LEADING CASES

ON

PUBLIC CORPORATIONS

SELECTED BY

H. A. ROBSON, K.C.

AND

J. B. HUGG

Barrister-at-law

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PREFACE.

This collection of cases presents over one hundred judicial discussions of important topics of municipal law dealing amongst others with ultra vires, compulsory purchase, compensation, franchises, misfeasance, nonfeasance, assessment, rates, taxation, tax sales, borrowing, procedure at meetings, contracts, responsibility of members of councils, scrutinies and ballots.

In addition to these purely municipal subjects a few cases are given dealing with officers of general government such as policemen and health inspectors, in respect of whom, though they are appointed by municipal authorities, the doctrine of *respondeat superior* does not apply.

Cases have also been included dealing with the statutory duties of a water company, the liability of an exhibition association in respect of unsafe premises, and the responsibility of a railway company for acts of a policeman employed by them.

While the cases have not been selected with a view to illustrating matters of practice, it will be found that the collection throws a great deal of light on such matters as *quo warranto*, quashing by-laws, injunction, mandamus and actions by the Attorney-General and by ratepayers.

Some of the cases included possibly cannot be termed leading cases. Clear expositions of principles have been sought for rather than cases in which principles have been first laid down.

Not the least interesting feature of the cases is the opportunity they afford of examining side by side the considered work of the representative English and Canadian Judges.

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H. A. R.
J. B. H.

Winnipeg, December, 1915.

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Powers of Statutory Corporations.

ATT.-GEN. v. LONDON COUNTY COUNCIL.

70 L. J. Ch. 367; 71 L. J. Ch. 268.

COURT OF APPEAL AND HOUSE OF LORDS.

The London County Council under statutory powers acquired certain tramways. Omnibuses had been operated by the tramways company as feeders to the tramways. The County Council continued to operate omnibuses as had been done by the tramways company, and extended the omnibus service to other districts, where the service was used by persons who were not intending to use the tramways. This action was brought by the Attorney-General on the relation of certain omnibus proprietors and by the proprietors as ratepayers claiming that the operation of omnibuses for reward by the County Council was *ultra vires*.

Cozens-Hardy, J., considered that the council could not carry on a separate and distinct business as omnibus proprietors. This view was upheld by the Court of Appeal and the House of Lords.

COURT OF APPEAL.

RIGBY, L.J.—The first question, or at any rate one that it will be convenient for us first to deal with, is the question as to the legal situation of the London County Council. They are constituted by statute. They are, in fact, incorporated by section 79 of the Local Government Act, 1888. So far, the Council is a statutory body, and not a common-law corporate body at all. It was argued that under section 2 of the Act of 1888 the council of a county and the members thereof are to be in the like position in all respects as the council of a borough divided into wards, and that under section 10 of the Municipal Corporations Act, 1882, the council of a municipal corporation can perform the

duties of a corporation. It was also said that municipal corporations are really creations not of an Act of Parliament, but of Royal charter in each individual case, and, although their proceedings are regulated by Act of Parliament, that does not prevent them from being, in effect, corporations by Royal charter, or what may be called corporations at common law, and that such corporations are not within the doctrine laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), and subsequently in several cases, including *Wenlock (Baroness)* v. *River Dee Co.* (2)—namely, that there must be found within the four corners of the Act of Parliament something to justify the assumption of the power which they claim to exercise, and, if there be nothing in the Act to justify the assumption of such power, then the power does not exist. It was said—and no doubt it is to a considerable extent true—that the doctrine does not apply to a corporation not created by Act of Parliament, because it existed by the grant of a Royal charter, and that, inasmuch as a municipal corporation is not within that doctrine, the council of a municipal corporation is able to do in the name, and on behalf of, the corporation, many acts which are not included in any statute, but which are within the general powers of a common-law corporation. Granted that that is the case, how does section 2 of the Act of 1888 make a county council capable of exercising the same powers? The provision is not that they shall have the same powers and authorities that the council of a municipal corporation has, but that the County Council "shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough." It is clearly those last words, if any, that could be construed as giving powers outside any statute. But it is to be subject to the provisions of the Act. It is therefore subject to section 79, and to the creation of the County Council as a statutory corporation thereunder. That puts the County Council in a different position from the council of a borough, and is, I think, quite sufficient to dispose of the suggestion that the Council can exercise common law powers of corporations created by Royal charter, although the council of a borough may do so. I hold, therefore, that section 2 of the Act of 1888 has no such effect as that attributed to it, and does not enable the London County Council to exercise any other powers than are contained in and conferred upon them by statute.

(1) [1875] 44 L. J. Ex. 185; L. R. 7 H. L. 653.
(2) [1888] 57 L. J. Ch. 946; 38 Ch. D. 534.

