HENRI LARIN (PETITIONER) ..... APPELLANT;

AND

LOUIS A. LAPOINTE AND OTHERS (RESPONDENTS) ..... RESPONDENTS.

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*Nov. 8, 9.
*Dec. 24.

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

Appeal—Quo warranto—Action by ratepayer—Municipal corporation—Payment of money—Statutory procedure—Matter of form—"Montreal City Charter," ss. 42, 334, 338—Construction of statute—3 Edw. VII. c. 62, ss. 6 and 27.

An action by a ratepayer of the City of Montreal to compel the members of the finance committee of the city council to reimburse the city for moneys which it was alleged they authorized to be illegally expended and asking for their disqualification under section 338 of the "City Charter" is not a proceeding in *quo warranto* under the provisions of articles 987 *et seq.* of the Code of Civil Procedure.

By section 334 of the charter (3 Edw. VII. ch. 62, sec. 27) the city council of Montreal must at the end of each year appropriate the revenues of the city for the services during the coming year, including a reserve of five per cent. of the total revenues, three per cent. of which is to provide for unforeseen expenses. By section 42 of the charter, as amended by 3 Edw. VII. ch. 62, sec. 6, the finance committee of the council must consider all recommendations involving the expenditure of money, unless an appropriation has been already voted for the purpose. An item of unforeseen expenditure came before the council and was passed and sent to the finance committee, which directed the city treasurer to pay the amount, and it was paid accordingly.

Held, the Chief Justice and Girouard J. *contra*, that the reserve of the two per cent. for unforeseen expenses was not an appropriation of the amount so directed to be paid.

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

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Held, also, the Chief Justice and Girouard J. dissenting, that under the provisions of the charter it is essential that every recommendation for the payment of money, where there has been no previous appropriation for the payment to be made, must receive the consideration of the finance committee and be sanctioned or rejected by that committee before being finally acted upon by the council. That any such payment made without this formality, even when made *bonâ fide* and though, in fact, sanctioned by the finance committee after it had been finally dealt with by the council, and though the city suffered no prejudice in consequence of such payment, is an illegal expenditure and involves the consequences provided in such cases by the 338th section of the "City Charter."

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, sitting in review, and restoring the judgment of Charbonneau J., at the trial in the Superior Court, District of Montreal, by which the petitioner's action was dismissed with costs.

The nature of the action and the questions at issue on this appeal are stated in the judgments now reported.

On the appeal coming on for hearing,

Atwater K.C. for the respondents moved to quash the appeal on the grounds that the Supreme Court of Canada had no jurisdiction to entertain appeals in cases, such as the present, where the proceedings taken were in the nature of *quo warranto* and involved merely the liability to a fine of $400, under the statute; that the case could not be ruled by the demand for the reimbursement of $3,800 to the city as the City of Montreal was not a party in the cause, and that there was misjoinder by the petitioner of separate causes of action in seeking this pecuniary condemnation.

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Lafleur K.C. for the appellant opposed the motion on the grounds that the proceeding taken was authorized by section 338 of the "City Charter"; that the amount now in controversy exceeded $2,000, and that, in any event, the Supreme Court of Canada had jurisdiction to review an improper exercise of jurisdiction by the Court of King's Bench if any such had taken place in that court by the decision complained of. Alternatively it was asked that the City of Montreal should be now added as a party to the cause on the present appeal.

THE COURT reserved consideration of the question as to its jurisdiction and directed that, in the meantime, the hearing on the merits of the appeal should proceed.

Lafleur K.C. and *C. Rodier* were heard for the appellant.

Atwater K.C. and *Ethier K.C.* for the respondents.

THE CHIEF JUSTICE (dissenting).—By the judgment of the Court of Review which, on this appeal, we are asked to restore, the seven defendants, that is to say, the entire finance committee of the Montreal City Council, are deprived of their offices, condemned jointly and severally to pay a sum of $3,809.40 and disqualified for re-election as aldermen for a period of two years from the date of that judgment, 17th April, 1909. (The statute says the disqualification is to run from the date of the occurrences complained of, *i.e.*, May, 1908.) The judges of the three provincial courts, nine in number, all agree that, by the irregularities

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which have resulted in such serious consequences to them, the defendants derived neither benefit, profit nor advantage; that no corrupt, fraudulent or indirect motive can be attributed to them, nor is it alleged that any injustice has been caused or wrong done, nor that any result different from what has occurred would have followed a literal compliance with the statute, even if we adopt the construction put upon it by the appellant. From this conclusion I understand that this court does not dissent. The majority here, however, are of opinion that the unanimous judgment of the provincial court of appeal must be reversed and the majority judgment of the Court of Review, which reversed the trial judge, must be restored. With great respect, however, it is impossible for me to concur.

It is important to extract from the record the substance of the charge made against the defendants and to set down with some minuteness, in the order of their occurrence, each step in the proceedings of the council and committee out of which this action arose. To do so may enable us more clearly to understand in what respect, if at all, the defendants have departed from the regulations made for their guidance in the City Charter, by-laws and rules of council, and to appreciate the legal consequences which result from the infringement of these regulations, if they have been infringed.

In substance, the plaintiff alleges that in May and July, 1908, the defendants, as members of the finance committee of the Montreal City Council, authorized an expenditure of money exceeding the amount previously voted and legally placed at the disposal of that committee and in consequence incurred the

pecuniary liability and are subject to the disqualifications enacted by section 338 of the municipal charter, which reads as follows:

> Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council and shall also be disqualified for re-election as alderman for a period of two years thereafter.

