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GEORGES A. VANDRY; THE GUARDIAN ASSURANCE COMPANY; THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY; THE PHOENIX ASSURANCE COMPANY OF LONDON, AND THE QUEEN INSURANCE COMPANY OF AMERICA (PLAINTIFFS) ..... APPELLANTS;

AND

THE QUEBEC RAILWAY, LIGHT, HEAT AND POWER COMPANY (DEFENDANTS) ..... RESPONDENTS.

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

Electric transmission—Statutory authority—Special Act—Negligence—Character of installations—System of operation—Grounding transformers — Defective fittings — Vis major — Responsibility without fault—Art. 1054 C. C.

After heavy rains, in cold weather, had coated trees and electric wires with icicles, a violent wind tore a branch from a tree, growing on private grounds, and blew it a distance of 33 feet on to a highway where it fell across the defendants' electric transmission wire, causing a high-tension current to escape to secondary house-supply wires, used only for low-tension currents, and resulting in the destruction of the buildings by fire. The high-tension current, 2,200 volts, was stepped down from the primary wire to about 110 volts on the secondary wires by means of a transformer which was not grounded, owing to doubts then existing as to doing so being safe practice. The secondary wires were used by the defend-

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

(NOTE.—Leave to appeal to Privy Council granted, 9th May, 1916.)

ants to supply electric light to consumers, the owners of the buildings destroyed, but these buildings were not fitted with "modern" installations for electric lighting nor with cut-offs to intercept high-tension currents.—V's action was to recover damages for the destruction of his building, alleged to have been occasioned by the defendants' defective system. The insurance companies, being subrogated in the rights of owners of buildings insured by them, brought actions to recover the amounts of the policies which had been paid.

Held, per Idington, Anglin and Brodeur JJ. (Davies and Duff JJ. *contra.*) Under the provisions of article 1054 of the Civil Code, the defendants were liable for the damages claimed as they had failed to establish that they were unable, in the circumstances, to prevent the escape of the high-tension electric current, a dangerous thing under their care, which had been the cause of the injuries, or that the injuries thus caused had resulted from the fault of the owners of the buildings themselves. The defence of *vis major* was not open as the circumstances in which the injuries occurred could have been foreseen and provided against by the installation of a safer system for transmission of electricity.

Judgment appealed from (Q. R. 24 K. B. 214), reversed, Davies and Duff JJ. dissenting.

Per Anglin and Brodeur JJ.—As the special Acts under which the defendants carried on their operations provide that the company shall be "responsible for all damages which its agents, servants, or workmen cause to individuals or property in carrying out or maintaining any of its said works "(58 & 59 Vict. (D.) ch. 59, sec. 13), and that the company "shall be responsible for all damages which it may cause in carrying out its works" (44 & 45 Vict. (Que.) ch. 71, sec. 2), they are liable for damages resulting from the operation of their constructed works, without regard to any consideration of fault or negligence on their part.

Per Davies and Duff JJ., dissenting.—Under article 1054 of the Civil Code, the onus lies upon the plaintiff to prove that the injury complained of resulted from the fault of the thing which the defendant had under his care; in the absence of such proof there is no liability on the part of the defendant. In the circumstances of the case the defendants are entitled to succeed on the ground that the damages were the result of *vis major*. *Canadian Pacific Railway Co.* v. *Roy* ((1902) A. C. 220); *Dumphy* v. *Montreal Light, Heat and Power Co.* ((1907) A. C. 454); *McArthur* v. *Dominion Cartridge Co.* ((1905) A. C. 72); *Shawinigan Carbide Co.* v. *Doucet* (Can. S. C. R. 281; Q. R. 18 K. B. 271); and *Canadian Pacific Railway Co.* v. *Dionne* (14 Rev. de Jur. 474), referred to.

APPEALS from the judgments of the Court of King's Bench, appeal side(1) reversing the judgments of

(1) Q.K. 24 K.B. 214.

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Dorion J, in the Superior Court, District of Quebec, and dismissing the actions with costs.

The circumstances in which the actions were instituted are stated in the head-note and the questions in issue on the present appeals are discussed in the judgments now reported.

L. A. Taschereau K.C. and *Cannon K.C.* for the appellants.

G. G. Stuart K.C. for the respondents.

DAVIES J. (dissenting). — Notwithstanding the enormous mass of testimony which appears to have been given in these cases and the great number of points raised by the plaintiffs on which it is contended that the defendants should be held liable, it seems to me that the real substantial questions are reduced to very few.—First, whether there was evidence of negligence on the part of the defendant company in not grounding their transformer secondary wires, or other negligence which was an effective cause of the damages complained of, and next whether the company is liable for these damages irrespective of proof of negligence under the statute 58 & 59 Vict., ch. 13, under which they were carrying on their operations and under articles 1053 and 1054 of the Civil Code of Quebec.

The case of the plaintiff Vandry and the four other appeals, by insurance companies which are suing as having been subrogated to the rights of the parties whose houses they had insured, depend upon the same facts and are the result of fires which took place on the 19th and 20th of December, 1912, which the appellants contend, as I think rightly, were caused by an electric current supplied by the respondents for the lighting of the burnt buildings.

As to the contention that, without proof of fault or negligence, absolute liability of the company is established under article 1054 C.C. upon its being proved that the damage sued for was caused by a "thing which it had under its care" or because, as contended, the company failed to prove that it was unable to prevent the act which caused the damage, I am in full accord with the judgment of the court of appeal which, as I understand it, is that fault or negligence causing or contributing to the accident on the part of the defendant company not having been proved, they are not liable for damages.

The question, to my mind, resolves itself into this:—Whether the respondent company can be held responsible for damages resulting from the exercise of its statutory powers where no negligence on its part is proved.

In the case of *Canadian Pacific Railway Co.* v. *Roy*(1), it was held by the Judicial Committee of the Privy Council that:

> A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or, in other words, by the proper execution of the power conferred by the statute.
>
> The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, art. 356, nor the Dominion "Railway Act," ss. 92, 288, on their true construction, contemplates the liability of a railway company acting within its statutory powers:—
>
> So *held*, where the respondent had suffered damage caused by sparks escaping from one of the appellant's locomotive engines while employed in the ordinary use of its railway.

Later, in the case of *Dumphy* v. *Montreal Light, Heat and Power Co.*(2), the Judicial Committee held

(1) [1902] A. C. 220.

(2) [1907] A. C. 454.

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that the respondents, being authorized by Quebec Act, 1 Edw. VII. ch. 66, sec. 10, in the alternative, to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precaution would have been effectual to avert the accident.

Each of these decisions was based on the ground that proof of negligence or fault causing the injuries complained of was essential to entitle a person injured to recover damages caused by the exercise by a company of its statutory powers.

The current of decisions in this court has, I think, been uniform to the same effect and no decision that I am aware of can be found to the contrary, supporting the proposition now contended for under article 1054 of the Civil Code.

There must be evidence proving the existence of fault on the part of the defendant, or, at any rate, since the decision of the Privy Council in the case *McArthur* v. *Dominion Cartridge Company*(1), from which the tribunal may reasonably and fairly infer both the existence of the fault and its connection with the injury complained of.

Then, as to the contention that sub-section (*e*) of section 13 of the Dominion Act incorporating the company and under which it was operating declared the company should be

> responsible for all damages which its agents, servants or workmen caused to individuals or property in carrying out or maintaining any of its said works,

I would apply the language used by The Lord Chancellor in delivering the judgment of the Privy Council in the case of *Canadian Pacific Railway Co.* v. *Roy*(2) at page 231.

(1) (1905) A. C. 72. (2) [1902] A. C. 220.

Section 288 (of the "Railway Act" of 1888) is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at * * * the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what is made an actionable wrong in another. *It would reduce the legislation to an absurdity*, and their Lordships are of opinion that it cannot be so construed.

But whatever may be the meaning of the language of this clause (*e*) it cannot, in my opinion, be construed so as to embrace or cover such an accident as we have proved in this case, one caused by *force majeure* and without negligence on the part of the respondent company.

The substantial, if not the only ground on which the plaintiffs could hope to establish negligence on the part of the company was the non-grounding of the transformer secondary wires.

The company, in erecting its poles along the roadside and supplying electricity to light the houses whose owners or occupants desired to have it, was admittedly doing so in the exercise of a statutory power authorizing it to carry electricity on wires attached to poles on any public road in the vicinity of Quebec.

In the operation which it was so carrying on, it was doing that which the statute authorized.

The trial judge distinctly found that, with the above exception of this non-grounding, none of the complaints made against the condition of the line were well founded.

The company's contention was, and it seems to me to be proved, that its wires were strung along poles placed on the St. Foy Road, on the highway, and were in good order and condition, that on the night on which appellant's house was destroyed a large branch of a tree growing on the property of Victor Chateau-

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vert, one of the parties insured and whose rights became subrogated to the Queen Insurance Company, one of the plaintiffs, was, as the result of a great wind and sleet storm, blown off the tree and carried out to the highway upon the respondents' wires bringing the primary wire, with its high-tension current, into contact with the secondary. The tree was approximately 90 feet high and the branch which broke was at a measured distance of 63 feet from the ground. It was a branch growing upwards in a westerly direction and at the time it broke was covered with a thick coating of ice and driven by a wind which attained a speed of 38 miles an hour. The respondent defendants further contended that if the wiring of the house had been properly done and efficiently maintained, instead of being as it was most defective, no injury probably would have resulted even if the high-tension current had been introduced into the house.

It was also proved that the defendants (respondents), were in no way responsible for the house wiring. That was a matter entirely within the duty of the plaintiffs (appellants).

The primary wires, three in number, were strung from pole to pole upon cross-bars, and the secondary wires, two in number, were strung some distance beneath them on other cross-bars.

The tree on Chateauvert's property from which the branch broke off was in a field at a distance of 22 feet 6 inches from the road-fence and a few feet further from the centre of the pole line. To reach the primary wires it was contended the branch must have been carried a distance of 33 feet 6 inches and this could only be done by an extremely violent wind and by the broken branch sliding along the lower branches of the tree, all of which were heavily coated with ice.

The tree and the branch were shewn to have been sound, without any visible weakness and defect, and the branch, some 9 feet in length, was one of the exhibits in the case produced before this court.

The majority of the court of appeal was of the opinion that nothing was shewn to have existed which should have caused any one to anticipate the occurrence of such an accident as happened, that it was one for which respondent defendants were in no way responsible and that, in view of the proved defective condition of the interior wiring of the burnt buildings for which the respondents were not responsible, the grounding of the transformer would instead of being a protection have been rather an added danger.

