

MEREDITH, C.J.O.

SEPTEMBER 21ST, 1914.

TORONTO v. CONSUMERS' GAS CO.

7. O. W. N. 58.

Municipal Corporations—Rights over Highways — Construction of Sewers—Removal and Replacement of Mains of Gas Company Cost of—By whom Borne—Estoppel — Public Utilities Act, 3 and 4 Geo. V. c. 41, s. 51—Municipal Act R. S. O. 1914 c. 192, s. 325—Act of Incorporation of Defendants—11 Vict. c. 14—Soil Occupied by Pipes—"Land"—Moneys Paid under Protest—Action for—Appeal.

WINCHESTER, Co.J., (26 O. W. R. 23) *held*, that the right of a gas company to lay mains in a highway was subject to the paramount right of the municipality to utilize such highway for public purposes, such as the construction of sewers, and when by reason of the carrying out of such public purposes it becomes necessary to relay the mains of the company, the work is to be done at their expense.

New Orleans Gas Light Co. v. New Orleans Drainage Commission, 197 U. S. 453, referred to.

SUP. CT. ONT. (1st App. Div.) *held*, that the soil occupied by the pipes of the appellants was land and that appellants were entitled to damages under sec. 325 of the Municipal Act for its injurious affectation by reason of the exercise of the powers of the municipality.

Consumers Gas Co. v. Toronto, 27 S. C. R. 453, followed. Judgment of WINCHESTER, Co.J., (26 O. W. R. 23), reversed.

I. F. Hellmuth, K.C., and W. B. Milliken, for appellant.
G. R. Geary, K.C., for respondent.

Appeal by the defendant from the judgment of the County Court of the county of York dated 5th March, 1914, 26 O. W. R. 23, pronounced by the Senior Judge of that Court after the trial of the action before him sitting without a jury on the 22nd December, 1913.

The action was brought to recover the expense incurred by the respondent in lowering a 20-inch gas main belonging to the appellant laid on Eastern Avenue, one of the public highways of the City of Toronto, at or near the intersection of that street with Carlaw Avenue, another of the public highways of the city, which was necessitated by the construction by the respondent in the public interest of a sewer on Carlaw Avenue.

HON. SIR WM. MEREDITH, C.J.O.:—It is conceded by the appellant that the lowering of the gas main was necessary to enable the sewer to be constructed and that if the appellant