the provisions of the sixteenth title of the Civil Code of Lower Canada and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone

PRESENT:—Sir Henry Strong C.J. and Sedgewick, Girouard, Davies and Mills JJ.

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by the act of the creditor and the debtor was entitled to its restitution although the obligation for which the security had been given had not been executed.

On a cross-demand by the defendant for damages, to be set-off in compensation against the plaintiff's claim ;

Held, that, as the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city ; and that the breach of contract in respect to supplying the public did not give the corporation any right of action for damages suffered by the citizens individually.

Held, further, that prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set-off in compensation of the claim for the return of the deposit.

The court also decided that, following its usual practice, it would not, on the appeal, interfere with the action of the courts below in matters of mere procedure where no injustice appeared to have been suffered in consequence although there might be irregularities in the issues as joined which brought before the trial court a *demande* almost different for the matter actually in controversy.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

The circumstances of the case and the questions at issue on this appeal are stated in the judgment reported.

Lafleur K.C. and *R. C. Smith K.C.* for the appellant.

Atwater K.C. and *Ethier K.C.* for the respondent.

The judgment of the Court was delivered by

GIROUARD J.—On the 11th of July 1893, John Coates, on behalf of tenderers John Coates & Co., a firm composed of himself and two nominal partners residing abroad, deposited with the City of Montreal the sum of $15,000

as a guarantee of the good faith of the tenderers and of the due fulfilment of their contract

as required by the specifications which form part of the contract.

By this contract John Coates & Co. agreed with the City of Montreal

to supply and furnish gas for lighting, cooking, heating or manufacturing purposes, *to the public* within the City of Montreal during a period of ten years to be computed from the first of May, 1895, at a price not to exceed one dollar per each thousand feet, subject to a rebate of five per cent for prompt payment.

The contract was signed by the City of Montreal and the said firm, acting through John Coates, on the 22nd day of December, 1893. It was stipulated that the city would not be liable for the gas supplied to the consumers

over and above the amounts to become due for gas furnished for the use of the buildings belonging to the city.

It was finally agreed that "the present contract does not apply to street lamps."

On the 17th of January, 1894, John Coates & Co. sold their contract, franchises, works, plant, mains and pipes to the Consumers Gas Co. (organized and controlled by Mr. Coates) who undertook to discharge and execute the liabilities and obligations of the said John Coates & Co. It is established that both John Coates & Co. and the Consumers Gas Co. did considerable work in the erection of gas works at Côte St. Paul and the laying of mains and pipes principally in some of the outside municipalities where they had secured similar franchises and privileges. As early as March 1894, the Consumers Gas Co. were supplying gas in the western parts of Montreal at one dollar, the price named in the concession, less five per cent for prompt payment. But, adds Mr. Coates, examined on behalf of the defendant,

as we came to each street that we supplied gas, the Montreal Gas Co. reduced their price to the citizens in that street only where we had our pipes and were supplying gas. As soon as this was done, many of the consumers who had promised to take gas from our company went back on their promises rather than have their grounds disturbed in front

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of the houses, saying that they could get it now at the same price from the old company. This was one of the factors that discouraged my directors from pursuing competition.

This unforeseen result induced Mr. Coates and his friends to sell out to the Montreal Gas Company, especially the works erected at Côte St. Paul and everything connected with them, for $347,483, paid in par value shares of the Montreal Gas Company, which at the time commanded a very high premium and permitted the shareholders of the Consumers Gas Co. to get their capital back and 15 per cent profit.

It is remarkable that the transfer comprises only the gas works at Côte St. Paul and the

rights, privileges and franchises for supplying gas to the said City of Ste. Cunégonde de Montréal and the Town of Saint-Henri.