After hearing the argument at bar and reading the evidence of the different experts and engineers on the point of this grounding and the correspondence between the defendants' manager, and Mr. Bennett, in December, 1911, on the same question, I have reached the same conclusion as the court of appeal, namely, that while electrical expert opinion is strongly in favour of the grounding of the transformer secondary wires as a protection and safeguard against accidents happening from the possible contact of the primary wire with the secondary wires in cases where the inside wiring of the houses is good, such grounding would not be a safeguard or protection with respect to houses the inside wiring of which was as bad and defective as it was shewn to have been in this case.

Being of the opinion, therefore, that the respondents, in the exercise of their statutory powers, were not responsible in damages for injuries not caused by negligence on their part; that no such negligence was or could be found on the facts of this case; that the accident which happened and brought the primary

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and secondary wires into contact and carried the high-tension current of the former into the houses was caused by the branch of a tree being blown off and carried, by force of a high wind in a sleet storm, some distance out to the highway and on to the wires and was an accident which they could not have anticipated and for which they should not be held responsible, and against which no precaution has been suggested which they could or ought to have taken; and that the injuries caused to the plaintiff might have been avoided if the inside wiring of his house had not been bad and defective, a condition for which he alone is responsible, I would dismiss this and the other appeals with costs.

IDINGTON J.—Notwithstanding the voluminous material of law and fact presented for consideration herein, and over two days of argument spent in enlightening us as to the bearing thereof, I think that to be decided in the case is within a very narrow compass, when we accept as proven that which every fair-minded person seems to have assumed, and eliminate that which is either irrelevant or immaterial.

Yet, as will presently appear, from my point of view there are some things relevant to what has to be decided which one should have desired to know more about than is presented in evidence or has been dealt with in argument.

Passing meantime these considerations it seems abundantly clear that the property in question was destroyed by the force of an electric current of 2,200 volts passing into the premises in question which no one could ever have imagined had been prepared to receive and resist the ill effects of more than a cur-

rent of one hundred and eight to one hundred and fifty volts of electric current.

It is equally clear that this was produced by reason of a large branch of a tree breaking and being blown by the wind upon the wire of respondent. The danger of such a thing happening was so well recognized by those engaged in the business that experts, including respondent's witness Mr. Herdt, hereinafter quoted on other points, tell us without hesitation or contradiction that those so engaged out of necessity for safety seek to have the trees near to their wires removed or so trimmed as to avert or ameliorate such damages.

Everything, therefore, urged in law or in fact as an impediment to the application of such means of safety rendered it the more incumbent upon the respondent to secure, by other means, the protection of life and property where it carried on its operations.

The freezing of rain falling upon the trees at certain seasons in Canada and consequent destruction of their branches by force of wind operating upon them when so laden is too frequent an occurrence to escape the attention of any intelligent person.

The possibility of the branches being in such circumstances carried from tall trees a much greater distance than anything involved herein should be so obvious to any Canadian, keeping his eyes open, that it is hardly necessary to dilate upon that incidental feature appearing in this case and becoming a subject of grave argument.

In short, the case is reduced to the consideration of a few facts and the law bearing thereon.

The respondent is engaged in the business of lighting by means of electricity. It produces electric current for distribution. In order to divide the current generated therefor it uses transformers whereby the main

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electric force is reduced to such fractions thereof as may be conducted with safety into houses or other places to be lighted by means of lamps it supplies for the purpose. These fractional currents, if I may so speak, are conducted by one wire, or set of wires, whilst the main or primary current is carried upon another wire. Both wires are carried overhead by means of same set of poles and cross-arms and should be so far apart as to avoid the dangers of induction of current from one to the other.

It is alleged and, I incline to think, supported by some evidence that the respondent's primary and secondary wires were strung too close together. In my view of the case I have not found it necessary to reach a definite opinion upon that disputed fact. I therefore eliminate it from what is necessary to be considered.

The naked facts are that the branch of a tree (which might, under the circumstances I have adverted to, be so expected to fall and, hence, had to be guarded against) falling upon these wires, caused in the absence of the use of a grounding at the transformer, the current of 2,200 volts to be carried in the primary wire to pass into the secondary wire and thereby to the houses only prepared or supposed to be only prepared to resist, or rather receive with safety, a current of one hundred and eight volts.

The result in each house in question herein was a fire and destruction of property.

The appellant Vandry was indemnified for part of his loss by the insurance companies which, in turn, were subrogated for him in respect of so much thereof as so paid, and they sue by virtue of such subrogations.

Other companies claim in subrogation of the other sufferers.

Nothing turns upon the question of subrogation beyond one or two points of procedure and costs to be referred to hereafter.

The learned trial judge held the respondent liable mainly, if not entirely, upon the ground that there was a means well known to the respondent which it ought to have adopted, but did not adopt, to provide for just such probable contingencies as happened, and, for the reasons I already have given, were likely to happen.

That means was the grounding at the transformer of the secondary wire whereby the augmented current therein caused by the accident would have been conducted to earth instead of into the houses in question.

The means of insuring safety by grounding secondary wires at the transformer is thus referred to by Mr. Herdt, one of the respondent's scientific expert witnesses, as follows:—

Q. You also add that this practice has been carried into effect very generally by most large operating companies?

A. Yes, sir.

Q. That was to your personal knowledge?

A. Yes, to my personal knowledge.

Q. For how many years prior to this letter, had this practice been carried into effect by the large operating companies, as stated by you in your letter?

A. Some of the large operating companies have started grounding transformer secondaries early in 1900, 1902 or 1903, but it has taken them years to carry that out.

Q. But the grounding of transformers was being put into effect by large operating companies ten years prior to your letter?

A. Ten years; hardly ten years.

Q. That is what you have said. You have said twelve years even?

A. It was started.

Q. It was started in or about 1900?

A. In 1902 or 1903.

Q. So, for ten years that had been going on?

A. For ten years that had been going on.

The results are testified to by same witness as follows:—

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A. Do I personally know of any case where the inside wiring is good and the transformer grounded?

Q. Yes?

A. No, I do not know of any case.

Q. So in all the cases that you are aware of, or that come to your knowledge, when the transformer was grounded and the inside wiring being good, no fire started?

A. No. If I know of any case?

Q. Yes?

A. No, I do not.

The only answer made thereto which seems worth a moment's consideration is that in the case of a defectively wired house there would be a possibility of increasing thereby the danger to life and property therein.

It was further alleged that the houses in question were of the defectively wired class. But how is that an answer? Had the respondent any right to venture to supply light to such a house? Where in its charter or in law can it find justification for doing so? The means for determining whether or not a house is of that character is referred to by Mr. Herdt, its own witness, as follows:

Q. I am very sorry to say that all that happened. Now I understand that there are some special instruments to test the wiring in a private dwelling?

A. Yes.

A. Are they expensive instruments?

Counsel for defendant objects to this question.

A. No.

Q. These tests may be easily made by the electrical company?

Q. Very easily.

Q. Easily made?

A. Easily made.

Q. And it is a perfectly safe test?

A. Perfectly safe test.

Q. If the wiring will hold that test, then the transformer can be grounded without any trouble?

A. Well, the different companies may have different methods of testing, different requirements of testing; but generally speaking, the insulation resistance test is not a difficult one to make.

Q. So as an electrical engineer, you know of not only one method of testing, but of several good methods of testing?

A. Yes.

Q. And if the wiring will pass that test, why, you can recommend the grounding of the transformer?

A. Yes, sir.

Q. As a safety device for life and fire?

A. Yes, sir."

And Mr. Wilson, another of its witnesses, says

Q. It is quite easy for the electrical company to test the wiring of the houses as you do in Montreal?

A. Yes, they can test to find out if there is ground, easy enough.

Q. And your practice in Montreal is to refuse current to any house that will not stand the test?

A. Well, we have to cut them off.

Q. So that good wiring won't suffer for the bad?

A. We exact now a certificate from the Fire Underwriters to connect the thing.

And this condition of things had prevailed in Montreal, he tells us, since 1909, about four years before this accident.

Surely the distance between Montreal and Quebec is not so great as to have prevented the intelligence of what was known at the former place to have reached the understanding of those in the latter place conducting a business wherein it became their bounden duty in law to recognize the advancement of scientific knowledge and the results of experience in order that they might exercise due care and have some regard to the protection of the lives and property of others.

Mr. Wilson tells us that previous to 1905 they had been so unfortunate as to have had two or three people killed by primaries and secondaries coming into contact.

Suppose there had been someone killed instead of only a fire occasioned by the neglect of duty on the part of the respondent's management, and the manager had been placed on trial for manslaughter and the evidence herein, and especially of his perversity, spread out in his correspondence with Mr. Bennett

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appealing to him for a change of methods and practice, had been adduced, I am puzzled to know what answer he could have made to such a charge. Yet substantially the question here involved and that in the case I put are the same. The only difference is that one depends on the interpretation to be put upon two articles of the Code designed to secure a remedy for those suffering from the neglect of others and in the Criminal Code is expressed in sections 247 and 262 combined in slightly different language.

I can understand the case of a man in the situation of Vandry having contracted himself out of any recourse against the respondent. That, however, is not pretended here. All we can infer from what appears is that there must have been a contractual relation between the respondent and someone to light, by means of electricity, the premises in question in each case.

It was the duty of respondent to have seen to it when applied to for such a service that it could perform the service with something like reasonable safety for life and property.

Was this appellant Vandry or his tenant the Hunt Club the applicant for the service herein? So far as the printed case goes I am unable to discover. He had bought the property from the club in February, 1912, and agreed to lease it to the club. He had apparently been a member of the club when, in 1909, the work was done of installing electrical appliances therein, and I gather had been on a committee having to do with letting that contract.

If the relations between the parties had been more accurately and definitely put in evidence it would have been more satisfactory.

In many cases of negligence the legal relationship between the parties concerned must be examined with

care. The nature and quality of the act or omission called negligence can only in many such cases be determined as result of such examination.

The relation between a company like the respondent and a tenant can hardly as of course and of necessity explain away all the rights of the owner seeking relief against negligent conduct of the company towards him such as in evidence herein.

If the tenant and company were both found to have entered, without his permission, into any enterprise endangering the premises, that would not of itself answer the claim of the owner.

As this phase of the matter was not presented in argument and the evidence is far from clear, the only use I wish to make of it is by way of illustration of how little there is, when one comes to consider the respondent's pretentions in the answer it makes, relative to the failure to protect by grounding the wire.

