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(NOUVELLE SÉRIE)

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JURISPRUDENCE ANNOTEE

CONTENANT

LES ARRETS DE PRINCIPES DE TOUS NOS TRIBUNAUX

RÉDACTEUR :

J. J. BEAUCHAMP, C. R.,

AVOCAT DU BARREAU DE MONTRÉAL, DOCTEUR EN DROIT

Auteur de "*The Jurisprudence of the Privy Council*", des "*Répertoires de la Revue Légale*" et de la "*Revue de Jurisprudence*", de la "*Deuxième table des Rapports judiciaires de Québec*", du "*Code civil annoté*", et du "*Répertoire général de jurisprudence canadienne*".

L'étude du droit élève l'âme de ceux qui s'y vouent, leur inspire un profond sentiment de la dignité humaine, et leur apprend la justice, c'est-à-dire le respect pour les droits de chacun,
(ESBACH, Etude du droit, p. 12).

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SOMMAIRE

la preuve nous démontre au sujet de l'écart entre les 200 et les 500 boîtes et que les demandeurs ont été alors informés que, s'ils persistaient dans leur prétention au sujet des 500 boîtes, la commande ne serait pas acceptée ni remplie et que les demandeurs ont accepté alors que la commande ne fut remplie que pour 200 boîtes. Cette preuve est faite par deux témoins, dont l'un, il est vrai, est un des défendeurs dans la cause, mais son témoignage est corroboré par celui de son premier teneur de livres et je crois qu'ils ont dit la vérité. Il résulte de cela que, même si 500 boîtes avaient d'abord été ordonnées, il y a eu modification subséquente de cette convention. On nous dit que la preuve de la modification de cette convention n'était pas légale parce qu'elle était verbale. La première réponse qu'il y aurait à faire à ce sujet c'est qu'il n'y a pas eu d'objection à cette preuve; la seconde c'est que, vu qu'il s'agit d'une affaire commerciale la preuve en question était légale.

Inutile d'en dire davantage: je concours dans l'opinion exprimée par monsieur le juge Panneton.

Je confirmerais le jugement.

Mr. Justice Martin:—The majority of the Court of Review held that the original order of 500 boxes of tomatoes had, by subsequent agreement bteween Beaulieu for appellants and Galbraith, one of the respondents, been reduced to 200 cases: all of the learned judges in the Court of Review holding that the parties could by a subsequent agreement, written or verbal, annul, amend or modify a prior agreement even in writing and in a commercial matter could establish by witnesses such subsequent agreement. The dissenting judge in Review, while concurring in the above holding that verbal evidence of a subsequent

agreement could be legally made, was of opinion that the same was insufficient.

Counsel for respondents in his factum and at the oral argument before us contended that there never was a final and concluded contract for the sale of 500 cases of tomatoes. The circumstances under which the order was given and the verbal evidence of Wylie and Galbraith and having in view Wylie's limited authority in the matter, tend to support this contention, but the written order is against it and the Court of Review properly held that verbal testimony of facts and declarations made before or at the time of writing the order was inadmissible to contradict or change the terms of the written order.

In the view that I take of the case, it does not turn on this point. The respondents invoke a subsequent agreement modifying from 500 cases to 200 cases, and the main question is whether or not they have established such subsequent agreement. The original order was given on the 28th of June, 1916. On the 3rd or 4th of July, Galbraith, noticing that the order was for 500 cases of tomatoes, telephoned to Beaulieu and the latter came down to Galbraith's office: [Here the judge makes an examination of the evidence, and cites the text of the deposition of several witnesses.]

It will be observed that Beaulieu first admits having gone to Galbraith's office a couple of weeks after the order, and in the second deposition he says the interview took place around October which would be four months afterwards. Beaulieu further states: "I am positive we received the goods the same week as the order was given on Wednesday the 28th of June", but the evidence and exhibits clearly show that Beaulieu is mistaken in this

in that no deliveries were made under the order until July 5th after the interview between Beaulieu and Galbraith.

The trial judge attached much importance to the memorandum written at the bottom of the account, stating "425 cases tomatoes to be delivered". Prat says: "I put that down at Mr. Beaulieu's instigation in the sense that he requested me to put that down" and Beaulieu admits that he requested Pratt, the book-keeper, to put this memorandum on the account, and this unauthorized act of Pratt, done at the solicitation of Beaulieu, could not alter or affect the righs of the parties under the agreement of the 3rd or 4th of July, 1916.

It was strenuously pressed for our consideration, by counsel for appellants, that parol evidence of the verbal agreement of the 3rd or 4th of July was illegal and inadmissible. I am of opinion that this objection fails for two reasons: first, proof may be made by testimony of all facts concerning commercial matters and, secondly, there was no objection made to the admissibility of such parol evidence. The only objection made in Galbraith's deposition is as to the witness' statement to Wylie, and no objection was entered to the evidence of Jones. (1)

I would confirm the judgment of the Court of Review and dismiss the present appeal with costs.

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(1) *Schwerenski* v. *Vineberg*, [1891] 19 Supreme Court Reports, 243;—*Gervais* v. *McCarthy*, [1904] 35 Supreme Court Reports, p. 14.

THE QUEBEC RAILWAY LIGHT AND POWER COMPANY, defenderesse-appelante v. VANDRY et autres, demandeurs-intimés.

Responsabilité — Incendie — Compagnie de lumière électrique — Chose inanimée — Preuve — Présomption — Faute — Cas fortuit — Installation défectueuse — C. civ. art. 1053, 1054.

1. Les articles du Code civil doivent être interprétés dans leur ensemble, et non séparément, mais si un article quelque clair qu'il soit dans ses termes, conduit à une injustice ou à une chose déraisonnable, l'on doit présumer que la législature n'a jamais eu l'intention d'atteindre un pareil résultat.

2. Le sixième paragraphe de l'article 1054 C. civ., s'applique aussi bien aux personnes qu'aux choses, ainsi qu'à tous les paragraphes au-dessus.

3. Le nom donné à un livre, un titre, un chapitre ou une section du Code civil ne suffit pas pour contredire la teneur des articles qu'il contient.

4. L'article 1054 ne crée pas seulement une présomption de faute, sans qu'il soit nécessaire qu'elle soit alléguée, mais il établit même une responsabilité. Il suffit pour cela au demandeur d'alléguer les faits de l'accident dont il se plaint, et les relations entre les choses qui ont causées les dommages et le propriétaire, sans qu'il soit nécessaire pour lui de prouver une faute, mais cette responsabilité peut être détruite par le défendeur

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MM. les juges Viscomte Cave, Lord Shaw, Lord Sumner et Lord Parmoor.—Conseil privé.—Nos 8-129.—Londres, 17 février 1920.—Taschereau, Roy, Cannon, Parent et Fitzpatrick, avocats des intimés.—Pentland, Stuart, Gravel et Thompson, avocats de l'appelante.

en prouvant qu'il n'a pas pu empêcher le fait qui a causé le dommage.

5. Lorsque les pouvoirs d'une corporation sont contenus dans des lois publiques et dans des lois privées, une des parties ne peut prendre avantage du fait que ces dernières ne sont pas alléguées, ni prouvées, à moins d'établir que si cela avait été fait, le résultat du procès aurait été différent.

6. Une compagnie d'électricité qui a obtenu de la législature le pouvoir de distribuer l'électricité à haute pression au moyen de cables supportés par des poteaux, n'en est pas moins responsable des dommages qu'elle cause par ses fils électriques, en vertu des articles 1053 et 1054 C. civ.

Le jugement de la Cour supérieure a été prononcé par M. le juge Dorion, le 30 juin 1913. Ce jugement a été infirmé par la majorité de la Cour du banc du roi, le 8 avril 1915. La Cour suprême, par une majorité de une voix, a confirmé le jugement de première instance et finalement le Conseil privé a confirmé ce dernier jugement.

Les faits de la cause et les plaidoiries sont expliqués au rapport du jugement de la Cour du banc du roi (1) et dans les remarques suivantes:

Lord Sumner.—Though no article of the Code is referred to by number in the declaration, it is plain that both art. 1053 and 1054 were relied on, and so the cases were treated both at the trial by Dorion, J., and in the Court of King's Bench on appeal and in the Supreme Court of Canada. There was much difference of opinion among the judges, but the Supreme Court, by a majority of one, restored the judgment of Dorion, J., in favour of the plaintiffs.

(1) 24 B. R., 214.