No reference is made to the contract of John Coates & Co. with the Town of Westmount and the City of Montreal, for what reason does not appear. For the purposes the Montreal Gas Company had in view, namely, to stop competition in the gas supply in Montreal, it was probably thought sufficient to acquire the above property and rights. The Montreal Gas Co. had their own system of mains and pipes throughout the whole city, and, at that time at least, the two or three miles of pipes of the Consumers Gas Co. within its limits were to them of little value, if any. So the above assets of the Consumers Gas Co. alone seem to have been purchased by the Montreal Gas Co., without any covenant on their part to carry out the obligations of John Coates & Co., or their substitutes.

Mr. Coates says, in his evidence, that the transfer was provisionally made and signed *sous seing privé* on the 22nd of September, 1894, by the legal advisers of the parties. His testimony is corroborated by a resolution of the Light Committee of the city of the 6th of February, 1895, wherein it is declared that the Consumers Cas Co.

have notified the city that they have sold to the Montreal Gas Co. all their plant, material, pipes, &c.

A notarial deed of transfer, which is alone produced, was signed on the 11th of March, 1895, and it is from that source that we have been able to comprehend the transaction between the two companies. Whether transferred in September 1894 or March 1895, the Montreal Gas Co. took possession and control of the whole gas system of the Consumers Gas Co., so far as completed, on the 22nd September, 1894, even using some of the pipes laid within Montreal, and abandoning others, and continued to charge the old rate to Montreal consumers, a course they could very well follow till the 1st of May, 1895, when their old franchise with the City of Montreal was terminating.

The whole summer of 1895 was spent in negotiations between the city and the Montreal Gas Co. At the same time, on the 11th of June, 1895, the city protested John Coates & Co., and requested them

to immediately fulfil their obligations resulting from the said agreement and to furnish gas to the public of the City of Montreal as they are bound by virtue of the said agreement; failing which the City of Montreal aforesaid shall take all steps and proceedings as it may think fit to protect its interest, shall forfeit the money deposited by the said John Coates & Company as a security for the fulfilment of the said obligations and shall take all other recourse for damages as of right against the said John Coates & Company.

John Coates & Co. took no notice of this protest.

The negotiations with the Montreal Gas Co. came to an end on the 15th day of November, 1895, when a new contract was entered into. The Montreal Gas Co. agreed to supply all the gas required within the city for ten years to be computed from the 1st of May, 1895,

1st. All the gas lamps and the gas therefor that the said City of Montreal may require during the existence of the present contract *for lighting the streets, lanes and public places* of the said city, at the rate of

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seventeen dollars per lamp per year; (and) 2ndly, gas for lighting, heating, cooking and manufacturing purposes *to the public* * * at a price which shall not exceed one dollar and twenty cents per each thousand cubic feet for lighting purposes, * * and of one dollar * * for cooking, heating and manufacturing purposes on prompt payment."

Then special concessions are provided for in favour of the poorer class under certain limitations.

It is in evidence that the Montreal Gas Co. did not always charge to the public the maximum price. As the secretary of the company explains,

if we supply a man taking a very large quantity, he gets it for less than other people.

As a rule, the company gets from the public $1.05 to $1.07 per thousand feet for lighting and heating, which is a higher price than the one agreed upon with John Coates & Co., namely $1 per thousand feet or 95 cents for prompt payment. The citizens therefore pay more, but the city does not.

Mr. Holt, the president of the Montreal Gas Co., says:

Q. Would you consider the fact that this contract was not executed, I mean Coates' contract, that there has been a loss to the city, and, if so, to what extent?

A. If it is to the city proper, the gas supplied by the Montreal Gas Company to the city—I think the Montreal Gas Company are supplying gas at less than was tendered for by Mr. Coates.

