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 *Feb. 19.
 MELISSA McCLEAVE, ADMINISTRATRIX OF THE ESTATE OF DAVID McCLEAVE (PLAINTIFF) } APPELLANT;

AND

THE CITY OF MONCTON (DEFENDANT) } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Principal and agent—Police constable—Negligent performance of duty—Liability of municipal corporation.

A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff at the trial and ordering judgment to be entered for the defendant.

The plaintiff kept a hotel in the City of Moncton, N.B., and, in 1899, was convicted by the Police Magistrate of an offence against The Canada Temperance Act which was in force in the city. The conviction was quashed on *certiorari* on the ground that one Belyea, a police

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

officer and constable, had laid the information and, afterwards, illegally executed the search warrant issued thereon. The plaintiff brought an action against the city claiming damages for an unlawful entry into his hotel and carrying away liquors therefrom, and for the value of the liquor which was destroyed under the provisions of the Act.

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The plaintiff obtained a verdict at the trial with \$300 damages. On motion by the defendant to the court *en banc* to have this verdict set aside and a verdict entered for the defendant or, failing that, for a new trial or, failing both, for reduction of the damages, the court ordered the verdict to be set aside and a verdict entered for defendant, holding that the city was not liable for the act of the police officer in executing the warrant issued on his own information. The plaintiff appealed.

Teed K.C., for the appellant, cited *Henly v. Mayor of Lyme* (1); *Borough of Bathurst v. Macpherson* (2); *Cowley v. Mayor of Sunderland* (3); *Mersey Docks Trustees v. Gibbs* (4); *Gilbert v Corporation of Trinity House* (5); *McSorley v. City of St. John* (6).

Chandler K.C. for the respondent. The city did not authorize nor direct the acts of which the plaintiff complains, nor could it legally give any authority to commit such acts. The general principle governing this case is found in *McSorley v. The City of St. John* (6). The police officer acted independently as a public officer enforcing a statute and his acts and proceedings were beyond the control of the respondent. A municipal corporation is not liable, where the acts complained of were done by officers

(1) 5 Bing. 91.

(2) 4 App. Cas. 256.

(3) 6 H. & N. 565.

(4) L. R. 1 H. L. 93.

(5) 17 Q. B. D. 795.

(6) 6 Can. S. C. R. 531.

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whose powers and duties were enjoined and granted, for the benefit of the general public, and delegated as a convenient method of exercising a function of general government. *Bailey v. The Mayor, &c. of New York* (1); *Main v. St. Stephen* (2); *Hill v. City of Boston* (3), and cases there discussed; *Bultrick v. City of Lowell* (4); *Hafford v. City of New Bedford* (5); *Rousseau v. Corporation of Levis* (6); *Winterbottom v. London Police Commissioners* (7). The maxim "*respondeat superior*" has no application under the circumstances of this case.

The judgment of the court was delivered by :

THE CHIEF JUSTICE (Oral).— We are all of opinion that the judgment appealed from is right and that the proper distinction has been drawn by Mr. Justice Gregory in coming to the conclusion that the city cannot be held liable for the acts of the constable Belyea in his effort to secure the observance of the statute.

In a case cited by Mr. Justice Gregory, *Bultrick v. The City of Lowell* (4) Chief Justice Bigelow, in delivering the judgment of the Supreme Court of Massachusetts, whose decisions are justly entitled to the greatest respect, says :

Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not

(1) 3 Hill (N. Y.) 531.

(2) 26 N. B. Rep. 330.

(3) 122 Mass. 344.

(4) 1 Allen [Mass.] 172.

(5) 16 Gray [Mass.] 297.

(6) 14 Q. L. R. 376.

(7) 1 Ont. L. R. 549.

from the city or town under which they hold their appointment. For the mode in which they exercise their powers the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as agents or servants of the city.

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And again he says :

If the plaintiff could maintain his position that the police officers are so far agents or servants of the city that the maxim "*respondeat superior*" would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action, because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city.

This language is in effect repeated by Dillon in his work on Municipal Corporations (4 ed.) sec. 974, in discussing the applicability of the maxim "*respondeat superior*." He says :

When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation * * * * If * * * * they are elected or appointed by the corporation in obedience to a statute, to perform a public service, not peculiarly local, for the reason that this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties, they are not to be regarded as servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the state confers upon them, and the doctrine of "*respondeat superior*" is not applicable.

I quite agree upon the question of fact with the court below that Belyea held his appointment from the corporation for the purpose of administering the general law of the land, and that the wrong complained

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of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely.

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It must, however, be added, in order that there may in future be no misunderstanding as to the effect of this decision, that in respect to torts, the law of Quebec may be quite different and that, therefore, the decision in this case ought not to bind this court in any cases of a similar nature occurring in the Province of Quebec. We have here to apply the common law as to torts as administered by the English courts solely, while in Quebec such matters are governed wholly by the provisions of the Civil Code. I make these observations in consequence of what fell from my brother Girouard during the argument.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. W. Hewson.*

Solicitor for the respondent: *W. B. Chandler.*
