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*May 18, 19.
*Oct. 13.

J. B. BELANGER (PLAINTIFF) ..... APPELLANT;

AND

THE MONTREAL WATER AND POWER COMPANY (DEFENDANTS) RESPONDENTS.

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

Municipal corporation—Contract with company—Franchise for water supply—Protection against fire—Negligence—Liability of company to ratepayer—Délit—Damages.

A municipal corporation, with assent of the ratepayers, entered into a contract by which it gave the defendant company the exclusive privilege for twenty-five years of maintaining a system of water supply to the municipality. The company was authorized to fix rates for water supplied for domestic purposes and was obliged, for protection against fire, to have hydrants at certain places and at all times, in case of fire, except when the plant was undergoing necessary repairs, to maintain a specified capacity and pressure of water. The property of B., a ratepayer, was destroyed by a fire which attained serious dimensions owing to the pressure being at the outset much less than that required by the contract.

Held, affirming the judgment of the King's Bench (Q.R. 22 K.B. 487) which affirmed the Court of Review (Q.R. 41 S.C. 348), Brodeur J. dissenting, that there was no contractual relation between B. and the company; that the contract did not evidence any intention by the parties to it to give a right of action against the company to each ratepayer in case of violation of the provisions for fire protection; and that B., therefore, could not maintain an action for the value of his property so destroyed.

Held, also, Brodeur J. dissenting, that B. could not maintain an action for damages on the ground that the failure to maintain the pressure stipulated for in the contract constituted a *délit* or *quasi-délit* under the law of Quebec.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

APPEAL from a decision of the Court of King's Bench, appeal side, of the Province of Quebec(1), affirming the judgment of the Superior Court sitting in review at Montreal(2), by which the verdict for the plaintiff at the trial was set aside and his action dismissed.

The facts are sufficiently set out in the above headnote.

The action was brought against the defendant company and the Town of St. Louis. It was dismissed as against the town at the trial in which judgment the plaintiff acquiesced. The action was maintained against the company and the damages assessed at $16,712. This judgment was reversed by the Court of Review and the action dismissed *in toto*. The Court of King's Bench affirmed such dismissal.

Migneault K.C. and *Duranleau* for the appellant. By the contract the municipal corporation covenanted on behalf of the ratepayers which it represents. *Stevenson* v. *City of Montreal*(3); and see *Wilshire* v. *Village of St. Louis du Mile End*(4).

The cases deciding against a right of action in a case like this where there is a penalty for non-performance do not apply. The clause in the contract providing for forfeiture in case of non-performance is not a penal clause. The forfeiture is conditional on the municipality buying the plant which it may not do. See *Simpson* v. *South Oxfordshire Water and Gas Co.*(5), referring to *Atkinson* v. *Newcastle and Gateshead Water Co.*(6), relied on by respondents.

(1) Q.R. 22 K.B. 487.
(2) Q.R. 41 S.C. 348.
(3) Q.R. 6 Q.B. 107.
(4) Q.R. 8 Q.B. 479.
(5) [1908] 1 K.B. 917.
(6) 46 L.J. Ex. 775.

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The question is peculiarly one of Quebec law and the decisions in France should be followed. See Fuzier-Hermann, Code Civile Annoté, Ad. 1121, No. 30; Dalloz Rep. 20, "Obligations" No. 273.

The following English decisions, among others, are in the plaintiff's favour. *Campbell* v. *East London Water Works*(1); *Dawson* v. *Bingley Urban District Council*(2).

The defendants may be liable on the contract and also to an action *ex delicto*. See 20 Laurent No. 463; Fuzier-Hermann C.N. Supp. Arts. 1382, 1383, No. 854. *Turner* v. *Stallibrass*(3); *Quebec Railway Light and Power Co.* v. *Recorder's Court*(4).

As to liability for *délit* in this case see *Guardian Trust and Deposit Co.* v. *Fisher*(5).

Atwater K.C. and *Buchanan K.C.* for the respondents. The appellant might, possibly, have had a right of action if the respondents had failed to supply water for domestic purposes, but could have none for failure in the public supply. *Johnston* v. *Consumers' Gas Company of Toronto*(6); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(7), *at page* 448.

THE CHIEF JUSTICE.—I concur in the dismissal of this appeal.