* * * * * * *

Q. Is it paying less than a dollar?

A. Oh, much less. They are only paying an average of seventy cents.

This testimony is not contradicted. Mr. Holt, being a witness adduced by the respondent it required no corroboration; but it is fully corroborated by Mr. Moore, the secretary of the company, another witness of the respondent. No attempt was made to prove that the city paid more for lighting its buildings. As the Coates contract covered only gas used in buildings, whether ordered by the citizens or the city, and

not street lamps, we must reasonably infer from Mr. Holt's evidence that the contract with the Montreal Gas Co. was at least more favourable to the city than the Coates contract, even as to city buildings. Probably the parties contemplated that *the public* mentioned in the second clause of the contract referred to the inhabitants or citizens and not to the city as a corporation, who should be charged under the first clause, both as to streets, squares, parks and buildings. From the evidence at least, no distinction seems to have been made.

Such was the situation of the City of Montreal when, on the 1st April, 1896, Mr. John Coates, by his counsel, requested from them the repayment of his deposit of $15,000 made, as he alleges "with his tender for street gas lighting." Seven days after, the Finance Committee passed a resolution, which was not adopted by the council till the 19th of January, 1897, in the following words :

Qu'il a pris en considération une lettre de M. John Coates demandant le remboursement de la somme de $15,000 qu'il aurait déposée pour guarantir l'exécution du contrat intervenu entre lui et la cité relativement à l'approvisionnement du gaz, et qu'après mûre délibération votre comité est venu à la conclusion que, le dit John Coates n'ayant pas rempli ses obligations, la dite somme de $15,000 soit déclarée confisquée conformément aux conventions intervenues au profit de la cité.

On the 9th of June, 1896, the appellant, as transferee of Mr. John Coates, but in his interest and for his benefit, sued the city for reimbursement of the deposit made by him, it is alleged in the statement of claim, as security for the due execution of his tender for street gas lighting, which was not awarded to him, whereas, in fact, no such deposit or tender or contract was ever made by him. No allegation is made that the city had confiscated the deposit or otherwise abused the thing pledged.

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The respondents, instead of meeting this demand by a simple general denegation, placed before the court all the facts in controversy between the parties. They pleaded,

1st. Fraud and conspiracy between the different tenderers, which plea was abandoned in the first court as not proved ;

2ndly. That the said deposit was made by the said John Coates for and on behalf of the said firm of John Coates & Co., who failed to carry out their contract and that, consequently, the sum deposited became the property of the city ;

And 3rdly. That by reason of said failure the city had suffered damages to an amount larger than $15,000, which is offered in compensation or set-off.

The appellant fyled a long answer which amounts practically to a general denial.

Notwithstanding the irregularity of these issues, which brought before the trial court almost a different demand, all the facts connected with the said tender, deposit and contract of John Coates & Co., were fully investigated. On several occasions this court has declared that in matters of mere procedure, when no injustice is shewn, it will not interfere with the action or doings of the court below.

After having heard the parties, their witnesses and examined all the documents, that court dismissed the action with costs for the following reason :

Considérant que la première défense est bien fondée, que c'est bien pour John Coates & Co., que le dit John Coates a fait le dit dépôt et que les dits John Coates & Co., après avoir obtenu le contrat ne l'ont pas rempli et ne se sont pas mis en mesure de le remplir, et que la cité a dû avoir recours à l'ancienne compagnie du gaz comme elle le dit, à des conditions plus onéreuses que celles qui comportait le contrat Coates, spécialement pour les citoyens que la cité représente et dont les intérêts font partie de pareils contrats, en sorte que les dits John Coates & Co., n'ayant pas rempli leur contrat, la défenderesse était en droit de confisquer leur dépôt comme elle l'a fait.

This judgment was confirmed in appeal purely and simply. No notes from the learned judges have been transmitted to us.

The first question we have to examine is the one decided by the two courts below. Was the City of Montreal authorized to confiscate the deposit? For if they were, the action of the appellant is at an end.

This confiscation is certainly not authorized expressly or impliedly either by the terms of the contract or by those of the specifications or tender. They merely set forth that

> a deposit shall be made with each tender, said deposit to be as a guarantee of the good faith of the tenderers and of the due fulfilment of their contract.

