WATT & SCOTT, LIMITED, (PLAINTIFF) ..... APPELLANT;

1920
*Mar. 9, 10.
*May 4.

AND

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

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

Negligence—Municipal corporation—Sewers—Heavy rain—Vis Major—Liability—Appeal—Jurisdiction—Consolidation of actions—"Charter of the City of Montreal," 62 Vict., c. 58, s. 42, ss. 94, 96 and 97 of s. 300—Arts 1053, 1054, 1614, 2615 C.C.—Arts. 281 and 292 C.P.C.—Arts. 1382 and 1384 C.N.

The appellant took two actions, one for $1,178.83 and another for $3,013.23, against the respondent for damages caused by two floodings of its cellar through the insufficiency of the civic sewer to carry off the drainings and surface waters. These two actions were consolidated for purposes of trial; they were both maintained by the judgment of the trial judge, and both dismissed by the Court of King's Bench, the first by a majority judgment and the second unanimously. The appellant took one appeal to the Supreme Court, and the respondent moved to quash the appeal for want of jurisdiction as to the first action.

Held, that there was no jurisdiction in the Supreme Court of Canada to entertain an appeal in the first action, which had not lost its identity through the consolidation of the two actions.

On the merits of the second action:

Per Idington, Duff, Anglin and Mignault JJ.—The respondent should have provided the instalment of "suitable automatic safety valves at connection in sewerage" as enacted by its charter.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Idington, Duff, Anglin and Mignault JJ.—Under the circumstances of this case, the rainstorm did not constitute *vis major*, as, though extraordinary but not unprecedented, it was not of such violence that it could not reasonably have been anticipated. Brodeur J. *contra*.

Per Idington and Duff JJ.—The primary duty rested on respondent, which was in control of the works it had undertaken to construct, and the responsibility devolved on it to see that they were so efficient in all details as not to injure any one else either in relation to person or to property.

Per Anglin and Mignault JJ.—The respondent's liability arises from the fact that the appellant's damage was caused by a thing which the respondent had under its care, i.e., the sewer, and that it has failed to prove that it was unable to prevent the act which has caused the damage, such act being the water from the sewer backing into the appellant's cellar. *Quebec Railway, Light, Heat & Power Co.* v. *Vandry*, (36 Times L.R. 296) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Wainwright K.C. and Elder for the appellant.

Laurendeau K.C. and *St. Pierre* for the respondent.

IDINGTON J.—The appellant herein brought two actions to recover from respondent damages suffered by reason of water flowing from a sewer of respondent into the cellar of appellant connected therewith.

The first was in respect of damages, not amounting to $2,000, for an occurrence of that nature in March, 1917.

(1) Q.R. 29 K.B. 338.

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The second arose out of an overflow on the night of 29th, and morning of 30th July, 1917.

An order was made for the consolidation, so called, of the two actions after issues had been joined.

The result was the trial of both actions together and a judgment of the learned trial judge which, after the recital of the pleadings in each case respectively awarded separate damages in respect of each cause of action namely the sum of $1,178.83 arising out of the occurrence in March, and the sum of $3,015.23 for that arising out of the occurrence in July.

The appeal from that judgment to the Court of King's Bench was prosecuted by a like preservation of distinction between the two causes of action and the determinate result.

There was never an amendment of the pleadings such as to produce any other result.

Hence on the appeal here we cannot say as to the result founded on the March occurrence there is a matter in controversy which can be said to involve at least $2,000.

And if we turn to the pleadings and the amount claimed thereby which often has to be, and here must be, our guide, we find nothing but the claim for $1,178.83.

It was therefore decided during the course of the argument herein that we had no jurisdiction to hear the appeal relative to the claim for damages in March, 1917. That branch of this appeal being thus eliminated, we must confine our attention to the alleged damages suffered in July, 1917.

The respondent is a municipal corporation created and operated by virtue of a special charter which enabled it to construct sewers and pursuant thereto it

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constructed in 1887 a main sewer, known as the "Commissioners Street Sewer" furnishing an outlet for the drainage through numerous other sewers draining an area of over thirty-eight acres in said city.

In 1896 the owners of the property, of which the appellant later, on the 1st of January, 1913, became tenants, obtained permission to make the necessary connections between said property and the sewer in question.

The respondent's engineer in charge of the sewer pumping station, testifies as follows as to that:—

Q.—First of all, Mr. Dowd, have you got with you the records of the Sewer Department of the city of Montreal shewing the permit issued by the city for the private drain from the premises at the north west corner of St. Gabriel street and Commissioners street, connecting with the Commissioner street sewer?

A.—Yes, it is in the book that I shewed you the other day.

Q.—So that here is a permit for a private drain from these premises to connect with the Commissioners street sewer?

A.—Yes, there is a permit; it is in book No. 10, page 40, permit No. 206, issued on the fourteenth of October eighteen hundred and ninety-six.

Q.—Does your record in reference to this permit show the particulars as to the location and size of the drain?

A.—Yes, they are all shown in the book, which I did not bring with me.

Q.—Then, there is no dispute between us on that point that there is a private drain from these premises to connect with the Commissioners street sewer?

A.—No.

Q.—There is no dispute as to that?

A.—Oh no, there is a private drain.

Q.—If I remember rightly, your records shew the location of the drain, its size and grade?

A.—Yes.

Q.—And you say you have not got that particular book with you?

A.—No, I did not bring it; I forget to bring it.

There seems to be no doubt of the power controlling all incidental thereto being with the respondent as appears by section 42 of its charter as it existed at that time, which is as follows:—

42. To regulate the sewerage of the city, and to assess proprietors of real estate to such amount as may be necessary to defray the expenses of making any common sewer in any street of the city, in which such proprietors own property, and for regulating the mode in which such assessment shall be made, collected and paid

and which was expanded in the charter as renewed in 1899 by 62 Vict. ch. 58, for which expansion see sections 94, 96 and 97 of Art. 300.