IDINGTON J.—The appellant was a ratepayer and inhabitant of the Village of St. Louis du Mile End when a fire destroyed his property whilst that muni-

(1) 26 L.T. 475.
(2) 27 Times L.R. 308.
(3) [1898] 1 Q.B. 56.
(4) 41 Can. S.C.R. 145.
(5) 200 U.S.R. 57.
(6) [1898] A.C. 447.
(7) 2 Ex. D. 441.

cipal corporation held a contract from respondent to supply the inhabitants thereof with water.

He sued both the municipal corporation and respondent to recover damages resulting from this destruction of his property by said fire.

The municipal corporation was discharged from such claim by the learned trial judge dismissing the action as against it, and no appeal has been taken, but respondent was held liable by said learned judge to the appellant.

This judgment against respondent was reversed on appeal to the Court of Review and such reversal has been upheld by the Court of King's Bench.

The question raised is the liability of the respondent to a party with whom it never had any contract.

It is said that the contract made between respondent and the municipal corporation was made on behalf of each and all of the inhabitants, members of the municipal corporation, and that though technically made with the corporation must be held to enure to the benefit of the appellant.

Without investigating fully the possibility of such a corporation, which is a mere creature of a statute and therefore possessing only such powers of action in way of contracting for itself or others as the statute may have given it, I cannot pass any opinion relative to such possibility.

I am content thus to indicate what may, on such investigation, be found to be an insurmountable barrier to the possible right of action founded on what may be an unauthorized transaction on the part of the municipal corporation. In the view I take of the contract and the possibility of its founding any such obligation on the respondent to indemnify the appel-

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lant as claimed, it is quite unnecessary for me to enter upon such an inquiry, much less express an opinion thereupon.

The contract provides, in a way that is quite usual, for the respondent supplying to the inhabitants water for domestic and other public purposes for the term of twenty-five years.

The necessary powers for executing such purposes are provided by the contract and, its counterpart, a by-law approved by the electors of the municipality; and the frame of the contract as well as the mode of compensation is such as to suggest that there may be created an obligation by the respondent to each of the ratepaying inhabitants for and in respect of which they may have, on default, personal remedies.

I express no opinion as to that either. All I am concerned with here is to point out that in the contract there clearly seems to be expressed some such purpose or intention on the part of the framers thereof and of the formal parties thereto.

There is also in the "Municipal Code" enabling the village to enter into such a contract much that would suggest that the municipality itself, undertaking the duty of furnishing such a water-supply, would become liable in many ways for its failure to discharge the duties incidental to the execution of such an undertaking.

But when we consider its powers and responsibilities in furnishing, if it should undertake to furnish, the needed fire protection, we do not find it so easy to see how it could become thus indirectly an insurer against fire which would give rise to the right of action against it in case of failure sufficiently to execute such a purpose. Though there does seem something

possible in way of liability for such supply of good water for domestic purposes there is not, I submit, a shred of reason to impute liability for non-maintenance of pressure of water in case of fire.

When, instead of doing either of these things, the municipal corporation, so constituted, delegated, by way of contract, these privileges and duties to another, surely such considerations, exhibiting the vast differences of law and fact between what is usually involved in the execution of each of such purposes in relation to either of these respective fields of action, must be had in view when we come to the interpretation and construction of such a peculiar contract and have to determine what was the intention of those entering into it.

It is by this intention so far as we can gather it from the contents of the instrument and the surrounding circumstances of law and fact existent at its execution, and aiding its interpretation wherein it may be ambiguous, that I think we must be bound.

The first article seems only to contemplate the supply of a

> continuous and sufficient supply of good, wholesome and drinkable water to the said municipality and its inhabitants, both for public and domestic use.

Hydrants are to be erected at specified distances apart.

Then, in article 5, we have the following:—

> Water from the said hydrants shall be used only for the extinguishing of fire and the practice of the fire engines, for watering the roads and streets, and the ordinary requirements of the police and fire stations and of the Municipal Hall and generally for all strictly corporation purposes now existing or which may hereafter exist during the term of this agreement, the whole gratuitously, except as provided in this article.

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And later on we have the article 8, as follows:—

The said water works shall at all times, except whenever and so long as absolutely necessary repairs must be made, be of a sufficient capacity to throw upon the flames, in case of fire, from three hydrants simultaneous streams of water from a hose three hundred feet long and two inches and a half in diameter with a one inch nozzle to the height of not less than seventy-five feet.

In these features of a very long contract there is to be found all that lends any colour to the contention that there was such a legal relation, contractual or otherwise, constituted between respondent and appellant whereon to found such an action as this.