The next question is whether the London County Council have by any statute whatsoever the power to run omnibuses. Section 2 of the London County Tramways Act, 1896, clearly enables the London County Council to work the tramways which were transferred to them under statutory powers. It was argued that by virtue of this section the London County Council acquired the right of running, at all events, the same tramways that were run by their predecessors. Those predecessors were at the time of the transfer in effect possessed of two separate and distinct lines, though as one undertaking no doubt, one being the tramway line and the other the "'bus line," and they had the power to use both. It would have been easy to say in section 2 of this Act that the London County Council should have the right to take their whole undertaking, including the omnibus line as well as the tram line. When I say "easy," I mean easy as a mere matter of drafting. That could have been made quite plain; but whether as a matter of Parliamentary policy it would have been easy or even possible I do not know. If the intention of Parliament was that the County Council should carry on the whole of the undertaking in both branches, the tramway branch and the omnibus branch, it would have been easy to say so. Nothing of the sort was said, and it is a very notorious circumstance that there is nothing which clearly refers to the transfer of the whole undertaking and the power to run both tramways and omnibuses. It was said that the power to provide horses, cars, fixed and movable plant, harness, and apparatus, as may be requisite or convenient for enabling the work of the tramways to be carried on, is sufficient for the purpose. I am of opinion that those words do not give the power. The suggestion was made that "cars" meant omnibuses, and not tram cars. I think that a little investigation leads to the conclusion that "cars" was used in the Tramways Acts in reference to tram cars and with the meaning of tram cars. When it is used with regard to omnibuses it seems to be coupled with the word "road." There is a large omnibus concern which is called the London Road Car Co., and "road car" would seem to be used as distinct from "tram car." Therefore I find no power under these general words to take and use the "'bus line." Then there is something further. The London County Council in what they have done—I am by no means prepared to say that it is not very reasonable and very beneficial to the public, if only within their powers under the statutes—have extended what I may call the subsidiary lines beyond where their predecessors ever carried

them. They are therefore not doing the same thing that the London Tramways Co. did, but something different. One difficulty that the London County Council had to deal with was that by section 68 of the Act of 1888 provision was made for payment of all receipts connected with any of their businesses into a fund entitled the "county fund," and for paying out everything that they had to expend from that same fund, so that unless they are authorised as trustees and administrators of that fund to spend the money on the running of omnibuses they have no title to do what they have been doing. Their counsel sought to get over that difficulty by reference to section 21 of the London County Council (Vauxhall Bridge Tramways) Act, 1896, which is in general alien to the questions now before us, although section 21 seems to be admitted to be quite general. There is no necessity under that section for payments into and out of the General County Fund under section 68 of the Act of 1888, but the section is all governed by the words "in connection with tramways"; and if it is not made out that this running of a line of omnibuses is, within the meaning of the statute, part of the tramway scheme, then section 21 of this Act does not help in any way.

With reference to section 31 of the London Tramways Co. Act, 1896, there are no "words" about the 'bus line to be bought, as the omnibuses run over the ordinary street, and the works and property dealt with in that section clearly could not have entitled the Council to any works in connection with the omnibus line; and if it entitled them to purchase omnibus property at all it would only be the omnibuses, and would not give them any power of running the omnibuses.

It was said that although the London County Council may not be expressly authorised to run the omnibuses, yet that it is an undertaking so intimately connected with the powers that are expressly given to the Council of running the tramways, that under the doctrine mainly depending on the judgment of Lord Justice James in *Atty.-Gen.* v. *Great Eastern Railway* (3), it may be treated as tacitly understood as being something belonging to, and so connected with, the other powers which are expressly given as to be really within the statute. It is not to be denied that there are certain things which a statutory corporation may do which are not absolutely mentioned in their

(3) [1880] 48 L. J. Ch. 428, 435; 49 L. J. Ch. 545; 11 Ch. D. 449, 483; 5 App. Cas. 473.

Act, but they must be things of a very different degree of importance from what is sought to be done in this case, that is the running of omnibuses as a separate undertaking; and I cannot read in the observations of Lord Justice James anything to authorise the notion that a separate undertaking might be entered upon, merely because it was thought to be convenient for the purposes of the main undertaking. I find no authority for that at all. Indeed, in the case of *Colman* v. *Eastern Counties* (4) it might well have been argued that to run steamboats from Harwich to the continent was most advantageous for the railway, and therefore ought to be taken as impliedly granted to them for the purposes of their undertaking; but Lord Hatherley would not have it at all. He said it was outside the power given to the railway company by the Act of Parliament, and, however advantageous it might be, there was no authority to do it. This line of omnibuses run by the London County Council may be—and I am willing to assume that it is—very advantageous for themselves and for the public; but if they have no power and no authority by their statutes to run the omnibuses, all that avails nothing. They must show authority to run the omnibuses before they can be allowed to do it.

