

1956

*Nov. 21
Dec. 21KLASSY SHOE STORE INC. (*Plaintiff*) APPELLANT;

AND

THE CITY OF MONTREAL (*Defendant*) RESPONDENT.ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,
PROVINCE OF QUEBEC*Municipal corporations—Special statutory provisions—Action against City of Montreal arising from backing up of water from sewers—Elements of defence under city charter, art. 536c, enacted by 1939 (Que.), c. 104, s. 19.*

Where damages are sought from the City of Montreal arising out of the flooding of a cellar as a result of the backing up of water from the City's sewers, the City has a complete defence, under art. 536c of its charter, if it establishes: (1) that the building was erected after April 28, 1939; (2) that safety valves, of a model approved by the Quebec Public Service Commission, were not installed in it; and (3) that the presence of such valves would have prevented the flooding.

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1), reversing the judgment at trial and dismissing the action. Appeal dismissed.

A. L. Stein, for the plaintiff, appellant.

P. Beauregard, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant's claim is one for damages sustained by reason of flooding in the basement of premises at 2671 Notre Dame Street West, Montreal, occupied as tenant by the appellant.

The learned trial judge awarded appellant \$3,485 as damages sustained by it as a result of the flooding, but this judgment was reversed by the Court of Queen's Bench (1).

The facts are fully set forth in the judgments in the Courts below and need not be repeated here.

The amount of damages assessed is not now in issue, and the main question argued before this Court related to the interpretation of art. 536c of the Charter of the City

*PRESENT: Taschereau, Rand, Kellock, Fauteux and Abbott JJ.

of Montreal, as enacted by 3 Geo. VI, c. 104, s. 19, which reads as follows:

English version:

536c. No action in damages shall lie against the city when the damages resulting from flooding shall be due to the failure to install, in any immovable erected after the 28th of April, 1939, Safety Valves of a model approved by the Quebec Public Service Commission, to prevent the backing up of the waters from the sewers of the City into the cellar of such immovable.

French version:

536c. Aucune action en dommages—intérêts n'est recevable contre la cité lorsque les dommages provenant d'inondation auront été occasionnés par le défaut d'installation, dans tout immeuble construit après le 28 avril 1939, de soupapes de sûreté d'un modèle approuvé par la Commission des services publics de Québec, en vue de prévenir le refoulement des eaux d'égouts de la cité dans la cave de tel immeuble.

Appellant based its claim upon the allegations that the basement in question was flooded to a depth of between 12 to 18 inches by water flowing from the respondent City's sewer into the said basement, and that the City was responsible under the provisions of arts. 1053 and 1054 of the *Civil Code*.

In its plea and at the trial, the respondent based its defence to the action upon art. 536c of the city charter, which has been quoted.

In the circumstances of the instant case, in order to invoke successfully the provisions of art. 536c of the charter, the City respondent, in my opinion, had to establish three things: (1) that the building containing the leased premises was erected after April 28, 1939; (2) that a safety valve or valves had not been installed in the said premises or, if such valves had been installed, that they were not of a model approved by the Quebec Public Service Commission, and (3) that such a valve or valves, if properly installed at the proper point or points in the plumbing system, would have prevented the backing up of water from the respondent's sewer and, therefore, the flooding complained of.

It was conceded by the parties that the building in question was erected after April 28, 1939, and the evidence clearly established (i) that there were no safety valves of any kind installed in the leased premises, (ii) that the flooding in the basement was caused by water backing up from the sewer into the basement through a drain in the

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floor of that basement, and (iii) that a safety valve installed below the floor drain would have prevented the flooding complained of.

I am in agreement, therefore, with the finding in the Court below that the respondent discharged the burden imposed upon it of proving the three facts to which I have referred.

Water falling upon the exterior of the premises in question finds its way down from the roof through certain pipes or ducts into the city sewer, a system of drainage which under certain conditions may be obligatory upon the property-owner under the city by-laws. Had the appellant alleged and proved a case of "flooding" due to the inability of the respondent's sewer serving the premises to carry away the drainage it was at the time called upon to carry, including that from the appellant's premises, it might have lain upon the respondent to establish not only that the presence of an approved valve or valves would have prevented the reverse flow of the contents of the sewer into the cellar but also that the appellant's premises would not have suffered damage by reason of any inability of its own drainage to get away. It is, however, unnecessary to consider this aspect of the matter, as the case actually alleged and proved by the appellant was one of damage caused by water backing up from the sewer into the cellar.

The other questions raised by appellant were, in my opinion, satisfactorily disposed of in the Courts below.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Stein & Stein, Montreal.

Solicitors for the defendant, respondent: Choquette & Berthiaume, Montreal.