I cannot conceive of such a purpose having been within the contemplation of the parties being so expressed.

If it was intended that each of the inhabitants was to enjoy such a right of action one would have expected the parties to such an unusual form of liability or obligation to have expressed it in some form or other.

So far from that being the case there is nothing but a capacity in equipment equal to the emergency of supplying, if needed, a pressure of water directed through such equipment.

It does not provide for constant pressure of any kind. Are we to read into the contract what it does not contain even as between the parties thereto, and then imply, upon such implication something, which common knowledge of the world and its ways in regard to municipal government, tells us no one ever dreamed of in framing any such like contract?

Generally in such like contracts special care is taken specifically to provide for a constant pressure of such degree as agreed upon and, on notice of fire, an

adequate increase of pressure measured by the requirements agreed upon.

This contract certainly is not a model for any municipality to adopt. And its expressly gratuitous nature and general attitude does not help the appellant.

We have had able argument presented in support of the appellant's claim, but unfortunately the foundation upon which it has of dire necessity to rest is most slender indeed.

I have for argument's sake assumed the possibility of a better contract, but any direct contract of this sort with any municipal corporation which does not indicate a clear purpose of its being so framed for the personal benefit of each of the inhabitants that it must give rise to a legal obligation towards each of such persons, must meet with great difficulty of its being so enforced.

Moreover, there is an express alternative given in case of default which seems of such a restrictive nature as to forbid such action as this.

I think the appeal must be dismissed with costs.

DUFF J.—The appellant bases his right to relief upon the proposition that the respondent company's covenant contained in the contract between the company and the municipality requiring a specified pressure to be maintained was a covenant exacted by the municipality for the personal benefit of all inhabitants and ratepayers. I think this contention cannot be sustained. The municipal council, of course, in entering into a contract of this description, acts in the interests of the ratepayers if not of the general body of the

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inhabitants of the municipal district. In a loose sense it may be said to be a trustee for these. But that is a very different thing from saying that every stipulation in the contract in question is intended to create and does create an obligation which is a *vinculum juris* between the company and every such ratepayer or inhabitant. The conclusion to which I have come is that as regards such a stipulation in question the intention to create such a situation is not sufficiently evidenced and I think there are considerations stated by Lord Cairns in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(1), at pages 446 and 447, which are sufficient to rebut the existence of any such intention in this case.

ANGLIN J.—Assuming in favour of the appellant (plaintiff) three points which are contested by the respondents (defendants), namely, that by its contract with the municipality of St. Louis du Mile End the defendant company undertook to maintain a defined water-pressure for fire purposes, that the part of the municipality in which the plaintiff's property is situate is within that undertaking, and that it is sufficiently established that failure to maintain such pressure was, in a legal sense, the cause of the loss which the plaintiff sustained, I am nevertheless of the opinion that he cannot recover the damages which he claims in this action.

An alternative claim against the municipal corporation was dismissed by the learned trial judge on the grounds that it owed no duty to the plaintiff in regard to the water-service, its powers in that respect

(1) 2 Ex. D. 441.

being purely facultative, that the plaintiff as a ratepayer was bound by the terms of the contract with the waterworks company which expressly relieved the municipality from all liability for damages arising out of the exercise of the privileges conferred by the contract, and that there was, therefore, no *lien de droit,* between him and the corporation on which he could found an action against it. He has acquiesced in this disposition of his suit against the town.

He bases his claim against the defendant company on two grounds — breach of contract and tortious dereliction of duty. He asserts that as a ratepayer he is a party to the contract under which the company, in consideration of an exclusive franchise from the municipality, undertook to furnish a supply of water; or that, if he is not a party to it, he is a person for whose advantage that contract was made, that it is within the purview of article 1029 C.C., and that he is entitled to claim the benefit of it and to maintain an action for damages for injury sustained through the defendant's breach of its provisions. In the alternative he says that by its contract the defendant company undertook a public duty or calling absolute in its character, and that, the company having entered upon the discharge of that duty, breaches of it entailed liability in tort to every individual citizen injured thereby.

The plaintiff's claim that he is a party to the contract seems to rest chiefly on the fact that it was authorized by a by-law submitted to the votes of the ratepayers. I am by no means satisfied that a municipal corporation has the power under Quebec law to enter into a contract in the name and on behalf of its ratepayers or citizens individually. But if that may be

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done, the present contract, at all events as to the supply of water for other than domestic purposes, is clearly not of that character. The municipal corporation makes it as principal and on its own behalf and not as agent or representative of its ratepayers. The consideration for the franchise granted is expressly stated to be

> the public benefit to be derived by the said municipality and the taxpayers.