In such a case as I put, and as possibly in fact exists herein, there could be found no excuse for attempting to supply electric current without testing to see if the fixtures were sufficient to ensure safety when protected by means of grounding. If so found it could and should protect by grounding. Otherwise it should, out of regard to the lives and property of others, refuse to turn its dangerous machine's destructive forces upon the property.

It seems, from the evidence, clearly established that when this course is pursued there is practically no danger of fire or loss to any one; save in the possible loss to the company of the possible profits derivable from an undesirable customer. It should never be forgotten that in such case the safety of adjacent properties either not using electric lights, or using

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them with the very best electrical fixtures available, are all jeopardized by following any other course.

I think the duty was the same in the case of any one applying as owner for lighting to be done, unless the owner contracted to assume the risk.

The owner's ignorance is generally as great, when he contracts for such service, as if he had never been consulted, as in the case I put of a tenant doing so behind his back as it were. But even in such a case what right has the respondent or any like company to endanger adjacent properties of others? The franchise given by its charter never was intended to permit such a course of conduct.

Again in the case of any one being applied to, who is supposed to possess skill in his business, to undertake anything for someone relying upon his skill, he is not generally supposed to presume that the man he is to serve knows as much as he. If he neglects to inform him of the risks he runs he is negligent of his duty in the premises.

How much more must that be implied in the case of one who has to answer for his conduct under article 1054 of the Civil Code?

Again, it has been well pointed out by Mr. Justice Carroll (if he is right in assuming the rules appearing in the case apply to respondent's contract), one of the rules it requires to be observed is:—

> The consumer is not permitted to make additions or alteration in his installation without receiving the written consent of the company.

This seems to pre-suppose an inspection and a contract in relation to the existing features as the basis of acting.

Assuming, for argument's sake, the answer made which I have been considering to present something arguable, I am far from accepting the view presented

by counsel for respondent relative to the facts as bearing out his argument.

The report of Morissette looks as if many things had to be rectified, but that was a year before the fire and what happened meantime I cannot assume to have been complete neglect of the report and its requirements and I cannot find it satisfactorily explained in a way to support the contention.

Nor does the evidence seem to bear out the suggestion of its construction being old, as it seems to have been done over in 1909 under a contract intended to satisfy the underwriter.

In my view, however, this does not matter for it certainly, even if all that is claimed by respondent, would not prove that the best wiring would have prevented a fire with a current of 2,200 volts which it seems to be admitted entered the house as result of the accident.

I, however, do not find the respondent excused thereby. I think it might well be found guilty of negligence under article 1053 C.C. But, at all events, under article 1054 C.C. it clearly was negligent and has not upon the ev[illegible]nce been excused in any way.

I see no difficulty in the pleading which is comprehensive enough to cover either case the evidence fits.

I think article 1054 C.C. fits the pleading and the proof. And both pleading and facts adduced in proof thereof peculiarly fit the case for which article 1054 was framed.

I am not disposed to fritter away the effect which should be given and I think was intended to be given respectively to the admirable and comprehensive articles 1053 and 1054 C.C. for the respective situations to which each is applicable.

The respondent failed in its obvious duty under the

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then well known results of experience and the advancement of scientific knowledge, to take proper precautions.

It had no right in law to attempt to shift, as it did, long before this accident now in question, the responsibility devolving upon it under the law in such circumstance or await the result of a public prosecution by way of indictment for continuing a public nuisance.

It should have refused to undertake anything so easily discoverable as likely to endanger the property of others and constitute an indictable nuisance and must be assumed to have run the risk of negligently so proceeding.

To appeal to *force majeure* as a defence under such circumstances seems an idle confusion of thought.

The judgment in the case of *The Canadian Pacific Railway Company* v. *Roy*(1), relied on by respondent, at foot of page 230 and top of page 231, disposes, in the following sentence, of all that rests therein:—

> The permission, of course, does not authorize the thing to be done negligently or even unnecessarily to cause damage to others.

This was, if ever there was, an unnecessarily causing of damage.

The appeal should be allowed with costs here and in the court of appeal and the judgment of the trial judge be restored.

The question of procedure invoked by the respondent is one with which we never interfere unless something more than costs is involved and that is all that seems to me in that regard involved herein.

DUFF J. (dissenting).—I have throughout used the word "appellants" as if the actions had been brought

(1) (1902) A.C. 220.

on behalf of the owners of the property and that it was the owners who are now appealing to this court.

The first question to be decided turns upon the effect of certain statutory provisions upon which the appellants rely. The principal Act of the respondent company is ch. 59, of 58 & 59 Vict. (1895), in which the undertaking of the company (then known as the Quebec Montmorency and Charlevoix Railway Company) was declared to be a work for the general advantage of Canada and by which it was further declared that that Act and the "Railway Act" of Canada should apply to the company and its undertaking instead of certain statutes of Quebec. The statute of 1895 was amended by chap. 85 of 62 & 63 Vict. (1899), and by this statute the name of the company was changed to the name which it now bears. By the Act of 1895 the company was authorized to "construct, work and maintain" a railway in, among other places, the streets of Quebec and telegraph and telephone lines; and extensive compulsory powers were granted for these purposes. By section 2 of the Act of 1899 the company was authorized to:—

(A) "manufacture, furnish, use and sell or lease in the city and district of Quebec, light, heat and motive power, generated from electricity, and construct, acquire, work and carry on any lines of wires, tubes or other apparatus for conducting electricity either by land or water;

(B) "acquire lands, water powers and watercourses, and erect, use and manage works, machinery and plant for the generation, transmission and distribution of electrical power and energy;

(C) "build power houses and stations for the development of electrical force and energy, and acquire the factories or stations of other like companies, or lease their works, equipments, appurtenances and power;

(D) "acquire any exclusive rights in letters patent, franchises or patent rights for the purposes of the works and undertakings hereby authorized, and again dispose of such rights."

For the first time apparently, the appellants raised the point in this court that section 13(*e*) of the Act of

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1895 has the effect of imposing upon the respondent company an absolute responsibility for harm arising from the working of the company's undertaking. I quote section 13 in full:

Section 13:—With the consent of the municipal council or other authority having jurisdiction over the roads and streets of any city, town, municipality or district, the company may, by its servants, agents or workmen enter upon any public road, highway, street, bridge, watercourse, navigable or non-navigable water or other such places in any city, incorporated town, village, county, municipality, district, or other place, for the purpose of constructing, erecting, equipping, working and maintaining its lines of telegraph and telephone and lines for the conveyance of electric power upon, along, across, over and under the same; and may erect, equip and maintain such and so many poles or other works and devices as the company deems necessary for making, completing and supporting, using, working and maintaining the system of communication by telegraph and telephone and for supplying power; and may stretch wires and other electrical contrivances, thereon; and, as often as the company, its agents, officers or workmen think proper, may break up and open any part whatsoever of the said public roads, highways, streets, bridges, watercourses, navigable and non-navigable waters and other like places subject, however, to the following provisions, that is to say:

(*a*) The company shall not, in the construction or operation of its lines, interfere with the public right of travelling on or using such public roads, highways, streets, bridges or watercourses, and other like places, and shall not do any unnecessary damage, nor in any way obstruct the entrance to any door or gateway or free access to any building erected in the vicinity;

(*b*) The company shall not affix any telegraph or telephone wires less than 22 feet above the surface of the street or road, nor erect, without the consent of the municipal council having jurisdiction over the roads or streets of the municipality, more than one line of poles along any street or road;

(*c*) In all municipalities the poles shall be as nearly as possible straight and perpendicular, and shall, in cities, be painted, if so required by any by-law of the council;

(*d*) Whenever, in case of fire, it becomes necessary for its extinction or for the preservation of property, that the poles or wires should be cut, the cutting under such circumstances of the poles or any of the wires of the company, under the direction of the chief engineer or other officer in charge of the fire brigade, shall not entitle the company to demand or to claim compensation for any damage thereby incurred;

(*e*) 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;

(*f*) The company shall not cut down or mutilate any shade, fruit or ornamental tree;

(*g*) In all municipalities the opening up of streets for the erection of poles, or for carrying the wires underground, shall be subject to the supervision of such engineer or other person as the council appoints for that purpose, and shall be done in such manner as the council directs: the council may also direct and designate the places where the poles are to be erected in such municipality; and the surface of the streets shall in all cases be restored as far as possible to its former condition by and at the expense of the company.

(*h*) No Act of Parliament requiring the company in case efficient means are devised for carrying telegraph or telephone wires under ground, to adopt such means, and abrogating the right given by this section to continue carrying lines on poles through cities, towns or incorporated villages, shall be deemed an infringement of the privileges granted by this Act, and the company shall not be entitled to damages therefor;

(*i*) No person shall labour upon the work of erecting or repairing any line or instrument of the company, without having conspicuously attached to his dress a medal or badge on which shall be legibly inscribed the name of the company and a number by which he can be readily identified;

(*j*) Nothing in this Act contained shall be deemed to authorize the company, its servants, workmen or agents, to enter upon any private property for the purpose of erecting, maintaining or repairing any of its wires without the previous assent of the owner or occupant of the property for the time being;

(*k*) If in the removal of buildings or in the exercise of the public right of travelling on, or using any public road, highway or street, it becomes necessary that the said wires be temporarily removed by cutting or otherwise, it shall be the duty of the company at its own expense, upon reasonable notice in writing, from any person requiring the same, to remove such wires or poles, and in default of the company so doing it shall be lawful for any such person to remove the same at the expense of the company, doing no unnecessary damage thereby; and such notice may be given either at the office of the company or to any agent or officer of the company in the municipality wherein such wires or poles are required to be removed, or in the case of a municipality wherein there is no such agent or officer of the company, then either at the head office or to any agent or officer of the company in the nearest or any adjoining municipality to that in which such wires or poles require to be removed.

The French version of sub-section (*e*), to which it may be convenient to refer, is as follows:—

"La compagnie sera responsable de tous dommages que ses agents, employés et ouvriers causeront aux particuliers ou aux propriétés en *exécutant ou entretenant quelqu'un de ses dits ouvrages.*"

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This provision has not in my judgment the effect contended for; Lord Halsbury's language in *Shelfer* v. *City of London Electric Lighting Co.*(1), at page 310, is applicable.

> When one considers how frequently the distinction between the execution of the works and the use of them when executed had been the subject of comment and discussion, I think it must be taken that the language used has been deliberately chosen by the legislature as pointing to a distinction, now well recognized, between the construction of works and the user of them when constructed.

A reference to other provisions of the Act shows that this distinction was not overlooked. See section 7*b*, section 8, section 9*a* and *b*, section 10, and subsections 2 and 3, section 12 and sub-section 2, the whole of the substantive part of section 13 and subsec. *a*.

