ETIENNE LEFEBVRE (PLAINTIFF) . . . APPELLANT;

AND

THE TOWN OF GRAND-MÈRE (DEFENDANT) . . . . . RESPONDENT.

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*Feb. 26, 27.
*June 22.

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

Negligence—Municipal corporation—Statutory authority—Franchise—Electric transmission—Connecting wires—Public nuisance—Art. 5641 R.S.Q., (1909) s. 11.

The granting of a municipal franchise, to construct and operate an electric lighting system in a town and to use the highways for that purpose, does not entail upon a municipal corporation the duty of supervision of the construction or the operation of the works authorized.

The powers conferred by section 11 of article 5641 R.S.Q., on a municipal corporation to regulate the use of public streets and properties, are legislative or governmental and neither imperative nor ministerial; and injury from a failure to exercise them does not give rise to a right of action except where specifically so provided.

The duty of a municipality to keep its highways free from nuisances is owed only to persons using the highways and not to ratepayers or others upon or in occupation of private properties; and a municipal corporation, which grants a franchise authorized by statute, cannot be held answerable in damages for an injury, sustained by an individual on his own property, ascribable to negligence in the carrying out of the undertaking for which such franchise has been given.

The Chief Justice and Idington J. dissented.

Judgment of the Court of King's Bench (Q.R. 25 K.B. 124), affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Superior Court, District of Three Rivers, and dismissing the action with costs.

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

(1) Q.R. 25 K.B. 124.

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The circumstances in which the action was instituted and the questions in issue on the present appeal are stated in the head-note and in the judgments now reported.

N. K. Laflamme K.C. and *A. Lefebvre* for the appellant.

J. L. Perron K.C. and *Paul St. Germain K.C.* for the respondent.

THE CHIEF JUSTICE. (dissenting)—I agree with Mr. Justice Idington.

IDINGTON J. (dissenting)—The facts, found by the learned trial judge that appellant suffered very serious injuries from an electric current conveyed from an electric lighting plant in respondent town, by means of and by reason of another electric plant's wires unused and out of order having been long tolerated by the respondent on the streets of said town, are not seriously denied.

The first named plant was used for lighting the town and had been erected pursuant to a franchise granted by respondent.

The owners of the secondly named plant had never got authority from any one entitled to give it, but by dint of sheer audacity against which the respondent had formally protested, proceeded to erect poles and wires upon the streets of the town where, connected with the former plant, there had already been erected poles and wires.

The two sets of wires came dangerously close together from the time the second was erected, and as the result of neglect the latter got out of order and in places somewhat delapidated, and very obviously a serious source of danger to those using the highway, as

well as others who might be placed near thereto, as appellant was, when he came in contact with something liable to conduct the current of electricity in use by those operating the first named plant.

This constituted in my opinion a public nuisance upon the highway, which was, as such, under the usual jurisdiction of respondent. But the respondent actually owned the road allowance over which, at that part in question, the highway ran.

Much elaboration in argument is submitted to support the propositions that the toleration of such a public nuisance by respondent was legal, or at least not a breach of duty, and in any event that its failure to use such powers as it had for the abatement thereof, was a mere omission of the observance of duty and hence not actionable.

If the like accident to that in question had happened, as it well might have done, to a traveller on the highway, could respondent have set up the answer put forward herein of the breach of duty being an omission and not a commission?

The duty imposed to maintain the highway in a travellable condition would have been the answer.

The appellant cannot avail himself of that, I imagine, in respect of the lane.

The very undesirable distinction that has grown up in our English law between nonfeasance and malfeasance, on the part of municipal corporations, when it comes to deciding a question of their legal responsibility to those suffering injury, as the result of either, does not seem to me to have so much room for expansion in Quebec if due heed is had to article 1053 and following of the Code.

Be that as it may, I cannot think that under either

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system of law the owner of any property—as respondent was of that in question—can legally tolerate upon his premises a nuisance obviously liable to produce injury to the person or property of another in the vicinity.

That is what respondent clearly was guilty of in relation to the secondly named electric plant being, without the first vestige of legal right, allowed so long to continue in the condition it was and constitute such a nuisance.