Then it was said that there was not sufficient public benefit shown to arise from this action, brought in the name of the Attorney-General, to justify it. For my part, I must say that if there be any case in which a public body is going beyond its powers, I do not see any reason why the Attorney-General should not interfere. He, of course, has to consider whether in his discretion it is worth while to interfere before he allows his name to be used; but any attempt to tie him down by rules, which I do not know to exist anywhere, or to tie him down for the first time by rules, should not, I think, be allowed. But in this case it really is not necessary to go into that question, for the relators are also plaintiffs. They are also ratepayers in the county of London, and I think, therefore, that there is no doubt whatever that the action is properly constituted, and the case made against the London County Council properly raised. I do not at all accede to the suggestion which was made by counsel for the respondents that the relators must necessarily be ratepayers, and that there cannot, at any rate as a rule, be an information without the relators being plaintiffs, because that is not a rule and never was. Consider, for example, all the cases of chari-

(4) [1846] 16 L. J. Ch. 73, 79; 10 Beav. 1, 15.

ties, where individuals interested in a charity, who may not be plaintiffs, appear as relators to an information by the Attorney-General. However, as a matter of fact, these relators are also plaintiffs, and we are therefore absolved from any minute enquiry as to the degree of public benefit that may be concerned in the information so as to justify the Attorney-General in bringing the action.

I think that upon all the grounds that have been stated it must be held that the London County Council have no power to run these omnibuses, and the result therefore will be that the appeal fails, and must be dismissed.

HOUSE OF LORDS.

THE LORD CHANCELLOR (EARL OF HALSBURY):—It appears to me that, as far as any question of general law is involved in this case, the whole ambit of the considerations that arise has been completely traversed by the two cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), and *Att.-Gen.* v. *Great Eastern Railway* (2), and I do not think that much would be gained by going through each individual topic of it, because I think now it cannot be doubted that those two cases, if we look at them, do constitute the law upon this subject. It is impossible to go behind those two cases: they are now part of the law of this country, and we must acquiesce in them, whether we like them or not.

Doctrine of Ultra Vires Explained.

ASHBURY v. RICHE.

44 L. J. Ex. 185; L. R. 7 H. L. 653.

HOUSE OF LORDS.

This is a case as to the powers of a company incorporated under the Companies Act, 1862, under its memorandum of association. As the doctrine of *ultra vires* laid down in this case has been held applicable to public corporations, the following excerpt is given:—

THE LORD CHANCELLOR (LORD CAIRNS) said, in part:—In these cases, in a case such as your Lordships have now to deal

with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in that sense. I assume the contract in itself to be perfectly legal; to have nothing in it obnoxious to any of the powers involved in the expressions which I have used. The question is, not the illegality of the contract; the question is, the competency and power of the company to make the contract. I am of opinion that this contract was entirely, as I have said, beyond the objects of the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void for this reason—it was void because the company could not make the contract. If every shareholder of the company had been in this room, and every shareholder of the company had said: "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position to that in which it stands now.

The company would thereby, by unanimous consent, have been attempting to do the very thing which by the Act they were prohibited from doing. But if the company, *ab ante*, could not have authorized a contract of this kind to be made, how could they subsequently have sanctioned the contract after in point of fact it had been made? I have endeavoured to follow, as accurately as I could, the very able argument of Mr. Benjamin at your Lordship's bar upon this point; but it appeared to me that this was a difficulty which he was entirely unable to grapple with. He endeavoured to contend that when a company had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been led, and, therefore, might acquire a power to sanction the contract being proceeded with. I am unable to sanction that suggestion. It appears to me it would be perfectly fatal to the whole scheme of legislation, to which I have referred, if you were to hold, in the first place, that directors might do that which even the company could not do, and that then the company, finding out what had been done, could sanction subsequently what they could not have authorized antecedently. If this be the point of view of the Act of Parliament, it reconciles, as it appears to me, the opinion of all the Judges of the Court of Exchequer Chamber, because I find Blackburn, J., whose judgment was concurred in by two other Judges who took the same view, says: "I do not enter-

tain any doubt that if, on the true construction of the statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and, therefore, wholly void, and to hold that a contract wholly void cannot be ratified."

That sums up and exhausts the whole case. I am of opinion, beyond all doubt, on the true construction of the statute of 1862 creating the corporation, that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to this memorandum of association, into a contract of this description. If so, according to the words of Blackburn, J., every Court, whether of law or equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as void, as *extra vires*, wholly void, and to hold also that a contract wholly void cannot be ratified.

Bad Faith in Exercise of Statutory Powers.

WESTMINSTER v. LONDON & N. W. RY.

[1905] A. C. 426; 74 L. J. Ch. 629.