Two questions of law arise upon the Code—(1) whether the plaintiffs can succeed without proving negligence or *faute* against the company; (2) whether even so the defendant would succeed, if they proved that they could not have prevented the fire. In the Courts below it was argued for the defendants that they could not have forseen the combination of bad weather overloading the branches with *verglas* and of wind breaking off the branch and driving it laterally on the cables, and that they were accordingly the victims of *force majeure*. As to this the findings of fact are against them. It was also argued for the plaintiffs, that if the defendants had installed suitable apparatus they would have received automatic warning at the central station of the breakdown of the cable in St. Foye Road in time to have cut off the current before any mischief was done, but, as nothing was made of this below, it need not be pursued now.

The question whether and under what circumstances a defendant can be made liable in a case of quasi-delict, unless actual *faute* is proved against him, has been much discussed in Quebec in recent years. The case of *Doucet*, (1) brought the controvesy to a head in 1909, and the Supreme Court was then divided in opinion. The present case renewed both the controvesy and the division. In *Doucet's* case, which arose between employer and employee, no definite cause could be discovered for the explosion by which *Doucet* was injured. In the present case the cause of the occurrence is known. The issue, moreover, arises in the present case between contractor and customer. Accordingly *Doucet's* case might be no authority in the present case, but for the fact that in Quebec both cases de-

(1) [1909] 42 S. C. R., 281.

pend on the language of the Code. Unfortunately this seems to have been imperfectly appreciated in the Canadian Courts, and the question "What do the words of Art. 1053 and 1054 mean as a matter of construction?" was not in either case always kept in the forefront.

The opposing views may be summarised thus, without always referring them to the particular judgments in which they are stated. *Faute*, it is said, is the basis of all liability for quasi-delict. To hold a man liable for either delict or quasi-delict, when he is not to blame, is unjust. This must be so in principel and it rests also on authority. The whole jurisprudence of Quebec before *Doucet's* case so holds. Since the Code was enacted, it has been so interpreted, and the dcision before the Code were to the same effect. Furthermore, the framers of the Code were directed to codify existing law and, if they suggested alteration, to indicate which of their proposed articles differed from the existing law, and they did not so indicate art. 1053 and 1054. As a matter of language the articles can be made to give effect to these principles, (1) by holding that art. 1054 does but amplify and carry on art. 1053, and impliedly therefore rests on *faute*, as art. 1053 does expressly, or (2) by holding that paragraph 6 of art. 1054, the "exculpatory" paragraph, applies to the first paragraph of the article as well as to the others, and implies that *faute* must be proved by the plaintiff before the defendant can be called upon for an excuse, or (3) by holding that paragraph 1 of art. 1054 really specifies circumstances from which *faute* may be presumed, leaving the defendant to rebut it by any evidence that may be available.

The contention on the other hand is that the Civil Code was founded on the Code Napoléon, from which it

differed only in language, and that the reasoning of recent decisions of the French Courts on the corresponding art. 1384, ought to be applied, the prior decisions of the Canadian Courts notwithstanding. The result is to apply a principle thus formulated by Fitzpatrick, C. J., in *Doucet's* case:—"Celui qui perçoit les émoluments procurés par une machine susceptible de nuire au tiers, doit s'attendre à réparer la préjudice que cette machine cause—*ubi emolumentum ibi onus.*" Art. 1054 must be held to raise a presumption of *faute* against the defendant Company as the basis of responsibility "non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé...par les choses qu'elle a sous sa garde". In other words, the fact of the accident supplies all the proof of negligence, which it is necessary for the plaintiff to give.

It seems plain that both these trains of reasoning start rather from the text of the Code Napoléon as interpreted by French Courts and the general purisprudence of Quebec than from the very words of art. 1053 and 1054 themselves. Natural as this may be, the statutory character of the Civil Code must always be borne in mind.

"The connexion between Canadian law and French law dates from a time earlier than the compilation of the Code Napoléon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law." *Maclaren* v. *Attorney General for Quebec* (1).

Thus, however, stimulating and suggestive the reasoning of French Courts or French jurists upon kindred subjects and not dissimilar texts undoubtedly is, "recent

(1) [1914] A. C. at p. 279.

French decisions, though entitled to the highest respect ...are not of binding authority in Quebec" *McArthur* v. *Dominion Cartridge Co.* (2), still less can they prevail to alter or control what is and always must be remembered to be the language of a legislature established within the British Empire. In the present case, as in *Doucet's* case, the learned judges of the Supreme Court of Canada sedulously, and as they conceived successfully, conformed to this rule and decided, though in different ways, a question of construction of the Quebec Code in accordance with reasoning, which seemed none the less convincing, because it was suggested by French authors or followed a view long laid down by the Court in Quebec. Nor can the history of the Quebec Code be altogether banished from the recollection of those who administer its provisions, and it is true that under certain conditions it is legitimate to refer to the prior cases which it was intended to codify: *Vagliano* v. *Bank of England*, (1). A construction of articles, which have long been before the Courts, differing from that hitherto accepted, will always, even in a tribunal not bound by prior decisions, be adopted with caution.

Still, the first step, the indispensable starting point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources. Of course it must not be forgotton what the enactment is, namely, a Code of systematised principles and rules, not a body of administrative directions or an institutional exposition. Of course also the Code, or at least the cognate articles, should be read as a whole,

(1) [1891] A. C., p. 145. (2) [1905] A. C., at p. 77.

forming a connected scheme; they are not a series of detached enactments. Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the legislature. Whether particular words are plain or not is rarely susceptible of much argument. They must be read and passed upon. The conclusion must largely depend on the impression formed by the mind that has to decide. In the present case their Lordships have arrived as the conclusion that the language of the articles is plain, in the sense that their meaning must be found in their words, though they are far form denying that the true construction is a matter of nicety and even of difficulty. It follows that the decision of this question is not legitimately assisted even by reference to the prior decisions in Quebec, which, in fact, are much less definite than they have been supposed to be, and that no useful suggestion can be derived from articles in the Code Napoléon differently expressed, or from the expositions of them, however brilliant, by learned French jurists. In no event can the intention of the legislature in passing the articles under discussion be gathered form the category in which they were placed by the commission which drafted the Code.

Art. 1053 and 1054 are the first two of a group of articles headed "Offences and quasi-offences." The first deals with damage caused by *faute* on the part of a person, who can tell right from wrong. The second deals further with the liability of such a person not only for damage caused by his own fault, but also for damage caused by persons whom he controls or things which he

has under his care. It is not necessary now to define the meaning of "controls" or "under his care". There is obviously much to be said in a proper case about both. The article proceeds to speak specifically of the liability of parents for the acts of infant children, of guardians for those of wards, of curators for those of lunatics, and of teachers and artisans for those of scholars and apprentices. Then follows provision for what has been called "Exculpation," a term, which, however, begs the question that *culpa* is implied in the *"responsabilité ci-dessus."* To this succeeds a rule as to the responsibility of masters and employers for their servants and workmen. Subsequent passages deal with responsibility for damage done by animals, or by buildings originally ill-constructed or afterwards allowed to get out of repair.

The language of the exculpatory clause is as follows:—

"The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage."

From this it is argued that the exculpatory clause does not refer at any rate to that part of the first paragraph which contains the words "and by things which he has under his care," firstly because "the act which has caused the damage" cannot be applicable to a case of "damage caused by things which he has under his care," for the act of a thing would be a meaningless expression; and secondly, because "the above cases" means only the "cases" properly so called of parent and child and so forth, which figure as particular cases, and even though taken together are far from exhausting the first paragraph. In the French text, however, the exculpatory clause is as follows:—

"La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage."

On these words it is pretty plain that the above comment, founded only on the English text, fails. "La responsabilité ci-dessus" refers to the whole preceding part of the article, every paragraph of which contains expressly or by implication the word "responsible." and "le fait qui a causé le dommage" is an expression not inapt to cover damage caused by inanimate things as well as by animate persons.

Behind this linguistic criticism lies the structure of the article. Art. 1053 deals with damage caused by the defendant's own *faute*. Art. 1054 takes up another and a wider responsibility, namely for damage otherwise caused, whether by persons or by things. It deals with what may be conveniently called vacarious responsibility and this under three categories: (*a*) persons who know right from wrong, and would therefore be themselves liable also for their own *faute* under art. 1053; for these the defendant answers on the principle of *respondeat superior;* (*b*) persons, knowing right from wrong, and therefore personally liable, who though not strictly failing under that principle, impose a vicarious liability on the defendant because they are under his control in one capacity or another; and (*c*) persons who do not know right from wrong, and things, animate or inanimate, for whom the defendant answers on the ground of his control or charge, his being the only responsibility which the law recognises. Paragraphs 2, 3, 4 and 5 are not mere instances of paragraph 1; they include persons incapable of knowing right from wrong, who are therefore outside of the words "the fault of persons under his control." They make a defendant liable,

when the actor himself is incapable of *faute* and is therefore guiltless of it and another person is made liable for him vicariously, regardless of any *faute* of his own. This position as applied to persons is the same as that which paragraph 1 applies to things. Such being the object of the article it would be illogical to refuse to the defendant, who is called on to answer for things in his care, the same exculpation, namely that he could not have prevented the injurious occurrence, which is open to him when called on to answer for minors, lunatics or apprentices under his control.