I suppose if the same audacious and venturesome spirit as had conceived this enterprise had discovered in the road allowance, owned by the respondent, an excellent specimen of stone and proceeded to quarry it and blasted therein, as a free miner might, from day to day and been enabled by smooth talk to set the council and others to sleep, we would be told, if some neighbour got injured by the flying rocks and sought a remedy against the respondent, that the sleeping officials had never authorized it and hence it was all a matter of omission and the law had no remedy to apply.

I do not think that is the law. I doubt if any one would contend in such a case, that it is. That thing would be too noisy. Electricity moving silently and unobtrusively does not seem to be so effective in rousing the average sleepy official.

Each operation under the circumstances would constitute a nuisance. I cannot in principle distinguish the two cases. The one man would suffer from a shower of flying rocks, and the appellant did suffer from a current of two thousand volts of electricity producing disastrous results.

The article 5641 of the Revised Statutes of Quebec, referred in argument, standing by itself might not avail much; behind that there is a legal principle which is

represented by the maxim *sic utere tuo ut alienum non laedas.*

That article and others gave ample powers to the respondent, if it had seen fit, to use them to have put an end to the wretched condition of things that existed upon property it owned.

Indeed the lawlessness was tolerated when those daring to enter and dig up the streets for their own purposes ought to have been promptly suppressed by an able-bodied constable when mild and courteous protests were of no avail.

Dr. Ricard as a private citizen, owning a franchise, had no other resort than tedious litigation. It was otherwise with respondent that was liable to have been indicted for the continuance of such a nuisance.

The gist of the whole matter is that the respondent alone could have suppressed or abated the nuisance, though a private citizen could not unless he chose to prefer an indictment.

It was just as much at fault as the owner of a falling house and for the like reason as prevails in law in the case of such a house out of repair falling on the neighbour or his property when he, owning such a nuisance, who alone could have averted the loss caused by its fall is held liable.

I am sorry to hear it said that people using the protest form of expressing resentment had no means of knowledge of what they were about. It was an obvious duty under such circumstances as evoked the protest and mild submissions to justice in years of continuous litigation about the very thing that is now in question to have known a great deal more than the respondent pretends to have known and the law will impute that knowledge to it.

As to the want of notice of action, I think it was

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sufficient and the judge's discretion as to its not having been served within the delay mentioned in the statute was properly exercised under the circumstances.

The entire object of such a notice being required by the statute is to avoid stale demands being put forward and to enable the corporation blamed to investigate whilst the facts are present to the minds of those concerned or likely to know the facts.

I think the appeal should be allowed with costs here and below and the judgment of the learned trial judge be restored.

DUFF J.—I concur in the opinion of Mr. Justice Brodeur.

ANGLIN J.—On the facts in evidence I should certainly not be prepared to find that there had been any negligence on the part of the unfortunate plaintiff. Neither do I think that the learned trial judge erroneously exercised in his favour the discretion conferred by Art. 5864 R.S.Q. to excuse the giving of the notice which it prescribed when it is proved that the giving of it was prevented

by irresistible force or for any other reason deemed valid by the court or a judge.

The narrow construction which has been put upon a corresponding clause of the Ontario municipal law does not commend itself to me as so satisfactory that I would hold that the application of the exonerating provision of the Quebec statute, different in its terms and somewhat more elastic, should be equally restricted.

Although convinced that the plaintiff is deserving of sympathy, I know of no legal duty owed to him which the defendant municipality has failed to discharge, breach of which would amount to actionable fault.

The granting of a municipal franchise to Dr. Ricard to construct and operate an electric lighting system in the town and to use its highways for that purpose and the recognition of the Phoenix Syndicate as transferee of his rights were admittedly within the statutory powers of the respondent corporation. Its position in regard to third parties injured in the course of the construction or operation of the system for which the franchise was so given was at least as favourable as it would have been had the works been constructed and operated for it by an independent contractor. Whatever its liability might be for injury caused by a danger inherent in the undertaking made the subject of such a contract, as owner it would not be answerable for the effects of collateral negligence on the part of its contractor. The injury sustained by the plaintiff was clearly due to negligence of that kind.