It was, therefore, a pledge, *nantissement* or *gage* for a special object well defined in the agreement between the parties. Our Civil Code clearly lays down the powers and rights of the creditor and debtor in such a case.

Article 1969 C.C. says:

> The pawn of a thing gives to the creditor a right to be paid from it by privilege and preference before other creditors.

Article 1971 as amended:

> Saving pawn-brokers, no creditor can, in default of payment of the debt, dispose of the thing given in pawn. He may cause it to be seized and sold in due course of law under the authority of a competent court and obtain payment by preference out of the proceeds * * * *The creditor may also stipulate that in default of payment he shall be entitled to retain the thing.*

Article 1972:

> The debtor is owner of the thing pledged until it is sold or otherwise disposed of. It remains in the hands of the creditor only as a deposit to secure his debt.

It seems clear that, under these articles of the Civil Code, the City of Montreal could not confiscate the deposit of John Coates made for and on behalf of John Coates & Co.

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This proposition of law is so evident that the learned counsel for the respondent, after some hesitation, admitted it as correct, at the hearing before us. They finally relied upon the damages alleged in general terms in their pleas, which John Coates & Co., caused the city by not carrying out their contract. These damages are of two kinds:—First, special, direct and immediate to the city, inasmuch as the Coates contract was lower than the price mentioned in the contract with the Montreal Gas Co. If the respondent had shewn that, in consequence of the change, the city was paying more for lighting its buildings, I would not hesitate to allow it the excess or surplus price in compensation. We have seen that, as a matter of fact, it does get cheaper gas, about twenty-five per cent less than under the Coates contract. Therefore this branch of the claim of the respondent fails.

But they said: "Gas supplied to the citizens is undoubtedly higher by about seven cents per thousand feet." This kind of damages is not set up in the pleas, but as no exception or objection was raised, we will perhaps do justice to the parties by examining this claim. In the first place, how much is, or may be, due to the citizens, does not appear. There is no evidence whatever as to that fact. Even if there was, how can the city, as a corporate body, claim the damages suffered by the citizens individually? True, a contract with a gas, telephone or railway company, may confer certain rights and privileges on the citizens individually which, if specially interested, they may assert in a court of justice; but there is no legal identity between a municipal corporation and the individual members thereof, and if the latter suffer any special damage by reason of a breach of the contract, they alone, individually, can demand its recovery.

(Am. & Eng. Ency. of Law, vo. Municipal Corporations, vol. 20 (2 ed) at p. 1133.)

Finally, the respondent sets up certain damages caused by the Coates pipes in the streets. According to Mr. St. George, the engineer of the city, and the only witness examined on the subject, these pipes will sooner or later form a serious nuisance, which cannot be removed for $15,000. He says:

> They (Coates & Co.) have caused damage to the city in this way, that they have laid gas pipes in those streets and have not supplied gas through them to the citizens, consequently those pipes occupy a position in the streets that is valuable to the city, for this reason, that our streets are so occupied now with sewers and gas pipes belonging to the Montreal Gas Company, our water pipes and conduits that some of them are in—the Bell Telephone Company, for example,—that if the city wants to give a franchise, or wants to permit other lighting companies or telephone companies to put their wires underground, we will have very little space to give them to do it.

Can it be seriously pretended that these remote and uncertain damages constitute a debt which is equally liquidated and demandable, within the meaning of article 1188 C.C.? No, they cannot be offered in compensation or set-off. It is indeed doubtful if they are recoverable. Whether they are or not, the respondent's only course was the direct action indicated in its protest or a cross-demand, *demande reconventionnelle* under Art. 217 of the Code of Civil Procedure.