Pursuant thereto by-laws were enacted as follows:—

By-law No. 239.

Sec. 1. The city, by resolution of its council, is authorized to place automatic safety valves at the connection of sewers for the drainage of any land situated within limits of its territory. This work, however, shall not be commenced before it has been declared necessary by a report of the Road Committee, accompanied by a detailed statement from the city surveyor, containing the name of the proprietor, the lot or cadastral subdivision, the name of the street, the probable cost of the work to be performed, and by a certificate to the effect that such work is necessary in order to prevent the floods resulting from the public sewer existing in any street where such land is situated.

Sec. 2. The expenditure to be incurred for the manufacture and putting in of said safety valves shall be borne and paid one half by the city, and the other half by the proprietors of such lands.

* * * *

Sec. 6. The cost of repairing and maintaining said safety valves shall be payable by the City, which is hereby authorized to appoint any persons or officials of the Road Department to do the work required for that purpose on said lands.

It became, I submit, the respondent's duty to see that due care was taken in executing the purposes of these provisions.

Section 95 of the later enactment provided as follows:—

95. To permit the city to provide, where it may be necessary, suitable automatic safety valves at connections in sewerage for the drainage of any lands, the expense thereof to be borne one half by the city and one half by the owner of the property, and such cost shall be recovered according to the statement prepared by the officer designated for that purpose by the board of commissioners and approved by the latter and to provide for the inspection of the same by the city; but for all other buildings the expense shall be borne entirely by the city.

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There is most emphatic evidence by an engineer in the employment of the city and, I think, others, that the instalment of such automatic valves is the efficient remedy.

Vanier, an engineer employed by the city, speaks as follows:—

Q.—D'après votre expérience, des valves, des trappes dont vous avez parlé tout-à-l'heure, croyez-vous que s'il y en eut chez les demandeurs de telles valves d'installées convenablement, comme il se fait dans la pratique, ç'aurait eu pour résultat de prévenir ces inondations?

R.—Je le crois, j'en suis convaincu.

Q.—Est-ce que de semblables trappes ou valves, à votre connaissance, ont déjà prévenu des inondations ailleurs?

R.—Certainement.

Q.—Il y en a beaucoup d'installées à Montréal?

R.—Vous en avez d'installées un peu dans tous les quartiers ici.

And he testifies as to the practice relevant to private drains, as follows:—

Q.—Vous savez que la ville de Montréal a approuvé la connection de l'égout privé de la demanderesse avec l'égout de la rue des Commissaires?

R.—Parfaitment. Cela, c'est pour la partie franchement privée, qui se trouve de la bâtisse à l'égout de la rue. Mais je ne sache pas qu'elle ait approuvé, au moins d'après la preuve que j'ai entendue ici, de dispositions intérieures du drainage dans la maison de la demanderesse.

Q.—C'est la ville de Montréal qui installe la connection entre l'égout privé et l'égout de la rue?

R.—Entre la maison et l'égout de la rue.

Q.—C'est la ville qui fait cela?

R.—Il me semble.

Q.—Et la ville a approuvé la connection qu'elle a faite elle-même dans cette cause entre l'égout privé de la demanderesse et l'égout de la rue des Commissaires

R.—Oui. Dans ce cas-ci ça n'a pas d'importance du tout.

Q.—Mais cela se fait

R.—Cela se fait; je sais que c'est la pratique suivie à Montréal depuis quelques années.

We heard a great deal in argument about *force majeure* as if to pronounce these words should charm away any common sense method of looking at the real questions involved therein.

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The exaggerated demands made on the one side thus met by the other, do not seem to me to furnish the way to the solution of the real problems presented.

The city had, seven years before the building of this sewer, a storm which I suspect was much more severe than that of July, 1914, now in question. That was followed later and meantime by very severe storms in July, 1906, June, 1907, and June, 1911, which would suggest a much greater downpour of rain than this sewer could take absolute care of if we have regard to the evidence of Mr. Blanchard, one of the city's engineers, who testifies as follows:—

Q.—Est-ce qu'il est pratique, au point de vue du génie civil, de construire des égouts pouvant répondre à des besoins tels qu'il s'en est produit le 29 et le trente juillet mil neuf cent dix-sept (1917)

R.—Non, il est impossible.

Q.—Est-ce que ça se fait

R.—Pas à ma connaissance.

Q.—Quelle est la capacité de l'égout de la rue des Commissaires, Monsieur Blanchard, en pouces, par heure

R.—Un pouce et quarante-deux centièmes.

Q.—Au point de vue des capacités "Standard," est-ce que c'est suffisant, cette capacité, un pouce et quarante-deux centièmes.

R.—Oui, dans un grand nombre de villes, on se contente d'un pouce seulement.

Q.—Quelle est la superficie que l'égout prend?

R.—C'est trente-huit acres et huit centièmes.

Q.—Tel que démontré sur le plan?

R.—Tel que démontré sur le plan.

Q.—Quelle est la capacité du débit de cet égout là par heure. Monsieur Blanchard?

R.—A l'heure,—je peux le donner à la seconde, c'est trente-six pieds et huit centièmes par seconde, c'est-à-dire des pieds cubes.

Q.—Maintenant, Monsieur Blanchard, quoi qu'étant un jeune homme vous connaissez bien Montréal depuis assez longtemps

R.—Je suis né ici à Montréal.

Q.—Est-ce que le quartier où la superficie que cet égout est appelé à égoutter est un endroit où il s'est fait un très grand nombre de changements depuis la construction de cet égout

R.—Seulement la rue St. Laurent qui s'est ouverte.