The granting of a franchise, such as was given to Dr. Ricard, does not entail upon a municipal corporation granting it a duty of supervision of the construction or the operation of the works authorized by the franchise. The powers conferred by paragraphs 11, 12 and 16 of Art. 5641 R.S.Q. are clearly legislative or governmental and injury resulting from a failure to exercise them does not give rise to a right of action except where specifically so provided. The liability of the municipality for the bad state of roads, streets, avenues, etc., declared by clause 11, does not cover such a case as this. Clause 16 is more directly applicable, if the Phoenix Syndicate's installation is not taken out of its operation by the saving of existing rights in clause 12. Clause 12 was enacted only in 1903 and was probably inapplicable to the exercise of the franchise powers conferred on Dr. Ricard in 1901 and by him transferred to the Phoenix Syndicate. If

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applicable, the power conferred by clause 16 is a governmental power to pass by-laws and failure to exercise it, in the absence of specific provision to that effect, cannot form the basis of a right of action.

But it is said that liability of the municipality to the plaintiff arose from a failure to fulfil the duty of keeping its highways free from nuisances and from the presence thereon of things which from their nature or their situation or both were a source of danger. This duty is said to exist both at common law and by virtue of the statutory provision of Art. 5641 R.S.Q., s. 11, already referred to. Any such duty, in my opinion, however, is owed only to persons using the highways—not to ratepayers or others upon or in occupation of private properties. Had the plaintiff been injured while travelling upon or otherwise lawfully using the highway, it is quite possible that he would have had a good cause of action either under the statute or at common law. But I know of no principle of law upon which a municipal corporation, because it grants a franchise authorized by statute, can be held answerable in damages for an injury sustained by an individual on his own property ascribable to negligence in the carrying out of the undertaking for which such franchise has been given. I do not wish to be understood as expressing the opinion that an injury so sustained would give a cause of action against the municipality if ascribable not to negligence in carrying on the undertaking but to danger inherent therein. That question is not before us and there would seem to be not a little to be said for the view that the statutory authorization of the grant of the franchise implies immunity of the municipal corporation from liability even for injury attributable to a danger inseparable from the undertaking.

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BRODEUR J.— Nous avons à décider en cette cause si la municipalité intimée est responsable de l'accident dont le demandeur a été victime. Le question présente beaucoup d'intérêt au point de vue de la responsabilité des municipalités. Voici, en deux mots, les faits de la cause:

En 1901, la ville de Grand 'Mêre a concédé à un nommé Ricard le privilège de fournir l'électricité aux contribuables et à cette fin d'ériger des poteaux dans les rues et d'y poser des fils électriques.

Plus tard, savoir le 2 décembre 1905, le gouvernement provincial a accordé une charte à une compagnie appelée "La Compagnie Electrique de Grand'Mêre" et lui a donné le pouvoir de fournir l'électricité dans différentes municipalités, y compris celle de Grand' Mêre. Mais, en outre, de cela, il lui a donné le pouvoir, en autant que la ville de Grand'Mêre était concernée,

de passer partout ou il sera nécessaire et sans autre autorisation que celle résultant des lettres patentes de la dite compagnie dans les, sous les, et au-dessus des chemins et places publiques, rues et ruelles de la dite ville de Grand' Mêre.

Armée de cette charte, la Compagnie Electrique de Grand'Mêre est venue poser des poteaux dans les rues de la ville et a commencé à y installer ses fils électriques. La municipalité protesta contre cette action de la compagnie; mais celle ci se réclame d'y avoir été autorisée par le gouvernement provincial. Une action est prise par le concessionnaire du privilège exclusif, Ricard, pour faire enlever les poteaux et les fils de la Compagnie Electrique de Grand'Mêre et la corporation de la ville est mise en cause dans cette poursuite.

Parmi les questions qui one été soulevées dans cette action était celle de savoir si la charte du gouvernement provincial donnait à la compagnie électrique le droit d'installer son système électrique dans la ville de Grand'Mêre était valable.

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La Cour Supérieure a, par une injonction interlocutoire, défendu à la Compagnie Electrique de Grand'Mêre de continuer sés opérations dans la ville; et la procès s'est continué pour faire décider définitivement cette question.

Pendant que le procès se faisait, les fils électriques des deux compagnies sont venus un jour en contact et le demandeur, qui se trouvait à proximité d'un fil de La Compagnie Electrique de Grand'Mêre, fut frappé et blessé. De là action contre les deux compagnies électriques et contre la municipalité.

La Cour Supérieure a donné gain de cause au demandeur contre la municipalité; mais ce jugement a été renversé, en tant que le municipalité était concernée, par la Cour d'Appel.

Il s'agit de savoir si la municipalité est responsable.