The alleged illegal expenditure was made under the following circumstances:

On the 18th of May, 1908, a letter was submitted to the Montreal City Council from the "Comité Dupleix" of Paris, inviting the mayor to represent the city at certain *fêtes* to be held in France to commemorate the tercentenary of the founding of Quebec by Champlain, and a resolution was forthwith adopted unanimously accepting the invitation and instructing the finance committee to place at the mayor's disposal the necessary funds to cover his travelling expenses. On the 20th of May a formal acceptance of the invitation was sent to the secretary of the "Comité Dupleix." On the 26th, Mr. Pelletier, city comptroller and auditor, was requested by the mayor to place $1,500 at his disposal for travelling expenses. On the 29th of May the comptroller put the mayor's letter before the finance committee and it was resolved to instruct the city treasurer to comply with the request and to advance the sum of $1,500. On May 30th, the city treasurer certified the account as true and correct, recommended that it should be paid and the payment was subsequently approved of by the finance committee in the following terms:

> The payment of the above amount is approved, but subject to the certificate of the city comptroller that there are sufficient available funds voted by council for said purpose.

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On the same day the comptroller issued his warrant for the payment of this sum of $1,500. This warrant is not in the record, but I gather from the evidence and the by-laws that the comptroller's warrant is the authority on which the city treasurer paid out the money. The latter can certify all accounts but he cannot pay them until they are approved of by the comptroller who must also countersign the treasurer's cheque. When the mayor and his secretary subsequently returned from France, the accounts for the balance of their travelling expenses were fyled with the comptroller on July 16th. On the 20th of July, the accounts were submitted to the finance committee and it was resolved

> that said accounts be approved of and that the city comptroller be instructed to pay the same.

On the next day, July 21st, the accounts were certified by the treasurer and approved of by the four members of the finance committee subject, as in the first instance, to the certificate of the comptroller that there were sufficient available funds voted by council for the purpose and on the same day the comptroller issued his warrant and the treasurer's cheque followed, as in the case of the previous payment. There is some confusion as to the dates on which the comptroller signed the vouchers given by the treasurer and conditionally approved of by the finance committee; but it appears on the face of the documents that the authority to pay, which is the sole foundation of these proceedings, was in each instance given by the members of the finance committee on the same day that the comptroller's warrant issued and, assuming that there is no evidence as to which was done first, the maxim *"omnia presumuntur rite*

esse acta" applies. There is no proof that I have been able to find that the defendants Robinson and Guay were present at either meeting of the finance committee, but as this objection has not been taken here I am content to mention it; in my view of the case it is not material.

The question for consideration is: Did the members of the finance committee, in these circumstances, authorize an expenditure of money exceeding the amount legally placed at the disposal of the council or committee within the meaning of section 338 of the charter?

It appears on the face of the documents that the authority to pay was given by the finance committee when, the accounts having been referred to the city treasurer, that official approved of them and recommended their payment. In addition, that authority was clearly and expressly given subject to the certificate of the comptroller that there were sufficient available funds voted by council for the purpose. In other words, the accounts being audited, the expenditure was authorized on the condition that the certificate of the proper official was produced to establish that there were funds available and at the disposal of the city for the purpose. In terms the authority to pay is given subject to the condition prescribed in section 336 of the City Charter which reads:

> No resolution of the council or of any committee, authorizing the expenditure of any moneys shall be adopted, or have any effect, until a certificate of the comptroller is produced, establishing that there are funds available and at the disposal of the city for the service and purposes for which such expenditure is proposed, in accordance with the provisions of this charter.

It was for the comptroller to say if there were funds available and at the disposal of the city out of

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which the travelling expenses could be taken. If there were no such funds, the condition upon which the comptroller was authorized by the finance committee to issue his warrant failed; and if such funds were available how can it be said that the finance committee authorized an expenditure of money exceeding the amount legally placed at the disposal of the council?

It was suggested here, and to some extent the judgment of the Court of Review proceeds on that suggestion, that the defendants came within the disqualifying section when they acquiesced, as members of the city council, in the resolution passed on the 18th of May, 1908, requesting the finance committee to provide for the mayor's travelling expenses. The argument, as I understand it, is that this resolution involving, as it did, an expenditure of a portion of the city's revenue should not have been adopted until it had been previously submitted to and sanctioned by the finance committee (rule of council 124 and section 42 of the charter) and the omission to comply with this condition precedent, although subsequently and before it became operative the resolution was submitted to and approved of by the finance committee, entailed the disqualification of the whole council under section 338. This resolution is an instruction to the finance committee to indicate the fund; but it is not an authority to the proper official to pay out of a fund not legally placed at the disposal of the council, which is the mischief prohibited by section 338. By the resolution the invitation is accepted and the finance committee is instructed to place at the disposal of the mayor an amount sufficient to cover his travelling expenses, the necessary implication being that

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those expenses are to be taken out of such funds as are legally available for the purpose. I am of opinion that the omission to comply with rule 124 at most makes the resolution inoperative until the certificate is produced (section 336). Finally this, in any event, would be an objection founded upon form or upon the omission of a formality which is provided for by section 308 of the charter. I am further of opinion that section 42 of the charter is not applicable in the circumstances because the reserve fund against which the expenditure for travelling expenses was chargeable was then appropriated and at the disposal of the council for these reasons. In the month of December, each year, the council is under obligation to appropriate ("mettre de côté" is the French term) the sums at its disposal out of the revenues of the city and to provide, among other things, for a reserve of five per cent. (sec. 334, sub-sec. (*d*)). The preparation of this annual estimate of expenditure is one of the functions of the finance committee and, when adopted by council, the estimate becomes the civic budget for the ensuing year. In the budget prepared by the finance committee for 1908 and adopted by council is included the reserve of five per cent. which was set aside to the extent of three per cent. to provide for unforeseen expenses, such as the cost of representations and delegations, not an unusual item in a civic budget, as may be seen upon reference to section 596 of the "Ontario Municipal Act." Briefly in my view the revenues at the disposal of the council for 1908 were appropriated in December, 1907, by the joint action of the finance committee and of the council and the reserve fund was included in and formed part of the civic budget and was at the disposal of the council for the reception and entertain-

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ment of distinguished guests and for travelling expenses as fully and effectually as any other item in it. If in this I am not mistaken the council could by virtue of section 334(*b*) authorize the payment of the mayor's travelling expenses and charge them against that fund without further reference to the finance committee, except in so far as the rule of council 124 was applicable. When the reserve fund was included in the annual estimate prepared by the finance committee, that fund was appropriated as fully and effectually in so far as the functions devolving upon the committee under section 42 are concerned as any other item of the civic budget and were it not for rule 124, I would say that with respect to that fund the finance committee was *functus,* but assuming that they had a duty to perform they did perform it substantially, as I have already attempted to shew.