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To put beyond peradventure as it were there is set forth in the appellant's declaration an instance as follows:—

11. The defendant had previously recognized and admitted its liability for loss and damage occurring under circumstances such as those hereinabove mentioned, having previously compensated plaintiff on a previous occasion for loss suffered by it from the same cause and under similar circumstances, namely in the sum of $91.20 on the 24th day of July, 1913, the whole as is well known to defendant.

Though denied in the respondent's plea, this was admitted on argument and no explantation why except for sake of peace. A mere surmise, I suspect, of counsel.

This last incident, to my mind, acts two ways.

It seems to deprive appellant of being entirely free from blame in failing to ask for the installation of the necessary valve. And at the same time robs respondent of any reasonable excuse for failing to point out, as was its duty, the true remedy.

That seems to me to present the common sense view. And it was within the power of the city alone to supply its application.

I entirely disagree with the ground taken in respondent's factum that it cannot refuse a ratepayer to connect with the sewer. It not only can refuse, but it is its duty to refuse unless and until all reasonable conditions have been complied with and the measure of such presumably are those provided in its by-laws.

I must also express my dissent from the misapplication sought to be made in same factum of the decision in the case of *Roy* v. *City of Montreal* (1),

The by-laws in question herein are of an entirely different character from that in question therein, and deal with the subject matters of the relations between the city and those connecting their property with the city sewers, and are obligatory on both.

(1) Q.R. 2 S.C. 305.

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Every brief storm such as those in question brings with it the risk of far more damage than the cost of these valves would be. And the brief storm if intense would leave on the streets and vacant places a temporary degree of discomfort which may have to be borne.

Hence I do not dwell on the issue of *force majeure* which from my point of view is besides the question at issue, or should be, if we apply common sense.

The primary duty rested on respondent which was in control of the works it had undertaken to construct, and did construct, and the responsibility devolved on it to see that they were so efficient in all details as not to injure any one else either in relation to person or to property.

The respondent did not exercise that due care which it was bound to have exercised.

Exhibit P2 filed herein as the permit given the owner in 1896 to make the connection is not very illuminating. Resort must be had to the by-laws for any delimitation of the respective rights and obligations of the parties concerned. The citizen who is presented with the due consideration of such a problem is not faultless if he fails to remonstrate when having occasion to complain.

I would, therefore, allow this appeal with costs, but divide the damages, four-fifths to be borne by respondent and one-fifth by appellant, and award it judgment accordingly with costs in the court below on the Superior Court scale throughout against respondent.

The appeal as to the other case having been quashed we ought not to interfere with anything relative to same beyond the costs of motion to quash.

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DUFF J.—I concur with Idington J.

ANGLIN J.—I concur with my brother Mignault.

BRODEUR J. (dissenting).—L' appelante par deux poursuites distinctes a poursuivi la cité de Montréal en dommages pour l'inondation de ses caves en mars 1917 et en juillet de la même année. Elle allègue que ces inondations ont été causées par l'insuffisance de l'égout collecteur construit par la ville.

La première poursuite pour l'inondation de mars était pour un montant de $1,178.83 et la seconde était pour un montant de $3,015.23. Comme ces deux poursuites soulevaient des questions qui étaient sous certains rapports substantiellement les mêmes, la cour a ordonné qu'elles soient instruites et jugées sur la même preuve (arts. 291 & 292 C.P.C.).

Par le jugement de la cour supérieure les deux actions ont été maintenues et la ville a été déclarée coupable de négligence pour les deux inondations. En cour d'appel ce jugement a été renversé.

La compagnie Watt & Scott porte les deux poursuites en appel devant cette cour.

La première question qui se pose est de savoir si nous avons juridiction pour juger la première poursuite, c'est-à-dire celle où le montant en litige est de moins de $2,000.

Les jonctions d'instances pour les fins de la preuve se font dans le but d'éviter des frais et n'ont pas pour effet de constituer une seule action. Les poursuites, après qu'elles sont réunies, ne perdent pas leur identité, et il arrive souvent que l'une d'elles soit maintenue et que l'autre soit renvoyée. Ainsi dans le cas actuel nous voyons que la cour d'appel, qui a été unanime sur la responsabilité de la défende-

rèsse dans la seconde action, s'est divisée quant à la première. Il y avait dans la considération de ces deux causes des circonstances qui pouvaient être invoquées dans un cas et ne pouvaient pas l'être dans l'autre.

Fuzier-Herman dans son Répertoire, *vo. Jonction d'instances,* nous déclare dans les termes suivants les effets de la réunion de deux poursuites:

> No. 77. On doit d'ailleurs admettre que le jugement de jonction des deux instances qui ne peuvent pas être considérées comme n'en formant qu'une seule laisse à chaque action son caractère primitif, *ses règles propres de juridiction* et n'altérant ni la nature ni les effets de chaque demande, chaque cause doit être évaluée séparément pour la fixation du dernier ressort.
>
> No. 83. La jonction de deux demandes formées par exploit séparé, n'a pas pour effet de modifier leur nature propre, de leur faire perdre leur individualité et de les fondre dans une instance unique. Chacune des actions conserve après le jugement de jonction son caractère primitif et ses règles propres de juridiction.

Pour déterminer la juridiction de cette cour, il faut donc voir quel est le montant des deux actions.

Dans une cause jugée récemment par cette cour, L'*Autorité* v. *Ibbotson* (1) nous avons décidé que si onze personnes se réunissent dans une seule poursuite pour réclamer des dommages au montant de $22,000 payables $2,000 en faveur de chacune d'elles, il faut traiter cette poursuite comme s'il y eût eu onze poursuites différentes.

Les décisions suivantes de cette cour sont au même effet: *Hearn* v. *Nelson & Fort Sheppard Ry. Co.* (2), *Glen Falls Ins. Co.* v. *Adams* (3), *Ontario Bank* v. *McAllister* (4).