The assent of the electors to the authorizing by-law — required because of the obligation imposed on householders to pay rates (art. 637(*a*) C.M.) — does not, in my opinion, make them parties to the contract, or entitle them to enforce it as privies.

No doubt, under the Civil Code in the Province of Quebec (art. 1029) as under the Code Napoléon in France (art. 1121), provision is made for stipulations in contracts in favour of persons not parties to them but for whose direct benefit such stipulations are intended; and in cases in which it is established that it was meant to confer upon such third parties rights of action in respect to such stipulations, such rights may exist. But every contractual stipulation for the benefit of another (*stipulation pour autrui*) does not give to that other a right of action to enforce it. Such a right arises only where it was the intention of the parties to the contract to confer it — an intention the existence or non-existence of which must be determined by the interpretation of the contract. *Watts-Ward et cie.* v. *Cels*(1). The principle of this *arrêt* was applied in *Allen & Curry Manufacturing Co.* v. *Shreveport Waterworks Co.*(2), to a contract not

(1) S.V. 1901, 1,270.

(2) 113 La. Rep. 1091.

dissimilar to that now before us in regard to its provisions for fire-pressure. From the fact that fire protection is in the nature of a public service, that it constitutes a branch of the civic administration, that the terms of the present contract, which distinguishes between domestic supply and that for hydrants to be used only for street watering, fire engines and "all strictly corporation purposes," indicate that it was for a service of such a public character that provision in regard to fire-pressure was made, that the municipality was not under any obligation to the inhabitants to furnish fire protection, that it is unlikely that it would seek to impose on a private company undertaking to supply water an obligation of the nature contended for, to which it was not itself subject, that liability to actions at the suit of individuals for every breach of such a contractual undertaking with the municipality would be of such an onerous character that its assumption by the company would be highly improbable — in a word, that there is nothing either in the language of the contract or in the circumstances under which it was entered into to rebut the ordinary presumption that the stipulation of a contracting party is for himself and not for a third person, but, on the contrary, much to indicate that there was no intention on the part of either contracting party to confer on every ratepayer or citizen such a right of action as the plaintiff asserts, I conclude that the stipulations in regard to public hydrants and pressure for fire purposes were not *stipulations pour autrui* in the sense in which the plaintiff prefers them and that they do not sustain his action.

We are referred by counsel for the appellant to an *arrêt* of the Belgian Court of Cassation in the case of

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Ville de Mons v. *Robert et cie.*(1), cited by Mr. Justice Cross. In that case the municipality of Mons had granted the defendants a franchise for a gas service in consideration of which the latter undertook to furnish at fixed rates a supply of gas to any citizen who should become a subscriber therefor. By demanding from the defendants a supply of gas and either paying or undertaking to pay for it the citizen entered into direct contractual relations with them and the court held that, from such relations, a right of action in his favour would arise. Whatever might be thought of the applicability of this decision had the present case arisen out of failure of the defendant company to furnish water for the domestic requirements of the plaintiff, it is not in point where the default lies in carrying out an undertaking for the benefit of the municipality as a whole, such as that with which we have to deal.

Mr. Justice Cross, in his dissenting judgment, also refers to the case of *Wilshire* v. *Village of St. Louis du Mile End*(2), as establishing that the contract now in question created a *lien de droit* between the plaintiff company and the inhabitants of the municipality individually. There are, no doubt, expressions of opinion to that effect in the judgment and the contract is treated as having been made by the corporation as mandatary of and as representing the ratepayers. But in that case the question was as to liability for failure to furnish to the plaintiff a private supply of water as to which the terms of the contract differ widely from those relating to the supply at public hydrants; the company were not parties to the action, which was brought against the municipality only; and

(1) (1889) Jour. du P. 2, 17.

(2) Q.R. 8 Q.B. 479.

the actual decision in the case is merely that the municipal corporation was under no liability whatever.