These provisions also suggest that the distinction between the user and maintenance was not unobserved. It may be noticed also that the collocation of words in sub-sec. *e* "damage caused by the agent's servants or workmen of the company" when read with subsection (*j*) would indicate that the section contemplates such operations only as those specifically authorized in the substantive part of section 13,

> entry upon any public road, highway, street, bridge, watercourse, navigable or non-navigable water or other such places * * * * erecting, equipping and maintaining.

of poles and other works and devices; the stretching wires and other electrical contrivances thereon; breaking up, opening public highways, watercourses and other like places; and not to the acts of the "agents, servants or workmen" of the company in the working of its railway, for example, in the running of its cars.

The provision, of course, ought to be read with

(1) [1895] 1 Ch.

section 92 of the Dominion "Railway Act" then in force (51 Vict. ch. 29). Section 92 has always been held in itself to give only a right to compensation under the special provisions of the "Railway Act" for lands taken or injuriously affected and this right has always been held to be available in those cases only in which lands are taken for the exercise of some legal right annexed to the ownership of the land, the right of access, for example, which is or is to be directly prejudiced by the construction or the operation of the railway. It is sufficiently obvious that section 13*e* may be given a considerable scope outside of the operation of section 92 of the "Railway Act" without adopting the sweeping construction advanced on behalf of the appellants.

I think the language of the section cannot properly be held to extend to damages resulting from the non-negligent exercise of powers declared by the statute to be lawfully exercisable in the working of the company's undertaking (as distinguished from the construction or maintenance of its works), as, for example, the running of its cars in the streets of Quebec and in the working of its electric light plant.

Decisions upon one statute ought, of course, to be applied very cautiously in the construction of another statute, but I think it right to say that when one considers the manner in which sections 92 and 288 of the "Railway Act" in force in 1895 and 1899 were construed and applied in *Canadian Pacific Railway Co.* v. *Roy*(1) (see particularly page 231), and the manner in which the provisions of the Quebec statute 1 Edw. VII., chap. 66, and especially the provisions of section 10 (only quoted in part in the judgment), were applied in *Dumphy* v. *Montreal Light, Heat and*

(1) (1902) A. C. 220.

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Power Co.(1), one is not disposed to charge oneself with rashness in rejecting the construction proposed by the appellants.

Some of my learned brethren think that the plaintiffs are entitled to recover under a provision found in the last sentence of section two of chapter 71, 44 & 45 Vict. (Que.) incorporating the Electric Light Company of Quebec and Levis, which apparently became the Montmorency Power Co., the words relied upon being:—

> La compagnie sera responsable de tous les dommages qu'elle pourra causer dans l'execution de ses travaux.

I observe, in passing, that there is sufficient evidence in the language of the Act, section 6 for example, to show that "travaux" is used in the sense of, to quote Lord Atkinson's expression in *The City of Montreal* v. *The Montreal Street Railway Co.*(2) of "physical things not services" and any contention founded upon this provision is properly subject to the observation made above as to the distinction between the "execution" of works and the use or operation of such works when executed, a distinction which was plainly not overlooked by the authors of this statute.

But the fatal objection against resorting to this provision as ground of relief is that there is nothing before us entitling us to hold that the damage complained of in this case was the result of the exercise of any of the powers conferred by the statute in which it is contained. Section 2 of the Act of 1899, quoted above, gives ample authority for the establishment and operation of a system of electric lighting for the City and District of Quebec, and I do not know on what

(1) (1907) A. C. 454. (2) (1912) A. C. 333.

ground this court could judicially say, the matter not having been touched in the evidence and no point having been made of it by the parties, that the works in question here were constructed or are operated under the provisions of the Quebec Act. Section 15 of the Act of 1895 authorized the purchase of the "works, buildings and machinery" of the Montmorency Electric Power Co. There is nothing in section 2 of the Act of 1895 which imports the provision relied upon as a qualification of the powers thereby given. The Dominion Parliament, of course, did not assume in section 3 to legislate with regard to the works of the Montmorency Electric Power Co. as an undertaking established and carried on under the authority of the Legislature of Quebec. It necessarily (otherwise there would be no jurisdiction) treated these works as part of the undertaking of the Dominion company whose undertaking had been, by the statute of 1895, declared to be a work for the general advantage of Canada. The "franchise powers and privileges" referred to in section 3 as those enjoyed by the Montmorency Electric Power Co. "in virtue of its charter" which it is declared the Dominion company "may in future exercise and enjoy" must be read as "franchise powers and privileges" granted by the Dominion Parliament. I think it is questionable whether one is entitled to treat that as importing a provision of the local Act relating o the responsibility of the Montmorency Electric Power Co. in view of the fact that the works authorized by the local Act are being brought into and made part of a larger undertaking under the control of the Dominion and governed by different statutory provisions. At all events until adequate grounds are shewn against it the respondent company is entitled to justify under the general

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provisions of the Acts of 1895 and 1899 including section 2 of the Act of 1899. There are other difficulties in the appellants' way on this branch of his appeal. First,—Does a provision of this kind, construed as relating to the operations of the companies' undertaking, govern the legal relation between the company and its customers to whom it supplies electric light or power? The appellants must maintain the affirmative. The language is not apt for the purpose of making the company insurer of its customers against accidents in operation not attributable to negligence. But I pass that. It is quite too late now, in the state of the record, in view of the considerations above mentioned to base any relief upon this statutory provision which was not relied upon at the trial or mentioned in the pleadings.

Secondly. Assuming the appellants to be right in their construction of the provisions I have been discussing and assuming the second of the provisions to be applicable, there is still, I think, an insuperable difficulty in the way of giving effect to the appellants' claim to relief in so far as it rests upon these provisions if the finding of the court of appeal be accepted, and I think it ought to be accepted, that the diversion of the electric current from the primary to the secondary wire was the result of *vis major*. Accepting that finding it results, I think, that on no admissible construction of these provisions can the company or the agents, servants and workmen of the company he held to have "caused" the damage for which reparation is claimed.

Lord Moulton in delivering the judgment of the Privy Council in *Rickards* v. *Lothian*(1), at page 278 said:—

(1) (1913) A. C. 263

Their Lordships are of the opinion that all that there is laid down as to a case where the escape is due to "*vis major* or the King's enemies" applies equally to a case where it is due to the malicious act of a third person, if indeed that case is not actually included in the above phrase. To follow the language of the judgment just recited—a defendant cannot, in their Lordship's opinion, be properly said to have *caused or allowed* the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant.

A passage in the judgment of Lord Sumner in *Charing Cross Euston and Hampstead Rway. Co.* v. *Boots*(1), was relied on in the argument as authority for the proposition that the "cause" in the juridical sense was the generation of electricity and the transmission of it through the company's wires, which was the work of the company's agents, employees and workmen; but the passage in question has obviously no reference to a case where *vis major* or the independent volition of a third person has intervened. An authority perhaps more directly in point is the judgment of the Privy Council delivered by Lord Robertson in *Dumphy's Case*(2). The injury complained of was the result of a derrick used by a building contractor being brought into contact with the overhead wires of the Montreal Street Railway Company, the current of electricity thereby diverted having killed the plaintiff's husband. Speaking for their Lordships, Lord Robertson says:

on the face of the case it is manifest that the *causa causans* of the casualty was the act of the person using the derrick.

The generation of the electricity by the respondent company which would have been harmless but for the interposition of a *novus actus interveniens* (*vis major*) ought not any more than the storing of water to be

(1) (1909) 2 K. B. 640.

(2) (1907) A. C. 454.

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regarded as the cause of the resulting harm for the purpose of assigning responsibility.

A little consideration makes it plain that no distinction can for this purpose be drawn between the case of water stored for the storer's purposes and electricity generated for his purposes. If a mischievous person opens the outlet of a storage basin, or the confining barrier is destroyed or rendered useless by some accident of nature not foreseeable amounting to *vis major*, the storer is not responsible for the ensuing damage because, as Lord Moulton says, he has neither caused the water to escape nor allowed the water to escape although it was he who constructed the storage basin and collected there water which on escaping was certain to become a destructive agency. So if he constructs a flume to carry water from his dam to his power-house and somebody breaks down his flume at a place where the water, under a high head, escaping becomes an instrument of harm, or if this happens through some operation of nature which he could not be expected to foresee or to provide against he is not responsible in absence of negligence because he has neither caused nor allowed the water to escape; so also the energy of the water flowing through his conduits operating on the machinery of his power-house having become converted into electric energy which solely by reason of the mischievous interference of a third person, or of the operation of *vis major*, escapes control, this is a result which, for juridical purposes, cannot in general be properly ascribed to the measures he has taken for the purpose of and resulting in the conversion of mechanical energy into electrical energy but must be ascribed to the agency to which its escape is immediately due.

Strictly, of course, what I have said upon this

point postulates a correspondence of meaning between "cause" as used in the provisions under consideration and "cause" as used by Lord Moulton in the passage quoted above. I think this is a legitimate reading; any broader reading of the word "cause" would, on the proposed construction subject the company affected by these provisions to a stricter responsiblity than that which would arise from the unfettered operation of the doctrine of *Rylands* v. *Fletcher*(1).

In the result the rule governing the responsibliity of the defendant company in respect of the operation of its electric lighting system, apart from special provisions in its statutes, which have no application here, is that, generally speaking, they are responsible for harm caused by negligence and not otherwise—the rule applied in *Dumphy's Case*(2) and *Roy's Case*(3).

But the important question arises:—Is the status of the appellants *vis-à-vis* the respondent company either as regards the rules governing the burden of proof, or as regards the rules governing their substantive rights, affected by the circumstance that they were customers of the respondent company; and that the injury in respect of which reparation is claimed was an injury that would not have occurred but for the connection, at their instance or by their consent, between their houses and the respondent company's system by service wires put in place for their accommodation? Dealing with the question, apart from articles 1053, 1054, 1055 C.C., I should have no difficulty in holding that the company's duty arising out of the situation, except in so far as it is modified by contract, is a duty to take proper care to protect the appellants

(1) L. R. 3 H. L. 330. (2) [1907] A. C. 454.
(3) [1902] A. C. 220.