(1) 57 Can. S.C.R. 340.
(2) 8 West. W.R. 99.
(3) 54 Can. S.C.R. 88.
(4) Cameron's Practice, 2nd ed. 265.

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On a dit que ces articles 291 et 292 du code de procédure étaient de droit nouveau et étaient tirés des Règles de la Cour d'Echiquier du Canada dans les causes maritimes. Je dois dire cependant à ce sujet que cette pratique de réunir les instances a toujours été reconnue dans la doctrine et la jurisprudence. (1865) *Foley* v. *Tarratt* (1), (1866) *Hébert* v. *Quesnel* (2), (1882) *Chrétien* v. *Crowley* (3), (1882) *Larivière* v. *Choquet* (4), (1891) *Dépatie* v. *Gibb* (5), Guyot, Répertoire, vbo. Connexité, p. 480; Ferrière, Introduction à la pratique, p. 91, vbo. Jonction; Rolland de Villargues, vbo. Connexité, p. 100.

Pour ces raisons je suis donc d'opinion que nous n'avons pas juridiction dans la première poursuite et que l'appel quant à elle doit être cassé avec dépens.

Quant au mérite de la seconde poursuite, je suis d'opinion que le jugement de la cour d'appel est bien fondé.

Il s'agirait de savoir si l'inondation du mois de juillet 1917 est due à une cause fortuite qui ne pouvait être prévue, ou s'il y a eu force majeure. La faute ne peut se concevoir chez celui qui subit l'empire d'un cas fortuit ou d'une force majeure. Lorsqu'il y a cas fortuit ou force majeure, il n'y a pas de responsabilité pour le dommage causé par une chose dont une personne a la garde.

Il est incontestable que les accidents de la nature proviennent d'une cause étrangère à l'obligé et constituent des cas fortuits, mais ils n'écartent pas la responsabilité dans tous les cas. Il faut qu'ils se produisent dans des conditions que la sagesse commune n'a pas prévues. Ainsi des pluies sont bien

(1) 15 L.C.R. 245.
(2) 10 L.C.Jur. 83.
(3) 2 Div. Q. B. 385.
(4) M.L.R. I S.C. 461.
(5) 35 L.C.Jur. 60.

l'acte de la nature, mais comme elles se répètent fréquemment, on doit remplir ses obligations de manière à se protéger contre elles. Cependant si ces pluies se déchainent en tempêtes, si elles dépassent les prévisions de la sagesse commune, alors elles tombent dans la catégorie des cas fortuits qui enlèvent toute responsabilité. (Sourdat, Responsabilité, nos. 644-645. Toullier, vol. 2, p. 223. Mignault, vol. 6, p. 362. *Sawyer* v. *Ives* (1).

Dans le cas actuel, il y a eu dans la nuit du 30 juillet 1917 une pluie torrentielle. Quant à son intensité et à sa durée, il n'y aurait jamais eu, de mémoire d'homme, un orage aussi considérable, excepté 37 ans auparavant. Et encore, quant à ce dernier orage, le système de mesurage alors en usage n'avait pas la précision des instruments dont on se servait au 30 juillet 1917.

On a examiné sur ce point l'officier, M. Weir, qui a charge de l'observatoire de l'université McGill et qui a la garde de ses registres et il nous parle d'abord de la tempête en question en la présente cause. L'orage aurait duré 78 minutes et il serait tombé pendant ce temps 1·51 pouce d'eau. L'intensité n'aurait pas toujours été la même. Ainsi, par exemple, il donne la période de cinq minutes où l'intensité aurait été plus grande et pendant laquelle il aurait trouvé une chute d'eau de 0·26 pouce. Si cette intensité s'était continuée pendant tout le temps de l'orage on aurait eu alors pour les 78 minutes 4·05 pouces et pour une heure 3·12 pouces. Aussi ce météorologiste n'hésite pas à dire:

I should say that as regards the intensities they are extraordinary, that is the shortest period *of intensities are not extraordinary, but the amount of water during the duration of the downfall is extraordinary.*

(1) Q. R. 4 Q. B. 374.

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Il prouve par les registres du McGill que nous avons eu dans les années qui ont précédé la tempête en question trois gros orages:

	Maximum de l'intensité 5 minutes.	Intensité pendant la durée de l'orage	Durée
1° le 30 juillet 1906	0·35	0·78	60 min.
2° le 26 juin 1907.....	0·35	0·59	60 "
3° le 11 juin 1911....	0·35	0·77	60 "
4° le 29 juillet 1917 ..	0·26	1·51	78 "

M. Weir nous dit qu'on ne devrait pas comparer les orages de 30 juillet 1906 et du 29 juillet 1917. Quoique l'intensité pour cinq minutes dans le premier cas fût plus considérable que dans le dernier cas, ce dernier doit être considéré bien plus sévère à cause de sa durée. La durée d'un orage, pour en déterminer la sévérité pour un égout, doit donc être prise en considération, et c'est bien naturel. En effet, si un orage ne dure que quelques minutes, l'égout peut en recevoir toute l'eau et sans crainte d'inondation. Mais si l'orage dure longtemps, alors l'égout se remplit, il devient insuffisant et l' inondation se produit. Il ne faut donc pas regarder au maximum d'intensité pour quelques minutes mais à la quantité d'eau qui tombe pendant tout le temps de l'orage.

M. Weir nous dit alors que le seul orage qui puisse se comparer avec celui qui a causé l'inondation est celui du 11 juin 1911 qui a eu une intensité de 0·35 dans cinq minutes, de 0·77 dans une heure et de 1·98 dans les onze heures que l'orage a duré. Si nous examinons soigneusement ces chiffres, nous voyons que pendant une heure il y a eu une chute d'eau de 0·77 tandis que dans l'orage de juillet 1917 il est tombé dans une heure et dix-huit minutes 1·51. Ce dernier me paraît avoir été plus sévère. Le chiffre de 1·98

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couvre 11 heures et par conséquent donne à l'égout, qui est d'ordinaire supposé avoir une chute d'eau d'environ 1·50 de l'heure, amplement le temps de transporter toute l'eau qui s'y jette.