HOUSE OF LORDS.

The London County Council as sanitary authority (1) had power to construct sanitary conveniences and in the exercise of such powers constructed conveniences beneath the centre of a street with an approach from each side. The approaches taken together formed a tunnel beneath the street which was used by foot-passengers. The plaintiff claimed that the council could

(1) Public Health (London) Act, 1891, sec. 44, sub-sec. 1: "Every sanitary authority may provide and maintain public lavatories and ashpits and public sanitary conveniences other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expenses of providing such lavatories, ashpits and sanitary conveniences, and of any damage occasioned to any person by the creation or construction thereof, and the expense of keeping the same in good order, as if they were expenses of sewerage."

Sub-section 2: "For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority."

not use the subsoil of the highway for the purpose of making a tunnel as had been done under the pretence of supplying conveniences. Joyce, J., at the trial held that the council had acted *bona fide*. The Court of Appeal reversed this holding. The council appealed to the House of Lords.

LORD MACNAGHTEN said, in part:—There can be no question as to the law applicable to the case. It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first. But in the present case, I think it will be convenient to take it separately.

Now, looking merely at what has been done—at the work as designed and actually constructed—it seems to me that, apart from the encroachment on the footway, it is impossible to contend that the work is in excess of what was authorized by the Act of 1891.

* * * * * * *

Then I come to the question of want of good faith. That is a very serious charge. It is not enough to shew that the corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side and the communication is not interrupted by a wall or a barrier of some sort. In order to make out a case of bad faith, it must be shewn that the corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place. That was the view of their conduct taken by the Court of Appeal. "In my judgment," says Lord Justice Vaughan Williams, "it is not true that the defendant corporation have taken this land with the object of using it for the purposes authorized by the Legislature." "You are acting *mala fide*," he added, "if you are seeking to acquire land for a purpose not authorized by the Act." So you are; there can be no doubt of that. The other learned Lords Justices seem to take the same view of the conduct of the corporation. Now this, as I said, is a very serious charge. A gross breach of public duty, and all for a mere fad! The learned Judge who tried the case had before him the chairman of the works committee. That gentleman declared that his committee considered with very great care for a couple of years or more the question of these conveniences in Parliament Street. He asserted on oath that "the primary object of the committee

was to provide these conveniences." Why is this gentleman not to be believed? The learned Judge who saw and heard him believed his statement. The learned Judges of the Court of Appeal have discredited his testimony, mainly, if not entirely, on the ground of two letters about which he was not asked a single question—one written by the surveyor of the parishes of St. Margaret and St. John under the city engineer of Westminster, the other by a person acting for the acting town clerk. The letter of the surveyor was a foolish letter, which the writer seems to have thought clever. The letter of the temporary representative of the acting town clerk, if you compare the two letters, seems to have derived its inspiration from the same source. I cannot conceive why the solemn statement of the chairman of the committee should be discredited on such a ground. I do not think there is anything in the minutes tending to disprove his testimony. I agree with Mr. Justice Joyce that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom.

I have felt more difficulty with regard to the question whether the corporation have acted altogether reasonably—"with judgment and discretion"—as Lord Justice Turner puts it in a well-known case. It seems to me that when a public body is exercising statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it is right—I am sure it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected. I cannot help thinking that if the engineer of the corporation and the engineer of the railway company had been put into communication, some modification of plan might have been suggested which would have obviated all this litigation and expense, and all the litigation and expense yet to come if the Court of Appeal is to take upon itself, as it proposes to do, the functions of a sanitary authority and determine the precise dimensions of approaches to such a place as this. The surveyor thought it politic, and not unworthy of his position as an officer of a great public body, to try and throw dust in the eyes of his correspondent. I do not suppose that the officials of the railway company were put off their guard by the answer which he sent. I have no doubt they knew perfectly well what the corporation proposed to do. But still, the mode in which they were met prevented anything like a free interchange of ideas between these two bodies for their mutual advantage.

The result of these considerations, to my mind, is that, if, at the trial, the respondents had suggested any practical mode of altering or amending the plans that would have obviated the inconvenience which the works as executed must cause to them, I should, speaking for myself, have been disposed to think that an injunction ought to have been granted to secure that object. Unfortunately, the respondents chose to stand aloof, and have given no assistance to the Court. Under these circumstances, I think there is no alternative but to allow the appeal, and to restore the judgment of Mr. Justice Joyce. But I think there ought to be no costs, either here or in the Court of Appeal.

Bad Faith in Refusing Permission to Telephone Company to Use Streets.

BELL TELEPHONE CO. v. OWEN SOUND.

8 O. L. R. 74; 4 O. W. R. 69.

CHANCERY DIVISION ONTARIO.