I come now to the consideration of section 338. I repeat what I have already said; there is no suggestion of personal wrong-doing and there was no diversion of funds. No result followed the action of the council or of the finance committee, except that which was desired. All checks and safeguards provided by the charter for the protection of the civic exchequer were observed; there was unanimous action on the part of the council; the certificate of the comptroller that funds were available for the purpose and the sanction and approval of the finance committee were given. Everything that the statute required on the most strict construction was complied with, although conceivably in one aspect of the case, in some respects, out of the statutory order.

I quite agree that the object of the legislature

was to check careless, unbusinesslike management of the public money; but

it is a general rule of law that a penal statute ought to be construed strictly so as not to extent its provisions to any case which is not within both the spirit and letter of the enactment. This rule applies with a greater degree of force where the Act imposes a severe punishment or affects the liberty of the subject than where it imposes merely a pecuniary penalty.

Encyclopædia of Laws of England, *vo.* "Penalty," p. 30.

In terms section 338 imposes very severe penalties on any member of the council who authorizes an expenditure in excess of the appropriations. Should we hold that to authorize the expenditure of a sum of money out of a fund amply sufficient, certified by the proper official to be at the disposal of the council for a purpose authorized by the statute comes within the spirit and the letter of the prohibition contained in this enactment? Let me here again draw attention to the form in which the authority to pay was given by the finance committee:

The payment of the above amount is approved but subject to the certificate of the city comptroller that there are sufficient available funds voted by council for said purpose.

If all the requisite formalities are complied with, even out of the regular order, before the money actually leaves the municipal exchequer, is the spirit of the Act violated? I read this section, which certainly is not free from ambiguity, to mean that when the annual appropriations have been made and placed at the disposal of the council and of the different committees, no obligation is to be contracted which would involve the credit of the city for any sum in excess of such appropriation, the legislature having in section 334 provided that in making the annual appropriations the

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council shall maintain the equilibrium between the revenues and expenses so that future ratepayers should not be charged with present expenditures and to prevent that mischief the statute makes the members who authorize the excess of expenditure personally liable therefor. But if a fund is available for a specific purpose and that in an attempt to legitimately apply it to that purpose an informality in the procedure laid down by the rules of the council and by the statutes chiefly for the guidance of the officials occurs, can it be said that the severe penalties enacted by this section are incurred? I cannot believe that such consequences were ever contemplated where no bad faith, negligence, carelessness or indirect motive is imputed and where the object of the council was carried out. If for an error in procedure, personal liability and disqualification are to be incurred, no honest man of substance would venture to assume the enormous risk involved in taking a share in the administration of the municipal government of a large city like Montreal.

The words

> any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or of any committee

in section 338, read in conjunction with section 336, must mean that what is prohibited is the expenditure by the council or by the committee of any sum in excess of the amount at the disposal of the council or committee, not that if the money is legally available for a specific purpose and that some formality is required to apply it to that purpose the omission of the formality involves the penalty. The result of such a construction, as shewn by this case, would be to make the members of the council insurers not only of the

honesty and efficiency but of the infallibility of the municipal officials. Of the fourteen judges who have heard this case, nine say that the necessary formalities have been complied with and five that the proceedings were irregular; and, as a result, seven men, admitted to be of the most trustworthy, are disqualified for a period of two years and condemned to pay a large sum. Are these gentlemen presumed to be endowed with that grace of infallibility which evidently has been denied the courts of this country?

It is the internal sense (says Plowden) that makes the law; the letter of the law is the body and the sense and reason of the law is the soul.

Applying that rule to the construction of the charter and in view of the admitted facts, I would dismiss this appeal with costs.

GIROUARD J. (dissident).—Lorsque cette cause a été présentée devant nous, j'étais sous l'impression qu'il s'agissait d'un bref de *quo warranto* purement et simplement aux termes du code de procédure civile et que par conséquent nous n'avions pas de juridiction, ni la cour d'appel non plus. Après avoir lu et relu l'article 338 de la charte de la cité de Montréal (62 Vict. ch. 58) je me suis convaincu qu'il s'agissait d'une action spéciale parfaitement indépendante du *quo warranto,* dans laquelle il y a appel non seulement à la cour d'appel, mais aussi à cette cour. Cet article se lit comme suit:

Tout membre du conseil de ville qui autorise, soit verbalement, par écrit, par son vote ou tacitement, une dépense d'argent excédant le montant préalablement voté et légalement mis à la disposition du conseil ou d'une commission, en est tenu personnellement responsable et est, par le fait même, déchu de son droit de siéger comme membre du conseil, et ne peut être réélu à la charge d'échevin pendant une période de deux ans à partir de ce moment.

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Le texte de cet article est bien différent de ceux du code de procédure, articles 987 à 991. Ces articles définissent se que c'est que le *quo warranto*. Il a pour but principal d'empêcher l'usurpation ou la détention illégale d'une charge, franchise ou prérogative publique et l'article 990 ajoute que, si la requête est fondée, le jugement ordonne que le défendeur soit dépossédé et exclus de la charge et peut en outre le condamner à une amende n'excédant pas $400, payable à la couronne. Comme l'on voit, il n'est aucunement question dans cet article d'un jugement ordonnant au défendeur de rembourser des deniers illégalement obtenus pendant l'exercice de sa charge; en fait d'argent, tout ce que le demandeur peut réclamer, c'est la condamnation à l'amende de quatre cents piastres.

L'article 338 de la charte de Montréal, cité plus haut, est bien différent. Il a pour objet principal la condamnation d'une dépense illégale d'argent; et la déqualification ou déchéance de siéger ou de se faire réélire n'est que la conséquence "par le fait même," dit l'article, de cette dépense. C'est ce que la cour d'appel a jugé et je crois qu'elle avait raison. L'application pour casser l'appel faute de juridiction doit donc être renvoyée avec dépens.