D'après M. Weir, l'orage le plus sérieux qu'on aurait eu est celui de 1880; mais il déclare que le mesurage qui se faisait alors n'avait pas la même précision que celui qui peut se faire avec des instruments modernes.

Toute cette preuve n'est pas contredite et le témoignage de ce météorologiste est accepté par les deux parties. Nous ne nous trouvons donc pas en présence de faits plus ou moins certains, comme dans le cas de la cause de *Sawyer* v. *Ives* (1), mais en présence de faits incontestables.

En résumé, je vois que la tempête qui a donné lieu à l'inondation n'a jamais été surpassée de mémoire d'homme, excepté par celui de 1880; et encore il n'y avait pas à cette époque d'instruments bien précis. A tout événement on aurait passé 37 ans sans avoir de tempête semblable.

M. St. George, l'expert des demandeurs, qui a construit lui-même le canal d'égout en question lorsqu'il était l'ingénieur de la défenderesse, nous dit qu'il a été fait suivant les règles de l'art et qu'il était suffisant pour égoutter les terrains qui s'y déversaient. Il a tenté, il est vrai, de trouver en faute la défenderesse par certains changements qui avaient été faits, mais il n'a pas réussi à convaincre les tribunaux inférieurs du bien fondé de ses prétentions sous ce dernier rapport.

Ce canal d'égout a la capacité d'une chute d'eau de 1·42 pouce par heure. Or cette cour, dans une cause de *Faulkner* v. *City of Ottawa* (2), a déclaré, sur la preuve qui y avait été faite

(1) Q.R. 4 Q.B., 374. (2) 41 Can. S.C.R. 190.

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that a fall of 1½ inch of water per hour is considered as meeting the requirements of good engineering and is the standard adopted by all the cities of Canada and the northern states.

La légère différence de 8-100 d'un pouce ne devrait pas être considérée comme étant suffisante pour engager la responsabilité de la défenderesse, d'autant plus que dans la cause actuelle la même preuve que dans la cause de Faulkner n'a pas été faite et qu'au contraire les experts de la poursuite et de la défense sont d'opinion que le canal était fait suivant les règles de l'art et était suffisant.

Pour que la corporation intimée fût responsable, il aurait fallu qu'elle eût concouru au dommage qui aurait été causé. Il n'y a pas de doute que l'inondation a été causée par la pluie torrentielle qui est tombée, c'est-à-dire par une force étrangère à la volonté de la défenderesse. Cette dernière a jugé à propos, après avoir été autorisée par l'Etat et dans un but de salubrité publique, de construire des égouts. Il était de son devoir de les construire assez spacieux pour la quantité d'eau que, dans les prévisions de la sagesse humaine, elle devait raisonnablement présumer devoir tomber. Or voici un orage qui de mémoire d'homme n'aurait eu lieu qu'une fois. Cet orage déjoue les calculs des hommes de l'art. Peut-il y avoir responsabilité? Je n'hésite pas à dire que cela constitue un cas de force majeure et que la défenderesse n'a pas engagé sa responsabilité.

Nous avons eu d'ailleurs récemment dans une cause de *Bénard* v. *Hingston* (1), à examiner cette question de force majeure et l'honorable juge-en-chef déclarait:

> The damages were caused by a combination of a very heavy rainfall and an abnormal overflow of the River St. Lawrence. It is not necessary to bring such an event within the scope and meaning of the

(1) 56 Can. S.C.R. 17.

words *vis major* or the act of God that such an event should never have happened before: it is sufficient that its happening could not have been reasonably expected.

L'honorable juge Anglin, dans la même cause, disait que si l'inondation était si extraordinaire qu'elle n'aurait pas dû être anticipée, alors il y aurait force majeure.

Les inondations dont il était question dans la cause de *Bénard* v. *Hingston* (1) étaient bien plus fréquentes que cet orage qui a eu lieu en juillet 1917, vu que de mémoire d'homme il n'aurait été surpassé en intensité et en durée que 37 ans auparavant.

La jurisprudence paraît bien établie dans Québec qu'une corporation municipale n'est pas responsable pour l'inondation des caves si elle a construit son système d'égout suivant les plans d'ingénieurs d'expérience et si elle en prend bien soin. (1880) *Riopel* v. *Cité de Montréal* (2); (1899) *The A.M.C. Medicine Co.* v. *Cité de Montréal* (3). Ce dernier jugement a été confirmé en appel.

Alors il me semble que nous ne devons pas hésiter à déclarer que dans la cause actuelle il y a eu cas fortuit et force majeure et que la corporation n'a pas engagé sa responsabilité.

En résumé l'appel devrait être cassé et renvoyé avec dépens.

MIGNAULT J.—The appellant company took two actions against the city of Montreal for damages caused by two floodings of its cellar on Commissioners street through the insufficiency of the civic sewer on that street to carry off the drainage and surface waters, so that the water of the sewer backed into the appellant's cellar which was used for purposes of storage in connection with its business.

(1) 56 Can. S.C.R. 17. (2) 3 L.N. 320.
(3) Q.R. 15 S.C., 594.

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The first flooding occurred in March, 1917, and the appellant in the first action claimed $1,178.83. The second flooding was during the night of the 29th and 30th July, 1917, and for this flooding the appellant sued for $3,015.23 by a second action against the city. These two actions were consolidated for purposes of trial, and were both maintained by the Superior Court, Weir J., for the full amount, no contradiction of the appellant's proof of damages having been made. On appeal, both actions were dismissed by the Court of King's Bench, appeal side, the first by a majority judgment, the second unanimously.