MEREDITH, J.:—The facts of this case are simple and free from doubt.

The plaintiffs' system of telephone communication has been in operation in the defendants' municipality for some years, and, as usual in this country, by means of overhead wires upon wooden poles. Their office was upon the main street of the town, and the wires were carried into it from two poles—carrying the wires from opposite directions over the main street—on the opposite side of the street to a pole upon the same side and thence into the office. They moved from that office into a new one, next door to it, and it became necessary to move the wires, and that the plaintiffs proposed doing by putting them underground instead of overhead, thus removing one, at least of their large and anything but picturesque poles, and all the danger and unsightliness of a great number of wires thus crossing the main street in two directions. The thing was so obviously better for everyone concerned that it is impossible to imagine any objection in good faith to it. In the interests of the public and in the interests of the defendants, nothing but advantage could come from their changing the mode in

which the wires crossed the thoroughfare. It is plainly insincere and untrue to suggest that the road, or the sidewalk, or the curb, or the gutter, would or could be injured by the work, if done even with ordinary care. It could be done in a few hours, if need be, without inconvenience to traffic at all and without interfering in the least degree with the sidewalk, or curb, or gutter, or doing a particle of injury to any of them or to the road bed. The road is but a macadamized one, and one that is often opened for far less generally useful purposes. Any objection to the work on these grounds is purely a subterfuge to cover some ulterior purpose, and that purpose is plain, namely, to coerce the plaintiffs to pay to the defendants a tax upon their business in the municipality which the defendants have no sort of legal right to enforce or demand. Their objection to the work is not made in good faith, but is for a purpose *ultra vires* and wholly unwarranted.

Both federal and provincial legislation has conferred upon the plaintiffs certain powers in respect of public ways. These powers are conferred quite as much in the public interests and for the benefit of the public as for the private gain of the plaintiffs, and are subject to certain restrictive powers conferred upon the municipalities, these powers being also conferred in the public interests and to be exercised for the public benefit as much as for the protection of the rights and interests of the municipality. Whether federal or provincial legislation is to prevail, or whether both in regard to matters in which there is no conflict between them, are questions not necessarily requiring consideration in this case upon the facts before set out. But it may be said that if provincial legislation prevails, the plaintiffs have undoubtedly the right to carry their wires under the street as they desire to do, and the defendants have no power to prevent the work. In any case, the Legislature has power to legislate as to public ways and municipal corporations, and it may possibly be to confer an additional right upon the plaintiffs in such ways and against such corporations, even if the general right of legislation in respect of the plaintiffs and their undertaking belongs to Parliament. Parliament has clearly and distinctly given the plaintiffs power to carry their wires over or under public streets, but has made that right subject to the restrictive rights before alluded to. The latter rights must be exercised in good faith and for a legitimate purpose, and should be reasonably exercised; instead of that they have been unreasonably exercised in bad faith and for a purpose not authorized or within the power of the defendants, so that whatever those rights may be, the plaintiffs are

entitled to succeed in this action: see *London and North Western R.W. Co.* v. *Mayor of the City of Westminster* (1).

The defendants will, therefore, be perpetually restrained from interfering with the work of the plaintiffs in carrying their wires to their new office under, instead of over, the highway for the purpose of exacting any tax or payment, disconnected from such work, from the plaintiffs, or otherwise than in good faith and in accordance with the federal legislation. Whatever may be the powers of a corporation when the plaintiffs first enter the municipality or when they are making great changes in their works after such entry, in this case, the defendants, acting in good faith, cannot impose restrictions beyond providing for the careful doing of the work and restoration of the street, so that no loss is suffered or injury done to the defendants or to anyone entitled to the use of the highway by reason of the work. It is but a usual thing to provide in municipal by-laws that such work as that in question shall be done under the direction of a competent officer of the municipality, and sometimes the deposit of a reasonable sum of money to insure the doing of the work as so directed, or if not so done, of enabling the corporation to have it so done and to pay for the work out of the money so deposited.

Attempt by Municipal Corporation to Exercise Powers of Trading Corporation.

OTTAWA ELECTRIC LIGHT CO. v. OTTAWA.

12 O. L. R. 290; 8 O. W. R. 204.

COURT OF APPEAL FOR ONTARIO.

The corporation of the City of Ottawa passed a group of three by-laws the first of which authorized the acquisition of a plant from the Consumers Gas Company, the borrowing of money for the purpose and the carrying on of the business of the production, manufacture, use and supply of electricity. The second by-law provided for and authorized the execution of the necessary deeds to complete the purchase, and the third authorized the

(1) [1904] 1 Ch. 759.

execution of an agreement with the Ottawa & Hull Company which provided for a supply of electricity for a period of 18 years. The plaintiffs, an electric light company, were ratepayers of the City of Ottawa and brought this action on behalf of themselves and other ratepayers for a declaration that the by-laws were *ultra vires*.