Au mérite, j'abonde dans le sens de l'honorable juge Archambault parlant pour toute la cour à l'unanimité. Qu'il y aît eu quelque irrégularité ou informalité dans la procédure suivie par le conseil de ville, cela est évident; mais ces défauts sont tolérés par la charte, à moins d'injustice réelle ou de nullité expresse (art. 308). Où est l'injustice ici? Il est impossible de la trouver. Les échevins soit du conseil de ville ou du comité des finances ont agi avec la meilleure foi du monde. Ceçi n'est pas contesté; il

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n'y a pas eu de détournement de fonds ou d'excès d'appropriation. Toute l'erreur consiste en ce qu'ils ont agi non pas dans l'ordre indiqué par la charte mais à l'inverse commençant au lieu de finir par le conseil de ville. Tous les corps dirigeants ayant droit d'être consultés, de se prononcer et de décider ont approuvé la dépense en question. Le montant payable avait été préalablement voté et était légalement mis à la disposition du conseil et de la commission des finances, vu que la charte prévoit qu'une pareille dépense doit être prise à même le fonds de réserve qui avait été voté au mois de décembre précédent; 3 Edw. VII. ch. 62, art. 27; 7 Edw. VII. ch. 63, art. 12. Et puis quant à la légalité. Comment peut-on soutenir en face de l'article 308 que les informalités que l'on reproche aux échevins entraînent la nullité ? Aucun des articles cités, pas même l'article 42 tel qu'amendé par 3 Edw. VII. ch. 2, art. 6, ne décrète la nullité de la procédure qui y est indiquée. L'article 308 se lit comme suit:

> Nulle objection ne peut être admise sur une action, poursuite ou procédure concernant des matières municipales, à moins qu'une injustice réelle ne doive résulter de celles dont l'omission rend nuls, d'après les dispositions de cette charte, les procédures ou autres actes municipaux qui doivent en être accompagnés.

Il faut bien remarquer que notre mode de procéder même devant les cours de justice n'est pas toujours prescrit à peine de nullité; que cette nullité, règle générale, n'existe pas à moins qu'elle ne soit prononcée. C.P.C. art. 175.

S'il faut en croire le jugement de la cour, les échevins se trouvent à garantir la légalité des procédures du conseil et des commissions. Ils sont, pour ainsi dire, les assureurs de l'infaillibilité légale du greffier de la cité et même de ses avocats. Est-il pos-

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sible d'imaginer que le législateur aît songé à créer une semblable position. Elle est non seulement peu enviable, mais elle est même intolérable et impossible. Aujourd'hui il s'agit de quatre ou cinq mille piastres, demain il s'agira peut-être d'un demi-million ou d'un million. Comment supposer pour un instant que les échevins qui, règle générale, ne sont pas même des avocats vont mieux résoudre les difficultés légales que les juges? Nous en avons un exemple frappant dans cette cause. Neuf juges de Québec se sont prononcés et sept en faveur des échevins qui cependant perdent leur cause parce que devant cette cour ils ont une simple majorité contre eux, trois contre deux. Il est évident qu'il sera bien difficile, sinon impossible, de trouver des candidats désirables à la position d'échevin de la ville de Montréal. La position sera pire qu'aujourd'hui, car elle devra être complètement abandonneé à des gens sans valeur ni responsabilité, à des aventuriers et des brasseurs d'affaires.

Je n'ai pas l'intention d'entrer dans les détails assez nombreux de cette cause. Ceux qui désireraient les connaître n'ont qu'à parcourir le jugement très élaboré et lucide de M. le juge Archambault. Il les comprend tous. Je me contenterai de citer la conclusion à laquelle le savant juge est arrivé:

> Somme toute la présente cause se réduit à peu de chose.
>
> Tout le monde admet que le conseil avait le droit d'envoyer une délégation à Paris et d'en payer les frais à même le fonds de réserve.
>
> Il est aussi admis que la balance disponible du fonds de réserve était plus que suffisante pour payer cette dépense.
>
> La résolution du conseil n'a pas été précédée d'une recommendation de la commission des finances; mais quel intérêt l'intimé peut-il avoir à s'en plaindre, lorsque c'est la commission des finances qui a elle-même autorisé le paiement de la dépense?
>
> Cette résolution n'a pas été accompagnée d'un certificat du contrôleur; mais ce certificat a été donné plus tard, et a ainsi donné effet à la résolution en la validant.

La résolution n'a pas fixé le montant de la dépense; mais les membres de la commission des finances n'ont pas excédé le montant de la partie disponible du fonds de réserve affectée à ce genre de dépense.

En résumé, le conseil avait le droit d'ordonner cette dépense. Il y avait des fonds disponibles pour la payer. Et la dépense a été payée à même ces fonds.

La procédure ordinaire et plus régulière n'a peut-être pas été suivie. Mais il n'en est résulté aucune injustice, ni aucune atteinte à l'esprit de la charte, qui veut que les fonds publics soient appliqués aux fins pour lesquelles ils sont versés dans de trésor municipal, et dans les limites établies par le conseil lui-même lorsqu'il autorise une dépense.

Je suis donc d'avis de renvoyer l'appel avec dépens.

IDINGTON J.—The City Charter of Montreal by section 338 provided as follows:

Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council, and shall also be disqualified for re-election as alderman for a period of two years thereafter.

This action is taken thereupon, as the conclusions of the statement of claim in the form of a petition shew, for the twofold purpose of having it declared that respondents being aldermen of the city have forfeited their seats and for two years the right to be elected as such, and to recover moneys they had unlawfully and in breach of the foregoing section 338 authorized to be paid.

The question raised at the threshold in respect of our jurisdiction to hear the appeal is unique in its character.

We have a matter in controversy between the parties as to an amount exceeding our jurisdictional limit of two thousand dollars.

Can any one join in the same action a claim for

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over two thousand dollars ($2,000) no matter how founded, and something else over which we have no jurisdiction and thus give us jurisdiction in the latter matter, or in the converse case begin and prosecute a *quo warranto* proceeding and join to it a claim for over two thousand dollars ($2,000) and thus force an appeal here.