The respondent, therefore, has entirely failed to establish that anything is due to it by reason of the breach of the Coates contract. How, then, can it keep and retain the deposit made in relation to the contract? It relies upon Art. 1975 of the Civil Code, and this is the last point to be examined. This article enacts that

> The debtor cannot claim the restitution of the thing given in pledge, until he has wholly paid the debt in principal, interest and costs; *unless the thing is abused by the creditor.*

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The debt in this particular case consisted in the supply of gas to the respondent and the citizens of Montreal at a certain price and in this respect John Coates & Co. are no doubt in default and must pay the damages caused by that default before they can claim the restitution of their deposit, *unless the thing pledged is abused by the creditor*. What greater abuse of a money deposit or pledge can be made than the appropriation of the same to his own use by the pledgee? If he was not called upon to hold it in a Savings Bank at interest, at least he was bound to keep it apart and take care of it, *en bon père de famille*; he cannot use the same and especially resort to confiscation, without a special stipulation to that effect. This confiscation was a gross abuse of the thing pledged. It is no answer to say that the City of Montreal, at all times, is able to produce its equivalent. The law makes no distinction between the rich pledgee and the poor one. It declares generally that the pledgee cannot abuse the thing pledged. Appropriation affords the clearest evidence of abuse within the meaning of Article 1975 of the Civil Code, corresponding to Art. 2082 of the Code Napoléon. This principle is not disputed; not a single authority to the contrary was cited at bar; it was practically conceded by counsel for the respondent when they admitted that it had no right to confiscate; it is finally laid down by all the French commentators and was applied by the Court of Review in *Leduc* v. *Girouard* (1), and also by the Court of Appeal in a judgment, confirmed by the Privy Council, in *Senécal* v. *Pauzé* (2). Even the mere use unauthorized by the debtor, is an abuse contemplated by the Code. Pothier, Nant. n. n. 23, 32, 51; Troplong, Nant. n. 468; 9 Marcadé, n. 1189; Baudry-Lacantinerie, Nant. n. 141; Pand. Fr. Rép. vo. "Gage," nn. 355, 409, 500. Laurent, vol. 28, n. 498 says:

(1) M. L. R. 2 S. C. 470. (2) 14 App. Cas. 637.

Il y a exception. dit l'article 2082, quand le détenteur du gage en abuse. Qu'entend-on ici par abus? Ce n'est pas une jouissance abusive comme celle de l'usufruitier (art. 618), puisque le gagiste n'a point le droit de jouir, à moins que le débiteur ne lui en ait donné la permission ; et, dans ce cas, il va sans dire qu'il doit se renfermer dans les limites de la faculté qui lui a été accordée. Hors ce cas, le fait seul d'user de la chose est un abus, puisque le créancier fait ce qu'il n'a pas le droit de faire.

Huc, Vol. 12, p. 457, after quoting article 2082 C. N,, likewise says :

Le débiteur peut donc réclamer la restitution du gage, avant l'extinction de la dette, si le créancier se sert de la chose engagée, ou si étant autorisé par le contrat à s'en servir, il en abuse. Le créancier qui est ainsi privé de son gage, par sa faute, n'a pas le droit d'en demander un autre ; c'est ce qui résulte des déclarations faites au corps législatif ; il ne peut pas davantage réclamer immédiatement le remboursement de ce qui lui est dû ; il est obligé d'attendre l'échéance. Il a donc encouru la perte de son gage avant d'être payé.

The respondent may perhaps recover certain damages in an action properly instituted—a point upon which we do not intend to offer any opinion—but it cannot retain the deposit. The debt may not be extinguished, but the security is gone by the act of the creditor, and the debtor is entitled to its restitution.

For these reasons, we are of opinion that the appeal should be allowed with costs. The respondent is condemned to pay to the appellant the sum of $15,000 with interest from the 8th day of June, 1896, date of the institution of this action, which is the only interest asked, and costs before all the courts.

Appeal allowed with costs.

Solicitors for the appellant: *Grienshields, Greenshields & Heneker.*

Solicitors for the respondent: *Ethier & Archambault.*