1915

*May 26, 27.
*Oct. 12.

DONALD ROBERTSON (PLAINTIFF) ..APPELLANT;

AND

THE CITY OF MONTREAL AND THE CANADIAN AUTOBUS COMPANY (DEFENDANTS) ..... RESPONDENTS.

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

*Municipal corporation—Powers of council—Highways—Exclusive privilege—Necessity of by-law—Validity of contract—Right of action—Status of plaintiff—Shareholder in joint-stock company—Ratepayer — Special injury — Public interest — Prosecution by Attorney-General—Practice—Art. 978, C.P.Q.*

Assuming to act under authority of an existing by-law regulating traffic by autobusses and in virtue of a special statute (2 Geo. V., ch. 56 (Que.)), and the general powers conferred by the city charter the municipal council passed a resolution authorizing the corporation of the municipality to enter into a contract granting a joint stock company the exclusive privilege of operating autobus lines on certain streets in the city and charging fares for the carriage of passengers. An action was brought by a shareholder in a tramway company (which held similar privileges), who was also a municipal ratepayer attacking the validity of the by-law and of a contract made by the municipal corporation in pursuance of the resolution on the grounds that there was no authority for the granting of such exclusive privileges, that such powers, if they existed, could only be exercised by means of a by-law, and that a provision in the contract whereby the municipality became entitled to certain shares in the stock of the autobus company was *ultra vires* of the municipal corporation.

*Held*, affirming the judgment appealed from (Q.R. 23 K.B. 338), Idington and Anglin JJ. dissenting, that in the absence of evi-

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

NOTE.—Leave to appeal to the Privy Council was refused on the 18th of December, 1915.

dence of special injury sustained by the plaintiff, he had no status entitling him to bring the action.

*Per* Idington J., dissenting.—The plaintiff was entitled to institute the action by virtue either of his quality as a shareholder in the tramway company, the privileges of which might be injuriously affected, or as a ratepayer of the municipality.

*Per* Anglin J., dissenting.—The plaintiff could bring the action in his capacity as a ratepayer of the municipality.

*Per* Fitzpatrick C.J. and Duff and Brodeur JJ.—An appropriate remedy in such a case would be by action prosecuted by the Attorney-General of the province under article 978 of the Code of Civil Procedure.

*Per* Duff J.—Such an action might be prosecuted either by the municipal corporation itself or by an authority representing the general public.

Validity of the by-law, resolution and contract in question discussed by Idington, Duff and Anglin JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of Demers J., in the Superior Court, District of Montreal, dismissing the plaintiff's action with costs.

The material circumstances of the case are stated in the judgments now reported.

*Lafleur K.C.* and *R. Taschereau K.C.* for the appellant.

*Atwater K.C., Bisaillon K.C.* and *J. A. Archambault K.C.* for the respondents.

THE CHIEF JUSTICE.—In my opinion, the appellant is not qualified to bring suit. A ratepayer who has not suffered any special injury, but only such as is public in its nature and affects all the inhabitants alike, has no interest entitling him to bring action against the city. It is against public policy that he should be permitted to do so.

(1) Q.R. 23 K.B. 338.

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It is undoubtedly the law in England that such a suit can only be brought with the permission and in the name of the Attorney-General representing the Sovereign, the *parens patriæ*. Apart from any presumption to which this fact may give rise in favour of the principle the grounds on which it is based seem clear. Rule in France, Garsonnet, vol. I., No. 376.

It would be difficult for public business to be carried on at all if every individual in a city with a population of half a million persons could sit in judgment on all the actions of the civic authorities and any crank were at liberty to drag them at any time before the courts. The city would never be free from litigation with its attendant expense when, as would probably be often the case, the complainants were men of straw.

But there is more than this. That which is for the general benefit of all the ratepayers may cause an injury to the private interests of any particular ratepayer which would far outweigh any advantage which he might gain simply as one of the body of ratepayers. This injury may or may not be actionable. If, for instance, his property is taken for the common purposes he will have a right of action, but if it is merely in his capacity as a rival trader that he suffers loss this may well give rise to no cause of action.

The appellant is the private secretary of the Montreal Tramways Co. and, as found by the trial judge, is only the *"prête-nom"* of a rival company. He originally claimed qualification as holder of a few shares in the company transferred to him for the purpose of the action. This clearly gave him no title to sue and in the course of the proceedings he abandoned the claim. His claim as a ratepayer is not *bonâ fide* as

such. The contract is not against the interest of the ratepayers generally, but in their favour and the appellant is using his interest as a ratepayer not for the benefit of the whole body of ratepayers, but in the interests of his private business. This claim as a ratepayer is an attempt to do indirectly what he cannot do directly.

Nevertheless, it is necessary to consider carefully what is the law, since if it permits the bringing of such actions, the courts have to give effect to it whatever inconvenience may result from such a course.

Article 77 of the Code of Civil Procedure provides that

> no person can bring an action at law unless he has an interest therein.

This is merely a formal statement of a rule that is elementary in every system of law. The difficulty that may arise is in determining what is an interest in the particular case.

In a Scotch case recently before the House of Lords (*Dundee Harbour Trustees* v. *Nicol*(1)), Lord Dunedin in his judgment said:—

> By the law of Scotland a litigant must always qualify title and interest. * * * I am not aware that any one of authority has risked a definition of what constitutes title to sue. I am not disposed to do so.

There is, I think, similarity as to this between the Quebec and the Scotch law and I do not myself propose to attempt any definition of what constitutes an interest within the meaning of article 77, C.P.Q.

It seems clear that there must be some limitation placed upon the word. Farmers in the west of Can-

(1) (1915) A.C. 550.

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ada whose produce is all sent to be shipped from the Port of Montreal must certainly have an interest of a kind in the affairs of the city. Indeed, every Canadian might be said to have an interest in the good government of the commercial metropolis of the country.

When the interest which the individual has is no greater or other than that of the rest of the public he has not, in my opinion, an interest in the action within the meaning of article 77, C.P.Q.

But no one is on this account without remedy. An individual can always inform the Attorney-General who can, and, in a proper case, must, take action thereon (art. 978, C.P.Q.). If the Attorney-General does not consider the case a proper one for him to intervene in he can permit the complainant to use his name and the action is then brought in the name of the Attorney-General on the relation of the individual informant. There is in this practice the advantage that the Attorney-General can impose such terms for security for costs being given as in the circumstances of the case he may deem proper.

Then it must not be forgotten that section 304 of the charter of the City of Montreal (62 Vict. ch. 58) provides a special remedy in favour of any individual ratepayer. In the manner provided in this section

tout contribuable peut, par requête libellée, en son nom, présentée à la cour supérieure, demander l'annulation d'un règlement pour le motif d'illégalité.

This provision does not necessarily imply either that there would be otherwise no remedy or that any previous right of action is superseded. There might, however, be some presumption that the latter alternative was the intention of the legislature. It is com-

mon where the intention is otherwise for the legislature to state explicitly that the remedy it provides is to be in addition to, and not in lieu of, any existing remedies. I do not doubt, however, that but for this provision individual ratepayers would have had no right to take action such as this section expressly confers upon them.

When we come to examine the jurisprudence on the subject, I think it is doubtful whether the courts have given any decisions that conflict with the principle under consideration.

I do not wish to enter at tedious length into a discussion of any that may be supposed to do so; most of them, at any rate, can, I think, be distinguished. There is, however, one class to which the majority probably belong to which I must call attention. There are cases in which property is involved on which the courts fastening a trust have held that fiduciary relations existed between the parties. It is on this ground that a corporation in the capacity of a trustee is allowed to be sued by an individual inhabitant as one of the *cestuis que trust.*

In the United States this right and the doctrine on which it is based are distinctly recognized. Thus, in Dillon, on Municipal Corporations (5 ed.), vol. IV., p. 2763, sec. 1579, it is said that in the United States the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations under such circumstances is established; the origin of the equitable doctrine is explained in the following sections. In the much quoted judgment of the United States Supreme Court in the case of *Crampton* v. *Zabriskie*(1), it was said:—

(1) 101 U.S.R. 601, at p. 609.

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Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question.

