1911

*March 9, 10.
*June 1.

CHARLES S. O. CROCKETT (PLAINTIFF) ..... } APPELLANT;

AND

THE TOWN OF CAMPBELLTON (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal corporation—Water service—Statutory authority—Construction of statute—Water for domestic, fire and other purposes—Motive power—Discretion of council.

The charter of a town (50 Vict. ch. 58, sec. 6 [N.B.]) provides that "the town council of Town of Campbellton are hereby authorized and empowered to provide for the said town a good and sufficient supply of water for domestic, fire and other purposes."

Held, per Fitzpatrick C.J. and Duff J. (Idington J. contra, Davies and Anglin JJ. *dubitante*), that the statute empowers the municipality to furnish water for the use of the customer in working a printing-press.

The town council, by by-law, fixed the rates to be paid for water including "printing presses, one service, 1¼ pipe or less, per year, $30." C., proprietor of a newspaper and printing establishment, connected his premises with the water mains by a two-inch pipe and received water for a year for his motor, paying said rate therefor. He then continued the use of the water for some months when the council passed a resolution that newspaper proprietors should be notified that the supply would be cut off at a certain date, which was done. C. brought an action for damages to his business.

Held, per Idington J.—The Council had no authority to make the contract with C.; there was no authority in the absence of a special contract with the town, to place a two-inch service pipe for receipt of water; and if the municipality had power to enter into this agreement it was under no duty to exercise it.

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

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Per Fitzpatrick C.J. and Duff J., that the municipality having entered upon the service of the appellant's motor was bound to continue it unless and until the council in the *bonâ fide* and reasonable exercise of its discretion thought it desirable to discontinue it in the interest of the inhabitants as a whole.

Per Davies and Anglin JJ.—If any contract existed it was one under which C. was entitled to a supply of water for his motor so long as the town council should, in its discretion, deem it advisable to continue it. There was no evidence to warrant the jury's finding that the council was guilty of negligence and exercised its discretion *malâ fide*.

Per Fitzpatrick C.J. and Duff J.—The circumstances disclosed were such as to warrant a finding of unfair discrimination against C., but the damages awarded were excessive.

Judgment ordering a new trial (39 N.B. Rep. 573) affirmed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1) setting aside the verdict for the plaintiff and ordering a new trial.

The facts of the case are sufficiently stated in the above head-note.

O. S. Crockett, for the appellant.

Teed K.C., for the respondent.

THE CHIEF JUSTICE.—I agree in the opinion stated by Mr. Justice Duff.

DAVIES J.—I agree with my brother Anglin.

IDINGTON J.—It is to be regretted that the law of New Brunswick did not, when judgment was given in appeal (though since changed), permit of the court of appeal dismissing an action when there existed no sufficient evidence to warrant a verdict for any of the alleged causes of action. It had then no alternative but to grant a new trial.

(1) 39 N.B. Rep. 573.

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The action is founded upon the supposed capacity of a municipal corporation created by a special Act, to contract in such a way as to bind it for a term of a year or more to supply water for a motor in an industrial establishment and that it had effectually become so bound.

The limit of its legal capacity in regard to water supply is contained in the following words from section 6 of said charter:

> The town council of the Town of Campbellton are hereby authorized and empowered to provide for the said town a good and sufficient supply of water for domestic, fire and other purposes, etc.

I cannot read these words as in law empowering such undertakings as are necessary to implement all that is implied in the alleged power to supply this motive power. If the power exists relative to a small machine does it not in absence of any limitation exist as to all the possible manifold operations of water power? Where is the limit? Such powers are never presumed to have been conferred unless the purpose to do so is made clear by the legislative language used.

When this difficulty was suggested counsel fell back upon the expression "franchises of the company" which appears in the Act enabling respondent to acquire a water-supply system owned by a local company.

It certainly was necessary in order to put an end to the power of the company in the town that the latter should acquire the franchises.

That was an expedient measure far from enabling when accomplished to use all of such franchises.

To acquire for purposes of extinction is one thing and for purposes of using is quite another.

The power to use cannot be implied from anything in the enactments before us. And as to the nature or extent of such franchises there is nothing to shew what they were.

Such being the foundation of the town council's power it passed a by-law determining what tolls were to be taken by it for the use of water it might supply.

One item is as follows:

Printing presses, one service, 1¼ pipe or less, per year, $30.00.

This cannot create a power out of nothing. But the town council had power to pass by-laws. The power was limited to what was needed

in order to *secure to the inhabitants of the said town an abundant supply of water and electricity,*

section 21 of 60 Vict. ch. 58.

This does not seem to favour the contention that the power extended to a supply of motive force relative to industrial operative machinery.

The town council, it is said, though not shewn how, had appointed a committee that went under the name of water and something.

We are told in argument, and it is not denied, that there is no evidence in this case defining the powers of this committee. So we are left to infer, if we can, from its name, that it must have had ample power to bind the town. It acted in some way. I am not sure that it ever was quite unanimous, or a majority so, as to this business. And it is urged that out of the divergent views its members presented to the court of what did transpire something must be made, for this committee kept no records and made no written reports of its transactions.

One thing we are quite sure of. A two-inch ser-

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vice pipe was put in connecting this appellant's premises with the respondent's mains, and a year later the town got thirty dollars.

What right such a committee had to put in a two-inch pipe service when the only boundary of authority they would seem to have was this by-law fixing rates; yet that made no provision of rate for more than an inch-and-a-quarter pipe.

It is said the full capacity of this pipe was not used. I am quite willing to assume that as perfectly true and do so assume.

But it is obvious that this two-inch service-pipe was the only record we have to guide us as to the result of the agreement. It must be taken as the limit of what was from day to day tendered for use and usable if desired.