The appellant took one appeal to this court as to the two actions, and the respondent having moved to quash the appeal for want of jurisdiction as to the first action, the motion was reserved for hearing at the same time as the merits. At the hearing the court intimated that it had not jurisdiction in so far as the appeal in the first action was concerned, which appeal is quashed, and the appeal was restricted to the second action for $3,015.23 for the July flooding, which is the only one to be considered.

I have carefully read the voluminous evidence. The sewer in question was built in 1887 and runs along Commissioners street, emptying into a main sewer which itself discharges into Elgin Basin in the Montreal harbour, some distance to the west. The Commissioners street sewer drains a drainage area of 38 8-100 acres, and has a capacity of 1·42 inches per hour. Its size is 4 by 2·8 feet. The main sewer carries the sewage and surface waters from the western part of the city, the volume of the sewage and surface waters thus carried being very considerable, and in comparison with it the sewage drained by the Commissioners street sewer is, according to the expression of one of

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the witnesses, a mere bucketful. Some years after the construction of the latter sewer, the city decided to install a pumping station at Youville Square, the object of which was to divert the sewage coming from the west by way of St. Sulpice street into the Craig street sewer, and for the purposes of the pumping station a small dam was built in the main sewer so as to have sufficient water to work the pumps. However the pumps when constructed were found not to have been properly built and the city refused to accept them as satisfying the contract for their construction and they were never put in operation. It is pretended by Mr. St. George, expert witness for the appellant, that this dam obstructed the flow of sewerage from the Commissioners street sewer, but this is denied by the respondent's experts, and the learned trial judge did not find that this dam contributed to the flooding complained of.

The appellant's cellar was connected with the Commissioners street sewer by a private drain constructed under the inspection of the respondent's officers and must be taken to have been a proper connection. For this reason I do not think that the respondent can claim that the appellant's cellar was too low for efficient drainage. It is common ground, however, that no automatic safety valve was placed by the appellant or the respondent in the appellant's connecting drain, and the respondent's evidence shews that had such a valve been installed it would have been closed by the overflow from the street sewer and no flooding would have occurred.

The July flooding was caused by a very heavy rainstorm, and the evidence is that the water backed up from the street sewer into the appellant's premises. The question under these circumstances is whether

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the respondent is liable for the appellant's damages. The Court of King's Bench, referring to the two floodings held that it was not because the appellant had not proved that the respondent's sewers were defectively constructed or were insufficient, and because

les inondations dont se plaigent les demandeurs intimés sont dues à des causes fortuites ne pouvant être prévues et constituant des causes de force majeure.

If this latter *considérant* of the judgment is well founded it disposes of the appellant's action.

In the Superior Court the learned trial judge held the respondent liable for three reasons:

1. The sewer on Commissioners street was not of sufficient capacity to drain the surface area in times of exceptional rainstorms which have been proved to have fallen on the locality at various times from the year 1880 onwards, and the damages were caused by such a storm.

2. The sewer was insufficient for the further reason that the flooding through the private drain could have been prevented by the defendant if it had equipped the sewer at its connection with the private drain with automatically closing and opening valves as described in its plea.

3. The defendant, knowing the possibility of such rainstorms occurring in the summer months, should have equipped and operated the Youville pumping station in such manner as to have aided the functions of the Commissioners street sewer in carrying off the unusual water flow, which it neglected to do.

The learned trial judge treats the rainstorm in question has having been "exceptional" or "unusual," but finds expressly that such storms have fallen on this locality at various times, and, in his reasons for judgment, he instances a rainstorm of greater intensity and quantity on the 9th of August of the same year, when the appellant's cellar was again flooded, another on June 11, 1911, comparable to the one in question, and a heavier one—the heaviest rainfall ever recorded in Montreal—on July 20, 1880, when 1·58 inches of rain fell in 46 minutes, as opposed to 1·51 inches in 78 minutes during the storm in question. He, therefore, holds that the rain in question was not unprecedented.

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In 1895, the Quebec Court of Queen's Bench in *Sawyer* v. *Ives* (1) held that a rainstorm extraordinary but not unprecedented, nor of such violence that it could not reasonably have been anticipated, does not constitute *vis major*. I must accept this holding as being in conformity with the definition of *force majeure* or of *cas fortuit*, as

> tout évènement que la prudence humaine ne peut prévoir et auquel on ne peut résister quand on l'a prévu." (Pandectes françaises, vo. Obligations, no. 1774.)

My opinion is, therefore, that the plea of *force majeure* is not made out, and I may add that the position taken by the respondent is that Commissioners street sewer was sufficient for ordinary needs, the inference being that it is not obliged to provide a sewer which can take care of extraordinary rainstorms, though not unprecedented or unforseeable. I will examine whether this pretension is founded in law, for I am of opinion that the respondent cannot rely on its plea of *force majeure*.

There remains therefore the question whether the respondent having constructed a sewer sufficient for the ordinary requirements of the population of the district to be drained, is liable for a flooding caused by an exceptional or unusual rainstorm not coming within the definition of a *cas fortuit* or a *force majeure*.

Besides citing several decisions of the Quebec courts which are not binding on us, and of which some support the respondent's position, while others were influenced by the fact that the flooded premises were built after the construction of the sewer (a number of these decisions favourable or unfavourable to the respondent, may be found in Beauchamp's Repertoire, vo. *Respon-*

(1) Q.R. 4 Q.B. 374.

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sabilité, nos. 407 and following), the respondent relies on the judgment of this court in *Faulkner* v. *City of Ottawa* (1), by which it was decided that where a city has constructed a sewer capable of carrying off 1½ inches of water per hour, which is considered as meeting the requirements of good engineering and which is the standard adopted by all the cities of Canada and the Northern States, the city is not liable for a flooding caused by a rainstorm which during nine minutes fell at an intensity of 3 inches per hour and was one which could not reasonably be expected.