Par l'article 1053 du Code Civil, on peut être tenu responsable du dommage qu'on cause par sa faute à autrui, soit par son fait, soit par négligence, imprudence ou inhabilité.

L'appelant prétend que la corporation municipale de Grand'Mêre a été négligente parce qu'étant propriétaire des rues, elle devait voir à ce qu'il ne s'y fit pas de nuisances ou à les en faire disparaitre. On prétend qu'elle aurait dû faire enlever les fils de la compagnie électrique qui avaient été placés là illégalement.

Il me paraît bien certain—et c'est admis aujourd'hui par les parties en cause—que le gouvernement provincial avait le droit de permettre à une compagnie d'aller poser ses fils électriques dans les rues de la ville. Il n'aurait, tout de même, peut être pas été sage pour la corporation de faire enlever ces fils électriques par ses propres officiers sans autorité de justice.

La question est alors soumise aux tribunaux par une poursuite dirigée par Ricard. La corporation est mise en cause ensuite au procès. Il est bien vrai qu'elle ne prend pas de conclusions elle-même et qu'elle s'en rapporte à la justice. Mais à quoi bon multiplier les frais en soulevant elle-même le point lorsque l'une des parties dans la cause allègue que ce privilège accordé par le gouvernement provincial était absolument nul? On ne peut done pas, suivant moi, prétendre qu'il y a eu là négligence de la part de le corporation, négligence telle que sa responsabilité pût en être affectée.

Maintenant, quelle est la responsabilité d'une corporation municipale de ville au sujet des rues? Cette responsabilité est déterminée par l'article 5641, sous-section 11, des statuts refondus de Québec 1909. Cet article donne au conseil le droit de

faire, amender et abroger des règlements:

11. Pour réglementer l'usage des rues, allées, avenues, ponts, ponceaux, terrains publics, places publiques, pavages, trottoirs, traverses, gouttieres, eaux et cours d'eau municipaux, et pour empêcher et faire cesser tout empiètement dans les, sur les, et au-dessus des rues, allées, avenues, terrains publics, places publiques et cours d'eau municipaux, et pour empêcher aussi qu'ils ne soient endommagés ou que l'on en fasse un mauvais usage;—la municipalité étant responsable du mauvais état de ces rues, allées, avenues, ponts, ponceaux, terrains publics et places publiques, pavages, trottoirs, traverses, gouttieres, eaux et cours d'eaux municipaux;

La dernière partie de cette sous-section déclare donc que la municipalité sera responsable du bon entretien des chemins.

Quelle est l'étendue de cette responsabilité? C'est qu'elle doit voir à ce que les chemins soient toujours dans un état qui puisse permettre au public de circular sans danger.

Il n'y avait, dans le cas actuel, aucun obstacle dans le chemin lui-même qui pouvait affecter la circulation du public; mais les deux compagnies électriques avaient placé des poteaux et des fils. L'une avait été

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autorisée par la municipalité, l'autre par le gouvernement provincial.

Ces deux compagnies étaient à se battre devant les tribunaux pour faire décider de leurs droits respectifs et notamment pour faire décider si le gouvernement pouvait accorder les pouvoirs qu'il avait accordé à la compagnie. Le procès s'instruit. Pendant ce temps-là, est-ce que la corporation aurait été justifiable d'enlever les poteaux de la Compagnie Electrique de Grand'Mère? Evidemment non.

Il est possible que les fils de ces deux compagnies fussent placés trop près l'un de l'autre. Mais comment la corporation pouvait-elle être responsable de cela sous les dispositions de la sous-section 11? Je ne crois pas que la responsabilité édictée par le loi couvre un cas comme celui que nous avons à examiner dans cette cause-ci.

Je considère donc que la corporation municipale n'était pas en faute et qu'elle n'a pas engagé sa responsabilité. Une municipalité, qui a le droit d'adopter des règlements, n'est pas nécessairement responsable, si elle n'adopte pas ces règlements-là. Ce sont des questions de discrétion qui ne sauraient engager sa responsabilité.

Tiedeman on municipal corporations dit (p.328):

> Not only are municipal corporations exempt from liability for the non-performance of public, or discretionary duties; but they are likewise exempt from liability from consequences, when they in good faith exercise such powers.

Le jugement de la Cour d'appel doit être confirné avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Arthur Lefebvre.*

Solicitors for the respondent: *St. Germain, Guerin & Raymond.*