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and their property, and proper care involves, where the consequences of neglect may in the ordinary course be expected to be very serious, the use of a high degree of knowledge, skill and diligence. That is the view which has been taken in a number of cases in Canada and the United States in which the question has come up, *Royal Electric Co.* v. *Hévé*(1); Joyce, "Electric Law," paragraph 445 *d* and *e*; and I think it is conformable to the legal principle according to which persons undertaking to perform services for others involving risk of harm from want of skill and from accidents beyond prevention by the highest skill are held generally not to be insurers but to warrant the execution of the undertaking with knowledge, skill and diligence commensurate with the gravity of the risk. The doctrine of *Rylands* v. *Fletcher*(2) is inapplicable because, apart from the effect of the statute, the risk arising from the connection between the customer's premises and the lighting company's system is a risk due to a situation created with the consent and for the benefit of the customer as well as of the company, and that risk, so long as it is not augmented by the company's negligence, is a risk which he assumes just as a passenger on a street-car assumes the risk of accident not avoidable by the exercise of proper care by the carrier. A risk arising from a situation created by common consent for the common benefit is not within the contemplation of *Rylands* v. *Fletcher*(2); *Carstairs* v. *Taylor*(3), *Blake* v. *Woolf*(4).

But the learned judges in both courts below have taken the view, and I understand the majority of the members of this court also take the view, that the

(1) 32 Can. S. C. R. 462.
(2) L. R. 3 H. L. 330.
(3) L. R. 6 Ex. 217.
(4) [1898] 2 Q. B. 426.

effect of articles 1053, 1054, 1055 C.C., is to create a presumption of fault which is a presumption of law capable of being repelled by the respondent company only by establishing that the fire in question was not due to any want of care on its part, the effect of these articles being, according to this view, that once it is shewn that the fire is the result of the escape of electricity from the respondent company's system the burden of establishing that the escape was not due to negligence on his part is cast *by law* upon the company.

Although such cannot, in view of the decisions I have mentioned, be held to be the operation of article 1054 C.C. as between a member of the public having no special relation with the company carrying on a statutory undertaking, *e. g.* a way-farer struck by a street-car, I am not aware of any decision that excludes the application of article 1054 C.C., according to whatever be the proper construction of it, for determining the reciprocal obligations and rights of the company and persons taking advantage of its services, although it would appear strange to find a rule of law putting upon a railway company the burden of proof in the issue of negligence or no negligence between it and a passenger and leaving the incidence of the burden upon a farmer whose crop is destroyed by fire resulting from the escape of sparks from an engine. I shall point out what seems to me to be a conclusive reason against the application of articles 1053, 1054, 1055 C.C. according to the appellants' construction of them to this case; but first I shall briefly discuss the appellants' contention as to the effect of them. Before going into articles 1053, 1054, 1055, C.C. it is perhaps desirable to point out in a word or two the difference in practical effect between the view, which I think is the right view, as touching

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the onus of proof resting on the appellants and the view in relation to the subject which has prevailed with the majority of the judges who have been called upon to pass upon the appellants' claims. The appellants' claims being, I repeat, according to my view, necessarily based upon an allegation that they were injured by the respondent company's negligence in respect of the custody of the electricity in their system, the burden of the affirmative of that issue is a burden which remains upon the appellants to the end; the question put to itself by the tribunal of fact at the conclusion of the whole case is,—taking all the evidence together—have the appellants established by an adequate preponderance in the weight of evidence the affirmative of the issue negligence or no negligence? The situation is well explained in the judgment of Brett, M. R. in *Abrath* v. *North Eastern Rly. Co.*(1). The subject of the burden of proof in this aspect of it is discussed in the treatise on "Evidence" in Halsbury's Laws of England, vol. 13, pp. 433 to 436, and, in a very illuminating way, in ch. 9 of Thayer's Preliminary Treatise on the Law of Evidence.

This is not to say, however, that the burden of proof, in another sense, did not shift from the appellants to the respondent company during the course of the trial. The moment the appellants established a *primâ facie* case the burden of proof was cast upon the respondent company in the sense that if no further evidence were given there would have been judgment for the appellants. The *primâ facie* case shifts the burden of proof in this sense although it does not affect the burden of establishing the issue which remains with the appellants to the end.

The appellants, as I have said, made out a *primâ*

(1) 11 Q. B. D. 440, at p. 452.

facie case the moment they proved that the fire was due to a current of excessive voltage. So to hold is entirely in conformity with authority and long practice. In *Great Western Railway Company* v. *Braid*(1), a passenger injured in a railway accident due to an embankment giving way was held to have made out a *primâ facie* case of negligence on proof of the fact that the embankment had given way; so the fact of the collision of trains constitutes a *primâ facie* case of negligence. The sufficiency of facts proved to constitute a *primâ facie* case is not determined by any rule of law of general application. The doctrine of the *primâ facie* case rests upon this—that the facts proved taken together with the failure on the part of the defendant to give any explanation justifies the inference of negligence. The doctrine of *res ipsa loquitur* rests upon that.

But the appellants having given evidence constituting a *primâ facie* case the respondent company could meet that case by proving facts which, while not establishing the non-existence of negligence, should destroy the preponderance of evidence in favour of the plaintiff. The practical effect as regards this appeal is, as I have already indicated, that the question to be determined is whether or not, on the whole of the evidence, the appellants have shewn that the fire in question was due to the negligence of the respondent company.

The other view is this: Article 1054 C.C. declares that where one person suffers harm from something in the care of another the law presumes that the harm is due to the fault of the person having care of the thing which has caused the harm, the practical consequence being, as regards the case before us, that the burden of

(1) 1 Moo. P. C. N. S. 101.

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establishing the negative of the issue negligence or no negligence is cast by law upon the respondent company the moment the origin of the fire is proved; and that at the conclusion of the case the appellants must succeed unless the tribunal is satisfied that the respondent company has established the non-existence of negligence leading to the escape of electricity.

In *Shawinigan Carbide Co.* v. *Doucet*(1), I have given my reasons in support of the view above indicated as to the construction and effect of articles 1053, 1054, 1055 C.C. which is that, except in the particular cases specified in those articles where *faute délictuelle* is the ground of the action, it must be proved and that the legal presumption of fault for harm caused by "things under one's care" arises only in those specific cases.

There appears to be very little room for dispute that such was the French common law. Admittedly this view of the effect of articles 1382, 1383, 1384, and 1385, C.N. was accepted without dissent or suggestion of dissent both by *la Doctrine* and by *la Jurisprudence* in France down to 1870.

I quote from an article by M. Saleilles (10 Rev. Trimestrielle p. 38):

si l'on se place au point de vue de l'interprétation originaire du droit français, il est absolument certain que jusqu'aux approches des années 1861 et 1866, époque de la préparation et de la promulgation du Code Civil canadien, tout le monde admettait en France, sur l'article 1384, doctrine et jurisprudence, que la responsabilité des accidents de travail était réglée exclusivement par l'article 1382. On admettait, à tort ou à raison, que l'article 1384, en parlant des "choses que l'on a sous sa garde," n'avait fait que poser un principe qui devait trouver son application explicite dans les dispositions subséquentes des articles 1385 et 1386. C'était une pierre d'attente. M. Esmein l'a admirablement établi, et M. Planiol aussi. La doctrine de M. Esmein et de M. Planiol, justifiée ou non, est celle qui avait cours avant 1870, ce n'est pas douteux. Comment donc le législateur canadien, qui nous empruntait le texte, à peu près intégral, de notre article 1384,

(1) 42 Can. S. C. R. 281.

l'aurait-il entendu autrement qu'on l'entendait en France à ses débuts? Donc la doctrine et la jurisprudence française ne peuvent avoir de valeur pour l'interpretation du texte canadien correspondant à notre article 1384, que s'il s'agit de celles qui avaient cours avant 1870.

I also quote from MM. Colin et Capitant (Cours Elémentaire de Droit Civil Français, Vol. 2, p. 390):—

Supposons un dommage causé par une chose autre qu'un animal ou un bâtiment, par exemple, par un terrain non construit (effondrement d'une marnière, éboulement, etc.), ou par un objet mobilier (explosion de machine, chute d'un pot de fleurs, etc.). Par quelle régle va être gouvernée la responsabilité du propriétaire de ces objets?

Pendant longtemps, la jurisprudence et la doctrine se sont accordées pour déclarer qu'il y avait lieu ici à application pure et simple des principes du droit commun. Le propriétaire n'était donc passible de dommages-intérêts, que si l'on pouvait faire la démonstration d'une faute qu'il eut commise aux termes des articles 1382 et 1383 (Civ., 19 juillet 1870, D.P. 70, 1. 361, S. 71. 1. 9). Cette solution, avec la différence qui en résultait entre les conséquences de la propriété d'un animal ou d'un bâtiment d'une part, et, d'autre part, celle de la propriété d'une chose inanimée en général, paraissait d'ailleurs équitable. Et en effet, si l'on comprend l'établissement d'une présomption de faute pour les animaux, lesquels exigent une surveillance constante, ou pour les bâtiments, dont la ruine possible est particulièrement dangereuse et exige d'attentives mesures de prudence, il n'y a pas de raison de se montrer aussi sévère pour le propriétaire d'objets inanimés. Par lui-même, l'objet inanimé n'est pas susceptible de causer un dommage; il faut supposer, pour que le fait se produise, une faute de la victime, un défaut d'entretien du propriétaire, ou enfin un de ces cas fortuits qui défient la prudence humaine. Dès lors, il serait peu équitable d'attribuer *à priori* à la faute du propriétaire des accidents dont la plupart auront une autre cause.

Les choses étaient à ce point, lorsque se produisit le mouvement doctrinal, dont nous avons parlé, en faveur d'une responsabilité purement objective. C'est surtout sur le terrain des dommages causés par le fait des choses inanimés, en particulier de l'outillage industriel (et si l'on comprend l'acuité du problème à une époque où aucune législation spéciale n'existait en matière d'accidents du travail), que se porta l'effort de la doctrine nouvelle.

It was not until 1908 that the Cour de Cassation departed from the traditional French view. In this country the Quebec court of appeal (Taschereau, C. J., Bossé, Trenholme, Lavergne, Cross, JJ.) in *Canadian Pacific Railway Co.* v. *Dionne*(1), decided in 1908, expressly and formally declared as follows:—

(1) 14 Rev. de Jur. 474.

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The fact of the injury alleged having been caused by a thing under the control of the defendant, has not in law of itself the effect of placing upon the defendant the burden of proving that the injury was caused without fault on the part of the defendant or his servants.

A declaration in harmony with decisions of the same court pronounced in great numbers during the preceding 40 years.

And in the Supreme Court of Canada, in 1906, in *Paquet* v. *Dufour*(1), Mr. Justice Girourard referred to the course of the decisions in this court in the following language:—

Before closing, I wish (says the learned judge), to point out a considérant of the trial judge to which I cannot subscribe:

"Considérant que la dite explosion ayant été causée par de la dynamite dont le défendeur était le propriétaire et dont il avait la garde, il doit êtr tenu responsable des dommages qui en sont résultés pour le demandeur, à moins qu'il n'ait preuvé qu'il lui a été impossible de l'éviter."