If, then, it is open to a defendant sued in respect of damage done by things in his care to raise a defence under the "exculpatory paragraph," the next question that arises is whether before the defendant can be called on to excuse himself, the plaintiff must prove that there was *faute* on the defendant's part, or whether proof of the facts (1) that a certain thing was under the defendant's care and (2) that the plaintiff was hurt by it, will in themselves suffice to discharge the whole of the plaintiff's burden. First of all, art. 1054 expressly goes beyond art. 1053 in that, after saying "non seulement du dommage qu'elle cause par sa faute à autrui", which refers to art. 1053, it takes up another's *faute*, "mais encore de celui causé par le faute de ceux dont elle a le contrôle." that is to say not caused by the defendant's own fault. Indeed, if *faute* must be proved against the defendant before he can be made liable under art. 1054, it is difficult to see what efficacy attaches to the exculpatory clause at all. If the defendant is proved to have been guilty of *faute*, how can he say that he could not have prevented it consequences? if he is not, he needs not exculpation. Secondly, there is no reason why the usual rule should not apply to this as

to other statutes, namely that effect must be given, if possible, to all the words used, for the legislature is deemed not to waste its words or to say anything in vain. Accordingly, the observation at once applies that, if the defendant must be guilty of *faute* before art. 1054 can apply, art. 1054 is otiose, for he might have been made liable for that *faute* under art. 1053. There can be no answer to this argument, unless it be that the *faute* required under art. 1053 is *faute* causing the damage, and that under art. 1054 *faute* not causing the damage is brought in, and this cannot be the intention of the Code, for then under art. 1054 a person would be answerable for damage done by things under his care, when his conduct has been blameworthy in some immaterial respect, but not when he has been blameless altogether. In other words he would be visited with civil liability to a private person as a penalty for some unconnected error, and an injured person's right to compensation for damage actually sustained would depend on the question whether the defendant was a person not beyond reproach or was a person of invincible impeccability. In the third place, to hold that even under art. 1054 the plaintiff must prove *faute* against the defendant would have the singular result that either masters would not be responsible for the *faute* of their servants, unless they were also guilty of *faute* themselves, of the seventh paragraph of the article would have to be read without the implication of *faute*, which on this construction is to be made in the first. There seems to be no doubt that art. 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, all of which are independent of that personal element of *faute* which is the foundation of the defendant's liability under article 1053. Furthermore,

proof that damage has been caused by things under the defendant's care does not raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage.

Their Lordships fully appreciate that considerable number of points can be made against this construction. It is said that absolute liability without *faute* shown was unknown in Quebec before *Doucet's* case. It would, perhaps, be more correct to say that the occasion for so deciding has only recently arisen with the growth of scientific inventions and their industrial exploitation. It may be said that art. 1054 is not the place for obligations arising from what art. 983 calls "the operation of the law solely," but is confined by the title of this group of articles to "delicts and quasi-delicts;" that absolute liability for damage done for things under a man's care, whether those things be in themselves dangerous or not and whether or not they have been brought into the condition which makes them dangerous for purposes of the defendant's own, is a liability transcending the rule in *Fletcher* v. *Rylands*, (1) and *Nichols* v. *Marsland* (2), and might work great injustice; that article 1054 does not begin with the words "Toute personne est responsable," but with the words "Elle est responsable," *Elle* referring to the words of art. 1053, viz., "Toute personne capable de discerner le bien

(1) L. R. 3 H. L. 330. (2) 2 Ex. D. 1.

du mal," a reference which is pointless if the *faute* of such "personne" is immaterial and if all that is needed is that in fact the thing should be under his care. To all this the plain words of the article, if they are plain as their Lordships conceive them to be, are a sufficient answer. In enacting the Code the legislature may have foreseen cases of the kind now in question many years before any of them arose. In construing it *Fletcher* v. *Rylands* (1) *and Nichols* v. *Marsland* (2) had better be left out of account. There is no reason why the Code should be made to conform to them. The mere title given to a group of articles is not in itself enough to contradict the prescriptions of one of them. As to the fact that the article begins with "Elle" and not with "Toute personne," it may be that a person incapable of knowing good from evil would be also incapable of having others under his control or of having things under his care, or at any rate would by that very incapacity be entitled to exculpation, on the ground that, if he could not tell right from wrong, neither could be prevent the *fait* which caused the damage. Even if this be not so, the only result would be to exempt from liability under art. 1054 persons incapable of knowing right from wrong, though they may occupy no decision or opinion need be given about it. The positive words of the article stand and must have effect.

Two other points may be briefly disposed of. The poplar tree grew in the field of one or the plaintiffs and belonged to him and both the houses burnt belonged to customers of the defendant company. Though these points were touched upon, it is not clear what legal consequence was supposed to result from them. The owner of the poplar was not shown to have been in fault and, even if

every tree that grows is "in the charge" of its owner, the tree was not the cause of the damage, but only an antecedent prerequisite. As to the other point there was no evidence that the owner of the houses consented to take the risk of what happened or even knew of it, and if it is said that the exploitation of the electricity was not solely for the supplier's benefit, but also for the customer's, which is somewhat far-fetched, the article says nothing about the liability of exploiters. On neither of these points have the facts been found, so as to raise in the appellants' favour any contention requiring decision.

Apart from the articles of the Code, the appellants resorted to a separte line of argument. The powers under which they carry on their undertaking are statutory and are contained some in private and some in public statutes. Their Lordships think there is no substance in the objection taken by the respondents that under art. 10 of the Code private statutes must be pleaded, which implies proof, and that evidence was not given of the private statutes in this case. The article does not provide that if such evidence is not forthcoming the same result may not be obtained by admissions and as all the statutes without distinction were the subject of discussion in the Courts below, as if the terms of both kinds of legislation had been duly brought before the Court, and as the printed text was in fact readily available, their Lordships think that this objection is not now open to the respondents.

The powers which these statutes give are of a very familiar type. The undertakers are authorised to carry and distribute high tension electricity over cables, which may be either overhead or underground. Section 13 of 58 and 59 Vict., ch. 58, expressly provides that the company may erect equip and maintain poles in the streets for

the purpose of working and maintaining its lines for the conveyance of electric power upon, along, across, over and under the same. It was contended by the respondents that subsection (*e*) of this section, by the words, "the company shall be responsible for all damage which its agents, servants or workmen cause to individuals or property in carrying out or maintaining any of its said works," made the company absolutely liable for the damage sued for in the present case. Their Lordships think that, as an independent cause of action, this case fails. The damage here is not, in any view of the construction of the subsection, caused in carrying out or maintaining works.

The appellants, however, rely on the authority to carry their wires overhead which the statutes give, as an answer to the claim, and contend that the statutes exclude the operation of art. 1053 and 1054 of the Code in matters concerning the distribution of high tension electricity by overhead cables, as repugnant to the power which the legislature has bestowed. The application of enactments of this kind is familiar and well settled. Such powers are not in themselves charters to commit torts and to damage third persons at large, but that which is necessarily incidental to the exercise of the statutory authority is held to have been authorized by implication and therefore it is not the foundation of a cause of action in favour of strangers, since otherwise the application of the general law would defeat the purpose of the enactment. The legislature, which could have excepted the application of the general law in express terms, must be deemed to have done so by implication in such cases. Nor need a use of the power conferred, which is injurious to others, be excluded from the ambit of that which is necessarily inci-

dental to their enjoyment merely because the progress of discovery or invention reveals some extraordinary means of preventing that injury to others which has previously been unavoidable. This point arose and was settled in connection with sparks falling from locomotive engines many years ago. It therefore becomes necessary to consider how far such an escape of electricity as took place in this case was incidental to the use of overhead cables and how far and by what reasonable precautions injurious consequences were preventible.