I incline to think not, and yet we are to give in any case, if we reverse the judgment which the court below has pronounced, the judgment and award the process or other proceedings which the court should have given or awarded.

One curious thing is the court below has no more power to hear appeal in a case of *quo warranto* than we, and yet it has heard this case in appeal and come to the decision that the case is not well founded.

Must we not first solve the question of the right of the court of appeal to interfere?

My solution is that if the case is to be held as one of *quo warranto,* then it is quite too clear for argument the court below had no jurisdiction, and its judgment ought for that reason to be reversed.

But as the question of whether the proceeding is one of *quo warranto* or not, despite the order therefor, is one of procedure, with regard to which we, according to the practice of this court, never exercise jurisdiction unless in a case, not this, wherein appears a violation of the principles of natural justice; and as the court of appeal has treated it as if not a case of *quo warranto,* I assume, for the present, that court did rightly in so treating the matter, and must, therefore, proceed to such merits as the case may have.

This section 338 quoted must be read in light of sections 42 and 336 of the charter.

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Section 42 is as follows, as replaced by Edw. VII. ch. 62, art. 6, in 1903:

The functions of the finance committee shall be: The preparation of the annual estimates of expenditure; the consideration of all recommendations involving the expenditure of money, and the awarding of all contracts, subject to the ratification by the council, for works, material and supplies, unless an appropriation has been already voted.

No recommendation for such purposes shall be adopted by the council unless the same shall have been previously submitted to and sanctioned by the finance committee; provided, however, that, upon the refusal of the finance committee to sanction an appropriation asked for by any committee, the council may, by a vote of the absolute majority of all its members, order such appropriation to be voted. No member of any other permanent committee can be a member of the finance committee.

The plan outlined is clearly and expressly that in the finance committee and therein alone can lawfully be formulated any authorization involving the expenditure of money.

I will not say that the council or any one else might not discuss such matters, and in that limited sense submit the propriety of the proper authority being moved in the matter to a consideration thereof. But one thing the council must not do without the committee's consent or refusal, and that is to recommend in the sense of authorizing an expenditure of money.

They have no such power unless an appropriation has been voted. Indeed, neither council nor committee can alone do so effectively.

The appropriation, which in the words of the statute has already been voted, must have had the recommendation of the committee first or its refusal to make such a recommendation.

Either thing once done the council is free to act by a vote (if necessary of an absolute majority of all its members), but not otherwise or until then.

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The finance committee in any representative body usually comprises the ablest men of experience available therein.

In this instance the control of the city's business was thus practically, and I think intentionally, handed over to the majority of the finance committee dealing with any matter.

But they cannot be autocratic for the council by an absolute majority can overrule them.

The plan, whether stumbled on, or the fruit of much thought, is an admirable one but for one thing, and that is, that it imposes the painful duty of thinking. It is essentially the plan of controllerships.

In this latter case men understand by seeing the physical severance and act accordingly.

There is another section, that is 336, which reads as follows:

> No resolution of the council or of any committee, authorizing the expenditure of any moneys shall be adopted, or have any effect, until a certificate of the comptroller is produced, establishing that there are funds available and at the disposal of the city for the service and purposes for which such expenditure is proposed, in accordance with the provisions of this charter.

The whole law necessary to a determination of this issue is contained in these three sections, but has been obscured by side issues arising from a consideration of rules of procedure, statutory, and otherwise. So far as statutory they emphasize if possible the need for the observance of these sections of the charter and so far as otherwise can have no effect.

Let us see the thing the respondents did which is complained of.

On 18th May, 1908, the council on motion of one of respondents adopted the following resolution:

Soumise et lue, une communication du comité Dupleix, Paris, invitant le maire à représenter la cité à l'occasion du tricentenaire de la fondation de Québec par Champlain. Sur motion de M. l'echevin L. A. Lapointe, appuyé par l'echevin Yates, il est resolu: Que la dite invitation soit acceptée, que son honneur le maire accompagné de son secrétaire, soit prié de représenter la ville en cette circonstance et que la commission des finances reçoive instruction de mettre à la disposition de son honneur le maire, le montant nécessaire pour couvrir ses frais de déplacement.

On the 29th May, 1908, the finance committee responded to this appeal by the following:

Submitted and read a communication from His Worship the Mayor, asking that a sum of $1,500 be placed at his disposal for travelling expenses on the occasion of his trip to Europe to represent the city at the tercentenary celebration of the foundation of Quebec.

Resolved, to instruct the city treasurer to comply with the mayor's request and to advance him the said sum of $1,500.

The respondents were parties to this.

The money was paid and the mayor and others travelled.

Something unpleasant occurred in the course of the accounting for the expenses.

We have nothing to do with that and all else which followed except that by the like illegal methods as outlined above connected with the same matter the respondents permitted and procured to be taken out of the treasury, without observing the prescribed statutory rules, sums in the aggregate which the Court of Review has found.

What appears on the face of these transactions so far as material, is that the respondents, within the words of the section first quoted, authorized an expenditure of money exceeding the amount previously voted, and thereby legally placed at the disposal of the council or committee. I cannot fritter away the force

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of the section by assuming it inoperative unless there had been a previously voted sum appropriated to the same purpose, or by adopting the statutory directions as to appropriations as a voting thereof, and thus a compliance with what is prescribed.

I repeat that section 42 constitutes the consideration of all recommendations, involving and authorizing the expenditure of money; first the duty of the committee and then of the council. Section 336 imposed also the respective duties of the committee seeing the certificate therein called for sent forward with its recommendation to the council and of the council refraining from voting till that certificate was received; for until then the recommendation was invalid.

With great respect I think the five per cent. or reserve fund specially set apart by sub-section (*d*) of section 334, as amended by 3 Edw. VII. ch. 62, was in law exactly in the same position as all the other funds of the municipality and required the provisions of section 42 to be observed in respect thereof. The statute did not place this reserve at the disposal of the council any more than other funds. Indeed, it was as to two per cent. a provision against loss merely. Although possibly, in harmony with the statute, the budget scheme might have included that in its frame, yet in no such sense as involved in the said duty laid down in section 42 can it be said to have been voted as an appropriation.