In presenting his claim as founded in tort, counsel for the appellant relies upon English and American authority. The decision of the Supreme Court of the United States in *Guardian Trust and Deposit Co.* v. *Fisher*(1), delivered by Mr. Justice Brewer (White, Peckham and McKenna JJ. dissenting) is, no doubt, a strong authority in the plaintiff's favour. Negligence in failing to maintain a sufficient supply in its storage tank by a company engaged in furnishing a municipality with water was held to give to a citizen, whose property was injured by fire in consequence of such neglect, a right of action against the company in tort. In England the improper discharge by a municipality of a statutory duty in regard to water supply for fire purposes, amounting to a misfeasance, has been held by the Court of Appeal to impose a like liability. *Dawson & Co.* v. *Bingley Urban District Council*(2). In his judgment Kennedy L.J. discusses the earlier Court of Appeal decision in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(3), on which the respondents rely. In that case by the provisions of the "Water Works Clauses Act," incorporated into the company's undertaking by a private Act, there was created, as the court said, a statutory duty to maintain fire-plugs with a specified supply of water. Of that undertaking there was a breach which occasioned injury to the plaintiff's property by fire. The court, after pointing out the improbability of Parliament having meant to impose, or of

(1) 200 U.S.R. 57.

(2) [1911] 2 K.B. 149.

(3) 2 Ex. D. 441.

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the company having undertaken liability to actions by any number of householders who might happen to have houses burned down in consequence of an insufficient supply of water being furnished, held the company not liable in damages. For certain breaches of the "Water Works Clauses Act" two penalties were imposed, one going wholly to the public treasury, and the other to the prosecutor; for other breaches, of which the failure to supply water was one, the only penalty imposed was for the benefit of the public treasury. No doubt these penalty provisions influenced the construction put by the court upon the statute. But both Lord Chancellor Cairns and Cockburn C.J. attached great importance to the point stated in the following passage from Lord Cairns' judgment. Referring to *Couch* v. *Steel*(1) he says, at page 448:—

> But I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down — that, wherever a statutory duty is created, any person, who can shew that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially, when, as here, the Act with which the Court have to deal, is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.

Cockburn C.J. dealing with the same point, says, at page 448:—

> Notwithstanding the great respect that I entertain for the judges who decided the case of *Couch* v. *Steel*(1), I must say that I

(1) 3 E. & B. 402.

fully concur with the Lord Chancellor in thinking, that the question, whether that case was rightly decided, is one which is open to very grave doubts. That question, however, is one which it is unnecessary to entertain here, for the present case is clearly distinguishable. The Act of Parliament on which that case turned was a public general Act applicable to all the Queen's subjects; here we are dealing with certain obligations imposed by the legislature upon a private company, as the conditions upon which Parliament granted them the powers under which they carried out their undertaking; and I think that such an Act of Parliament as this is liable to a much more limited and strict interpretation than that which can be put upon one which is applicable to all the subjects of the realm.

The language of Lord Cairns just quoted is referred to with approval by the Judicial Committee in *Johnston* v. *Consumers' Gas Co. of Toronto*(1), at pages 454-5. As is pointed out by Chief Baron Palles in *Bligh* v. *Rathangan Drainage Board*(2), the right created by the private legislation dealt with in the *Atkinson Case*(3) was a public right, not a right given to individuals.

In the present case we have not even a statutory duty imposed on the defendants by private legislation. Whatever the obligation, it is purely the result of a private contract between the municipal corporation and the water works company. *A fortiori* it does not give rise to a right of action on the part of the individual citizen, not within the contemplation of the parties. Moreover, as is pointed out by Kennedy L.J. in the *Dawson Case*(4), it is to be noted that the defendants in the *Atkinson Case*(3) (as here) "were not a public body but a private company." Where the duty is statutory, the liability which it imposes, is to be determined by the intention of the legislature as gathered from the language of the statute; where it

(1) [1898] A.C. 447.
(2) (1898) 2 Ir. 205, 224.
(3) 2 Ex. D. 441.
(4) [1911] 2 K.B. 149.

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is contractual it depends upon the intention of the contracting parties to be gleaned from the contract fairly and reasonably interpreted. Where such an interpretation leads to the conclusion that liability in damages to individuals sustaining injury through non-fulfilment of the obligations undertaken, was not intended by the parties, no such liability exists under English law. Such appears to be the only proper conclusion to be drawn from the statement of Lord Cairns indorsed by Lord Macnaghten speaking for the Judicial Committee.