We have so often decided in our court that proof of fault, whether by direct evidence or by presumption, rests upon the plaintiff, that it is not necessary to quote authorities.

Without entering upon an analysis of the language of the articles 1053, 1054, 1055 C.C. for which I may refer to my judgment in *Shawinigan Carbide Co.* v. *Doucet*(2), I quote two paragraphs from that judgment touching the effect of the legislation by which the Civil Code was formally declared to be law in the Province of Quebec.

A far stronger reason against excluding the pre-existing law from consideration is afforded by the terms of the enactments under the authority of which the Code came into force as law which evince very plainly the intention to declare, in articles 1053, 1054, 1055 the law as it then stood. There was first an Act of the Province of Canada (20 Vict. ch. 43) authorizing the appointment of Commissioners and directing that they should embody in the Code to be framed by them, to be called the Civil Code of Lower Canada, such provisions as they should hold to be then actually in force, giving the authorities on which their views should be based, but stating separately any proposed amendment.

(1) 39 Can. S. C. R. 332. (2) 42 Can. S.C.R. 281.

Then (the commissioners having in due course framed their report and laid it before Parliament), there was another Act (29 Vict. ch. 41) declaring a certain roll attested in the manner described in the Act to be the original of the Civil Code reported by the Commissioner as containing the existing law without amendments; directing the Commissioners to incorporate in this roll certain specified amendments eliminating and altering the provisions of it only so far as should be necessary to give effect to these amendments; and providing that the Code so altered, should, on proclamation by the Governor, have the force of law.

It hardly seems necessary to comment on the effect of this legislation. It very manifestly exhibits the intention of the legislature that the provisions found in the roll referred to were not, excepting in so far as they should be affected by the amendments specified, to effect any substantial alteration in the law then actually in force in Lower Canada. Among the provisions contained in this roll (and untouched by the amendments sanctioned), are articles 1053, 1054, 1055 C. C.; and in construing them we have therefore this clear and important guide to the intention of the legislature.

The view of the effect of article 1054 C.C. which appears to have been taken by the majority of the court below, namely, that it creates a presumption of law that harm arising from things under one's care, whether in their nature dangerous or not, is due to one's fault, which presumption can be repelled by proper and sufficient general evidence of the absence of fault. This view has not been accepted in France either in *la doctrine* or in *la jurisprudence*. A very lucid and concise account of the present state of *la doctrine* and *la jurisprudence* on this subject is given by MM. Colon et Capitant at pp. 390-391, vol. 2, of the work already referred to.

In *la doctrine* the weightiest authorities favour the theory known as *faute objective* or *risque professionel* of which the late M. Saleilles was the most eminent protagonist, the doctrine, in a word, that the incidence of responsibility in law depends upon the incidence of risk and that one ought to bear the risk of harm from things one exploits for one's own benefit. In exploiting for one's benefit *choses inanimées* one acts at one's

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peril. The course of la jurisprudence may be described in the language of MM. Colon et Capitant as follows:

On a pu croire un moment que la jurisprudence allait suivre les novateurs dans la voie qu'ils frayaient. Un arrêt de la Chambre civile du 16 juin 1896 (D. P. 97. 1. 433, S. 97. 1. 17) semblait en effet s'y engager, car il affirmait la responsabilité du propriétaire d'une machine, (d'un remarqueur), qui avait fait explosion, bien que cette explosion fut due à un vice de construction auquel il était étranger; et après cette décision autour de laquelle on mena grand bruit, on en rencontre quelques autres encore se rattachant par leurs motifs à la théorie du risque crée (Trib. Seine, 23 janvier 1903, D. P. 1904, 2. 257; Lyon, 18 janvier, 1907, D. P. 1909, 2, 245; Trib. com. Seine, 23 décembre 1911, Gax. Pal. 19 janvier 1912). L'une de ces décisions n'avait-elle pas condamné le propriétaire d'un café à indemniser un consommateur par cé seul motif que le demandeur avait été blessé par l'éclatement d'un siphon?

Mais ce courant peut être considéré aujourd-hui comme définitivement tari. La Cour de Cassation a, par plusieurs arrêts, condamné le nouveau système d'interprétation (Req. 30 mars 1897, D. P. 97. 1. 433, S. 98. 1. 65; Civ. 31 juillet 1905, D. P. 1905. 1. 532, S. 1909. 1. 143).

Neanmoins, si la jurisprudence a refusé de suivre les novateurs dans l'interprétation audacieuse qu'ils proposaient, elle n'en a pas moins subi leur influence. En effet, elle admettait autrefois, nous l'avons vu, que la victime d'un accident causé par un objet inanimé devait prouver la faute commise par le propriétaire de cet objet, ou par celui qui s'en servait. Aujourd'hui, au contraire, elle considère que l'article 1384, al. 1, crée une présomption de faute à l'égard de ce propriétaire, et, en conséquence, elle fait peser sur lui la charge de la preuve.

La jurisprudence, toujours sous la même influence se montre plus sévère; elle applique ici la même solution qu'au propriétaire ou gardien d'animaux. Il ne suffira donc pas au défendeur d'établir qu'il n'a commis ni négligence ni imprudence; il devra prouver que le dommage provient soit de cas fortuit, soit de la force majeure, soit de toute autre cause étrangère, par exemple de la faute de la victime ou de celle d'un tiers, en un mot il faudra qu'il précise le fait générateur du dommage subi par son adversaire (Req. 22 janvier, 1908, D. P. 1908, 1. 217; 25 mars 1908, D. P. 1909. 1. 73, S. 1910, 1.17; Bordeaux, 14 mars, 1911, S. 1913, 2. 257; Pau, 13 janvier, 1913, Gaz. Pal. 2 avril, 1913; Paris, 4 décembre, 1912, D. P. 1913, 2, 80, S, 1913, 2. 164 et Req., 19 janvier, 1914. Gaz Pal. 7 fevrier, 1914.) V. cependent Req. 29 avril 1913, D. P. 1913. 1. 427, exemptant le propriétaire d'un chaine ayant occasionné un accident par sa rupture, motif pris de ce qu'on n'a pu relever aucun vice de construction et "qu'il a été impossible de déterminer la cause d'un évènement qu'il ne dépendait de lui ni de prévoir ni d'éviter.)

From the point of view of verbal interpretation simply there is probably more to be said in favour of these views which have found acceptance in France than can be said for the view adopted by the Quebec Court of Appeal.

I have pointed out in the *Shawinigan Carbide Co.* v. *Doucet*(1), at pages 317 to 320, the impossibility of reading paragraph 6 of article 1054 C.C. as applying to the first paragraph of the article as well as to the particular case mentioned in paragraphs two to five. The English version is conclusively against this application of paragraph six and article 2615 C.C. requires us, where the two differ, to resort to that version which is the more conformable to *le droit commun*. The French theories above referred to both rest upon the hypothesis that the first paragraph of 1384 C.N., while not in itself establishing a principle of responsibility, indicates a principle of responsibility underlying the precise dispositions of articles 1385 and 1386 C.N.; and that, although the framers of the Code Napoleon had no thought of any such principle, it is the legitimate function of the courts to extend by analogy the supposed principle of those dispositions (harmoniously with the *ensemble* of the law in force for the time being) to new conditions as they arise. M. Saleilles in the article to which I have just referred (p. 42) uses these words:—

> En réalité, les avocats et les juges n'avaient pas donné de la loi une interprétation inexacte, en l'interprétant jadis autrement qu'on ne l'interpréte aujourd'hui. Ils lui attribuaient alors, et avec raison, le sens qui ressortait des principes généraux admis autrefois par l'ensemble de la législation. Ces principes généraux se sont modifiés aujourd'hui; et, en se modifiant, ils ont influé sur le sens qu'il faut attribuer actuellement aux textes restés sous la dépendance directe de ces

(1) 42 Can. S. C. R. 281.

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mêmes principes juridiques. C'est le sens intime de la loi qui a varié, ce ne sont pas les juges.

And he adds that it is the duty of the courts to act upon their view of what the legislator would have enacted if he had envisaged the conditions of to-day. If this were a legitimate procedure much might be said for the conclusion of M. Saleilles, and much for the theory of *la jurisprudence* in France and much also it may be added for the view of the court of appeal; in truth the want of unanimity as to result (there are other theories current in France), is but the natural consequence of following a procedure which, under the name of judicial interpretation, in reality amounts to explicit judicial amendment of the law. I use this phrase because the process described by M. Saleilles is what we should unquestionably call legislation and there can be no doubt that the abrupt reversal by the Quebec court of appeal in *Doucet* v. *Shawinigan Carbide Co.*(1), of the principle of its previous judgment in *Canadian Pacific Railway Co.* v. *Dionne*(2), pronounced only a very short time before, was the direct result of French influence. I cannot understand on what principle (compatible with proper respect to judicial precedent), this court can now sanction an interpretation of article 1054 C.C. which it has again and again rejected. See *Shawinigan Carbide Co.* v. *Doucet*(3), pp. 309 and 310.

There is, moreover, I think, this complete answer to any claim under article 1054 C.C. Assuming the first paragraph of article 1054 C.C., when read with article 1055, to justify the extension of the dispositions of article 1055 to analogous cases, it is quite clear that

(1) Q. R. 18 K. B. 271. (2) 14 Rev. d: Jur. 474.
(3) 42 Can. S. C. R. 281.

there is no analogy between the specific cases therein provided for and the case where as here the risk, incidence of which the plaintiff seeks to make the defendant discharge, arises out of a situation created by the common consent and for the common benefit.

As to the questions of fact, I think the judgments of the learned Chief Justice and Mr. Justice Pelletier shew satisfactorily that the appellants have failed to make out that the fires are ascribable to the negligence of the respondent company. I will add that I do not differ from the finding that the circumstances in which the high-voltage current escaped to the secondary wire constitute a case of *vis major*.

ANGLIN J.—The question for determination in these cases is the liability of the defendant company for damages occasioned by fires caused by a high-tension electric current (approximately 2,200 volts), carried on its primary wires, having passed from them to its secondary or low-voltage wires and thence into buildings of its customers fitted with a system of wiring designed to carry a current not exceeding 108 to 110 volts. It appears to be so well established that it is practically common ground that the immediate cause of connection having been established between the primary and secondary wires was the falling across them of a large branch from a near-by tree, which stood on the adjacent property of one of the defendants' customers.