In the by-law it is expressly declared as follows:

> For purposes not mentioned herein, or for larger services than above named, or for peculiar circumstances, special agreement to be made with the town council.

When the year in question had expired nothing further was done in way of agreement.

The appellant continued without any further payment or tender of rates until his supply was cut off as complained of, or determination thereof was arrived at, though such rates were payable on the first of the months of March, July and November. Two of these gale-days had passed before this water was finally shut off.

On the 11th of December, 1906, the town council decided the water should be cut off from this motor

> in one week's time from date, on account of the very low pressure of water.

Notice of this was given the appellant next day.

The resolution was rescinded on the 18th of December, but on the 26th of February, 1907, the council resolved that the proprietors of newspapers using water for motor purposes should

be notified that the water for their water motors will be shut off on the first day of April next.

Such is the alleged contract and breach thereof for which damages are sought.

Where is the contract? What power existed to make it? What authority had those placing a two-inch service pipe there for appellant's use in face of the express prohibition of the by-law unless and until an express agreement had been made with the town council for such special contract? Since when has the law implied any right in any one to say that his mere continuation of enjoyment after expiry of the first term implies any further fixed term for its enjoyment? The law does not in any such case imply any such thing unless and until there has been something done from which an inference of purpose and agreement can be drawn.

The case of master and servant, *Beeston* v. *Collyer* (1), relied upon, illustrates how such an inference may, after years of continuation in service and payment for fixed periods of time, on fixed days, during successive years, be drawn therefrom.

When no authority nearer than this can be found for the contention, it seems needless to argue further.

Then it is said the very resolution cutting off for a specific reason, and rescinding it next week, can found such an inference and fix a term of one year as having been agreed upon. It seems impossible to hold such to be the law in any case.

(1) 4 Bing. 309.

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And where, as here, the whole proceeding was irregular and no binding contract ever had been made of the special nature involved, the claim as founded upon contract is hopeless.

Then, was there any duty devolving upon respondent to supply water for power; or supply power derived from use of water in any way ?

I cannot find that there ever existed any power in the respondent to enter upon such an enterprise. In the entire absence of such power there could be no duty to do so.

And even if there could be said to have existed a power enabling the respondent to do such a thing, there could not exist any duty in law to exercise it. If such an exercise of a given power ever was contemplated, certainly there exists in the statutes no express and imperative duty to exercise it, nor is there anything in the legislation and conditions presented for our consideration that can warrant us in holding any legal implication of such duty to exercise the power had arisen.

There being neither contract nor duty the claims for negligence and alleged malice all fall with these other claims.

The appeal must be dismissed with costs.

DUFF J.—I think the proper inference from the various provisions of the statute empowering the municipality to maintain a water-works' system is that having entered upon a particular service for any of the authorized purposes the municipality is bound to make such provision for that service as may reasonably be required unless and until the council of the municipality in the *bonâ fide* and reasonable exer-

cise of its discretion thinks it desirable to discontinue it in the interests of the inhabitants as a whole. That a service such as that furnished the appellant was within the contemplation of the Act seems hardly open to doubt; "domestic, fire or other purposes" is a phrase which in its literal meaning embraces — nobody would dispute — the purpose to which the appellant was devoting the water supplied to him. "Other purposes," it is said, is to be construed *ejusdem generis*. But what is the *genus* which comprehends the purpose of fire protection as well as everything denoted by the comprehensive words "domestic purposes," and at the same time excludes the working of a motor? I have heard no attempt to answer this question. There appears to be nothing in the objection that a by-law was required. The existence of a by-law might in such circumstances be inferred. *City of Victoria* v. *Patterson*(1), at pages 623 and 624.

The question then is, was there evidence of *malâ fides* fit to be submitted to the jury? It is a point upon which I have a good deal of doubt. But if they accepted the plaintiff's story, as they evidently did, the jury might not improperly have thought the conduct of the members of the council from first to last only explicable upon the hypothesis of actual ill-will towards the plaintiff. On that hypothesis the circumstances were such, I think, as to support a finding of unfair discrimination against him.

I am not able, however, to escape the conclusion that the damages awarded are excessive; and on that question there should, I think, be a new trial. I do

(1) [1899] A.C. 615.

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not enter upon the question in detail as that becomes unnecessary in view of the opinion on the other points taken by the majority of the court.

ANGLIN J.—In my opinion, if any contract was established by the plaintiff it was a contract under which he was entitled to a supply of water for his motor at the rate of $30 per annum so long as the municipal council of the defendant town should in its discretion deem it advisable to continue such supply. I agree with McLeod J. that there was no evidence to support a finding of any other contract.

Neither can I accede to the contention that the defendant owed to the plaintiff a statutory duty to supply him with water power for his motor at all times and regardless of the effect upon the domestic, fire and other similar services of the municipality. I doubt whether the defendant was compellable to furnish water for any such purpose, however great the supply available. But, if it was, the only construction of the statute under which it operated which seems to me at all reasonable is that the municipal council was within its rights in cutting off such a service as that which the plaintiff enjoyed whenever in its judgment to continue it would, or might be prejudicial to the supply requisite for domestic, fire and other similar purposes.

I agree with McLeod J. that there was no evidence to warrant a finding against the defendant of negligence, or of *mala fides* in the exercise of its discretionary power to discontinue the service in question to the plaintiff.

With regret that, under the law in force in New Brunswick when this action was dealt with, it appears

to be not possible finally to dismiss it(1), I concur in the order for a new trial and would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *O. S. Crockett.*

Solicitor for the respondent: *W. A. Trueman.*

(1) Sup. Ct. Act, s. 51.