It will be observed that in the United States the proceeding is one in equity. Whether the courts in this country would in like cases assume to exercise a similar equitable jurisdiction need not be too closely inquired into. The present case offers no occasion for the raising of any trust or the jurisdiction flowing therefrom.

To this class of cases belongs the case to which I have already referred, of the *Dundee Harbour Trustees* v. *Nicol*(1), though the principle on which it depends may not be so expressly recognized. In that case the appellants had been constituted by statute a body of trustees to be elected in part by the shipowners and harbour ratepayers of Dundee, and the Act vested in them certain property and rights. They made a use of part of their property for purposes not authorized by the Act and which involved the risk of its loss. It was held that they could be restrained from so doing and that the respondents, who were shipowners and harbour ratepayers, had a good title to maintain the proceedings. The Lord Chancellor said:—

> Reading the sections together I think that the effect of the statute is to establish a trust comprising a fund made up of rates, ferry dues and other sources of income as well as of sums authorized to be borrowed. * * * It appears to me that the respondents have an interest as beneficiaries in the fund so constituted and in the undertaking. * * * I see no reason in point of principle to doubt that this beneficial interest in the trust funds and undertaking, which are vested in the appellants as a corporation with limited

(1) (1915) A.C. 550.

powers, is sufficient to enable the respondents individually to claim to restrain dealings which are *ultra vires* with the trust funds and undertaking.

And, after referring to the usual and proper practice in England to invoke in such a case the assistance of the Attorney-General, he said that he thought it probable that even in England a harbour ratepayer in such a case

whose interest in the undertaking and funds is apparent ought to be treated as within the analogy of the principle, which enables a single shareholder to sue in his own name to restrain an *ultra vires* action.

Lord Dunedin, who delivered the principal judgment on the point, insists on the argument that the respondents being persons for whose benefit the harbour is kept up have a title to prevent an *ultra vires* act of the appellants which directly affects the property under their care.

So that it was really as trustees of the property to which the respondents had contributed and in which they were beneficially interested that the appellants were sued, and it was to prevent the loss of that property through their improper acts.

There can be no analogy between such a case and that of a ratepaper suing to prevent acts which neither involve any property in which the ratepayers are interested as *cestuis que trust*, nor impose any taxation or burdens upon them, but on the contrary are for their common advantage.

If I have dealt more fully with this case than its concern with the present case calls for, it is because it is the most recent case on the subject and has the authority of the final Court of Appeal for the United Kingdom. It illustrates well, moreover, the character

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of the class of cases in which a single individual can sue as one amongst a number of beneficiaries a corporation in whom property is vested in trust for all such beneficiaries.

As regards cases in the Canadian courts, particularly those of the Province of Quebec, I do not desire to say more than that I think the foregoing remarks apply with force to them. Perhaps, however, it must be admitted that there is difficulty in reconciling all the decisions in the Quebec courts.

Under these circumstances I think the matter must be treated as one that, in view of its importance, has not yet been sufficiently discussed and, at any rate, not conclusively decided. I think on all grounds it is open to this court to give a clear and final decision upon this point.

Since for the above reasons I consider that the appellant was not qualified to bring suit I express no opinion upon the merits of the questions raised in the suit.

The appeal is dismissed with costs.

IDINGTON J. (dissenting).—The respondent, the City of Montreal, a municipal corporation, entered into a contract with the other respondent whereby an exclusive franchise was attempted to be given the latter to establish and operate lines of autobusses to be operated over certain streets of said city in the way of carrying passengers for hire for the period of ten years.

The contract rests upon a by-law of the city, which it is said delegates the power to the city council to enter by way of resolution into such a contract, and upon such a resolution passed by the said council.

The contract is dated 22nd August, 1912, and is expressly made in virtue of the authority conferred upon the city by 2 Geo. V., ch. 56, sec. 12, sub-sec. 137, as well as all the municipal regulations of said city which can relate to the exploitation of autobus lines of the company.

The appellant is a ratepayer of the city and claims that the whole proceeding is illegal.

The questions thus raised must be determined by the consideration of a few sections of the city charter as amended by some of the numerous amendments that exist and of a few elementary principles of municipal law.

The amending sub-section 137, being that alone upon which the parties could have proceeded and must have supposed their proceedings rested, is as follows:—

137. To permit, under such conditions and restrictions as the city may impose, the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the City of Montreal; to prescribe on which streets they may circulate and be established and from what streets they may be excluded; subject to the provisions of arts. 1388 to 1435 of the Revised Statutes, 1909, governing motor vehicles, respecting speed limits, the registration of vehicles and the licences of owners and chauffeurs.

To understand this we must observe in what connection it is used and how intended by the amendment to be applied. We find in tracing back the matter thus that it is made supplementary to sections 299 and 300 of the charter as consolidated in A.D. 1899 by 62 Vict., ch. 58, which enabled the city council to enact by-laws for the purposes defined and specified.

In the schedule of subjects contained in section 299 there is specified item, No. 17, which is as follows:—

The granting of franchises and privileges to persons or companies.

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Section 300, so far as bearing upon this subject, is as follows:—

300. And the city council, for the purposes and objects included in the foregoing article, but without limitation of its powers and authority thereunder, as well as for the purposes and objects detailed in the present article shall have authority: * * * 74. To regulate and control, in a manner not contrary to any specific provisions on the subject contained in this charter, the exercise, by any person or corporation, or any public franchise or privilege in any of the streets or public places in the city, whether such franchise or privilege has been granted by the city or by the legislature.

Let us read sub-section 137, introduced and put in connection with the foregoing by 2 Geo. V., ch. 56, above referred to and quoted, as if it followed this, and we see what gives it vitality, and upon and subject to what conditions the power which it contains is given.

It is a power to enact a by-law and nothing less and does not authorize the council to act by a mere resolution.

Surely, it is elementary that any one given a power to do a particular thing, in a strictly specified way, must follow the allotted path and is not at liberty to try to accomplish what he believes to be the same result by some other method, and then claim he is exercising the powers given.

I find, therefore, that the power given to do that contemplated by the amendment quoted above, whatever may be the scope and purpose thereof, must be exercised by by-law.

There was no by-law adopting the contract in question and, hence, it cannot rest upon this amending section; for the mere resolution of the council cannot maintain anything dependent thereupon.

It is argued that the amended powers of the com-

missioners enable this contract to be entered into by a resolution of the council. Sub-section 3 of section 21, enacted by 1 Geo. V., ch. 48, as follows:—

> It shall devolve upon the council, on the commissioners' report, to grant franchises and privileges, by by-laws, resolutions or contracts, as the case may be; to issue debentures and to effect loans,

is relied upon.

With great respect I cannot see how such an interpretation can be placed upon this sub-section.

It clearly indicates that where "as the case may be" a by-law is the appropriate method, then a by-law must be adopted, and where a resolution is a suitable mode of executing the proposals of the commissioners, that may be adopted.

It would surprise some people to be offered debentures resting merely upon a resolution of the council even if the commissioners had recommended such an issue.

Again, it has been argued that, as there may be a general power given municipalities relative to franchises for running cars for the conveyance of passengers, and, as clause 4650(*a*) and following sections, restraining the like grants beyond ten years, unless sanctioned by a vote of the municipal electors, use the phrase "by-law or resolution" in dealing therewith, it may be implied first, that an exclusive franchise for the ten years can be granted and that when the term of any such contract is less than ten years, then the use of a resolution may be resorted to.

Such far-fetched reason for resting an implication of any kind upon, hardly deserves serious consideration in relation to the matter now in hand.

These general provisions are intended to be comprehensive and to cover not only the actual, but also

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the possible by virtue of any existing, or by way of anticipation of any future regulation, enabling the use of either by-law or resolution in the cases referred to. How can the suggested implication rest thereupon unless and until legislative authority had been given to use resolutions as such basis of action?

Moreover, I venture to think that a municipal corporation has only such powers as are expressly given it by statute or as may arise from the necessary implication involved in the obligation to discharge some statutory duty imposed upon the corporation. And in the discharge of any such duty the usual methods appropriate to the execution of such business must be adopted.

When such corporations find they cannot, by acting within these limitations, efficiently promote the supposed purposes had in view in their creation, they usually apply to their legislative creators to confer further powers.