When were any of these moneys placed at the disposal of the council or any committee?

What had the finance committee ever done as required by section 42 to place any such moneys at anybody's disposal in any way to justify what was done?

Until the finance committee passed upon the matter and set aside for this purpose the necessary money forming part of this statutory reserve nothing could be legally done with it. It fell under section 42 just as other moneys were put.

To say it was available for the committee and council by proper methods is one thing. To apply or fail to apply those methods is entirely another thing.

The failure of duty upon which the foundation for the attack on respondents rests is entirely that in respect of proper legal methods they failed to observe their obligations in that regard which were as plainly written as language could make it if attentively read.

I think the appeal must be allowed and judgment go for the amounts awarded by the Court of Review. The penalties claimed cannot be awarded herein.

The section sued upon does not give any right of action in the nature of a *quo warranto* or anything leading to like results. The action is founded on the right of a rate-payer not questioned here to invoke such a statutory provision.

In light of what the court of appeal holds, however, in what I repeat is a mere matter of procedure, I do not see my way to vacating that declaratory part of the judgment.

With great deference, but for that, I would rather have held the parties to an action for money as one independent in every way of anything in the nature of *quo warranto*.

The one is not dependent on the other, though the same facts and laws may and indeed must produce in one case a judgment for money, and in the other a vacant seat.

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DUFF J.—This appeal raises first a question of procedure, which in one view of it involves the question of the jurisdiction of this court to entertain the appeal.

The action in which the appellant was plaintiff was in form of proceeding in *quo warranto,* and calling upon the respondents to shew cause why they should not be declared to be disqualified to sit as members of the municipal council of the City of Montreal, under article 338 of the City Charter, and asking also that under the provisions of that article they should be directed to repay to the city certain sums voted by them to defray the expenses of a delegation to Paris to take part in a celebration on the occasion of the tercentenary of the founding of Quebec. The Court of King's Bench has held that the action, though in form *quo warranto,* was in substance a special action under article 338. The respondents dispute this view and contend that the proceeding was in substance *quo warranto,* and that it was incompetent to the plaintiffs to include with the claims for relief appropriated to such proceeding a claim for the repayment of the moneys mentioned; they further contend that treating the action as a proceeding in *quo warranto* simply an appeal does not lie to this court. As to this contention it is sufficient to say that the view of the court of appeal is concurred in by the members of this court specially qualified to form an opinion upon a question of law of procedure in the Province of Quebec, and I see no adequate reason for disagreeing with that view.

The question of substance raised by the appeal turns upon the construction of certain articles of the Charter of Montreal, and it arises in this way: On the 1st of May, 1908, the council on receiving communica-

tion of a letter addressed to the mayor inviting him to represent the City of Montreal on the occasion mentioned, passed the following resolution:

Resolved: That said invitation be accepted, that His Worship the Mayor accompanied by his secretary be requested to represent the city on this occasion, and that the finance committee be instructed to place at the disposal of His Worship the mayor the necessary amount to cover his travelling expenses.

Subsequently the finance committee the members of which (the respondents) were the defendants in the action authorized the city treasurer at the request of the mayor to pay him to him the sum of $1,992.40 in liquidation of the expenses, the payment of which the council by this resolution professed to authorize.

The ground upon which the appellants rest their claim to have this sum refunded by the respondents, is that the resolution of the council was for various reasons inoperative to confer upon the finance committee any authority to authorize the payment of money out of the city treasury; and that the respondents having directed the disbursement mentioned without authority are compellable to restore the fund thus withdrawn under the provisions of article 338. The articles requiring consideration are 42, 334 and 338. It will be convenient to set them out in *extenso* now.

Article 42, as amended by 3 Edw. VII. ch. 2, art. 6, reads as follows:

The functions of the finance committee shall be: The preparation of the annual estimates of expenditure, the consideration of all recommendations involving the expenditure of money, and the awarding of all contracts, subject to ratification by the council, for works, materials and supplies *unless an appropriation has been* already voted.

No recommendation for such purpose shall be adopted by the council unless the same shall have been previously submitted to and sanctioned by the finance committee, provided, however, that upon the refusal of the finance committee to sanction an appropriation asked

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for by any committee, *the council may, by a vote of the absolute majority of all its members, order such an appropriation to be made.*"

Article 334. As replaced by 3 Edw. VII. ch. 62, article 27, [1903]:

In the month of December of each year, the council shall appropriate the sums at its disposal out of the revenues of the city for the needs of the various civic departments for the ensuing fiscal year.

In so doing, the council shall maintain the equilibrium between the revenues and expenses and provide for:

(*a*) The cost of the collection of the civic revenue;

(*b*) The interest upon the civic debt and sinking fund which may be established;

(*c*) The school tax;

(*d*) A reserve of five per cent.—two per cent. being to cover all possible loss in the collection of taxes and three per cent. for unforeseen expenses, such as those relating to judgments, official receptions, epidemics, inundations, fortuitous events and damages caused by irresistible force;

(*e*) Other established charges upon the civic revenue, including the deficit from any previous year;

(*f*) Repairs, maintenance, salaries and expenses for general administration.

334(*a*). Added by 63 Vict. ch. 49, art. 10, [1900]:

The reserve fund may also be employed to pay claims for damages arising from offences or quasi offences.

334(*b*). Added by 7 Edw. VII. ch. 63, article 12, [1907]:

The city may charge against the reserve fund the costs of representation and of delegations authorized by the council as well as the sums required for the settlement of claims and for the removal of snow and ice from the sidewalks.

Article 338:

Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council, and shall also be disqualified for re-election as alderman for a period of two years thereafter.

Added by 8 Edw. VII. ch. 85, art. 22, [1908]:

Nevertheless the said liabilities and disqualifications enacted in this article shall not exist if the council of the city has subsequently acknowledged and ratified the said expenditure of money as being valid and lawful. This provision shall have effect for the past only.