In this court the plaintiffs rested their claims upon four distinct grounds:—

1st. That by the statute (58 & 59 Vict. (D.) ch. 59, sec. 13) under which they were operating, the defendant company is declared to be

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responsible for all damages which its agents, servants, or workmen cause to individuals or property in carrying out or maintaining any of its said works.

Its original Act of Incorporation (44 & 45 Vict. (Q.), ch. 71, sec. 2), provides that the company

shall be responsible for all damages which it may cause in carrying out its works;

and the works authorized by the section in which this provision is made are, *inter alia*,

to manufacture, furnish, produce, use and sell or lease light, heat and motive power in the city and district of Quebec generated from electricity and to establish, construct, &c., lines of wires, &c.

Under this legislation, it is asserted that the company is liable for damage caused by the electric current which it transmits upon its wires, without regard to any consideration of fault or negligence on its part.

2nd. That without proof of fault or negligence, absolute liability of the company is established under article 1054 C.C. upon its being shewn that the damage sued for was caused by a thing which it had under its care.

3rd. That liability under article 1054 C.C. exists at all events, because the company failed to prove that it "was unable to prevent the act which caused the damage;"

4th. That proof has been given of specific negligence or fault on the part of the company (*a*) in not having taken adequate precautions to guard against the fall of the branch which fell across and broke its wires, (*b*) in not having had its transformers grounded.

I make no allusion to other grounds of fault which were urged, either because they were not alleged in the particulars furnished, or because they were so clearly disproved that they are not open for consideration in this court.

It was so obviously unnecessary to provide expressly for liability of the company in case of fault or negligence that the explicit declarations of responsibility above quoted can scarcely have been inserted to cover that ground. There is nothing in the language of the clause in either statute which requires that it should be so restricted in its application, and it is

a settled canon of construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. The *Queen* v. *Bishop of Oxford* (4 Q.B.D. 245, 271); *Ditcher* v. *Dennison* (11 Moo. P.C. 325, 337).

It would, therefore, seem proper to regard these clauses as intended to declare that, in empowering the company to do what would otherwise be unlawful, both the Legislature and Parliament meant to subject it to liability for injuries which might arise from the carrying out of its undertaking in cases in which the legislative authorization of such undertaking would, but for such provisions, entitled it to claim immunity. *Canadian Pacific Railway Co.* v. *Roy*(1), *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*(2). With similar clauses in legislation conferring special privileges we are not unfamiliar. *Gale* v. *Bureau*(3); *Dumont* v. *Fraser*(4). In conferring such privileges in the present instance the legislature apparently thought it reasonable to provide that its sanction should not be invoked as a shield against responsibility for any injuries to others which the exercise of those privileges might entail.

The injuries sued for were caused in carrying out or maintaining "the works," *i.e.*, the undertaking of the company. This seems to be clear from the terms of

(1) [1902], A. C., 220.
(2) [1902], A. C., 381.
(3) 44 Can. S. C. R., 305.
(4) 48 Can. S. C. R. 137.

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the original Quebec statute, wherein the furnishing of electric current for lighting purposes by means of wires is part of the works authorized by the very section in which the declaration of liability is found. Although the fall of a branch from a tree was, in a certain sense, the cause of the fires, it in reality but created the situation in which the transmission of a high-voltage current by the company, acting through its servants or workmen, along its wires in the course of carrying out its undertaking caused the damage complained of. I have found no reason for confining the effect of the clauses in question to injuries done in the course of constructing or repairing the company's lines or installation. The phrase, "carrying on and maintaining its works," or "carrying out its works," in these statutory provisions, in my opinion, covers operation as well as construction. In this respect the statute differs from 1 Edw. VII., ch. 66, under which the works had been constructed in *Dumphy's Case*(1), and a provision somewhat similar to that above quoted from 44 & 45 Vict. (Que.) ch. 71 does not appear to have been there relied upon.

Neither can I, without frittering away these legislative declarations of responsibility, regard this case as outside their purview merely because the fall of a branch from a tree was the immediate occasion of the existing danger created by the defendant company producing actual injury. On the first ground, therefore, I think the defendant liable.

I assume, that in so far as these actions are brought under article 1053 C.C., it has been rightly held that the burden of proving fault or negligence of the defendants, which rested on the plaintiffs, has not been satisfactorily discharged. They certainly failed to shew

(1) 1907 A. C. 454.

that the defendants' high-tension wires were in too close proximity to its low-tension wires, or that the distance between pins on cross-arms was not sufficiently great, and there was no evidence that these defects, if they existed, had anything to do with the cause of the fires. I am not prepared to say that the Court of King's Bench erred in holding that the plaintiffs had failed to prove actual requirements of the Canadian Fire Underwriters' Association or orders issued by the Public Utilities Commission with which the defendants had not complied, or, upon the evidence as to the safety or advisability of grounding transformers to reverse the finding of the appellate court that it was not affirmatively established that, having regard to the condition of the wiring of the houses in the neighbourhood, it was actionable fault or negligence on the part of the company not to have had its transformers grounded, or that it was negligent in not having foreseen that there was reason to apprehend that the branch which fell across its wires would do so.

The matter last mentioned, though not included in the particulars furnished was fully gone into at the trial. Whether the branch which fell actually overhung (surplombait) the defendant company's wires is a point in dispute. The trial judge apparently thought it did—the appellate judges, that it did not; and the evidence seems to support the latter view. But it appears that branches at a lower level undoubtedly did overhang the wires and it would seem reasonably certain that, when the large branch, which fell, was broken off by the weight of the ice upon it, probably aided by the action of the wind, in falling, again aided in all probability by the high wind, it glided or slid on the icy surface of these lower overhanging branches out

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from the tree towards the defendant's wires and was thus brought over and allowed to fall upon the two outer wires which it broke, the inner wire—that nearest the tree—remaining intact. Whether this occurrence was something which should have been anticipated and guarded against or ought to be regarded as a case of unforeseeable accident, or an "act of God," or the result of *vis major*, against which there is no obligation to provide, is in issue. That the storm, with its accompaniments of sleet and heavy ice formations on trees and wires and high wind, was not in itself so extraordinary that it should be regarded as unforeseeable, or as constituting *force majeure*, so that its ordinary or not improbable consequences would be something which persons in the position of the defendants would not be bound to anticipate and guard against is, I think, quite clear. But whether, having regard to its situation and the surrounding circum stances, the fall of the branch in question across the company's wires should be deemed such a consequence is a debatable point.

As to the other defects in installation suggested at the trial, as Mr. Justice Pelletier points out, the existence of some of them was not shewn, and the causal relation of others, assuming their existence, was not established. Indeed some of these grounds of negligence were raised only when evidence was being given in reply. I proceed, therefore, on the assumption that the plaintiffs failed to establish liability of the defendants under article 1053 C.C.

In considering the case presented under article 1054 C.C. several questions arise. That electricity is a thing within the purview of that article I entertain no doubt. *Sed vide* 3 Rev. Trimestrielle, pp. 1-19.

It is urged that the plaintiffs preferred their claim

only under article 1053, and that, having failed to establish negligence or fault on the part of the defendants by positive evidence, they should not be permitted to fall back upon a presumption of fault under article 1054.

The fourth paragraph of each of the declarations of the several plaintiffs contains a general charge that electric current produced by and under the control of the defendants was, by their negligence, introduced into the plaintiffs' buildings at a very high tension, much in excess of that required for purposes of illumination, and that it caused the fires which occasioned the injuries complained of. In the sixth paragraph of each declaration defective installation of the defendants' system is charged. Upon application particulars were ordered of the defects charged under the latter paragraph; but particulars of the fault or negligence alleged in the fourth paragraph were refused—apparently because that paragraph was regarded by the judge who heard the motion as merely an allegation under Article 1054 C.C. intended to cast upon the defendants the burden of proving that they could not have prevented the act which caused the damage sued for.

Mr. Justice Carroll and the learned trial judge, it is true, have expressed the view that, in making a claim under article 1054, it is sufficient to allege injury and consequent damage caused by a thing under the care of the defendant, without adding an allegation of fault or negligence. But the learned Chief Justice of Quebec, on the contrary, in a somewhat elaborate argument maintains the view that, while proof of fault is not necessary, an allegation of it in the pleadings is required. With very great respect, if a presumption of fault on the part of the defendant arises upon its

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being shewn that the injury complained of was caused by a thing under his care, I cannot understand why it should be necessary to allege more than this latter fact. But if a general allegation of fault is necessary, notwithstanding that the law presumes it, it is furnished by paragraph four, which was probably inserted to prevent difficulty should the view taken by the learned Chief Justice of Quebec prevail. In any case I agree with the learned trial judge that in making the allegation of fault contained in that paragraph the plaintiffs cannot be taken to have abandoned the advantage of their position under article 1054, but were on the contrary seeking to secure it.

While still adhering to the view which I expressed in *Shawinigan Carbide Co.* v. *Doucet*(1), at pages 342, *et seq.*, that, for reasons there stated, the sixth paragraph of article 1054 C.C. probably does not apply to the first paragraph of that article, in the present instance I proceed upon the assumption that either the sixth paragraph applies to the first as well as to the following paragraphs, or that, if not, the first paragraph is subject to a similar qualification, as had been held in regard to the corresponding article (1384) of the Code Napoleon, in which the application of the exculpatory clause, corresponding to the sixth paragraph of article 1054 C.C., to the first paragraph of article 1384 C.N. is clearly excluded. Recueil, Phily, 1909, p. 926, No. 5039.

Assuming then that the defendant company could acquit itself of liability by proving that the introduction of high-voltage current into the plaintiffs' buildings was due to a cause the operation of which it could not prevent (2 Planiol, Droit Civil, Nos. 929–30–31) I

(1) 42 Can. S. C. R. 281.

am of the opinion that it has failed to discharge that burden. While the evidence may be insufficient to enable us to say that it affirmatively establishes fault or negligence, it has, in my opinion, not been shewn that the defendants could not have prevented the occurrence of the fires in question either by grounding their transformers, by taking proper steps to secure the removal of the branch which fell or of the lower overhanging branches, which in this instance seem to have increased the danger, or by employing other means to guard their wires against the fall of the branch which broke them. It has not established that they were wholly free from fault.

Moreover, I am not satisfied that, having regard to the contractual relations between the parties and to the defendants' knowledge of the danger to buildings of their customers attendant upon high-tension wires being carried in proximity to secondary wires connected with house services when their transformers were not grounded, it was not their duty to have disconnected the premises of their customers during a storm such as the witnesses describe, and until danger from its consequences had passed, failure to perform which entails liability for resultant injury.