Such, I take it, was the origin of the amendment above quoted and relied upon. It never was, I imagine, supposed that there existed any such implication till the hard exigencies of arguing to maintain this contract suggested a resort thereto.

Starting out in any direction to solve the problems involved herein we are always driven back to the realization of the hard legal facts that the only semblance of power ever given in relation thereto was to enact a by-law relative to

> the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the City of Montreal.

And this has not been adhered to.

Again, the contract proposed was to constitute an exclusion of others than the respondent company from

operating upon the streets selected. No such power is given in this section or elsewhere.

To begin with the streets are open to use by everyone for travelling over with suitable vehicles and whether carrying either passengers or freight for hire, or only for private business or comfort. An express enactment is required to take away any part of this public right.

In the next place the mere regulation of the traffic on the streets which is vested by the charter of the city in its authorities seems to have been the purpose of, and at least is clearly the nature of, what this amendment is provided for, and it cannot be extended by by-law, or otherwise, to the creation of an exclusive right in any man or firm or corporation to use the streets for any specific purpose. All must be treated alike unless by virtue of some express legislation taking away such right.

The section enables the council to prescribe the streets on which autobus lines may circulate, but does not enable the preference of one line over another.

I think it may be well, respectfully, to point out that those depending upon the argument of implication in legislation, would do well to consider the chapters in Hardcastle on Statutes dealing with implications and enabling statutes, and the many authorities collected therein.

The respondent being a ratepayer and constituted by the city charter a member of the corporation is entitled to take this action. It is one sort of security the law gives (as it does to each member of a corporate body) for keeping the municipal authorities in their acts

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within the limitations of the law, or often municipal government would be quite intolerable.

The statute gives, it is true, a summary method for attacking by-laws, but that is not inconsistent with the right each member of a corporate body has by law. And the provision does not purport to exclude any other remedy, though giving a summary method.

The appeal should be allowed with costs throughout, the contract declared illegal and void, and the by-law and resolution also, so far as designed and, if possibly valid, capable of being applied to support such a contract.

There are a number of the paragraphs in the by-law which are general and in themselves complete and inoffensive as they trench upon no man's right.

I had written the foregoing opinion before the re-argument, which recently took place, touching the right of the appellant to institute such proceedings as presented herein, was directed.

That right of appellant must depend upon whether or not he falls within article 77 of the Code of Civil Procedure for Quebec, which is as follows:—

> 77. No person can bring an action at law unless he has an interest therein.
>
> Such interest, except where it is otherwise provided, may be merely eventual.

The new part indicates (whatever else it may have been intended for) as fairly arguable the proposition that the shareholders of the Montreal Tramways Company having an eventual interest in the decision of such a question as agitated herein, may be qualified to sue. The value of the interest is immaterial. It might happen to be, in any case, either that of the

owners of almost the entire shareholding property, or of only a single share.

The probably tenable answer is that generally speaking the shareholders are not as such entitled to apply to the courts unless and until shewing that by reason of the existing conditions of the company or its directorate, who should act but will not, there is no means left to any number of shareholders to obtain justice, or that the company is doing, or attempting to do, that which is *ultra vires*.

That brings the matter back to the other ground taken in this action by the appellant as an inhabitant and ratepayer, in other words as a corporator, that the contract he attacks is *ultra vires* of the corporation of which he is a member and that in having it so declared he has an interest entitling him to sue. English practice might suggest or require the suit to be on behalf of all the ratepayers. Passing that minor point not raised in argument, I return to the proposition just enunciated, which I maintained in what I have already written, and still maintain (more confidently) as result of the re-argument.

"The inhabitants and ratepayers of the City of Montreal and their successors" were, by section 4 of the charter, incorporated.

The charter, by section 304, specifically recognizes a ratepayer as having the right to apply to the Superior Court to annul any by-law. And a similar provision is made in the "Cities and Towns Act," para. 5623 of the Revised Statutes of Quebec, and article 698 of the Municipal Code.

All these provisions indicate that the legislature considered ratepayers to be in fact persons interested.

I think these enactments merely provide a sum-

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mary remedy by petition, in addition to such remedies as already were existent, for the enforcement of the legal right thus, apparently as matter of course, assumed to exist and to be grounded upon obvious interest.

And the almost entire abstention on the part of the Attorney-General from interference in such matters would seem to indicate that reliance is not to be placed as in England upon such officer, but upon the vigilance of the ratepayers for the purpose of protecting the members of municipal corporations against attempts on the part of those in authority to act *ultra vires*.

Then why should we assume under such a condition of things that an article of faith, as it were, which anciently existed in England must prevail in Quebec ?

Surely in the absence of English faith and practice there, and where reason alone is our guide, it is expressive of our common sense to hold that every "inhabitant and ratepayer" has a direct interest in keeping his municipal rulers within their legal boundaries. It is not a question of every such man having a right to interfere with the acts of the class of men whom the legislature has designated, and from whom the people have chosen those to transact the business of the corporation. It is simply the question of restraining such men from misrepresenting those who put them there going beyond the line of their authority that is now in question.

Why, for example, should shareholders of a corporate company impliedly have this right and it be denied to the municipal corporator ?

Why should a shareholder be told, as he was by

Bacon V.C. in *Hope* v. *The International Financial Society*(1), at page 332:—

> But he is a shareholder also, and, as a shareholder, it is his right, and it is also his duty, to see that the moneys of the company are applied to their legitimate purpose.

This seems to me sound law and sense and so was upheld in appeal. The plaintiff there had an interest as a creditor, but that was expressly discarded. The case is cited in Buckley on Companies, etc. (9 ed.), at page 613, where the legal distinctions applicable to cases in which a shareholder may, and those in which he may not, have a right to invoke the action of the courts to control a company, are dealt with.

Or take the doctrine as laid down by Sir George Jessell in *Russell* v. *Wakefield Waterworks Co.*(2), at pages 479 and 480, and especially foot of latter page, when quoting with approbation the language of Sir J. Wigram in *Foss* v. *Harbottle*(3), where he ends by attributing to Lord Cottenham the saying that

> the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

What is dealt with there is not exactly what we have to deal with here, but the mode of thought and speech touches what may well have been had in mind by those amending the article 77 of the Code of Civil Procedure already quoted.

It all comes back to what that article covers and enables or impliedly denies.

If the attitude taken in England towards the supposed needs of resorting to the Attorney-General as

(1) 4 Ch. D. 327.
(2) L.R. 20 Eq. 474.
(3) 2 Hare 461.

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sole repository of the right and duty to invoke the powers of the court to restrain corporations from transgressing the limits of their powers, has been correctly reflected in these dicta as what obtained half a century ago, can we rely much upon the merely technical doctrine transmitted thence as a guide to interpret said article 77 ?

The Attorney-General of Quebec has, by article 978 of the Code of Civil Procedure, imposed upon him the respective duties, therein expressed, either absolutely or conditionally, as the case may be. Does that take away from the interest, right or duty of the "inhabitant and ratepayer"?

I do not find therein any such necessary implication.

Then in articles 713, 714, 715, and 716 of the Revised Statutes of Quebec, 1909, there is defined his legal functions, duties and powers.

Amongst these article 716 gives him the functions and powers which belong to the office of Attorney-General and Solicitor-General of England, in so far as the same are applicable to this province, etc.

When we fail to find an active use of such powers in relation to such subject matters, should we not conclude that the same have not been found in that respect applicable to the province ?

If he is supposed to act only upon the application of some one indemnifying against costs under article 978, then who has the right to so demand ?

If the ratepayer or inhabitant has no interest, how can he demand such action ? It seems over refinement to say he has an interest which entitles him to set the law in motion, yet no interest entitling him to sue.

Let us turn to article 50 of the Code of Civil Procedure, which reads as follows:—

50. Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the province, are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

Who is to move the court to invoke the exercise of this visitorial power? If intended to limit it to those moving by and through the Attorney-General, the article likely would have said so. We do know that such has not been the interpretation given it in many cases. Even before this legislation the power was exercised apparently as if inherent in the court, though not as accurately defined.