While I fully recognize the weight which should be attached to the judgment of the Supreme Court of the United States in *Guardian Trust and Deposit Co.* v. *Fisher*(1), English authority appears to be adverse to the appellant's claim. Moreover, the great majority of the American courts seem to hold the view which obtains in England. See cases collected in Dillon's Municipal Corporations (5 ed.), vol. 3, sec. 1340, p. 2303. See also *Cunningham* v. *Furniss*(2).

In order to establish that the defendant's failure to maintain the fire-pressure stipulated in its contract was illicit, and therefore delictual within the purview of article 1053 C.C., Mr. Justice Cross treats it as falling under clause (*b*) of section 499 of the Criminal Code. Assuming in favour of the plaintiff that conduct declared criminal by clause (*b*) would render the defendants civilly liable to individual citizens for consequential injuries sustained by them although such liability was not contemplated by the contract, in the present instance a case within that provision of the Criminal Code has not been made out. I doubt

(1) 200 U.S.R. 57. (2) 4 U.C.C.P. 514.

whether it has been established that the failure to maintain the agreed fire-pressure in the neighbourhood was "wilful" on the part of the defendants within the meaning of that term as used in clause (*b*). But if it has, their contract was for a supply of water to the town and its inhabitants as a whole, not to "a part thereof"; and there is no evidence that the defendants broke their contract, knowing or having reasonable cause to believe that, in consequence, the inhabitants of the town would be deprived wholly or to a great extent of their supply of water. For aught that appears to the contrary the use of the regulating valve, of which the plaintiff complains, may have been in the general interest of the municipality and its inhabitants. The curtailing of the water supply in a limited district may have been on the whole beneficial. Its purpose may have been to prevent a large majority of the inhabitants of the town being deprived to a great extent of their supply of water. If bringing the defendants' conduct within clause (*b*) of section 499 would entail their civil liability to the plaintiff as an inhabitant of the Town of St. Louis, the record does not contain evidence which would establish such criminal responsibility. Moreover, a breach of section 499 is not alleged in the declaration and the case does not appear to have been tried on the footing that such an issue was involved. It is not even hinted at in the judgment of the trial judge or in the opinions delivered in the Court of Review. Had that issue been presented at the trial, it is not possible to say what evidence might have been adduced to meet it. It is too late to raise such a ground for the first time in appeal and it would be manifestly

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unfair to the defendants to make it the turning point of the case.

I have found no authority indicating that a contractor in the situation of the defendant company with regard to the water supply for fire-purposes would be liable under the civil law for delict or quasi-delict arising out of the non-fulfilment of his contractual obligations where such liability would not exist in an action of tort under English law. Liability cannot, I think, extend beyond what was in contemplation of the parties when the obligation was undertaken. The nature and extent of the obligation and the persons to whom the duties are owed to which it gives rise depend upon the terms of the contract fairly and reasonably interpreted. To subject the contractor to a greater burden, whether the claim against him is founded in contract or in tort, since it necessarily exists only by reason of the contract, would seem to be contrary to the spirit, if not to the letter, of articles 1074 and 1075 C.C.

For these reasons I would dismiss this appeal with costs.

BRODEUR J. (dissident).—En vertu des dispositions du code municipal (arts. 637 et suivants) toute corporation a le droit d'accorder à une compagnie le privilège exclusif de construire un aqueduc et d'effectuer avec elle un contrat pour l'approvisionnement de l'eau dans la municipalité.

La corporation du Village du Mile End a été autorisée par un règlement adopté par son conseil municipal et approuvé par les contribuables, à donner à la compagnie intimée le privilège exclusif de poser un aqueduc dans les limites de son territoire, pourvu que,

moyennant une rémunération spéciale qui lui serait payée directement par les contribuables, la compagnie leur fournisse de l'eau pour les besoins domestiques.

Le règlement déclarait en outre que la compagnie devait poser des bornes-fontaines à différents endroits et elle devait s'obliger de toujours y maintenir une certaine pression d'eau.

La compagnie intimée, sous l'autorité du contrat qui a été signé par elle et la corporation le 12 février, 1891, a construit son aqueduc et a fourni l'eau aux contribuables de la municipalité, et notamment à l'appelant en cette cause, qui lui a donné régulièrement ce qu'il était obligé de lui payer en vertu du règlement et du contrat.

Mais la compagnie ne paraît pas avoir observé son obligation quant à la pression de l'eau; car, à diverses reprises, elle a été protestée à ce sujet par la corporation.