The question, whether it was necessary to hang the two sets of cables on the same poles or in such proximity to one another that the fall of the branch upon one would lead to the flow of the high tension current into the other, hardly seems to have been examined at the trial. The main contention is this. It was the result of voluminous evidence called at the trial, and indeed in their Lordships' view the company's case, that, if the wires of the transformers, which are used at intervals along the line of cable, had been grounded, the escaping high-tension electricity would have found its way innocuously to earth instead of entering the houses and setting them on fire. The value of this precaution had been established by the experience of several years, but it was the view of some distributors of electricity, and of the defendant company among them, that there was an offset to this advantage in the fact that, if the wiring of the customers' houses was defective, the grounding of the transformer wires would substitute new difficulties for the old. It was not, however, shown that the wiring of the plaintiffs' houses was defective to this extent, although it was "démodé," nor did the evidence compare the one disadvantage with the other quantitatively. The com-

pany could have inspected the wiring and, if it was not safe, could have declined to supply current. It is plain that the company was quite willing to have carried out the grounding of the transformer wires, if the representatives of the fire insurance companies, who advised this course, had given an instruction instead of a recommendation. The later naturally pointed out that they had no authority to issue instructions but must confine themselves to advice, and as their Lordships are neither prepared to assume that this request on the appellant's part for instructions was a mere quibble, designed to disguise their own reluctance to do anything, nor even to infer that they saw any objection to the proposal except the expense of it, they conclude that the grounding of the wires of the transformers would, some substantial time before the accident in question, have been a practicable and efficient safeguard against the injury which in fact was inflicted. If so, it is impossible to say that the escape of electricity into customers' houses and the consequent damage in time of storm was a necessary incident of the exercise of the power to distribute high tension current by overhead cables along roads, such as would by implication relieve the company from liability for the consequences.

Two decisions which were pressed on their Lordships' attention require particular examination, viz., *Roy's* case (1) and *Dumphy's* case (2). The former is a case of damage by the escape of sparks from a locomotive engine and the decision in terms is in line with the well-known authorities of *Vaughan* v. *The Taff Vale Railway Com-*

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(1) 1902, A. C. 220. (2) 1907 A. C. 454.

pany (1) and *Brand* v. *The Hammersmith Railway Company* (2): it is a case of "plain words authorising the doing of the very thing complained of." *Dumphy's* is a case of high tension electricity released by the act of a third party's workman, whom the jury acquitted of negligence. No specific article of the Code is mentioned, and the presence of a high tension current in the cable was only the *causa sine qua non* and the human action which released it was the *causa causans* of the accident. There was statutory authority to circulate high tension electricity overhead, but on the simple issue, whether the damage caused by the escape of that electricity was caused by the company's negligence, it was held that no negligence had been proved, and indeed but for the act of a stranger, who himself was not careless, the company's electricity would have done no harm to anybody.

Whether in the present cases the evidence established affirmatively a case of negligence against the defendants is a question on which the Supreme Court arrived at no definite conclusion. Had it been necessary, the respondents would have been entitled to claim before their Lordships' Board that this issue should be decided now, since the terms imposed on the appellants under the special leave to appeal bound them to rely on points of law only but did not preclude the respondents from meeting those points upon the facts in any way which the evidence warranted. In the view, however, above taken of the case no decision on this question is needed.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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(1) 5 H. & N. 679. (2) L. R. 4 H. L. 171.

LA VILLE DE DORVAL, demanderesse-appelante v. MARCIL, défendeur-intimé.

Responsabilité—Inondation—Force majeure—C. civ. art. 406, 508, 1053, 1054, 1055, 1057.

Un propriétaire n'est pas tenu de faire des travaux pour protéger la propriété de son voisin contre une inondation provenant du fleuve St-Laurent; dans ce cas, il y a force majeure dont il n'est pas responsable. *Res perit domino.*

Le jugement de la Cour supérieure, qui est infirmé, a été rendu par M. le juge Maclennan, le 31 décembre 1918.

L'intimé, est propriétaire d'un immeuble situé entre le fleuve St-Laurent et le chemin public dans la ville de Dorval. Aux mois d'avril et mai 1916, l'eau venant du fleuve Saint-Laurent a inondé le terrain de l'intimé, et a désagrégé en partie le chemin.

L'appelante poursuit l'intimé et lui réclame $1597.23 de dommages-intérêts disant que si ce dernier avait suffisamment protégé sa grève, la rue n'aurait pas été endommagée, ne l'ayant pas fait, la ville de Dorval a été obligée de dépenser ces $1597.23 pour des travaux nécessaires à la protection du chemin public.

L'intimé plaide que les dommages ont été causés par la

MM. les juges Lamothe, juge en chef, Lavergne, Carrol, Pelletier et Greenshields.—Cour du banc du roi.—Nos 536-282.—Montréal, 29 décembre 1919.—Décary et Décary, avocats de l'appelante.—A. Panneau Mathieu, avocat de l'intimé.

crue des eaux du fleuve Saint-Laurent et qu'il y a force majeure.

La Cour supérieure a rejeté la demande. (1)

En appel:

M. le juge en chef Lamothe.—Les raisons données par la Cour de première instance me paraissent péremptoires. L'action manque de base. Les faits allégués ne démontrent par un lien de droit entre les deux parties. Le défendeur intimé ne saurait être responsable des dégats causes par l'eau du fleuve St-Laurent et par le vent qui agite ses eaux. Il a subi l'érosion de son propre terrain; il n'a fait aucun acte aidant au ravage des éléments naturels. L'intimé n'était pas tenu de faire des dépenses pour protéger la propriété d'autrui,—pas même la propriété du public.

M. le juge Carroll:—Les faits sont virtuellement admis, de sorte qu'il ne s'agit, au fond, que d'une question de droit.

L'appelante base son action sur les dispositions des art. 406, 508, 1053, 1054, 1055 et 1057 C. civ.

Je ne vois pas qu'aucun de ces articles ait d'application à l'espèce. L'art 406 dit que le propriétaire a droit de jouir et de disposer de sa chose de la manière la plus absolue, pourvu qu'il n'en fasse pas un usage prohibé par la loi ou les règlements.

L'art. 508, qui assujétit les propriétaires, l'un à l'égard de l'autre, à certaines obligations, sans convention, n'a pas d'application non plus.

Les art. 1053 et 1054 rendent les propriétaires et les

(1) Autorités citées par la Cour supérieure: *Corporation de Beloeil* v. *Préfontaine*, [1885] 11 C. S., 81;—*Passicrisie*, [1854], 2, 238;—6 Laurent, 141.

gardiens des choses responsables du dommage causé par leur fait, leur imprudence, leur négligence ou leur inhabileté, ou encore des dommages causés par les choses qu'ils ont sous leur garde. Or, l'intimé n'a causé aucun dommage par son fait, et je ne sache pas qu'il ait la garde des eaux du Lac Saint-Louis.

Dans son factum, l'appelante précise la source de son droit: elle dit que l'intimé est tenu, comme le propriétaire d'un bâtiment, de prendre les précautions nécessaires pour empêcher que sa maison ne tombe en ruines. Ce cas est prévu à l'art. 1055 C. civ. C'est une obligation imposée au propriétaire d'un bâtiment par un texte positif de la loi. Aucun principe de droit n'oblige un propriétaire d'empêcher la désagrégation de sa propriété par une cause qui lui est complètement étrangère et qui, pour lui, est un cas de force majeure.

Il me semble que, dans cette cause-ci, le principe *Res perit domino* s'applique. Ce principe, dans l'espèce, est conforme à la justice et au sens commun. Je suppose que cette lisière de terrain n'aurait qu'une valeur de $100, l'intimé serait-il obligé, pour l'avantage de l'appelante, de payer $1500 afin de protéger le chemin de cette dernière. Poser la question, c'est la résoudre.

Il est vrai qu'il ne faut pas toujours avoir recours aux conséquences pour juger du bien-fondé d'une proposition; mais, lorsque les conséquences sont celles que je viens d'indiquer, nous pouvons, en toute sécurité, dire que le principe qui conduit à de telles conséquences est faux.

Laurent (1) cite un cas absolument semblable à celui qui nous est soumis.

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(1) Vol. 6, no. 141.

"Un propriétaire,—dit-il,—n'use pas de son droit, il laisse dépérir sa propriété; c'est un terrain riverain d'un cours d'eau, il est insensiblement emporté par l'action des eaux et il en résulte que des maisons voisines s'écroulent. Le propriétaire négligent répond-il de ce dommage? Nous croyons, avec la Cour de Gand, que le propriétaire n'est point responsable. En effet, la propriété donne le droit d'abuser de sa chose, en ce sens que le propriétaire peut la laisser périr. Le riverain peut même avoir intérêt à abandonner un terrain qu'il ne pourrait conserver qu'en faisant des travaux de défense dont les frais surpasseraient la valeur de sa propriété. Donc, en le laissant périr il est dans son droit. Il ne lèse par là aucun droit de son voisin; celui-ci peut faire des travaux défensifs sur son fonds, mais aucune loi ne lui permet de contraindre le riverain à conserver sa propriété."

Je confirmerais.