The courts have continually acted upon the application of those interested and the only difference of opinion has been as to the interest a ratepayer, merely as such, may have. We find many cases in which the objection has been taken that he applying had no interest, and that often answered by shewing he had some possible financial interest more or less remote. From this counsel for the company seems to ask us to infer those cases are the limit. I fail to find in the very numerous cases of that sort any such doctrine as he argues for to be necessarily implied.

I do find, however, something to warrant the inference that a confusion of thought has often existed in the minds of those pressing such objections, between the right of a member of the corporation to restrain it acting *ultra vires* and that of a member of the general public in such cases as arise out of what is *intra vires* the municipal authority.

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For example, some obstruction may exist on a highway, obnoxious to the safety or general sense of propriety, and a member of the public may complain. Unless, however, he is able to shew he suffers particularly beyond the rest of the public some injury therefrom, he is held not entitled to bring a suit therefor. The subject is within the administrative powers of the municipal authorities. No private right is invaded is the answer to the action. I do not think the cases are at all analogous in law.

We find, however, a line of cases where the suitor had obviously no interest but that of a ratepayer or other member of the corporate body.

The following cases have been cited to us by counsel for appellant, in the recent argument, as some of those in which the element of interest other than simply as a ratepayer or otherwise, as member of the corporation, clearly did not exist, or was in effect eliminated, by the view taken by the court, as to such right and interest.

The case of *Allard* v. *La Ville de Saint-Pierre et al.* (1), is one where the question arose of the right of a ratepayer to bring an action before the Superior Court to have a by-law quashed which had been passed *ultra vires* which was maintained in appeal. All the questions involved herein relative to the right of a ratepayer to sue in the Superior Court instead of proceeding by way of petition as an elector were dealt with therein.

Then in the case of *Aubertin* v. *La Ville de Maisonneuve* (2), it was first decided by Mr. Justice Curran that the action should be dismissed purely on the

(1) Q.R. 36 S.C. 408. (2) 7 Q.P.R. 305.

ground that there was no right in the plaintiff to sue in his quality of proprietor of immovables situated within the limits of the municipality defendant, and that he did not shew any grievance not suffered by other proprietors and electors. In appeal to the court of appeal the judgment was reversed, the majority of the court holding distinctly that there was error in the said holding of Mr. Justice Curran. Many cases are cited in the notes thereto; some relevant to the point in question, others not so relevant.

In the case of *Lennon* v. *La Cité de Westmount* (1), the exception was taken that the plaintiff should have proceeded by way of petition and it was held that where the by-law was *ultra vires* the ratepayer need not proceed by way of petition.

In the case of *Corporation of Arthabasca* v. *Patoine* (2), the right seems to have been recognized although the Chief Justice, Sir A. Dorion, dissented from the result, holding that in that case proceedings were not open to be taken by anybody, because it was a matter for the administration of the municipality in which there might be a mere irregularity. He expressly distinguishes that case from the case where the council has acted beyond its jurisdiction and seems to have recognized that then any party injured could proceed in virtue of the provisions of the Code, or, in certain cases, by direct action in the ordinary form. Unfortunately the exact question of whether the individual ratepayer would in such a case necessarily be injured, was not by him touched upon. The case is valuable for the consideration given therein to the general principles which ought to govern those manag-

(1) 10 Q.P.R. 410. (2) 9 L.N. 82.

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ing municipal affairs, and govern the court in supervising their conduct and rectifying wrong, if any.

In *Guay* v. *The Corporation of Malbaie*(1), the court seemed to recognize the right of an elector or ratepayer as having sufficient interest in certain cases.

In *Jacob* v. *La Cité de St. Henri*(2), Judge Pagnuelo clearly holds the ratepayer had sufficient interest.

The case of *Tremblay* v. *The City of Montreal*(3) proceeds on article 304 of the charter, but St. Pierre J. distinguishes between that which is *intra vires* and that which is *ultra vires,* as to the extent of this remedy.

In *Trudel* v. *Gité de Hull*(4), the right of a ratepayer to have a mandamus to compel the corporation to observe the law was clearly recognized. That case concerned the finances of the city, but turned on the question of the plaintiff having an interest to bring the suit therefor. The plaintiff clearly had no such right as where given expressly the power as in the last mentioned case. Yet he was held entitled to sue. The form thereof or kind of relief sought or got cannot affect the question of his right or interest. If he had no interest he could not sue in any form.

The case of *Farwell* v. *Corporation of Sherbrooke* (5) clearly lays down the law that the ratepayer is not confined as to his right to relief to the provisions contained in specific articles enabling him to sue, but may have a by-law passed *ultra vires* quashed by tak-

(1) 11 Rev. de Jur. 29.
(2) Q.R. 6 S.C. 488.
(3) Q.R. 28 S.C. 411.
(4) Q.R. 24 S.C. 285.
(5) Q.R. 24 S.C. 350.

ing the proceeding in an ordinary action. Many of the leading cases in Quebec are discussed in the judgment.

I may also refer to the case of *Piché* v. *La Corporation de Portneuf*(1), where the Court of Review confirmed, for the reasons given by Routhier J., the judgment given by him granting relief against the action of the council in regard to roads, where he relied upon article 2329 of Revised Statutes of Quebec, 1888, which gives very wide powers over all courts, magistrates and judges, and circuit courts and corporations in the province, and now appears as article 3085 of the Revised Statutes of Quebec, 1909.

I do not think we should discard and overrule such a mass of authority simply because we find in some other cases a different rule has been observed.

I have examined all such cited and many others, for the subject is an interesting one. I think, however, when we have under consideration any branch of the law where there has been a development, indicating a process of discarding that which is no longer serviceable, and substituting therefor that which tends to the furtherance of justice and judicial control over those who are determined to exceed the limits of their authority, we should at least lend a sympathetic ear to such decisions as tend to aid and promote such beneficent development.

In this instance it turns upon the meaning to be given the "interest" of him who, if he has regard to what is going on about him, must be most deeply interested in seeing that the bounds of authority in his local rulers are not exceeded.

It does not occur to me that the term can only re-

(1) Q.R. 17 S.C. 589.

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late to financial interests. In the ultimate result, assuredly, misgovernment always tends to affect even those interests. In this case there are financial provisions dealt with in the contract proposed. If the contract is *ultra vires* it is void and the corporation may run many merely financial risks of which the end may be difficult to see. Is such a thing to be tolerated ?

In the case of *Paterson* v. *Bowes*(1), the Court of Chancery in Upper Canada held a ratepayer entitled to sue as plaintiff therein did, and we in this court in the case of *MacIlreith* v. *Hart*(2), followed that and other like cases.

The principle involved in the latter was the *ultra vires* nature of the act of payment complained of. Here it involves money and much else that concerns the right and duty of the citizen.

There is nothing peculiar to French law in the doctrine that a man who has no interest in the subject matter giving rise to litigation shall have no right to bring an action. That doctrine is common to all legal systems. It has been unduly pressed by its application to a condition of things arising out of the development of corporate activities, both of an industrial and municipal character.

Those fond of technicalities may approve of so doing. Those caring less for technicalities, seeing the trend of events and having more regard for the useful application of the principles of law than the form or mode of such application, should find no difficulty in discovering that he who has as the result of such development a very real interest in restraining

(1) 4 Gr. 170.

(2) 39 Can. S.C.R. 657.

those he has placed in power from exceeding the limits thereof.

Counsel for the city urged that the business of the city would be hampered by permitting the exercise of such a right. The contrary seems to me to be the correct way of looking at it. If the municipal authorities keep within their powers they have nothing to fear. If they exceed them the sooner it is so determined the better. For what is done by such excess leads only to confusion and loss of efficiency and money.

An *obiter dictum* of Lord Watson in the judgment of the Judicial Committee of the Privy Council in *Déchène* v. *City of Montreal*(1), at middle of page 642, was referred to in argument. He said there, referring to some legislative provisions enabling any municipal elector to attack by-laws:—

> They confer upon each and every municipal elector the right, which he had not at common law, to challenge, on the score of illegality, any corporate appropriation of money to meet the expenses of the current year, subject to the condition that the right shall prescribe, if not exercised within three months from the time when the appropriation comes into force.