The Municipal Act authorized the manufacture and sale of electricity by the City corporation and it was contended on behalf of the corporation that to employ independent contractors to manufacture electricity for the corporation was the same thing as if the corporation manufactured electricity itself.

BOYD, C., dismissed the plaintiff's action. On appeal the Court of Appeal declared the third by-law invalid and void.

MEREDITH, J.A., said in part:—The plaintiffs are ratepayers, and sue on behalf of all other ratepayers, as well as of themselves, to have the by-laws in question adjudged invalid, and to prevent anything being done under them. It is their lawful right so to sue, and the fact that they may have other objects in view, and other interests to be benefited, does not deprive them of their right of action as ratepayers.

The main question is whether the defendants have the power to buy electricity for the purpose of supplying it to others.

That they have not seems to me to be very plain. Their power is that which has been conferred upon them by statute, and that only; and the power so conferred is only to produce, manufacture and use, and supply to others to be used, and to buy for their own use. No reasonable construction of any of the Acts can include a power to buy to sell again.

Nothing in any of the Acts aids the defendants' contention, but everything points to their being producers or makers, and not traffickers, of the commodity. I do not comprehend the asserted force of the contention that these powers are to be read distributively; it cannot be that they may produce or manufacture without using or supplying to others; or that they may use and supply to others that which they have not produced or made; and nowhere is any power given to buy for the purpose of supplying others. If the power to supply to others could be said to include the power to buy for that purpose, it quite as well includes the power to produce or make for that purpose, and the expressed power to do so would not be needed.

Whatever the future may bring forth, legislation, up to the present time, has advanced as far only as to permit municipal corporations in general, and this corporation in particular, to become producers or makers of electricity to supply to others, as well as for their own use; but not to become middlemen.

However convenient or proper it might be, we cannot by adjudication turn a municipal corporation into a trading corporation, either generally, or as to any one commodity—a thing which the Legislature has refused to do in this very case, upon the corporation's application for a special Act making lawful that which they desire to do.

Any of the by-laws in question which is not at least part of a scheme for the production and manufacture of the force, or is part of a scheme to buy it to supply to others, is therefore *ultra vires* and ought to be quashed, that being the most appropriate relief in such a case as this. * * *

Statutory Conditions Precedent to Exercise of Powers.

RE WILLIAMS AND BRAMPTON.

17 O. L. R. 398; 12 O. W. R. 1235.

EXCHEQUER DIVISION ONTARIO.

A petition was filed with the council of the town of Brampton pursuant to 7 Ed. VII., ch. 46, sec. 11.(1)

The Council refused to act on the petition and Williams, one of the Councillors, made application for a mandamus requiring the Council and the members thereof to submit a by-law in accordance with the petition.

MEREDITH, C.J., granted a mandamus. His order was reversed by the Divisional Court.

(1) "In case a petition in writing, signed by at least twenty-five per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections, is filed with the clerk of the municipality on or before the first day of November next preceding the day upon which such poll would be held, praying for the submission of such by-law, it shall be the duty of the council to submit the same to a vote of the municipal electors as aforesaid."

In the Divisional Court, ANGLIN, J., said in part:—The appellant takes three objections to the application for *mandamus*: first, that a petition in compliance with the statute R. S. O. 1897, ch. 245, sec. 141 (3), as added by 6 Edw. VII. ch. 47, sec. 24, and amended by 7 Edw. VII. ch. 46, sec. 11, was not filed with the clerk of the municipality; second, that if the municipal council has in good faith determined that the petition is insufficient, the Court will not review that decision upon an application for *mandamus;* and, third, that the applicant failed to shew a demand upon the council that the by-law should be submitted to the electorate, and a refusal to submit it, such as is necessary upon the authority of *Re Peck and County of Peterborough* (1). I shall deal with these three objections in inverse order.

Assuming that there must be a demand other than that which is made by filing a petition in compliance with the statute, I am of opinion that the action of the deputation which waited on the council on the 2nd November was a sufficient demand, and that the attitude and address to the council of Dr. Burns on the 23rd November was a further sufficient demand. There may have been no express refusal by the council formally enunciated, but the proceedings in the council—the course of events—satisfy me that there was a withholding of compliance with the prayer of the petition, a determination not to comply, the equivalent, I think, of a refusal. In committee, the operative clause of the by-law was voted down; in fact, the views adverse to the legality of the petition expressed in the report of Mr. Blain were accepted and acted on. If the applicant for *mandamus* were compelled to await a definite and formal refusal, inaction by the council would put it out of his power to take any effective measures to assert his rights. In such a case, inaction is the most complete and effective refusal: *The King* v. *Brecknock and Abergavenny Canal Navigation Co.* (2). Assuming that the decision in *Re Peck and County of Peterborough* applies, there has been, in my opinion, sufficient demand and refusal established.