M. le juge Pelletier.—La ville de Dorval a un chemin qu'elle a acquis de la commission des chemins à barrière et à l'entretien duquel elle est en conséquence tenue; le défendeur intimé, Marcil, était propriétaire d'une lisière terrain sur le bord du lac St-Louis qui séparait le lac du chemin en question. En 1916, les eaux du lac St-Louis c'est-à-dire, du fleuve St-Laurent, ont détruit une partie de la lisière de terrain appartenant au défendeur intimé et ce terrain étant ainsi détruit, les eaux du lac ont commencé à endommager le chemin de l'appelante. Cette dernière prétend que l'intimé était obligé de faire des travaux de protection pour que les eaux du lac St-Louis ne se rendent pas jusqu'à son chemin, ce qui reviendrait à dire que je serais obligé de faire chez moi pour un terrain qui peut ne valoir que $100 des travaux de protection—coûtant peut-être $200 et plus—afin que l'action de

l'eau, après avoir brisé ou détruit ma propriété ne brise pas celle de mon voisin.

Je ne connais aucune loi sur laquelle on puisse appuyer cette prétention, et je crois que le jugement qui a renvoyé l'action est bien fondé.

Mr. Justice Greenshields.—The pretension of the appellant, in law, seems to be as follows.—Being the owner of a strip of land between the public road of the appellant and Lake St. Louis, you failed to contruct a revetment wall or dyke, or other construction to prevent the waters of the Lake from entering your property and washing or carrying it away, thereby giving the water easier access to the road of the appellant, and in consequence the road of the appellant was damaged and is threatened with greater damage; and the appellant took steps to protect its road at an expense of $1597.23, and it demands that the respondent pay for the same.

The appellant states its pretension on its factum as follows:—(Translation): "As the respondent has not built a revetment wall along Lake St. Louis to protect the shore of its land, the waters of Lake St. Louis have gradually undermined the same to the extent that at three different places along the shore of this property all the land has disappeared and the water has excavated holes at these three different places under the highway or St. Joseph Street."

This is its claim, and says the appellant, it is an exact resumé of the proof. It proceeds to conclude, in law, as follows:—(Translation): "A proprietor has no right to allow his property to perish if in so doing he exposes his neighbor's property to damages."

The appellant refers the Court to articles 406, 508, 1053, 104, 1055 and 1957 of the Civil Code.

Art. 406 gives the right of complete enjoyment of a man's property, provided that no use be made of it prohibited by law or by regulation. There is no law or regulation that I know of to prohibit a man from alloing the waters of Lake St. Louis from devouring his land.

Art. 508 makes a wise provision. It subjects proprietors to different obligations in regard to one another independently of any stipulation. I have no remark to offer upon this article in connection with this case.

Art. 1053 in too well known to require comment or quotation.

Art. 1054. The same remark can be made, with the added observation, that it was not the thing owned by the respondent, and which he had under its control, that caused the damage to the appellant. It was the wind of heaven and the waters of Lake St. Louis.

Art. 1055 does not held the appellant. The respondent had no building on land, and building perished.

This would seem to be the appellant's whole case. The appellant does add, that when the respondent bought its land it was bought sugject to the disadvantage of having to protect it from the waters of Lake St. Louis, upon which it bordered. If it wanted to protect its land possibly it was a disadvantage. I suppose the same answer might apply to the appellant. When it built its road so near Lake St. Louis that the waves of the latter might reach it, it probably was exposed to the disadvantage of protecting it against the waters which might reach it. But to conclude that the appellant was bound to expend $159.23, not to protect its property, but to protect the property of the respondent is a conclusion in law that I cannot accept, and I confirm the judgment.

Jugement confirmé.

MONTREAL TRAMWAYS CO., défenderesse-appelante v. JACQUES, demandeur-intimé.

Procès par jury—Cause mûre—Contestation liée—Inscription en droit—C. proc. art. 195, 198, 205, 214, 293.

Le demandeur est forclos de répondre à la défense le septième jour qui suit la production de cette dernière, qu'elle soit ou non accompagnée d'inscription en droit, et la cause est mûre pour le procès le jour ou jugement est rendu sur telle inscription.

Le jugement de la Cour supérieure, qui est infirmé, a été rendu par M. le juge Duclos, le 14 février 1919.

Cette cause est rapportée au volume 21, p. 310, des Rapports de pratique de Québec, avec les notes des juges, excepté celles de M. le juge Carroll. Nous référons à ce rapport que nous complétons en publiant ci-dessous les remarques de ce juge:—

M. le juge Carroll.—Il s'agit de l'appel d'un jugement qui a accordé une motion pour définir les faits dans un procès par jurés et, comme conséquence, déclarant que l'intimé a droit à son procès par jurés. L'appelant nous dit que ce droit était périmé par suite du défaut de l'avoir exercé dans les 30 jours de la contestation liée.

MM. les juges Lamothe, juge en chef, Lavergne, Carroll, Pelletier et Martin.—Cour du banc du roi.—Nos 2264-331.—Montréal 27 octobre 1917.—Perron, Taschereau, Rinfret, Vallée et Genest, avocats de l'appelante.—J. P. Lanctôt, avocat de l'intimé.

Les procédures principales dans cette cause ont consisté dans la déclaration, la défense et une réponse qui a été produite tardivement et qui a été rejetée sur motion. Conséquemment la contestation s'est trouvée liée par la production de la défense, car une procédure inutile et mise hors du dossier ne peut servir à prolonger les délais.

Dans notre procédure, les moyens de faits doivent être produits en même temps que les moyens de droit; seulement l'on ne peut inscrire une cause au mérite à moins que la Cour ne dispose d'abord des moyens de droit.

L'intimé prétend que le jugement sur l'inscription en droit suspend les délais et que la contestation n'est liée qu'après jugement sur l'inscription en droit et dans les 6 jours qui suivent cette inscription. Cette théorie ne peut être acceptée vu la jurisprudence de notre Cour réitérée dans au moins trois jugements. Les mots de l'art. 442 du C. civ. "mûre pour le procès" ont été définis dans la cause la plus récente *Dougan* vs. *Montreal Tramways Co.* (1).

Le regretté Sir Horace Archambault disait que ces mots signifiaient que la partie doit procéder dans les 30 jours de la contestation liée.

L'on nous a cité trois jugements de la Cour supérieure où le contraire a été décidé et je constate que l'honorable juge Dorion, à Québec, dans une cause de *Huot* v. *Cité de Québec*, a donné des arguments plausibles à l'encontre de cette jurisprudence.

Après tout, il ne s'agit que d'une simple question de procédure et il me semble qu'il vaut mieux suivre les arrêts de notre Cour plutôt que de ré-ouvrir la question.

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(1) [1919] 26 R. L., n. s., 295.

Je suppose que la question serait ré-ouverte et jugée différemment; la confusion deviendrait encore plus considérable et il est important que, dans les questions de procédure surtout, il y ait uniformité de jurisprudence.

Je suis d'opinion de maintenir l'appel avec dépens.

LA CITE DE MONTREAL, requérante-appelante v. HENAULT, propriétaire exproprié-intimé.

Expropriation— Rapports des commissaires— Juridiction— Appel— C. proc., art. 4243, 62 Vict. [1899], ch. 58, art. 439. (Charte de la cité de Montréal.)

1. Lorsqu'un jugement final n'est pas appelable à la Cour du banc du roi un jugement incident dans l'instance ne peut pas être porté en appel, excepté dans le cas où le juge de première instance a excédé sa juridiction.

2. Après le dépôt d'un rapport des commissaires en expropriation, la Cour supérieure n'a pas droit de s'enquérir du fond du rapport, de changer la bâse de l'indemnité et d'ordonner qu'ils devront retrancher une partie de leur décision.

3. La Cour de première instance, en ordonnant aux commissaires de modifier leur rapport, a outrepassé sa juridiction, et son jugement peut être porté en appel *de plano* devant la Cour du banc du roi.

MM. les juges Lamothe, juge en chef, Lavergne, Carroll, Pelletier et Martin.—Cour du banc du roi.—Nos 160-349.—Montréal, 26 juin 1919.—Laurendeau, Archambault, Damphouse, Jarry, Butler et St-Pierre, avocats de l'appelante.—Dessaulles, Garneau et Vanier, avocats de l'intimé.

Le jugement de la Cour supérieure, qui est infirmé, a été prononcé par M. le juge Duclos, le 1er mai 1919.

L'expropriation nécessaire pour l'élargissement de l'aqueduc de Montréal et des boulevards de chaque côté, a été autorisée par divers statuts provinciaux. Les commissaires en expropriation déposèrent leur rapport au bureau du greffier de la cité de Montréal, et ce dernier donna un avis au public du jour où son homologation serait demandée à la Cour supérieure.