What he had in mind is made to appear at foot of page 643, where he says:—

> To begin with the first of these pleas, it is true that an incompetent resolution must be illegal; but it does not follow that an illegal resolution must be beyond the competence of the council. In this case, the resolution sought to be impeached was plainly within their competence, seeing that it exclusively relates to matters committed to the council by statute. Even if it had been incompetent, that circumstance could not enable the appellant to bring a petition for its annulment after the expiry of the three months. After the lapse of that period, the right conferred upon a municipal elector by 42 & 43 Vict. ch. 53, sec. 12, is at an end; though the incompetent resolution remains open to challenge, at the instance of persons who have a proper title.

(1) [1894] A.C. 640.

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Who the persons having a proper title might be is not stated. An elector might be a corporator or not according to the statute incorporating.

As against this dictum we have the recent decision (in 1915) in the case of *Dundee Harbour Trustees* v. *Nicol* and others (1), holding that appellants, who were constituted a board of trustees under the "Dundee Harbour and Tay Ferries Consolidation Act," 1911, to be elected in part by the shipowners and harbour ratepayers of Dundee, were liable to be restrained by proceedings, taken at the suit of shipowners and ratepayers, from acting *ultra vires*. And the neat point was raised as to the right of those parties to complain without the necessity of the Lord Advocate being made a party to take the proceeding.

Lord Haldane, mindful of the analogy according to English practice which might suggest the single shareholders's right upon which I have relied alone, instead of the Attorney-General who, in a like English case might be a proper party to so act, said:—

> In England it may well be that it would be in accordance with the usual and proper practice to invoke, in a case such as this, the assistance of the Attorney-General, who, as representative of the Sovereign the *parens patriæ*, has the capacity to interfere. But even without invoking the Attorney-General I think it probable that, in a case such as the present, a harbour ratepayer in the position of the respondents, whose interest in the undertaking and funds is apparent, ought to be treated as within the analogy of the principle which enables a single shareholder to sue in his own name to restrain an *ultra vires* act.
>
> It is not necessary to decide this question of English law, and the judgment in the present case will leave it open; yet I have thought it right to say what I have said in order to shew that I do not overlook the analogy. But whatever would be the position in England, the case for recognition of the individual title to sue of a person in the situation of the respondents is materially

(1) (1915) A.C. 550.

stronger in Scotland, inasmuch as the Lord Advocate does not, under the law and practice which obtain there, usually intervene as representing the *parens patriæ* excepting when some statute casts on him the duty of doing so. I have come to the conclusion that the respondents had a good title to maintain these proceedings.

Then in the same case we have (if I might be permitted to say so) a most instructive judgment by Lord Dunedin citing many cases and shewing the development of judicial thought in regard to the very question we have in hand.

If the ratepayers can be upheld by the House of Lords in maintaining such a right as involved herein in Scotland, where so much of the mode of legal thought depends on the principles of the civil law, surely the Province of Quebec need not dread the adoption of what, as shewn by the cases cited above, so many of their able judges have held to be law.

In the United States opinion seems to have been much affected by the local condition of things relative to the exercise of the powers of supervision by the Attorney-General. Where by statute or otherwise that officer continuously undertook to see to the enforcement of law and order, he often was looked to as the proper party to bring the action, but in states where that officer has ceased to act, the tendency seems to have been to hold the ratepayer had the right, in other words, the interest, qualifying him to act.

In the case of *Crampton* v. *Zabriskie* (1), at page 609, the Supreme Court of the United States held that at that day (1879), no serious question existed of the right.

Of course, all this is predicated upon the hypothesis that the contract in question is *ultra vires* and the

(1) 101 U.S.R. 601.

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mode or condition of doing anything like thereunto has not been adopted.

If I am mistaken in the opinion of its being *ultra vires,* this supplementary opinion has no bearing on the appeal.

DUFF J.—On the 10th of June, 1912, the council of the City of Montreal passed a by-law containing the following provisions:—

Sec. 2. Les autobus destinés à transporter des "passagers" seront exclus de toutes les rues, avenues et autres voies publiques qui ne sont pas mentionnés dans la cédule ci-annexée.

Sec. 16. Aucune personne ou compagnie ne devra faire circuler des autobus ou établir, maintenir ou exploiter des lignes d'autobus dans la Cité de Montréal, dans les rues mentionnées dans le présent règlement, sans avoir préalablement obtenu un permis à cet effet de la cité.

On the 22nd of August of the same year the mayor on behalf of the municipality made a contract with the Canadian Autobus Co. Ltd. in pursuance of a resolution passed by the council on the 14th of the same month, by which (*inter alia*) the Autobus Co. was given the right to run autobusses for the transportation of passengers for hire on certain parts of the public highways mentioned in these two sections. The contract contains the following provisions:—

La Cité de Montréal s'engage durant une période de dix années à compter de la mise en exploitation des lignes désignées dans les articles 1, 26, et 27, du présent contrat, à n'accorder aucun autre permis pour l'établissement, le maintien et l'exploitation de lignes d'autobus sur ces dites lignes,

the effect of this contract, if valid, being that for the period of ten years following "la mise en exploitation" the Autobus Co. acquires the right to run its vehicles as above mentioned, while the municipality disables itself from granting permits under the by-law of the

10th of August to possible competitors for any of the same routes. On the same assumption it is also probable that the council is disabled from abrogating the regulation contained in the 16th section of the by-law. It is not necessary, however, in the view I take, to consider that point.

The validity of the contract is attacked upon three grounds:—

(1) That the City of Montreal has no authority to grant an exclusive right to run autobusses in the city streets.

(2) That assuming such a power to be vested in the municipality it is a power which can only be exercised under the authority of a by-law and admittedly no by-law was passed authorizing the contract of the 24th of August.

(3) That the contract provides for a transfer to the municipality of shares in the Autobus Co., and the taking shares in such a company is *ultra vires* of the municipality.

The first ground raises, among others, the important question of how far the council can by contract bind its successors in respect of regulating the use of the city streets; *Ayr Harbour Trustees* v. *Oswald* (1); *Staffordshire and Worcestershire Canal Proprietors* v. *Proprietors of Birmingham Canal* (2), but I think the appellant has no title to impeach the resolution of the council or the contract upon either the first or the second of these grounds. I shall state my reasons for this as briefly as possible, but a summary reference is unavoidable to the powers and authorities

(1) 8 App. Cas. 623. (2) L.R. 1 H.L. 254.

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with which the municipal corporation of the City of Montreal is invested by its present charter — of the year 1899 (62 Vict., ch. 58). By section 4 it is provided (*inter alia*) that the inhabitants and ratepayers of the City of Montreal and their successors shall continue to be a municipal corporation under the name of the City of Montreal,

> and as such shall have * * * *all the powers of legislation* control and administration commonly possessed by municipal corporations and in addition thereto all the powers specially granted to the said city by law and by the provisions of this Act.

The description of these "powers of legislation" and "control," in so far as they are material for the present purpose is found in sections 299 and 300 of the charter and in an enactment, passed in 2 Geo. V., and specially referred to in the contract by section 12, subsec. 137, ch. 56, of the statutes of that year. Section 299 of the charter which is the general provision on the subject of "powers of legislation" had better be quoted substantially in full, and is as follows:—

> 299. It shall be lawful for the city council to enact, repeal or amend, and enforce by-laws for the peace, order, good government and general welfare of the City of Montreal, and for all matters and things whatsoever that concern and effect, or that may hereafter concern and effect the City of Montreal as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of this province or of Canada, nor contrary to any special provisions of this charter.
>
> And for greater certainty, but not so as to restrict the scope of the foregoing provision or of any power otherwise conferred by this charter, nor to exceed the provisos herein above mentioned, it is hereby declared that the authority and jurisdiction of the said city council extends, and shall hereafter extend to all matters coming within and affecting or affected by the classes of subjects next hereinafter mentioned, that is to say:—
>
> 3. *Streets, lanes, and highways, and the right of passage above, across, along or beneath the same;*
>
> 6. *Licenses for trading and peddling;*

8. *Health and sanitation;*
12. *Nuisances;*
14. *Decency and good morals;*
17. *The granting of franchises and privileges to persons or companies.*

The provisions of section 300 are more specific; sub-sections 1, 29, and 74 have some bearing upon the question before us. They are as follows:—

300. And the city council, for the purposes and objects included in the foregoing article, but without limitation of its powers and authority thereunder, as well as for the purposes and objects detailed in the present article, shall have authority:—

1. To regulate the use of and prevent and remove encroachments into, upon or over streets, alleys, avenues, public grounds and public places, municipal streams and waters, and to prevent injury thereto and prohibit the improper use thereof;

29. To license and regulate hackmen, draymen, expressmen, porters, and all other persons or corporations, including street railway companies, engaged in carrying passengers, baggage or freight in the city, and to regulate their charges therefor, and to prescribe standing places or stations within the streets or near railway stations, where the same may remain while waiting for business, and to prohibit the same from standing or waiting at any other places than the places so prescribed;

74. To regulate and control, in a manner not contrary to any specific provisions on the subject contained in this charter, the exercise, by any person or corporation, of any public franchise or privilege in any of the streets or public places in the city, whether such franchise or privilege has been granted by the city or by the Legislature.