The statute is imperative, and it is the duty of this Court, upon the present application, to determine for itself whether or not a petition sufficiently signed has in fact been presented, whatever view the municipal council may have taken of it. The statute confers no discretion upon the council, and it cannot escape the duty imposed by erroneously deciding that the petition is in any respect insufficient.

(1) 34 U. C. R. 129. (2) 3 A. & E. 217, 223.

But upon the main question—whether a petition in compliance with the requirements of the statute was in fact filed, I find myself, with very great respect, unable to agree with the view of the learned Chief Justice of the Common Pleas.

The document actually before the council was in fact signed by only two of the alleged petitioners. Appended to it, when filed with the town clerk, were the signatures of a great many other electors, which had been detached by the Rev. Dr. Burns from the headings to which they were subscribed by the electors, and then attached to this sheet, containing a heading in the same words as that which these electors had in fact signed. It is urged by the respondent that the document thus put together was a petition signed by at least 25 per cent. of the qualified voters of the municipality, because uncontradicted affidavits establish beyond doubt that there was an entire absence of fraud on the part of Dr. Burns, and that the persons whose signatures were sent to the council did in fact sign a petition identical with that presented. There is not the slightest suspicion in this case of any intentional wrongdoing on the part of Dr. Burns. But the fact remains that the document sent to the council was not actually signed by the electors whose names now appear appended to it. To that document as a physical entity they never placed their signatures, and it is not, in my opinion, a petition in writing signed by 25 per cent. of the electors, within the meaning of the statute.

While it may be quite certain that, in the circumstances of the present case, no actual wrong would be done by treating this document as sufficient, it would be extremely perilous to create a precedent which would, as Mr. Haverson very forcibly put it, open the door to frauds of the most dangerous kind—frauds which affidavits of apparently reputable witnesses might successfully cover up. The Courts cannot be too careful to discourage the alteration or mutilation of documents.

Here the statute gives an unusual effect to a petition presented in compliance with its terms. It operates as a command to the council, whose ordinary discretion in dealing with petitions is in this case entirely superseded. It is not too much to require, in such circumstances, a strict performance of that which the Legislature has made the condition precedent to such compulsory action by the council. Under the statute, the council is entitled to have upon its files a petition signed by 25 per cent. of the electors before it can be compelled to discharge the duty imposed on it by the

statute. I can see no difference in principle between the document now before the Court and a document consisting of a replica of those to which the signatures of all the petitioners had been appended, but to which, in fact, not a single signature had been physically subscribed. To require the council to act upon such a document—verified by evidence, however incontrovertible and above suspicion—would be to treat what is really secondary evidence that a petition in terms the same as that presented had been in fact signed by the electors whose signatures are found appended to a paper admittedly not that to which they were subscribed, as equivalent to the original evidence which the presence of the papers actually signed would furnish. The statute, in my view, entitles the council to require the assurance and guarantee of authenticity which the filing of the actual papers to which the signatures of the electors were affixed by themselves alone can afford. The Legislature did not intend that municipal councils should be required, in cases such as this, to weigh the sufficiency of affidavits or to pass upon the credibility or reliability of deponents.

Again, the requirements above alluded to—that there should be proof that there had been demand and refusal as preliminaries to a motion for *mandamus*—serve to indicate that this extraordinary remedy is in a sense *stricti juris*. If the Courts exact that an applicant for *mandamus* shall prove strict compliance with what may be regarded as technical rules governing the right to that relief, they will assuredly require that he shall establish by unexceptionable proof his legal right to the performance of the duty which he seeks to compel. No evidence, however clear, of moral right or of a right merely equitable in character, will suffice. Where the legal right asserted depends upon the fulfilment of a statutory condition, there can be no application of the doctrine *cy pres*. The Court must see that the case is clearly brought within the provisions of the Act. Here the applicant has, in my opinion, failed to shew the filing of such a petition as the statute prescribes.

By-laws Which Discriminate.

JONAS v. GILBERT.

5 S. C. R. 356.

SUPREME COURT OF CANADA.

The City of St. John passed a by-law imposing a license tax of $20 on resident traders and of $40 on non-resident traders. Jonas, a non-resident trader, was summoned before Gilbert, a police magistrate, on a charge of selling without a license, and was fined. He did not pay the fine and Gilbert, as magistrate, thereupon issued a warrant under which Jonas was arrested and imprisoned. Jonas then brought this action against Gilbert, claiming that the by-law was void, that the defendant acted without jurisdiction.

The Supreme Court of New Brunswick gave judgment for the defendant, who appealed to the Supreme Court of Canada.