Invalidity is imputed to the resolution of the council on various grounds; but in my view of the case it is necessary to consider only one of them, which is this —article 42 prohibits the adoption by the council of any proposal for the expenditure of money which has not been previously submitted to the finance committee, except in those cases in which an appropriation has already been voted. It is argued, and after the most careful consideration of the provisions of the statute I think the argument has not been answered, that in this case there was no appropriation within the meaning of this article of the sum disbursed or, indeed, of any sum for the purpose to which it was devoted and that the proposal was never submitted to the finance committee in the sense of article 42.

The first point for consideration is whether at the time of the passing of the resolution of the 18th of May there had been an appropriation within the meaning of article 42 of the sum in question. The point turns largely on the construction of article 334. It is argued with a good deal of force and plausibility that the city is expressly authorized by article 334(*b*) to charge expenses of this character against the reserve fund provided for by article 334, and that by the terms of the last mentioned article the reserve fund thereby directed to be provided is treated as a sum appropriated for all or any of the various purposes to which the statute authorizes the council to apply it. The statute does, no doubt, expressly authorize the city

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to charge such expenses as these against the reserve fund; but I am unable to follow the argument through to its conclusion. I do not think the reserve fund (created by the statute rather than by the council) can be treated as a sum appropriated in the sense indicated. The article 334, it is observable, requires the council in the December of each year to appropriate the sums *at its disposal* out of the revenue of the city for the needs of the various civic departments, for the ensuing fiscal year. It then goes on to direct that in thus providing for the disbursements of the revenues the city council shall make provision for certain permanent charges upon the city revenue—the cost of collection, interest upon debt and sinking fund, school tax, deficit from any previous year, "other established charges upon the revenue," maintenance, salaries and expenses for general administration. It is perfectly clear that in each one of these cases it is intended that the council should set apart sums, specific and ascertained, and that it should at the same time declare the purposes (with more or less precision as the circumstances may admit) to which these sums are to be applied.

It is perfectly clear, too, that the duty of preparing and considering the estimates upon which the appropriations are based devolves under article 42 upon the finance committee. The reserve fund stands necessarily in a different category. It is obviously intended to be what its name imports, viz.: a fund that shall be available for expenditures the municipality may be called upon to make during the course of the year, but which cannot at the time fixed for making the appropriations be ascertained with any accuracy or certainty. It is in a word a provision for contin-

gencies. Does it follow that the whole of this fund is to be treated as a sum appropriated within the meaning of article 42? So to describe it seems to me to involve some disregard of the meaning of the words as well as the substance of the operation. The direction to provide for a reserve fund seems rather to aim at imposing a limit upon the annual appropriations in relation to the amount available for expenditures—a requirement to allow a margin which shall leave a fund that can be appropriated to meet unforeseen demands which may arise during the course of the year, rather than what is commonly understood to be an "appropriation." If this be the correct view it follows that there was no appropriation for the purposes to which the sum in question was applied. It follows too, I think, that the direction to the treasury to disburse the sum in question given by the finance committee was

> an expenditure of money exceeding the amount previously voted and legally placed at the disposal

of that committee, because although the reserve fund was at the disposal of the council, who could disburse it on compliance with article 42, their attempt to disburse it was inoperative for want of compliance with that article. The respondents are consequently accountable for the sum so paid out by the committee without authority.

I have not overlooked the view expressed by Archambault J. upon the construction of article 42. If I have correctly apprehended the learned judge's view it is that the article applies only to "recommendations" made by committees of the council and not to proposals initiated in the council itself. I quite agree that if that is on its true construction the meaning of

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the article there is an end of the matter so far as this point is concerned; but I can see no valid reason for thus limiting the scope of the word "recommendation." I do not know why it should not be held to embrace any proposal made by the mayor or by any other member of the council involving any expenditure of money. I think the true construction is that which council itself has adopted in Rule 124, which requires that "any resolution, motion or report" involving the disbursement of any part of the revenues of the city shall first be submitted to the finance committee.

There remains to consider the contention that the omission to submit this proposal to the finance committee should in the circumstances be regarded as a mere irregularity not affecting the validity of the transactions impugned. It is argued that in point of fact the proposal was passed upon both by the council and by the finance committee, and that in the circumstance that the council passed upon the proposal first and the committee afterwards there is involved no substantial departure from the requirements of the charter. I do not think that is a very satisfactory way of treating the express requirements of a legislative enactment such as this—designed as it is to provide machinery for securing the due administration of the funds of a municipal corporation. I do not, of course, profess to know the exact degree of importance which the legislature attached to the prohibition found in article 42. One cannot, however, lose sight of this; the legislature has entrusted not only the preparation of estimates, but the examination of all proposed expenditures to a special committee, and I am unable to say that they

may not have considered it of real importance that the municipal council in dealing as a council with the funds entrusted to its care should, before passing and as a condition of the power to pass upon any proposal involving the expenditure of money not already appropriated, submit that proposal to this committee for examination. It is not very much to the purpose to say that the council might eventually override the committee. The function of examining and advising is one function, the function of vetoing is another, and the fact that the legislature has not seen fit to endow the committee with the latter is not a ground upon which a court of law can legitimately treat the first named function as a matter of form merely. It does not, moreover, help the matter to say that the expenditure was in fact passed by the finance committee. If my view of article 42 be correct what the law requires is that the proposal, having been examined by the finance committee in the exercise of the responsibility cast upon them by article 42 shall then, and only then, be ripe for the action of the council. Obviously it is a vastly different procedure for the council first to put its imprimatur upon the proposal and then to instruct the finance committee to carry its decision into effect; and that in substance is what the respondents are called upon to uphold.

It is only bare justice to the respondents to say that no imputation involving any personal reflection upon them was seriously advanced, and in such circumstances there is a natural and justifiable regret that in the absence of *malus animus* they should suffer the penalties which will be the result of their proceedings; on the other hand it is a paramount consideration that the safeguards with which the legislature has surrounded the administration of the public funds

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should not be trifled with, and with very great respect I think one could not accede to the views advanced in behalf of the respondents without giving a start to the frittering away of the important provisions of section 42.