The statute of 2 Geo. V. is in these terms:—

137. To permit under such conditions and restrictions as the city may impose, the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the City of Montreal; to prescribe on which streets they may circulate and be established and from what streets they may be excluded; subject to the provisions of arts. 1388 to 1435 of the Revised Statutes, 1909, governing motor vehicles, respecting speed limits, the registration of vehicles and the licences of owners and chauffeurs.

It is evident that in passing the by-law of the 10th of June and the resolution of the 14th of August the council was attempting to exercise one or more of the

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"powers of legislation" and "control" described in these enactments. The soil of highways within the municipality is declared, it is true, by another enactment to be vested in the municipality (Municipal Code, art. 752); but as highways they are dedicated to a public use and the municipality holds its title subject to the public right. The municipal council in professing to regulate the exercise of the public right (as in prohibiting the running of autobusses for hire without licence) is not acting as proprietor in the administration of the private property of the corporation. In Mr. Dicey's phrase, it acts herein as a "subordinate law-making body" in a matter which concerns not only the ratepayers or the inhabitants, but all persons who as the subjects of His Majesty are *primâ facie* entitled to use the highways. And the "law-making" function it thus exercises may be assumed to have been committed to it in the interests of the whole public understood in that sense.

I have been unable to convince myself that, apart from special enactment, the relation between the municipality and a ratepayer or an inhabitant as such imports in itself the possession by each of them of an "interest" within the meaning of article 77, Code of Civil Procedure, entitling each of them as an individual to call the council of the municipality to account in a court of law for excess or abuse of authority in the exercise or professed exercise of functions of this description.

Although the phrase has perhaps countenance from the highest judicial authority (see *Bowes* v. *City of Toronto* (1), at p. 524), it is only in a broad sense that

(1) 11 Moore P.C. 463.

a municipal council exercising such powers can be said to act as "trustee" for the inhabitants or for the ratepayers as individuals. Between them as individuals, and the council, there is no fiduciary relation in the legal sense; but it is urged that since the inhabitants and ratepayers are constituted the Corporation of the City of Montreal by section 4 of the charter the law confers upon each of them a status to maintain such an action as this as a member of the corporation and the analogy of the shareholder in a joint stock company and his right to attack *ultra vires* acts of the corporation is invoked. I think that is straining the analogy. The governing body of a municipal corporation exercising law-making powers affecting the rights of all His Majesty's subjects presents a very different hypothesis from a corporation administering private property only. For excess of power in the first case (which is a wrong against the corporation or against the public as a whole) the appropriate remedy seems to be by way of some proceeding at the instance either of the corporation itself or of an authority representing the public. The law of Quebec provides the machinery. Article 978, C.P.Q.

What I have said has, of course, no necessary bearing upon any right a ratepayer might be supposed to have to impeach proceedings of the council to impose a tax or rate exigible from such ratepayer.

The decisions relied upon give little help to the appellant. The ratio of *Dundee Trustees* v. *Nicols* (1) is stated in this passage of the judgment of Lord Dunedin, at pages 568 and 569:—

I now turn to the circumstances of this case. As I said at the outset, I do not think any general pronouncement can be made as to

(1) (1915) A.C. 550.

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when there is title and when there is not. But when I find that the *respondents in the capacity of harbour ratepayers are members of the constituency erected by the Act of Parliament to elect the trustees*, and *as such, are also persons for whose benefit the harbour is kept up*, I cannot doubt that they have a title to prevent an *ultra vires* act of the appellants, *which ultra vires act directly affects the property under their care*. It is not only that loss of that property through improper acting may have the effect of imposing heavier rates on the respondents in the future, but, in the words of Lord Johnston in the *Stirling County Council Case*(1), at p. 1293, as they have contributed to the funds which bought the property, "they have an interest in the administration of a * * * fund to which they have contributed," and a title flowing from that position and interest.

This passage, of course, has no application to the present case. The Lord Chancellor, at page 558, suggests an analogy between the ratepayers whose rights were being considered and that of a shareholder in a joint stock company under the English law. His Lordship's language makes it plain that he has in mind a case where the right which is being asserted is in the nature of a "beneficial interest in trust funds"; and I think I am not misreading his Lordship's judgment in interpreting it as giving no countenance to the proposition that the analogy of the shareholder in a joint stock company extends to a case in which the act complained of is not an act dealing with or directly affecting corporate property, but an act done in professed exercise of law-making powers exercisable in the interests of the public as a whole. In *Bowes* v. *The City of Toronto*(2) the action in the form in which it ultimately succeeded was an action by the municipality and the complaint was that certain city officials had made a profit out of business transacted for the municipality and for this they were

(1). (1912) Sess. Cas. 1281. (2) 11 Moore P.C. 463.

compelled to account. *McIlreith* v. *Hart*(1) was a case of *ultra vires* payments to members of the council. I concurred in the judgment of Mr. Justice Davies, but I must admit I have always had my doubts about the decision.

There is, moreover, the observation of Lord Watson in *Dechène* v. *City of Montreal*(2), which, as I read it, affords an argument of considerable weight in favour of the respondents. In that case the appellant sought to attack the annual appropriation as illegal. The charter of Montreal as it then stood (37 Vict., ch. 51, amended by 42 & 43 Vict., ch. 53), gave a right to any municipal elector in his own name to impugn by-laws, resolutions and appropriations on the ground of illegality within a delay of three months. At pages 642 and 643, Lord Watson explicitly says for the Judicial Committee that in his view a municipal elector, as such, would have no title to atack the resolution even if incompetent except under the authority of this provision. The provisions of the charter then in force in relation to the qualification of voters seem to shew that all classes of persons qualified to vote would fall within the category of "ratepayers" as that term is used in the charter of 1899. It would not be easy to reconcile the positions (1) that a voter (necessarily a ratepayer) has no status to attack even an incompetent resolution or by-law authorizing an appropriation except by special enactment, and (2) that a ratepayer as such has such a status even where the resolution or by-law does not directly affect the municipal property or impose a tax or rate.

It should be noted that this observation by Lord

(1) 39 Can. S.C.R. 657. (2) [1894] A.C. 640.

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Watson was made in 1894 and that the present charter which is a revision and consolidation of the statutes relating to the City of Montreal was passed five years later. A comparison of the enactment under review by the Privy Council in 1894 in *Dechène's Case*(1), with section 304, which was substituted for it in the present charter, would hardly support a suggestion that the law as stated by Lord Watson had been intentionally changed. There is, therefore, some ground for saying that, having regard to the course of legislation and the discussion in the judgment referred to, section 304 ought not to be read as a regulation or a limitation of an existing right, but as conferring a new right which would not otherwise have existed even as regards incompetent resolutions dealing directly with corporate property.

As to the second ground, namely, that the council proceeded by resolution and not by by-law. If a by-law was strictly required, the objection, assuming as it does the power to act by by-law, must, I think, be rejected on the additional ground that as the council may be assumed to have been ready to pass a by-law had they been advised that a by-law was necessary, and as the corporation itself as represented by the council stands by the resolution and the contract entered into pursuant to it the nature of the procedure followed by the council is not a matter in which the courts ought to interfere at the suit of an individual ratepayer. The resolution on this same assumption is not *ultra vires* in the sense of the rule which enables an individual shareholder to attack the *ultra vires* acts of a joint stock company. If the analogy of the

(1) [1894] A.C. 640

shareholder is to be appealed to I can see no good reason why the principle of *Foss* v. *Harbottle*(1) should not be put into effect.