En procédant à cette expropriation, la cité a changé de niveau de la rue "Church" et, notamment, vis-à-vis certains lots de terre appartenant à l'intimé Hainault. Les commissaires ont accordés à l'intimé $55,000 de dommages comme indemnité pour les lots expropriés, "de mê-"me que pour tous dommages résultant de l'expropria-"tion et du changement de niveau nécessaire à l'établis-"sement des boulevards et à la construction des ponts sur "ledit canal de l'aqueduc."

L'intimé demanda, par motion, que ce rapport fut envoyé aux commissaires avec l'ordre de retrancher de leur rapport tous les mots à partir de "et du changement".

Cette motion fut accordée, mais l'appelant porta ce jugement en appel.

L'intimé demanda par motion le rejet de cet appel, sur le principe que ce jugement n'est pas susceptible d'appel.

Cette motion a été rejetée par les motifs suivants:—

M. le juge Lamothe:—La motion de l'intimé Hénault, pour faire rejeter l'appel faute de juridiction, soulève une question qui, depuis quelque temps, s'est présentée devant cette Cour sous différentes formes.

Lorsque le jugement final n'est pas appelable à la Cour du banc du roi, un jugement incident dans l'ins-

tance, peut-il être porté en appel? A cette question la réponse doit être, en thèse générale, négative.

A toute règle, toutefois, il y a des exceptions. Il me parait y avoir une exception dans les cas, fort rares, où la Cour de première instance est sortie de sa juridiction. Le jugement rendu est alors atteint d'une nullité absolue qui le rend pratiquement inexstant. La Cour d'appel a compétence pour constater judiciairement cette nullité absolue et annuler le jugement. C'est l'appel de droit commun.

Dans le cas présent, la Cour supérieure est entrée dans le mérite du rapport des commissaires en expropriation, ce qu'elle ne pouvait faire. La motion doit être rejetée.

M. le juge Carroll:—L'intimé demande le rejet de l'appel, parce que, d'après l'article 439 de la charte de Montréal, il n'y a pas d'appel d'un pareil jugement.

Cet art. 439 édicte, en substance, que la Cour ou le juge, examine le rapport et, toutes les formalités ayant été accomplies, il le confirme. Un rapport ainsi homologué et confirmé, n'est pas sujet à appel.

Comme on le voit, la Cour, ou le juge, n'a aucune juridiction pour s'enquérir du mérite du rapport. Il constate seulement si les formalités ont été accomplies par les commissaires en expropriation: sa juridiction se borne à confirmer le rapport ou à le rejeter, suivant que les prescriptions légales ont été remplies, ou ne l'ont pas été.

Dans cette cause-ci, les commissaires ont accordé un certain montant de dommages résultant de l'expropriation et de la surélévation du niveau de la rue. La Cour, en ordonnant de retrancher ce qui a trait au niveau de la rue, est entrée dans le mérite même du rapport et elle a assumé une autorité que la loi ne lui confère pas.

Il semble admis, depuis la décision dans *Brisson* vs *McShane* (1) qu'il y a appel chaque fois qu'un tribunal juge sans juridiction. Son jugement, dans ce cas, suivant l'expression de Lord Haldane, est une nullité. Et, comme il n'y a aucun autre recours pour remédier à cet état de choses, l'appel est accordé pour faire déclarer la nullité d'un tel jugement.

Il ne s'agit pas ici d'un cas où la Cour, ayant juridiction *ratione materiae*, aurait fait une erreur de procédure. L'erreur de procédure ne touche pas au fond du droit.

L'absence de juridiction, dans ce cas-ci, est *ratione materie*, et l'appelante n'ayant aucun autre recours à sa disposition, je crois qu'elle a droit d'appel.

M. le juge Pelletier:—L'intimé allègue que les jugements rendus en matière d'expropriation ne sont pas appelables devant cette Cour, que le juge de la Cour supérieure ne peut que s'enquérir des informalités existantes avant de confirmer le rapport des évaluateurs dans le mérite duquel il n'a pas droit d'entrer. Or, ici, le juge qui n'a pas le droit d'entrer dans le mérite et qui ne peut qu'approuver le rapport des évaluateurs si les formalités ont été observées, a ordonné aux évaluateurs de changer la base sur laquelle ils se proposaient de s'appuyer pour faire leur évaluation et leur rapport.

Le juge était clairement sans juridiction pour ordonner cela et les évaluateurs devaient être libres de faire leur rapport comme ils l'entendraient.

En conséquence, vu que le premier juge a agi sans juridiction, la cité de Montréal avait le droit d'en appeler devant nous et, en conséquence, je rejetterais la motion qui nous est soumise.

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(1) [1890] 6, M. L. R., Q. B., p. 1.

Mr. Justice Martin:—At the argument on this motion before us, another ground was raised that the judgment was interlocutory, and if there was a right of appeal at all, permission for leave to appeal should have been first obtained.

Is the judgment of the Superior Court of the 1st of May, 1919, appealable? Counsel for respondent invokes art. 493 of the city charter which reads as follows:—

"439. On the day specified in such notice, the city "shall submit to the Superior Court, or to one of the "judges thereof, the report of the commissioners for confirmation and homologation; and such Court or judges, "as the case may be, upon being satisfied that the pro- "ceedings and formalities hereinbefore provided have "been observed, shall confirm and homologate the said "report; and such order thereon shall be final as regards "all parties interested, and shall not be subject to any "appeal." and says that this judgment is not subject to any appeal.

The Court of King's Bench, sitting in appeal, has appellate civil jurisdiction through out the province over all causes appealed from all Courts and jurisdiction wherefrom an appeal by law lies, unless such appeal is expressly directed to be to some other Court, and unless where otherwise provided by statute, an appeal lies to this Court from any final judgment rendered by the Superior Court except in certain specified cases (1).

Section 439 of the charter denies the right of appeal from a judgment confirming and homologating the report of the commissioners in expropriation but this judgment does neither.

Under the provisions of the old law, 54 Victoria, (2)

(1) C. C. P. 42 and 43. (2) Ch. 87, art. 11.

in cases of expropriation for the widening of streets or for any other public improvement, the depositions of the witnesses were taken down by stenography and transcribed and the parties had a right of appeal to the Court of Review, within eight days after the homologation by the Superior Court of the report of the commissioners. It is doubtful if the Superior Court had any jurisdiction to amend the award of the commissioners in expropriation, as it proceeded to do by the judgment appealed from, cutting out words and leaving the amount of the award intact. It did not other the report returned to the commissioners and direct that the amount of the award should be determined after striking out the part pertaining to the change of level.

It is alleged by respondent that the words in the commissioners' report which were ordered erased were so inserted by error, and that two of the commissioners signed the report in ignorance of the fact that it contained a reference to expropriation for damages occasioned by change of level, and one of the commissioners, M. Leclair, gives an affidavit to that effect. The other commissioners, (and there are several of them) are not heard from.

The Superior Court had no right or jurisdiction to enquire into the merits of the award, and when the Commissioners reported that they arrived at a figure of $55,000 as full compensation to the respondent for certain things, the Superior Court was exceeding its jurisdiction in changing the basis of the award and eliminating part of the grounds thereof.

If the Superior Court wrongly usurped jurisdiction, surely there must be an appeal of this Court on that point.

Lord Haldane in *National Telephone Company Ltd vs Postmaster General,* (1).

I would hold that it did usurp jurisdiction and that there is an appeal to this Court and that even if the Superior Court had jurisdiction, the order and judgment appealed from do not come within the class of judgments from which there is no right of appeal by statute.

If the commissioners in expropriation proceeded on a wrong principle, the recourse of the party was either to have the report remitted back to them with instructions to proceed on a right principle, or to complain by direct action, which was the course adopted in the case of the *Royal Trust* vs *The City of Montreal,* a recent case carried to the Supreme Court.

Is the judgment final or interlocutory? I am clearly of opinion that this is a final judgment from which an appeal lies *de plano.*

It is doubtful if the Superior Court on being later called upon confirm and homologate the commissioners' report, could revise the judgment appealed from. That matter would not be properly before the Court and could only be enquired into by the Court assuming to have jurisdiction to enquire into the merits of the basis of the commissioners' award which in my opinion it would not have a right to do.

The motion to reject the appeal should be dismissed with costs.

Judgment:—Considering that the Court of King's Bench sitting in appeal has appellate civil jurisdiction

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(1) Appeal Cases, 1913, p. 549.

throughout the province over all causes, matters or things appealed from all Courts and jurisdictions wherefrom an appeal by law lies unless such appeal is expressly directed to be to some other Court. (1)

"Considering that unless where otherwise provided by statute an appeal lies to the Court of King's Bench sitting in appeal from any final judgment rendered by the Superior Court except in certain specified cases (2).

