SELECTIONS.

LIABILITIES OF MUNICIPAL CORPORATIONS FOR CONSEQUENTIAL DAMAGES.

I. How far a municipal corporation, acting under its lawful and undisputed powers, such as the laying out, opening, and grading of streets, &c., may be liable for consequential damages to property-owners, has within the last few years been extensively discussed. So far as private property is taken for public use, the rights of the owners are protected under the provisions of all the state constitutions in regard to such taking; but there are numerous cases in which no property was actually taken for public use, and yet substantial damages resulted to individuals from the progress of changes made for the public benefit and by the public authorities, and for this damage the owners have sought to recover compensation under the constitutional protection referred to. With the exception, however, of some cases in the State of Ohio, which will be noticed presently, the decisions have been uniformly against the right to recover, the provision in the constitution being held to refer only to a *taking* of property, and any damage merely consequential from a lawful action being *damnum absque injuria*. Thus, in Pennsylvania, *Green* v. *Borough of Reading*, 9 Watts 382, where it was first held that a municipal corporation is not liable for damages caused by the opening of a street. *Mayor* v. *Randolph*, 4 W. & S. 514, where it is said, that the motives of the corporation are not the subject of inquiry, and it is not liable, therefore, though its motives may have been merely to benefit its private property; and *O'Connor* v. *City of Pittsburgh*, 6 Harris (18 Penn. State Rep.) 187, where the city was held not liable for damage from the change of grade of a street, though the building was conformed to the grade previously established by law.

In Ohio, however, it was held in *Rhodes* v. *City of Cleveland*, 10 Ohio 159, that municipal corporations are liable, in the same manner as individuals, for injuries done, although the act be not beyond their legal powers. And in *McCombe* v. *Town Council of Akron*, 15 Ohio 476, the court went further. The plaintiff's house stood higher than the street grade as adopted by the Town Council, and by the cutting down of the street his house was injured, without any fault of the Council or their agents in performing their work. The court, basing its decision on the broad ground of justice, that he should receive compensation for an undeniable injury, avowedly went beyond precedents, and permitted the plaintiff to recover. BIRCHARD, J., dissented, and delivered an opinion showing very clearly that a private person would not be liable on the same state of facts, and that the decision was going far beyond what was called for by the case of *Rhodes* v. *Cleveland*. The court, however, adhered to its decision on second hearing: *Akron* v. *McCombe*, 18 Ohio 229: and the decision was afterwards affirmed in *City of Dayton* v. *Pease*, 4 Ohio, N. S. 80.

II. The basis of the decision in the foregoing cases, that the corporation is not liable, is, that the duties involved are discretionary and *quasi* judicial, and wherever they partake of that character, the party to whom such discretion is committed by the sovereign authority, is exempt from question as to the manner of exercising it, and from liability for the results that flow therefrom. If the exercise of the corporation's judgment in a particular case could be questioned in an action at law, the result would be ultimately to remove the discretionary power from the corporation and put it into the hands of the court and jury, a result clearly shown and deprecated in the principal case of *Carr et al* v. *Northern Liberties*, 11 Casey (35 Penn. State Rep.) 329.

The precise point, therefore, at which municipal duties cease to be discretionary or *quasi* judicial, and become merely ministerial, is of great importance, and has been much discussed, especially in the state of New York. It is thus expressed by SLOSSON, J., in *Lacour* v. *Mayor, &c., of New York*, 3 Duer 406: "A public officer is not amendable to an individual in a civil action for the exercise, or the refusal or neglect to exercise a judicial duty, but the moment the duty ceases to be of this character, which it does when the election to perform it is made, this immunity also ceases. The execution of the work itself is purely ministerial, and thenceforth the public officer is liable in damages for the improper or negligent exercise of the duty."

From this distinction it follows that, while a municipal corporation is not compellable by a civil action for damages, to exercise its discretion in any particular manner, or at all in any particular case, yet, when it has decided, and undertaken a work, it is to be held to the same rule of carefulness and skill in the performance of it as a private individual; and there are numerous cases, accordingly, in which damages have been allowed to be recovered against such corporations. And the distinction thus indicated has been adhered to with great unanimity wherever the question has arisen, unless it be in the case of *The Mayor, &c., of Baltimore* v. *Marriott*, 9 Md. 160. In that case the plaintiff, in passing over a pavement covered with ice, fell and was injured, and brought an action against the city for damages. There was some evidence that the pavement had been allowed to remain covered with ice for a considerable time, and the recovery, therefore, might have been allowed on the ground of negligence of the city in enforcing its ordinances for cleaning pavements, but the court declared that the action would lie because the city charter contained a provision that the corporation "shall have full authority, to enact and pass all laws * * * and to *prevent and to remove nuisances*." This, it was held, was not discretionary but imperative, and the words "power and authority,"