The appeal should be allowed with costs and judgment should be against the respondents for the restoration of the moneys disbursed with the costs of the action.

ANGLIN J.—The facts of this case and the contentions of the parties sufficiently appear in the judgments rendered in the provincial courts.

The judgment of the Court of King's Bench, reversing that of the Court of Review, and dismissing the action of the appellant, is impugned upon the grounds that the Court of King's Bench entertained the respondents' appeal without jurisdiction, and that upon the merits the judgment of the Court of Review, which had reversed that of the court of first instance, should not have been disturbed.

The action of the appellant was not, in my opinion, primarily or principally in the nature of a proceeding in *quo warranto*. He primarily and principally sought to compel the reimbursement by the respondents, the seven members of the finance committee of the municipal council, to the City of Montreal, of the sum of $3,809.40, the expenditure of which he claims they illegally authorized; and, incidently, to have them disqualified. He also sought to have them subjected to a money penalty. His action was brought to enforce against the defendants the special remedies and penalties provided by article 338 of the charter of the City of Montreal in case of such misconduct in office as he

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charges against the defendants. He has added, improperly, I think, a claim that the defendants be condemned to pay a sum not exceeding $400 each to the Crown, by way of penalty.

I agree in the view that the provision which excludes the right of appeal in ordinary cases of *quo warranto* beyond the Court of Review, does not apply to this case; and that the Court of King's Bench therefore had the jurisdiction which it assumed to exercise.

Article 338 of the Montreal charter is as follows:

338. Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, an expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council, and shall also be disqualified for re-election as alderman for a period of two years thereafter.

Did the defendants authorize "an expenditure exceeding the amount previously voted and legally placed at the disposal" of the finance committee?

The expenditure in question was made out of "the reserve fund" (1). This fund is by the annual budget placed under the control of the council itself. It could only be placed at the disposal of the finance committee by a legal and sufficient act of the council. The resolution of the council upon which the finance committee acted was passed without any previous recommendation of that committee, contrary to the provisions of article 42 of the city charter, and without any certificate of the comptroller having been first obtained, in violation of the requirements of article 336. The resolution did not designate any fund out of which

(1) Art. 334(*d*).

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the expenditure should be made, nor did it specify either the amount or the maximum amount to be expended. By article 334(*b*) the council is empowered to provide out of the reserve fund for the expense of representation and of delegations.

By article 42 the council is forbidden to pass any resolution for expenditure without a prior recommendation of the finance committee, unless the latter body has refused to recommend, and such refusal has been overruled by a majority of all the members of the council. Rule 124 of the council is to the same effect. Under article 336 the passage of any such resolution without production of the comptroller's certificate shewing that there are funds available therefor, is prohibited, and it is provided that a resolution so passed shall not "have any effect."

For the respondents it is asserted that the non-observance of these provisions of the charter was a mere informality or irregularity which would not prevent the resolution of council operating to legally authorize the finance committee to draw upon the reserve fund—that the committee therefore drew upon a fund "legally placed at its disposal."

I am unable to take this view. I cannot understand how a resolution of council, which is by the charter expressly declared not to have any effect, can operate to legally place the reserve fund *pro tanto* at the disposal of a committee. The comptroller's certificate required by article 336 was never obtained. Two other certificates, which the rules required should be attached to the warrants for payment were secured, but not until some time after the moneys had been actually paid over by the city treasurer. Neither of these was the certificate required by article 336.

The absence of the preliminary recommendation of the finance committee prescribed by article 42 is excused on two grounds: (*a*) that the reserve fund was under the direct control of the council itself; and (*b*) that the finance committee subsequently assented to the expenditure.

As to the former, I think it clear that the council could not have legally authorized the expenditure by any other committee of part of the reserve fund without the preliminary recommendation of the finance committee prescribed by article 42. As to the latter, it by no means follows that the finance committee in carrying out the order of the council to make the expenditure directed, exercised in regard to it any such duty or power as that conferred on it by article 42—a power or duty which the article contemplates shall be exercised before and not after the authorization of the expenditure by the council. In directing the payment pursuant to the resolution of council the committee may well have deemed itself to be discharging a purely ministerial duty.

I am of the opinion that the members of the finance committee by their votes authorized an expenditure of money which was, for both of the above reasons, not "legally placed at their disposal."

The omission to indicate the fund out of which the expenditure should be made was, in view of article 334(*b*), probably only an irregularity. The omission to fix the sum or the maximum sum to be expended, although a more serious defect, would probably not suffice to nullify the resolution.

I do not pause to consider the allegation that there was improper expenditure by the mayor's secretary. Upon the argument I was not convinced that this was

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established, and further consideration of the evidence has not satisfied me that a finding against the defendants upon this ground would be warranted.

Having regard to the good faith of the respondents which has not been seriously questioned, and to the facts that no real injustice has been done the city; that the finance committee, if asked, would probably have recommended the expenditure; and that the comptroller could certainly have given the certificate called for by article 336, I regret to find myself obliged to reach a conclusion which must entail such grave consequences to the respondents. But it is of the utmost importance that all the safeguards which the legislature has ordained for the protection of the ratepayers of Montreal in matters of civic expenditure should be maintained intact. For this reason, no doubt, severe consequences are attached by article 338 to certain breaches of duty in this connection, regardless of whether they are or are not intentional. While regretting that, in the circumstances of this case, the respondents must suffer, being satisfied that what they have done falls within the purview of article 338, I know of no power or right in this court to exempt them from its provisions.

With the greatest respect for the Court of King's Bench, and also for those of my colleagues with whom I find myself unable to agree, I am of opinion that this appeal should be allowed and the judgment of the Court of Review restored with costs throughout to be paid by the respondents to the appellant.

Appeal allowed with costs.

Solicitor for the appellant: *Charlemagne Rodier.*
Solicitors for the respondents: *Ethier & Co.*