"Considering that while art. 439 of the Charter of the City of Montreal denies the right of appeal from a judgment confirming and homologating a report of commissioners in expropriation, the judgment appealed from is not a judgment from which an appeal is expressly denied by statute;

"Considering that the Superior Court had no right or jurisdiction to enquire into the merits of the award of the commissioners in expropriation and exceeded its juridiction in changing the basis of said award and eliminating part of the grounds thereof;

"Considering that where the Superior Court wrongly usurps jurisdiction there is an appeal to this Court;

"Considering that the said judgment appealed from is final from which an appeal lies de plano;

Doth dismiss the said motion with costs to the appellant against the respondent.

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(1) C. C. P. art. 42. (2) C. C. P. art. 43.

MONTREAL TRAMWAYS COMPANY, défenderesse-appelante v. SAVIGNAC, demandeur-intimé.

Loi des accidents du travail--S. ref. [1909], art. 7321, 7322, 7325.

1. Il y a faute inexcusable dont une compagnie de tramways est responsable, dans le cas d'une collision entre l'un de ses tramways et l'un de ses wagons de secours (emergency wagon) tous deux roulant à une vitesse immodérée à une intersection dangereuse de rues, où plusieurs accidents avaient déjà eut lieu, dû à la négligence du garde-moteur du tramway de ralentir sa course.

2. La faute de l'employé, dans l'interprétation de la loi des accidents du travail, doit être considérée comme celle du patron.

Le jugement en première instance a été rendu par M. le juge Tellier, le 30 juin 1917. Il a été confirmé par la Cour du banc du roi, le 29 décembre 1917. [MM. les juges Lavergne et Cross, dissidents], mais avec réduction de l'indemnité. Ce jugement est confirmé par le Conseil privé.

La principale question de la cause est de savoir si la compagnie-appelante s'est rendue coupable d'une faute inexcusable, et si, de ce chef, l'intimé a droit à une augmentation d'indemnité en vertu de la loi des accidents du travail, art., 7325.

MM. les juges Vicomte Finlay, vicomte Cave, Lord Summer et Lord Parmor.—Conseil privé.—Nos 4273-150-45.—Londres, 8 décembre 1919.—Perron, Taschereau, Rinfret, Vallée et Genest, avocats de l'appelant.—J. P. Lanctôt, avocat de l'intimé.—Aimé Geoffrion C. R. conseil.

Les faits de la cause sont suffisamment expliqués dans le rapport du jugement de la Cour du banc du roi. (1)

Conseil privé:

M. le vicomte Cave [Après avoir fait le récit des faits et examiné la preuve.]

The first question to be determined is whether there was "inexcusable fault" on the part of the driver of the emergency wagon. It is plain from all the evidence that the wagon was driven at full speed, not only along Dorchester Street, but also at the moment when it was approaching St. Denis Street, at right angles, in order to cross it. At that moment the wagon was travelling at such a pace that it was plainly impossible for the driver, in the event of any tramcar or other vehicle passing along St. Denis Street at the time when he reached it, to check his horses and so avoid a collision. He drove recklessly into and across this frequented thoroughfare and trusted to good fortune to escape a serious accident. It is suggested that his action was excusable because it was desirable, in order to protect the public from serious and perhaps fatal injury from the broken cable, that the wagon should reach the scene of the breakdown at the earliest possible moment, and that it was therefore allowable for the driver to disregard all precautions and travel at the highest possible speed. Thier Lordships are unable to accept that view. It was no doubt desirable that the wagon should proceed at the highest possible speed consistent with the safety of the public and of the occupants of the wagon itself; but this fact by no means justified the driver in throwing aside all prudence and putting the lives of others in imminent peril. On the contrary, the

(1) 27, B. R. 246.

exceptional nature of the call made it his duty to take proper precautions to avoid an accident to the wagon, as it was plain that the result of such an accident might be to prevent him and his fellow workmen from going to the repair of the cable; and this is what, in fact, occurred. If Pettigrew had checked his wagon on approacing the crossing, so that he might be able, in the event of traffic approaching, to avoid a collision, he would have done his duty, and his journey would not have been delayed for more than a few seconds. It is unnecessary, and probably undesirable, to attempt a definition of the expression "inexcusable fault". Each case must be judged on its own facts, and their Lordships find no difficulty in saying that the conduct of Pettigrew in this instance fell within that description.

It has next to be determined whether the "inexcusable fault" of Pettigrew is to be attributed to the appellant Company as his employers so as to give occasion for an increase of the maximum compensation under article 7325; or, in other words, whether, according to the maxim "*Respondeat superior,*" the fault of a workman is, for the purpose of that article, to be attributed to the employer. This question was considered by the Quebec Court of Appeal in the recent case of *The Grand Trunk Railway Company* v. *Poulin* (1) and was there decided in the affirmative. Their Lordships agree with that decision, and with the reasons given by the late Chief Justice Sir Horace Archambault. It is plain that the word "the employer," in article 7325, cannot be confined to the employer personally; for in that case a company, which can only act through its agents, would escape altogether from the ef-

(1) [1917] 27 K. B., 141.

fects to the article. Counsel for the appellant recognising this difficulty, suggested that according to the true construction of the article, the fault giving rise to an increase must be that of the employer or of some person or persons entrusted with the management of the concern. If this be the meaning of the article, then its effect is similar to that of article 20 of the French law of the 9th April, 1898, which empowers the Court to increase the compensation if the accident is due to the inexcusable fault of the employer *"ou de ceux qu'il s'est substitués dans la direction."* Their Lordship are unable to accept this construction. It appears to them that if (as is admitted) the article must be read as extending to the act of some agents of the employer, there is no sufficient reason why the ordinary rule under which a principal is made responsible for the acts of all his agents acting within the scope of their employment should not be applied. This construction is supported by the form of the enactment of 1909, in which there is introduced at the head of the article relating to Workmen's Compensation of reference to "article 1053 and following"—article 1054 including the following provision:—

"He (i. e., a person) is responsible, not only for damage caused by his own fault, but also that caused by the fault of persons under his control and by things he has under his care"...

"Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work in which they are employed."

Support is also given to the same conclusion (as pointed out by Archambault, C. J., in the case above cited) by article 1334 of the Code, which provides that: "The person injured or his representatives shall con-

tinue to have in addition to the recourse given by this subsection, the right to claim compensation under the common law from the persons responsible for the accident other than the employer, his servants or agents."

For this article appears to deprive the injured workman of his common law remedy against a servant or agent of the employer whose misconduct or gross negligence may have been chiefly responsible for the accident, and it would be a hardship if that remedy were taken away without substituting a special remedy against the owner of the concern.

The result is that their Lordships are satisfied that Pettigrew, an agent of the appellant company, was guilty of an "inexcusable fault" giving rise to the accident, and that such is imputable to the appellant company and justifies an increase, under article 7325, of the compensation payable under the Act. This being so, it becomes unnecessary to consider the further question whether the driver of the tramcar was also guilty of an "inexcusable fault": for if any one of the company's servants was guilty of "inexcusable fault" giving rise to the accident, the liability of the company is clear. It is also unnecessary to consider the question which was discussed by the Canadian Court, whether in this case there was "inexcusable fault" on the part of those responsible for the management of the company's affairs. For having regard to the view which their Lordships have taken of the law of Quebec, that question becomes irrelevant.

For the reasons already given their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

WILSON and others, petitioners-appellants v. THE SCHOOL COMMISSIONERS OF THE MUNICIPALITY OF HUDSON, respondents.

Injunction—Discretion—Action annulling resolution—School Commissioners—Notice—C. P. art. 959, 960, 962, 965, 968—R. S. (1909) art. 2723, 2728, 2777, 2779—5 Geo. V. ch. 76, art. 12—7 Geo. V. ch. 27.

1. No interlocutory injunction can be granted and issued unless an action is instituted or pending at the same time, as it is only an incident of the case. (1)

2. Where a demand of injunction is made to prevent school commissioners to proceed to the construction of a school house, the petitioner must previously take proceedings to set aside, as illegal and null, the resolutions passed by the commissioners to erect this school house.

3. The rejection of an application for an interim injunction by the Court of first instance, is a case in which the discretion thus exercised should rarely be interfered with in appeal.

4. The following notice of a meeting: "to borrow money for the purpose of buying land and erecting a new

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Lamothe, Chief Justice, Lavergne, Carroll, Pelletier and Martin, JJ.—Court of King's Bench.—Nos 2169-344.—Montreal, June 26, 1919.—Hibbard, Gosselin and Moyse, attorneys for appellants.—Dorais and Dorais, attorneys for respondent.