I have had more difficulty with the third ground of objection, but I have come to the conclusion that, assuming the transaction otherwise competent, section 4 read together with these words of section 299, namely:—

> It shall be lawful to enact by-laws for all matters and things whatsoever that concern and effect or that may hereafter concern and effect the City of Montreal as a body politic and corporate

and with the statute of 2 Geo. V., are sufficient to invest the municipality with authority to take shares in such a company as that in question here which are fully paid up and in respect of which the municipality can incur no liability on account of the conduct of the company's affairs. If it be said there is no by-law then that objection has just been answered. I reserve my opinion on the question whether assuming the taking of such shares to be *ultra vires*, the transaction would on that ground be open to attack at the instance of a ratepayer after the expiration of the delay prescribed by section 304.

ANGLIN J. (dissenting).—I am, with great respect, of the opinion that this appeal must be allowed.

Under the alleged authority of a by-law and of a subsequent resolution of its council, the corporation of the City of Montreal entered into a contract purporting to give to its co-defendant the Canadian Autobus Company, Ltd., an exclusive privilege to operate lines of autobusses on certain named streets in the

(1) 2 Hare 461.

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city. The by-law prohibited the operation of lines of autobusses on any other of the city's streets on the ground that they were not suitable for such traffic. The effect, if the contract were valid, would be to confer a monopoly upon the respondent company.

The appellant, a ratepayer of the city, attacks the by-law, resolution and contract on the grounds that

(1) The defendant corporation has not the power to grant such an exclusive privilege;

(2) If the defendant corporation has that power, it can only be exercised by by-law;

(3) The by-law in question does not purport to authorize a contract conferring such an exclusive privilege.

The status of the plaintiff to maintain this action as a ratepayer has been the subject of much controversy. The numerous authorities cited to us indicate some uncertainty on this question in the jurisprudence of Quebec. The proceedings of the municipal corporation are attacked in the present action not merely as being illegal, but as beyond its competence. I do not think that section 304 of the city charter (62 Vict., ch. 58), excludes any common law right of action which a ratepayer may have to prevent abuse of its powers by the municipal corporation of Montreal. (Compare 42 & 43 Vict., ch. 53, sec. 12; and see *Dechêne* v. *City of Montreal*(1); *Comté d'Athabasca* v. *Patoine*(2); *Coriveau* v. *St. Valier*(3); *Aubertin* v. *Ville de Maisonneuve*(4); *Lennon* v. *Cité de Westmount*(5); and *Farwell* v. *Corporation of Sherbrooke*(6).) The weight of authority seems to

(1) [1894] A.C. 640.
(2) 9 L.N. 82.
(3) 15 Q.L.R. 87.
(4) 7 Q.P.R. 305.
(5) 10 Q.P.R. 410.
(6) Q.R. 24 S.C. 350.

me rather to favour the view that the ratepayer's interest is sufficient under article 77, C.P.Q.; *Allard* v. *Ville de Saint-Pierre*(1); *Tremblay* v. *City of Montreal*(2); *Guay* v. *Corporation of Malbaie*(3); *Jacob* v. *Cité de St. Henri*(4); and *Trudel* v. *City of Hull*(5). No doubt there are not a few cases in which the contrary opinion has been expressed. Although the contract in question does not involve a direct expenditure of municipal funds, it deals with and ties up municipal property and the control of the city streets in a manner that may result in serious loss of revenue to the municipality in future years, and may thus materially affect to their detriment the interests of the ratepayers in the finances of the city. The case would, therefore, seem to fall within the ratio of the judgment in *Paterson* v. *Bowes*(6), and of the decision of this court in *MacIlreith* v. *Hart* (7), as stated in the judgment of Maclennan J.A., concurred in by my Lord, the Chief Justice, although it would have been more clearly within these authorities had the plaintiff sued on behalf of himself and all the other ratepayers and inhabitants of the city. See, too, *Black* v. *Ellis*(8). But this objection to the form of action was not taken in the courts below or at bar in this court and should not at this stage be allowed to defeat the plaintiff's claim. I express this opinion in favour of the plaintiff's status with some hesitation induced by respect for my learned colleagues from the Province of Quebec, who hold the contrary view. I should, however, deem it a misfortune if such an

(1) Q.R. 36 S.C. 408.
(2) Q.R. 28 S.C. 411.
(3) 11 Rev. de Jur. 29.
(4) Q.R. 6 S.C. 488.
(5) Q.R. 24 S.C. 285.
(6) 4 Gr. 170; 11 Moo. P.C. 463, 524.
(7) 39 Can. S.C.R. 657.
(8) 12 Ont. L.R. 403.

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action as this could not be maintained by a ratepayer. Having regard to the many difficulties in the way of securing intervention by Attorneys-General, a very useful, if not in many instances, the only practical safeguard in this country against improper exercise of their powers by municipal corporations would be taken away.

A careful examination of the provisions of the charter of Montreal has not disclosed to me anything in them which empowers the municipal council to confer such an exclusive privilege as that here in question. In this country the power to grant exclusive privileges on its public streets does not exist in a municipal corporation unless it is conferred by legislative authority, either expressly, or by necessary implication. Dillon on Municipal Corporations (5 ed.), pars. 1215-8, 1234, 1308; 28 Cyc. 874; see, also, *Ottawa Electric Co.* v. *Hull Electric Co.*(1). This restriction is due to the public interest in the user of the streets and exists whether the ownership of the land they occupy is vested in the Crown, the riparian proprietors, or the municipality itself.

The subject of the licensing of autobus lines (art. 300, sub-sec. 137) and the granting of franchises and privileges (art. 299, item No. 17) having been expressly provided for in the charter of the City of Montreal, I rather incline to the view that art. 4650 (*a*) of the Revised Statutes of Quebec (7 Edw. VII., ch. 48), relied on by the respondents, is not applicable to such matters in that municipality. But, if it is, I fail to find in its terms warrant for the implication that the municipal corporation has the power to grant

(1) Q.R. 10 K.B. 34; [1902] A.C. 237.

an exclusive privilege such as that under consideration, assuming it to be, as I think it may be deemed (*ut res magis valeat quam pereat*), limited in duration to ten years notwithstanding the provisions of the seventeenth clause of the contract and their apparent conflict with the first clause.

By sub-section 137 of article 300 of the charter, the municipal council is empowered to license and regulate autobus traffic in the streets of the city. The impeached by-law was passed under that provision as appears upon its face. The by-law is general in its provisions. It provides for the licensing and regulating of autobus lines. Nothing in it purports to authorize the granting of any exclusive privilege. The subsequent resolution approving of the contract made between the respondents, in so far as that contract purports to bind the municipal corporation not to grant autobus privileges to any other autobus proprietor, is not based upon and cannot be supported by the by-law. Having regard to the provisions of articles 299 and 300 of the chapter, I have no doubt that, if the municipal corporation had power to grant such an exclusive privilege as the contract in question purports to confer, it could exercise that power only by by-law. There is nothing in the statutory provisions creating the Board of Control and defining its powers which dispenses with the necessity of a by-law in such a case. On the contrary, as I read those provisions, by article 21 of the Act of 62 Vict., ch. 51, as replaced by the statute 1 Geo. V., ch. 48, the requirement of a by-law in such a case is expressly continued.

It follows that, in my opinion, although the by-law is unobjectionable, the subsequent resolution author-

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izing the contract in question and that contract itself are *ultra vires* of the defendant corporation and should be set aside and vacated.

The appellant is entitled to his costs throughout.

BRODEUR J.—Deux questions se présentent dans cette cause-ci: la première est de savoir si le demandeur a un intérêt suffisant pour lui permettre d'instituer la présente poursuite; et par la seconde on soulève la validité de certaines ordonnances municipales et d'un certain contrat.

La conclusion à laquelle j'en suis venu sur la première question, c'est-à-dire sur le droit de poursuite du demandeur, me dispense de discuter la seconde.