The defendant company invokes a provision of the contracts under which it alleges electric current was supplied to the injured premises, whereby it was stipulated that

> the company shall not be liable for damages resulting from electric current when its appliances shall have been installed according to the rules of, or approved by, the Board of Fire Underwriters.

Assuming that it has been established that this provision is binding on the plaintiffs, the defendants failed to shew installation approved by, or in conformity with, the rules of the Board of Fire Underwriters.

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While it may be that actual enforcement of the decision of the underwriters to insist upon the grounding of transformers was deferred until after the fires in question had happened, the system of the defendant company was not in conformity with the rules of the Board and its disapproval had several times been brought to the attention of the company, which had promised a year before the date of the fires to improve its installation and to meet the requirements of the underwriters. The term of the contract which the company invokes, therefore, affords no answer to the plaintiff's claim.

I would, for these reasons, allow this appeal with costs in this court and the Court of King's Bench, and would restore the judgment of the learned trial judge.

BRODEUR J.—Nous avons à décider dans ces causes-ci si l'intimée, la Quebec Railway Light Heat and Power Company, doit supporter les dommages résultant de l'incendie des propriétés de l'appelant, M. Vandry, et de M. Chateauvert.

La compagnie intimée fait l'éclairage de la ville de Québec et de ses environs. Elle fournit aux particuliers la lumière dont ils ont besoin pour leurs maisons et en vertu des contrats qu'elle fait avec ses consommateurs elle leur transmet un courant electrique d'environ 110 volts qui n'offre que peu ou point de danger d'incendie ou de chocs violents. L'installation des fils électriques dans les propriétés privées est faite par les propriétaires; mais l'intimée voit elle-même à faire dans les maisons les raccordements avec ses propres fils électriques. Au moyen d'instruments d'une précision remarquable, elle peut s'assurer et déterminer facilement et sans frais si l'installation du propriétaire est suffisante et convenable.

Afin de ne pas fournir à ses consommateurs un courant électrique plus considérable que ne le comportent ses conventions et l'usage, elle installe sur ses poteaux des transformateurs qui réduisent de 2,200 volts à environ 110 volts le courant électrique destiné à ses consommateurs.

Dans la nuit du 19 au 20 décembre, 1912, une branche de peuplier chargée de verglas, qui surplombait la ligne de l'intimée, s'est brisée, est évidemment tombée sur la ligne et a établi une jonction entre le fil qui portait 2,200 volts et celui de 110 volts. Comme résultat de cette jonction, le fil électrique qui conduisait le courant aux maisons de MM. Vandry et Chateauvert s'est trouvé chargé d'un courant de 2,200 et a allumé l'incendie qui les a détruites.

De là l'action en responsabilité par M. Vandry et par les compagnies d'assurance qui ont payé une partie des pertes qui avaient été subies lors de cet incendie.

La preuve qui a été faite dans ces causes, qui ont toutes été réunies dans une seule, est très volumineuse et bien complète et elle offre aux tribunaux l'avantage de pouvoir se prononcer sur tous les faits et les incidents de la cause.

On a tenté de circomscrire le débat et on s'est basé à ce sujet sur des subtilités de procédures et de plaidoiries. On a prétendu, par exemple, que la déclaration des demandeurs devait nécessairement restreindre le débat aux fautes particulières qui ont été spécifiquement alléguées.

Mais on oublie qu'il y a dans cette déclaration des allégations générales de négligence et de faute qui ouvrent la porte à toute preuve de négligence qui puisse être présentée. De plus, comme je viens de le dire, la preuve a été aussi complète que possible, couvre tous les faits et toutes les circonstances et par

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conséquent ce serait bien malheureux maintenant que les parties ont fait valoir tous leurs moyens tant en demande qu'en défense de les restreindre à des allégations plus ou moins spécifiques. S'il y avait nécessité, d'ailleurs, cette cour, avec les pouvoirs qu'elle a d'amender les plaidoiries, devrait le faire afin que justice complète soit rendue aux parties. Mais je considère qu'il n'est pas nécessaire d'avoir recours à cela dans les circonstances.

Voici une compagnie qui ne devait fournir à ses clients, Vandry et Chateauvert, qu'un voltage de 110. A un moment donné, le courant est porté à 2,200 et a causé l'incendie qui a eu lieu et aurait pu également causer la mort de personnes qui, à ce moment là auraient pu venir en contact avec ce courant mortel.

Il est indéniable que l'accident a été causé par un courant électrique dont elle avait la garde et elle a en vertu de l'article 1054 du code civil engagé sa responsabilité, à moins qu'elle ne prouve qu'elle n'a pu empêcher le fait qui a causé les dommages.

Il est du devoir d'une compagnie qui exploite un commerce d'une nature aussi dangereuse de prendre toutes les précautions nécessaires qour empêcher tout accident qui pourrait se produire, ainsi que cette cour l'a décidé dans la cause de *Royal Electric Company* v. *Hévé*(1).

Il est en preuve que les compagnies d'assurance ont déclaré à l'intimé à plusieurs reprises, par une correspondance qui est au dossier, que des incendies très nombreux se produisaient à Québec à raison du fait que son système n'était pas perfectionné. On lui a suggéré naturellement de mettre à ses transforma-

(1) 32 Can. S.C.R. 462.

teurs des fils électriques qui rejoindraient la terre et qui préviendraient dans une très grande mesure, sinon entièrement, ces incendies.

L'intimée a paru, à un moment donné, disposée à se rendre à ces suggestions et au printemps de 1912 elle a déclaré qu'elle n'attendait que le dégel du terrain pour pouvoir faire ces travaux.

Mais le dégel est arrivé, l'été s'est passé, rien n'a été fait; et vers le milieu de décembre, 1912, l'incendie en question était allumé. Il a fallu un ordre de la commission des utilités publiques, l'année suivante, pour forcer l'intimée à faire ces améliorations qui étaient jugées nécessaires.

Mais elle nous dit que cette mise en terre d'un fil électrique n'aurait pas produit le résultat voulu à moins que les consommateurs n'améliorent leur système à l'intérieur. Sur ce point la preuve est loin d'être certaine; mais alors pourquoi n'a-t-elle pas incité ses consommateurs à faire des améliorations voulues si elle croyait que leur système était défectueux. C'était chose facile à faire pour elle que de refuser à ces consommateurs de leur donner le courant s'ils ne voulaient pas faire les améliorations nécessaires ou jugées telles par le bureau des assureurs. C'était d'ailleurs une des conditions de son contrat avec ses consommateurs.

Ces améliorations auraient été dispendieuses et elle a préféré courir les risques d'un accident que de se rendre aux suggestions des compagnies.

Maintenant je considère que l'intimée est également responsable à raison du fait qu'elle est allée passer sa ligne à un endroit où cette dernière était susceptible d'être frappée par des branches d'arbres (art. 1053 C.C.).

Elle a prétexté force majeure.

Cette excuse ne vaut rien. Tous les hivers et plusieurs fois dans nos hivers, nous avons ces pluies

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où l'eau tombe par gouttelettes sur les arbres, s'y congèle et force les arbres à plier et les amène à se briser. C'est un cas d'occurrence si fréquente que l'on ne peut raisonnablement prétendre que les compagnies qui fournissent du pouvoir ne sont pas tenues d'en tenir compte. Laurent, vol. 16, No. 265; 4 Aubry & Rau p. 104, note; 24 Demolombe No. 560.

L'intimée devait donc dans le cas actuel protéger ses fils contre le peuplier dont une branche s'est détachée. Ces arbres, comme on le sait, se brisent facilement; et alors raison de plus pour la compagnie de se protéger contre ce danger qu'elle aurait pu facilement obtenir de faire disparaitre, mais elle n'a pas jugé à propos de le faire.

J'ai eu l'avantage de voir l'opinion de mon collègue Anglin sur la responsabilité statutaire de la compagnie intimée et j'y concours entièrement. La legislature a accordé à la compagnie intimée des pouvoirs considérables, exorbitants même du droit commun. (44 & 45 Vict. ch. 71 et 58 & 59 Vict. ch. 59.) Cette dernière en effet a le droit de venir poser ses poteaux sur les chemins municipaux, qui sont cependant la propriété des municipalités, et ce sans payer d'indemnité. Mais, d'un autre côté, si dans l'exercice de ses pouvoirs ou dans l'exploitation de son industrie si dangereuse elle cause des dommages, le statut déclare, suivant moi, qu'elle engage sa responsabilité, qu'il y ait faute ou non de sa part.

Cette législation n'est pas nouvelle. Nous la relevons dans plusieurs de nos lois. Ainsi, par exemple, le marchand de bois a le droit de se servir de cours d'eaux privés sans payer d'indemnité. Mais s'il cause des dommages par négligence ou non il engage sa responsabilité (art. 2256 S. R. Que., 1909; art. 503 Code Civil; art. 1627 S. R. Que.). *Dumont* v. *Fraser*(1). Les

(1) 48 Can. S. C. R. 137.

compagnies de chemins de fer qui incendiaient des propriétés avoisinant leurs voies étaient d'ordinaire tenues responsables de ces dommages, que leurs locomotives fussent bien ou mal construites. (Beauchamp, Code Civil, par. 175, sous l'art. 1053.) Le Conseil Privé ayant renversé cette jurisprudence et ayant décidé dans la cause de *Canadian Pacific Railway Co.* v. *Roy*(1) qu'une compagnie de chemin de fer qui aurait causé un incendie par des flammèches qui se seraient échappées de l'une de ses locomotives dans l'exploitation ordinaire de son chemin n'était pas responsable des dommages causés, le Parlement est intervenu et a déclaré dans la section 298 de l'Acte des Chemins de fer qu'il y avait responsabilité de la part de la compagnie si ses locomotives causaient un incendie, qu'il y eut négligence ou non.

Alors ce serait, suivant moi, une erreur de dire que la compagnie intimée n'est responsable que dans le cas où une faute est prouvée contre elle. Je suis d'opinion, au contraire, qu'elle est responsable dans tous les cas où elle cause des dommages, quand bien même ces dommages ne résulteraient d'aucun acte de négligence.

Je considère donc que dans les circonstances la compagnie doit être tenue responsable de l'accident qui s'est produit chez le demandeur, M. Vandry, et chez M. Chateauvert, et je considère que le jugement de la cour d'appel, qui a maintenu la défense de l'intimée, est mal fondé et que l'appel doit être maintenu avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Pentland, Stuart, Gravel & Thomson.*

(1) 1902 A.C. 220.