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(1) See the case of *Allard* v. *Cloutier*, 26 K. B., where the Court of King's Bench has laid down rules to be followed in a demand of injunction.

"school will be considered" given by School Commissioners, is sufficient notice under the R. S. [1909] art. 2771.

The judgments of the Superior Court, which are affirmed, were rendered by Mr. Justice Bruneau, on March 31, 1919, dismissing the demand for an interlocutory injunction, and by Mr. Justice Duclos, on April 24, 1919, refusing leave to inscribe in Review. Permission to appeal to the Court of King's Bench from both judgments was granted. The following notes explain the facts.

M. le juge en chef Lamothe:—Les appelants ont demandé une injonction pour empêcher les commissaires d'école intimés de procéder à la construction d'une maison d'école. Cette demande leur a été refusée par l'honorable juge Bruneau. Les appelants se sont adressés à l'honorable juge Duclos pour demander permission d'appeler de cette décision. Cette demande leur a été refusée.

Les appelants se sont adressés à un juge en chambre de la Cour d'appel qui leur a donné permission d'appeler. C'est cet appel qui doit être maintenant jugé.

Une question de procédure se présente d'abord. Elle est soulevée par les intimés. Une demande d'injonction interlocutoire, peut-elle être faite et un ordre d'injonction peut-il être émis si aucune action n'est intentée alors ou en même temps? Cette question doit recevoir une réponse négative, dans mon opinion.

Sous l'ancien Code de procédure, la demande d'injonction constituait une action par elle-même. Elle était introductive d'instance. Elle était mise au rang des brefs de prérogative, savoir, mandamus, quo warranto et prohibition. Le nouveau Code de procédure a modifié considérablement la nature et la forme de l'injonction. L'ordre

d'injonction est devenu "interlocutoire". Il peut être émis dans deux cas: (a) lors de l'émission d'un bref d'assignation; (b) au cours d'une instance.

Pour que l'ordre soit interlocutoire, il faut qu'une action ait été intentée préalablement ou le soit en même temps. C'est par cette action, c'est par les allégations et les conclusions prises que le juge pourra se rendre compte de l'utilité de l'injonction pour les fins du litige.

Dès la mise en vigueur du nouveau Code de procédure, la question s'est soulevée; deux courant d'opinions se sont manifestés, l'un disant que le bref d'assignation devait être émis au temps où l'ordre d'injonction était donné, l'autre disait que le bref d'assignation pouvait être émis plus tard. Cette question divisa les esprits pendant quelque temps. Puis elle fut soumise à la Cour de révision et à la Cour d'appel. La Cour de revision à Québec *Re McArthur Bros* v. *Coupal*, (1) décida que sous le nouveau Code, le bref d'injonction est un accessoire à une demande principale. La Cour d'appel a décidé la même chose dans la cause de *Lombard* v. *Sociétés Anonymes des Théâtres* (2).

Malgré ces deux décisions, il est arrivé dès que ces ordonnances d'injonction ont été rendues alors qu'aucun bref d'assignation n'avait été émis. Dans ces derniers cas, on trouve généralement que la requête pour injonction contenait des conclusions faisant connaître exactement quel était le litige qui allait s'engager entre les parties.

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(1) [1899] 16 C. S., p. 521, Casault, Routhier and Andrews, JJ.

(2) [1905] 15 B. R., 267 et s.

Dans le cas présent, on veut arrêter l'exécution d'une résolution adoptée par les commissaires d'école, sans qu'aucune conclusion n'ait été prise demandant l'annulation de la dite résolution. Ces conclusions, nous dit-on, se trouveront plus tard dans une action qui sera intentée. La réponse n'est pas satisfaisante. Le juge appelé à émettre un ordre d'injonction,—ce qui est un procédé rigoureux,—doit pouvoir vérifier par lui-même quel est le véritable litige entre les parties et connaître par là quelle sera la portée réelle de l'injonction demandée.

Dans le cas présent, aucun bref n'avait été émis lorsque la requête a été refusée par l'honorable juge Bruneau: aucun bref d'assignation n'avait encore été émis lorsque l'honorable juge Duclos a refusé la demande d'appel à la Cour de révision. Le bref d'assignation n'aurait été émis que le 12 mai 1919, alors que la présente cause était pendante devant la Cour d'appel. C'est ce que l'on nous a déclaré verbalement. Ce bref n'est pas devant nous. Nous nous trouvons dans la sigulière position suivante: On nous demande d'émettre une ordonnance d'injonction arrêtant la construction d'une maison d'école construite en vertu d'une résolution de la commission scolaire, résolution approuvée par le surintendant de l'instruction publique, alors qu'aucune conclusion n'est prise, à notre connaissance, pour faire annuler cette résolution. De plus, on nous dit que l'on va procéder en vertu de l'art. 50 C. proc., article qui permet à la Cour supérieure d'intervenir pour faire annuler un acte quelconque qui serait oppressif, abusif, ou qui créerait une criante injustice; mais nous n'avons rien pour nous assurer qu'un tel litige existe réellement.

Je suis d'avis que l'appel peut être rejeté pour ce motif.

Considérant la question à son mérite, je trouve, après

étude de la procédure et des pièces qui nous sont soumises, que la commission scolaire s'est conformée substantiellement aux exigences de la loi. Elle a donné les avis requis, concentrant dans un même avis public la question de l'emprunt et la question du site de la construction d'une maison d'école, ce qu'aucune loi ne défend. Les contribuables étaient avertis suffisamment. La question se discutait depuis longtemps; on le constate par les procès-verbaux. Les appelants avaient un droit d'appel à la Cour de circuit sur la question du site de la nouvelle école; ils ont laissé écouler trente jours pendant lesquels ils pouvaient exercer ce droit. Il ne leur reste plus que la question des illégalités causant nullité absolue ou des irrégularités graves ayant le même effet. Sur ce point, ils ne signalent guère que la défectuosité de l'avis public, défectuosité plutôt de forme que de fond.

Je confirmerais le jugement et je rejetterais l'appel au mérite.

M. le juge Carroll.—Permission d'appeler à la Cour du banc du roi ayant été accordée, la cause nous est régulièrement soumise sur le fond.

Les appelants sont des contribuables de la municipalité de Hudson, et les intimés sont les commissaires d'écoles de cette municipalité. Les commissaires ont adopté une résolution décrétant un emprunt pour l'acquisition d'un terrain et la construction d'une maison d'école.

Avant les amendements contenus au statut 5 Geo. V., ch. 36, s. 12 et à 7 Geo. V., ch. 27, s. 1, les commissaires qui voulaient emprunter devaient se conformer aux dispositions des S. ref. [1909]. Leur devoir était indiqué aux art. 2723 et 2728 de ces statuts. Ils pouvaient acquérir et posséder des biens meubles et immeubles pour fins scolaires, acquérir les terrains nécessaires pour les

emplacements de leurs écoles; ils pouvaient bâtir, réparer et entretenir les maisons d'écoles et leurs dépendances, etc. Quant aux emprunts et émissions d'obligations, ils pouvaient, avec l'autorisation du lieutenant-gouverneur en conseil, sur la recommendation du surintendant, emprunter des deniers et émettre des obligations, en vertu de résolutions indiquant les fins pour lesquelles l'emprunt devait être contracté, le montant total de l'émission, le terme de l'emprunt, le taux de l'intérêt, en un mot, tous les détails qui se rattachent à l'émission des obligations et à l'emprunt.

Il a été décidé par cette Cour que les commissaires peuvent emprunter temporairement sur billet à ordre, pour des sommes modiques. Pour donner force de loi à ces jugements, l'on a amendé les S. ref., en y ajoutant l'art. 2728-d, qui permet d'emprunter temporairement, sur résolution, au moyen d'un billet à ordre, un montant n'excédant pas $5,000, pour une période n'excédant pas six mois. (1)

Lorsqu'il s'agit d'un terrain, ou de construire une maison d'école, et d'emprunter pour ces fins, la législature a décrété qu'il faut un avis aux contribuables de la municipalité.

Dans cette cause, un avis a été donné dans les délais voulus; seulement l'on dit que cet avis est insuffisant, parce qu'il ne fait pas voir l'objet de l'emprunt et ne donne aucun détail.

L'avis qui a été donné est reproduit au factum des appelants. Il est en date du 7 novembre 1918 et avertit les contribuables que, le 15 novembre, une résolution "to borrow money for the purposes of buying land and erecting a new school will be considered."

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(1) 5 Geo. V, ch. 36, s. 12.