Le 26 septembre, 1906, un incendie s'est déclaré dans une cour voisine de la propriété de l'appelant. Les pompiers furent immédiatement appelés; ils se mirent à l'œuvre pour éteindre le feu; mais malheureusement la pression d'eau étant insuffisante, l'incendie s'est étendu et a atteint en définitive la propriété du demandeur appelant et l'a détruite de fond en comble.

Il poursuit maintenant la compagnie en dommages et réclame la valeur de sa propriété et de ses effets qui ont été détruits dans cet incendie.

La cour supérieure, présidée par l'Honorable Juge Curran, a maintenu son action et lui a accordé une somme de $16,712.

La cause a été portée devant la cour de revision,

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présidée par les Honorables Juges Pagnuelo, Charbonneau et Dunlop. Le jugement de la cour supérieure a été renversée par les Honorables Juges Charbonneau et Dunlop, l'Honorable Juge Pagnuelo ayant pris sa retraite quelque temps avant que jugement fut rendu par la cour de revision. Des notes qu'il a laissés au dossier, font présumer cependant qu'il favorisait les prétentions du demandeur.

La cour d'appel a maintenu le jugement de la cour de revision, et a, par consèquent, renvoyé l'action du demandeur, MM. les Juges Trenholme et Cross étant dissidents.

Il est incontestable que les dommages soufferts par l'appelant auraient pu être évités si la pression d'eau stipulée dans le règlement et dans le contrat avait existé au moment où l'incendie a commencé. Nous avons alors à décider si la compagnie doit être tenue responsable de ces dommages.

Son obligation contractuelle est bien définie dans le règlement qui a été adopté par la corporation et qui a été ensuite incorporé dans le contrat lui-même du 12 février, 1891.

Mais on dit:—Le demandeur n'a pas été partie à ce contrat et la stipulation, quant à la pression d'eau, ne peut lui donner le droit de s'en prévaloir comme obligation contractuelle.

Il ne faut pas perdre de vue cependant le fait que ce contrat, quoique passé entre la corporation municipale et la compagnie, établissait un lien de droit et donnait lieu à des relations légales entre le demandeur appelant et l'intimée quant à l'approvisionnement de l'eau pour des fins domestiques. C'est ce que la cour

d'appel a décidé, il y a quelques années dans une cause de *Wilshire* v. *Village of St. Louis* (1).

Notre article 1029 du Code Civil déclare:—

> On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'un contrat que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui fait cette stipulation ne peut plus la révoquer si le tiers a signifié sa volonté d'en profiter.

Ce principe de droit qu'on peut stipuler pour un tiers n'est pas reconnu dans le droit anglais; et alors il est excessivement dangereux de décider une cause comme celle-ci à la lumière de la jurisprudence de l'Angleterre.

Du moment que le demandeur commençait à payer à la défenderesse le prix convenu pour l'eau qui lui était fournie, un lien de droit se formait non seulement pour l'eau nécessaire aux fins domestiques, mais aussi pour l'eau qui pouvait être requise en cas d'incendie. Nous avons la compagnie qui était, d'un côté créancière du prix, et, de l'autre, débitrice de l'obligation de fournir l'eau pour les deux fins mentionnées au contrat.

Il est bien vrai qu'il n'y a pas de montant spécifiquement mentionné que le contribuable devra payer pour l'eau qui lui sera fournie en cas d'incendie; mais que cette obligation de la part de la compagnie résulte soit du privilège exclusif qui lui a été accordé, soit du montant qu'elle a le droit de percevoir de tous les contribuables pour l'eau qu'elle leur fournit pour des fins domestiques, elle s'est tout de même obligée à fournir l'eau en cas d'incendie et de maintenir une certaine pression et, par conséquent, cette stipulation

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faite en faveur du contribuable donne certainement à ce dernier un droit d'action.

Ce droit d'action, la compagnie ne nie pas qu'il existe au cas où il s'agirait de son obligation de fournir l'eau pour des fins privées; mais elle prétend que quant à l'eau qu'elle est obligée de fournir pour des fins publiques, comme dans le cas actuel, il n'y a pas, pour le contribuable, de droit de poursuite.

Je suis incapable de trouver une distinction entre les deux. Je considère que le droit d'action existe dans les deux cas et que si la corporation fait défaut de donner la pression nécessaire, elle engage sa responsabilité.