Judging by the evidence in this case, the rainstorm was not as violent as the one in *Faulkner* v. *The City of Ottawa* (1). Moreover the liability of the respondent must be determined according to the rules laid down by the Quebec Civil Code (Arts. 1053, 1054), so I do not think that the matter would necessarily be concluded by the decision of this court in the *Faulkner* case (1), were it on all fours with the case at bar.

The respondent also cited the judgment of this court in *Bénard* v. *Hingston,* a Quebec case (2). I do not think that this decision helps the respondent, for the litigation arose between a tenant and a landlord, and the latter, after having been condemned to pay damages to her tenant for a previous flooding, had adopted the very measure of precaution indicated by the tenant's experts and the best possible professional advice, which she herself had obtained. Moreover the flooding there was caused by an ice shove in the river St. Lawrence, coinciding with a very heavy rainstorm, which might reasonably be considered as a *cas fortuit,* and the question was as to the contractual liability of the landlord under article 1614 of the Quebec Civil Code.

(1) 41 Can. S.C.R. 190.

(2) 56 Can. S.C.R. 17.

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As I have said, the question of liability or non-liability of the respondent must be determined according to articles 1053 and 1054 of the Quebec Civil Code, and as to the construction of the latter article we are bound by the recent decision of the Judicial Committee of the Privy Council in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1).

In that case the Judicial Committee held that the first paragraph of article 1054 C.C. stating that

> he (i.e. every person capable of distinguishing right from wrong) is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care,

does not, in the case of damage caused by a thing which a person has under his care

> 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 defeasable by proof of inability to prevent the damage.

Perhaps I may be permitted to observe that holding that article 1054 C.C. establishes a legal liability does not entirely do away with the idea of fault, for this legal liability is evidently imposed because of a presumed fault, that is to say, a negligence in respect of the care of the thing which caused the damage. (Planiol, vol. 2, nos. 917 and 930, 7th edition).

Their Lordships also hold that by the "exculpatory paragraph," the penultimate paragraph of article 1054 C.C.

> 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,

(1) 36 Times L.R. 296.

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applies to the first paragraph of the article as well as to the four next succeeding paragraphs concerning the vicarious liability of fathers and mothers, tutors, curators, school masters and artisans. This is an absolutely new construction, and in adopting it preference was given to the French version of article 1054 C.C. without apparently considering the rule of construction laid down by article 2615 C.C. that when a dffference exists between the English and French texts of any article of the code,

> that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded.

Hitherto it had always been considered that the "exculpatory paragraph" of article 1054 C.C. referred merely to the specific cases mentioned in the four preceding paragraphs, this being more consistent with the provisions of the existing laws (see Pothier, *Obligations*, Bugnet ed. no. 121), while a similar excuse was not open to masters and employers when held liable for the damage caused by their servants and workmen in the performance of the work for which they were employed. The extension of the "exculpatory clause" to the first paragraph of article 1054 may now give rise to new questions of construction.

Deferring to the Privy Council decision in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1), I must hold that the inquiry in this case should be whether the appellant's damage was caused by a thing which the respondent had under its care, and whether the respondent has failed to establish that it was unable to prevent the act (*empêcher le fait*) which has caused the damage.

(1) 36 Times L.R. 296.

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The respondent undoubtedly had the Commissioners street sewer under its care, and this sewer collected the rain water of the area drained by it. The damage was caused by the water from this sewer backing into the appellant's cellar, which was the act (*le fait*) which caused the damage. This establishes against the respondent a liability defeasable only by proof of its inability to prevent the damage.

Has the respondent established this inability? Its own plea states that had an automatic valve been placed in the appellant's private drain connecting with the street sewer, the water would not have backed into the cellar, and the respondent's own evidence establishes this fact. Could not the respondent have installed such a valve and thus prevented the damage?

The City Charter, 62 Vict. ch. 58, sect. 300, subsection 95, gives the city council the power

> to permit the city to provide, where it may be necessary, suitable automatic safety valves at connections in sewerage for the drainage of any lands, the expense thereof to be borne one-half by the city, and the other half by the owner of the property, and said cost shall be recovered as per statement prepared by the city surveyor, and to provide for the inspection of the same by the city; but for all other buildings, the expense shall be borne entirely by the city.

The city passed a by-law in 1899, numbered 239, section 1 of which provides that

> the city, by resolution of its council, is authorized to place automatic safety valves at the connection of sewers for the drainage of any land situated within limits of its territory. This work, however, shall not be commenced before it has been declared necessary by a report of the Road Committee, accompanied by a detailed statement from the City Surveyor, containing the name of the proprietor, the lot or cadastral subdivision, the name of the street, the probable cost of the work to be performed, and by a certificate to the effect that such work is necessary in order to prevent the floods resulting from the public sewer existing in any street where such land is situated.

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The words "any lands" and "all other buildings" in subsection 95 are very vague, but the respondent did not contend that it could not have placed an automatic safety valve in the appellant's private drain, but merely that it was discretionary on its part to do so.

If, therefore, the installation of such a valve would have prevented the act which has caused the damage, the respondent has not brought itself within the "exculpatory paragraph" of article 1054 C.C., and is liable under paragraph one of this article.

The respondent contended that, under the statute and by-law, it could only install an automatic safety valve at the connection of the appellant's private drain with the street sewer, and not in the appellant's cellar, and that had it installed such a valve at the sewer connection, the filling up of the sewer would have closed the valve and the rain water from the appellant's roof (which drains by means of a pipe inside the building into the private drain and thence into the sewer) would have been unable to get into the sewer and would have flooded the appellant's cellar. The answer is that so long as the sewer was not filled the rain water from the roof would freely flow into it, and that if it could not get away and backed into the cellar, it would not be on account of the valve but because the sewer was filled and, valve or no valve, the rain water could not have gone into the sewer and must have backed into the cellar. It follows therefore that the flooding of the cellar by the rain water would be caused not by the valve, but because the sewer was completely full, and could carry no more water. And because the valve was not there, not only the rain water from the roof but the sewer water as well backed into the appellant's cellar.