Le demandeur veut faire annuler par action directe:

1°. Un réglement de la cité de Montréal permettant la circulation des autobus;

2°. La résolution qui déterminait les conditions auxquelles la compagnie intimée pouvait s'établir à Montréal;

3°. Le contrat fait entre la cité et cette compagnie en exécution de ce règlement et de cette résolution.

La cité de Montréal est régie par une loi spéciale adoptée en 1899 (62 Vict. ch. 58).

En vertu de cette loi (article 304) les règlements municipaux peuvent être attaqués par un contribuable par voie de requête qui devra être présentée à la Cour Supérieure dans les trois mois de leur mise en vigueur.

Il n'y est dit nulle part que les résolutions du conseil municipal ou que les contrats exécutés par la corporation peuvent être attaqués par un contribuable.

Dans la cause actuelle le demandeur aurait pu procéder par la voie expéditive de la requête en cassation (motion to quash); mais il a préféré avoir recours à l'action directe afin de contester en même temps la résolution et le contrat.

Je considère qu'il n'a pas prouvé avoir un intérêt suffisant pour lui permettre de réussir dans sa poursuite.

Il ne démontre pas qu'il soit personnellement affecté par le règlement, la résolution ou le contrat en question.

Il avait d'abord allégué qu'il était actionnaire dans une compagnie rivale de celle qui a eu le privilège de faire circuler ses autobus mais lors de l'audition devant nous il a abandonné ce point.

Son intérêt est celui de tous les contribuables de la municipalité.

Cette question d'intérêt a fait l'objet de plusieurs décisions.

Nous avons d'abord le Conseil Privé qui, dans les causes de *Brown* v. *Gugy*(1), et de *Bell* v. *Cité de Quebec*(2), a décidé que le droit d'un propriétaire riverain de poursuivre pour des obstructions placées dans une rivière ne pourrait être exercé qu'au cas où il souffrirait des dommages spéciaux.

Il est bien vrai qu'il ne s'agissait pas d'une affaire municipale; mais la distinction est tout de même faite entre l'intérêt personel et l'intérêt général.

En 1879, dans une cause de *Bourdon* v. *Benard* (3), la cour d'appel a déclaré que le droit de faire disparaître des obstructions et empiètements sur les

(1) 2 Moore P.C. (N.S.) 341 at p. 363.
(2) 7 Q.L.R. 103.
(3) 15 L.C. Jur. 60.

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chemins appartient exclusivement aux municipalités et que les particuliers ne possèdent pas ce droit d'action à moins qu'il ne leur en résulte des dommages réels et spéciaux.

In 1892, 1893 et 1894, le même principle a été suivi par l'Honorable juge Doherty, aujourd'hui ministre de la justice, dans les causes de *Sénécal* v. *Edison Electric Co.*(1), et de *Bélair* v. *Maisonneuve*(2), et par l'honorable juge-en-chef suppléant Archibald dans la cause de *Bird* v. *Merchants Telephone Co.*(3).

En 1907, la Cour de Revision, composée des Honorables juges Tellier, Lafontaine et Hutchison, a confirmé le jugement de l'Honorable juge Mathieu dans la cause de *Emard* v. *Village du Boulevard St. Paul*(4), qui avait décidé que l'action en nullité d'une résolution du conseil municipal ne peut être intentée trente jours après la mise en force de cette résolution que par un contribuable ayant un intérêt direct et spécial.

En 1909, dans la cause de *Allard* v. *Ville de Saint-Pierre*(5), quatre honorables juges de la Cour Supérieure se sont également divisés sur cette question, la majorité de la Cour de Revision étant d'opinion que tout contribuable peut demander par action directe la cassation d'un règlement *ultra vires* nonobstant le recours spécial par voie de requête prévu dans l'acte.

Dans une cause de *Aubertin* v. *La ville de Maisonneuve,* décidé en 1905(6), les juges se sont aussi là également divisés sur la question de savoir si l'action directe pouvait être exercée par un contribuable qui n'avait pas d'intérêt spécial.

(1) Q.R. 2 S.C. 299.
(2) Q.R. 1 S.C. 181.
(3) Q.R. 5 S.C. 445.
(4) Q.R. 33 S.C. 155.
(5) Q.R. 36 S.C. 408.
(6) 7 Q.P.R. 305.

Enfin dans la cause actuelle l'hon. juge Lavergne, qui a rendu le jugement de la cour, dit dans ses notes que—

Robertson ne pouvait faire maintenir son action sans démontrer un préjudice personnel et spécial. Les moyens de nullité au d'illégalité qu'il pourrait peut-être faire valoir comme requérant ne peuvent être invoqués par lui dans une instance ordinaire où il se porte demandeur.

La jurisprudence des cours provinciales dans ces dernières années est donc assez incertaine.

Les décisions du Conseil Privé, que j'ai mentionnées plus haut, et de la cour d'appel dans la cause de *Bourdon* v. *Benard* (1), démontrent clairement que les droits d'un particulier de poursuivre n'existent en vertu de la loi que s'il est personnellement et directement intéressé.

C'ést la principe suivi en France et je relève dans Dalloz, Répertoire Pratique, les passages suivants: Vo. action:—

No. 39. C'est un principe fondamental qu'on ne peut exercer une action qu'en autant qu'on y a intérêt. * * * L'absence d'intérêt exclut la recevabilité de l'action.

Vo. Commune,

No. 505. Pendant longtemps le Conseil d'Etat a décidé en termes généraux qu'un contribuable n'a pas en l'absence de tout intérêt direct et personnel qualité pour demander au préfet de déclarer la nullité d'une délibération.

Dalloz, 1887-3-72; Dalloz, 1889-3-68; Dalloz, 1892-5-128; Dalloz, 1902-3-33.

Mais des arrêts plus récents ont décidé qu'un contribuable d'une commune a intérêt en cette qualité de faire déclarer la nullité d'une délibération par laquelle le conseil a inscrit une dépense au budget de la commune.

Je comprends la raison de ces arrêts récents dont parle Dalloz. Le contribuable a un intérêt personnel à ce que le budget d'une municipalité ne soit pas il-

(1) 15 L.C. Jur. 60.

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légalement augmenté parce qu'alors il sera appelé à payer un plus fort montant de taxes.

Au No. 506 Dalloz, vo. Commune, ajoute qu':—

Un contribuable n'est pas recevable à demander que les délibérations relatives à l'érection d'une statue et à la dénomination d'une rue soient déclarées nulles alors qu'il ne justifie d'aucun intérêt personnel et que les délibérations attaquées n'engagent pas les finances municipales.

Le droit pour un contribuable de demander l'annulation d'ordonnances municipales sort des bornes ordinaires de la loi commune.

On ne peut avoir recours aux tribunaux en principe général que pour la conservation de nos droits personnels. Mais dans le cas d'une demande en cassation de règlements municipaux, le contribuable exerce une action populaire et s'il réussit ils seront cassés et annulés non-seulement quant à lui mais aussi quant à tous les autres contribuables. On plaide alors non-seulement pour soi-même mais aussi pour autrui. Il est d'ordre public que ce droit de poursuite ne soit exercé que conformément aux règles prescrites par la loi qui l'a créé.

On dira peut-être que ces restrictions pourraient avoir pour effet de faire perdre aux tribunaux le contrôle que l'art. 50 du Code de Procédure leur donne sur les corps municipaux.

Cette objection ne saurait être fondée car si une corporation municipale adoptait une résolution ou exécutait un contrat entièrement *ultra vires* le contribuable pourrait alors avoir recours au Procureur-Général sous l'article 978, C.P.Q., pour avoir un redressement de ses griefs.

Pour toutes ces raisons j'en suis venu à la conclusion que le demandeur n'avait pas le droit dans les cir-

constances de prendre une action directe. Son appel doit être renvoyé avec dépens.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Perron, Taschereau, Rinfret, Genest, Billette & Plimsol.*

Solicitors for the City of Montreal, respondent: *Laurendeau, Archambault, Lavallée, Damphousse, Jarry, Butler & Saint-Pierre.*

Solicitors for the Canadian Autobus Co., respondent: *Bisaillon, Bisaillon & Pepin.*