Cette question de savoir si un contribuable peut poursuivre une compagnie est venue dans une cause rapportée dans Sirey, 89-4-9 et Journal du Palais, 1889-4-17; et il a été jugé par la Cour de Cassation de Belgique que—

> La ville qui a fait un traité avec un entrepreneur pour l'éclairage public et privé, a qualité pour faire reconnaître en justice les droits résultant de la dite convention au profit des habitants abonnés, lesquels, *de leur côté, ont individuellement le droit d'exiger de l'entrepreneur l'exécution des stipulations faits à leur profit.*

Mais il y a plus dans le cas actuel.

Je considère que la compagnie intimée a commis non seulement une faute contractuelle, mais une faute délictuelle et qu'en vertu de l'article 1053 du Code Civil elle doit indemniser le demandeur—

> Toute personne (dit l'article 1053) est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabilité.

Qu'est-ce qu'une faute ? C'est tout ce qui blesse injustement le droit d'autrui en faisant une chose

qu'on n'a pas le droit de faire, ou bien encore c'est quand on omet de faire soit des actes prescrits par la loi ou soit des actes que les rapports nécessaires des hommes considèrent comme obligatoires.

Du moment que la loi prohibe une chose elle devient illicite et constitue un délit. Ainsi nos lois criminelles ou pénales qualifient tel acte de faute. Or, du moment que cet acte cause des dommages, il donne lieu à une réparation civile. Laurent, vol. 20, No. 402, dit:—

> Que les faits punis par une loi pénale soient des faits illicites, cela va sans dire; toute infraction est donc un délit civil pourvu qu'il en résulte un dommage.

D'un autre côté, il y a beaucoup d'actes qui blessent les principes de la morale, mais qui cependant n'ont pas été formellement qualifiés de délictueux par nos lois. Ces faits cependant constituent des fautes dont l'article 1053 nous charge également de faire l'application.

Nous déclarons constamment coupable de négligence l'industriel qui néglige de couvrir ses machineries. La loi ne dit pas formellement qu'il engagera sa responsabilité en ne remplissant pas cette obligation statutaire. D'ordinaire elle se contente de lui imposer une amende. Mais les tribunaux civils, appelés à appliquer l'article 1053 de notre code, trouvent dans cette négligence de couvrir ses machines la faute que cet article exige pour déterminer la responsabilité.

Dans le cas actuel, nous avons la corporation municipale qui décrète, sous l'autorité de la loi, que la compagnie intimée ne pourra fournir de l'eau qu'à telle et telle condition. Cette dernière reçoit le privilège

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exclusif de poser un aqueduc dans les limites de la municipalité. Mais en retour elle contracte l'obligation de fournir pour éteindre les incendies une certaine pression d'eau. Son obligation revêt un caractère public. Que le contribuable le veuille ou ne le veuille pas, il est obligé de payer cette compagnie pour l'eau qui lui est fournie pour des fins domestiques. Il y a là pour le contribuable une obligation statutaire qui lui est imposée. Est-ce que les obligations correlatives de la compagnie ne sont pas également d'une nature publique ? Le Code Criminel, d'ailleurs, répond à cette question par son article 499 qui dit que

> toute compagnie qui * * * s'étant chargée d'approvisionner quelque cité ou localité * * * d'eau, de propos délibéré viole un contrat * * * sachant ou ayant raison de croire que les conséquences probables de son acte peuvent être de priver les habitants de cette cité ou localité * * * totalement ou en grande partie de leur approvisionnement d'eau, est passible d'une amende.

Il y avait donc faute pour la compagnie intimée en violant son contrat; et elle a sciemment violé son contrat, car elle en avait été notifiée par la corporation et on lui avait intimé que les conséquences probables de sa négligence pouvaient priver les habitants du Mile End de la protection qu'ils avaient le droit d'attendre en cas d'incendie.

Je suis donc arrivé à la conclusion qu'il s'est formé un lien de droit entre le demandeur et la défenderesse et qu'en vertue de ce lien de droit le demandeur a un droit d'action contre la défenderesse résultant de cette obligation contractuelle.

Mais, en outre, la défenderesse s'est rendue coupable de faute délictuelle en ne remplissant pas son contrat.

Suivant les dispositions des articles 1065 et 1053 du Code Civil, elle est responsable du dommage souffert par le demandeur. Le jugement *a quo* devrait être renversé avec dépens de cette cour et des cours inférieures et celui de la cour supérieure confirmé.

Appeal dismissed with costs.

Solicitors for the appellant: *Monty & Duranleau.*

Solicitors for the respondents: *White & Buchanan.*