It may be useful to add that under articles 1382-1384 of the Code Napoleon, similar to our own articles as to damages caused by things, the liability of a *commune* for the flooding of a house connected with a public sewer, through the insufficiency of the public sewer, is fully recognized. Thus the Conseil d'Etat decided in 1895, in a case of *Ville de Paris c. Nissou* (1) that

l'inondation des caves d'une maison par suite du débordement des eaux d'un égout dont la capacité n'était pas suffisante, constitue un dommage provenant de l'exécution d'un travail public, et dont la ville, qui a construit l'égout, doit réparation au propriétaire (L. 28 pluv. an 8, art. 4.

See also the note appended to this decision.

The law referred to (loi du 29 pluviose, an 8, 17 février, 1800) has no bearing on the question of liability for flooding, but merely determines the jurisdiction of the *conseil de préfecture* to pronounce on questions arising as to damages caused by the construction of public works.

And in another case, *Deloison* c. *Ville de Paris* (2) it was also held by the *Conseil d'Etat* that

la commune est responsable des dommage causés par une inondation survenue dans les caves d'un immeuble et provenant du refoulement des eaux de l'égout public qui ont débordé par le manchon des tinettes filtrantes placées dans ces caves, alors cette inondation a eu pour cause, d'une part, l'insuffisance de l'égout, et, d'autre part, les conditions dans lesquelles la commune a autorisé la pose des tinettes et dans lesquelles elle a contracté à leur sujet un abonnement.

See also Fabreguettes, *Traité des eaux publiques et des eaux privées*, vol. 2, p. 394, note 1.

I take it therefore that the liability of the respondent for the July flooding admits of no doubt. The only question is whether the respondent is alone answerable for the whole amount of the damages suffered by the

(1) Sirey, 1897, 3, 77. (2) Dalloz, 1900, 3, 63.

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appellant. If the latter contributed to these damages, if it neglected any precaution which it should have taken to avoid the flooding of its cellar by an overflow from the street sewer, the rule of the civil law is that there being common fault, the injured party should bear a share of the damages proportionate to its own fault.

See *Price v. Roy* (1), also Planiol, Droit Civil, 7th ed. vol. 2, no. 899, and, as having a bearing on cases of flooding, *Epoux Laugier c. Delarbre*, Cassation, 11 novembre, 1896 (2).

The evidence shows that automatic safety valves are in common use in Montreal and are installed by the owners of buildings with deep cellars so as to prevent an overflow from the street sewers. The appellant well knew that its deep cellar rendered a flooding probable in case of heavy rains, for it alleges that its cellar had previously been flooded, and after its experience in the previous March, it acted most imprudently in storing thousands of dollars worth of perishable goods in its cellar and in not resorting to the simple device of placing an automatic safety valve on the sewer connection. I do not think that the appellant was justified in thus neglecting to adopt a well-known precautionary measure and in expecting at the same time to be fully compensated by the city for any damage caused to its goods. To my mind, the rule is well stated by Sourdat, *Responsabilité*, 6th ed., vol. 1, no. 660, as follows:

> Si la partie lésée a elle-même offert occasion au dommage par une faute personnelle, est-elle recevable à s'en plaindre?
>
> La Cour de Cassation décide que cette circonstance ne fait pas disparaître la responsabilité, mais a seulement pour effet de l'atténuer.

(1) 29 Can. S.C.R. 494. (2) Dalloz, 1897, 1, 315.

Nous pensons, pour notre part, qu'il ne peut y avoir à cet égard de règle absolue. Il n'en est plus ici comme dans l'hypothèse d'un délit. Celui qui, dans une intention malveillante, commet un acte de nature à nuire à autrui, en est responsable alors même que la victime du dommage y aurait contribué par sa faute. Mais les conséquences d'une simple imprudence, d'une légère inattention, peuvent être absorbées complètement par celles de l'imprudence plus grave, de la faute lourde, et surtout du délit commis par la partie lésée. C'est aux tribunaux à apprécier si la faute imputable au plaignant est seulement de nature à atténuer la responsabilité du défendeur, ou si elle est assez grave pour rendre la personne lésée complètement irrecevable à se plaindre du préjudice éprouvé.

Even accepting the doctrine of the Judicial Committee that the liability here is one imposed by the law irrespective of any presumption of fault, I cannot think that the conduct of the injured party, in so far as it may have contributed to the damage, should be disregarded. It is no doubt difficult in a case like this to divide the damages so that each party shall bear a share exactly proportioned to its own fault or imprudence, but I am convinced that here the appellant should assume a substantial part of the damages it could easily have prevented. After due consideration, I think that justice will be done to both parties if the liability for the damages caused by the July flooding is equally divided between them.

I would therefore allow the appeal and condemn the respondent to pay to the appellant $1,507.61 with interest and the costs of an action for that amount in the Superior Court, except the cost of evidence. The action for the March flooding was dismissed with costs by the Court of King's Bench and the appeal to this court is quashed for lack of jurisdiction, so that this part of the judgment of the Court of King's Bench stands. The evidence dealt with both floodings, and I think in view of the result that each party

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should bear the expense of its own evidence. As but one appeal was taken in the Court of King's Bench and in this court, and as one action stands dismissed and the other is partially maintained, my opinion is that each party should bear its own costs both in this court and in the Court of King's Bench.

Appeal allowed without costs.

Solicitors for the appellant: *Davidson, Wainwright, Alexander & Elder.*

Solicitors for the respondent: *Laurendeau, Archambault, Damphousse, Jarry, Butler & St. Pierre.*