RITCHIE, C.J., delivered the judgment of the Supreme Court and said, in part:—This Act (1), in my opinion, only contemplated and authorized the establishment of a uniform rate to be paid by persons to be licensed under it, to do business in the said city. I think this general power to tax by means of licenses involved the principle of equality and uniformity, and conferred no power to discriminate between residents and non-residents; that this is a principle inherent in a general power to tax; that a power to discriminate must be expressly authorized by law and cannot be inferred from general words such as are used in this statute; that a statute such as this must be construed strictly; and the intention of the legislature to confer this power of discrimination must, I think, explicitly and distinctly, appear by clear and unambiguous words.

Mr. Cooley, in his work on Constitutional Limitations (2), says:—

"The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations. It is presumed the legislature has granted in plain terms all it has intended to grant at all."

The legislature never could, I think, have intended that the corporation of St. John should have the arbitrary power of

(1) 33 Vict. (N.B.), ch. 4, under the authority of which the by-law in question was passed.
(2) P. 387.

burthening one man or one class of men in favour of another, whereby the one might possibly be enabled to carry on a prosperous business at the expense of the other, but must have contemplated that the burthen should be fairly and impartially borne, and the legislature must be assumed to have been quite alive to the distinction between a general uniform power and a power to discriminate, for by 6 Vict. ch. 38, which they were then altering, authority is given to discriminate between British subjects and aliens, which is entirely ignored in the 33 Vict. ch. 4.

Unless the legislative authority otherwise ordains, everybody having property or doing business in the country is entitled to assume that taxation shall be fair and equal, and that no one class of individuals, or one species of property, shall be unequally or unduly assessed.

Uniformity and impartiality in the imposition of taxes may in many cases, we all know, be very difficult; still, in construing Acts of Parliament imposing burthens of this description, I think we must assume, in the absence of any provision clearly indicating the contrary, that the legislature intended the Act to be construed on the principal of uniformity and impartiality; and in this case, I think it never could have been the intention of the legislature, not only to discourage the transaction of business in the city of St. John, but to do injustice to those seeking to do business there, by granting to any one person or class pecuniary advantages over other persons or classes in the same line of business; in other words, to restrain the right of any particular individual or class to do business in the city by enabling the corporation to favour, by the imposition of a license tax, one individual or class, at the expense of other individuals or classes transacting the same business, thereby enabling certain individuals or classes to do business on more favourable terms in the one case than the other.

I, therefore, think, if the legislature contemplated such a departure from uniformity and impartiality as is established by this by-law, such an intention would have been made apparent on the face of the Act and cannot be inferred, and, in the absence of any such declared intention, I think no power of discrimination such as they have exercised in this by-law has been conferred on the corporation of St. John, and, therefore, the by-law, supposing the local legislature has the power of enacting the 33 Vict. ch. 4, is *ultra vires* of that Act, and, therefore, the defendant had no jurisdiction to act under it or to give it effect as he did.

By-laws Which Discriminate.

ATT.-GEN. v. TORONTO.

23 S. C. R. 514.

SUPREME COURT OF CANADA.

The City of Toronto, by by-law, excepted Dominion Government institutions from the benefit of a discount on water rates paid within a certain time.

The Dominion Government paid the rates under protest and then brought this action to recover the amount of the rebates.

THE CHIEF JUSTICE (STRONG) said in part:—The first objection to this by-law is that it expressly contravenes the general policy of the law in disregarding an express enactment of the paramount legislature as well as a well defined rule of the common law. By the 125th section of the British North America Act it is enacted that:

No lands or property belonging to Canada or any province shall be liable to taxation.

Again, by an ancient and well established rule of the common law, the property of the crown is not subject to a tax imposed by a general law, and in no case unless expressly made so liable by statute.(1) I entirely agree that this by-law does not attempt directly to contravene these provisions of the statute and the general law by imposing a tax or anything in the nature of a tax upon the property of the Dominion; but it does, in my judgment, contravene the general policy of the law embodied in this enactment and rule, when it makes the exemption conferred by paramount legislation and lawful prerogative the condition for discriminating against the crown and compelling it to pay an enhanced price for the water required for use in its public buildings. I can conceive no stronger case of a by-law conflicting with the policy of the law.

Then, a distinct ground for holding this by-law bad, irrespective altogether of the ground before stated, is that it is unreasonable and unfair in making an unwarranted discrimination against a particular consumer of water.

(1) Chitty's Prerogatives of the Crown, p. 377.

By-law Held Not to be Ultra Vires and Unreasonable.

SLATTERY v. NAYLOR.

13 App. Cas. 446, 57 L. J. P. C. 73.

JUDICIAL COURT OF THE PRIVY COUNCIL.

S. interred the corpse of his wife in his family burial place in the Roman Catholic cemetery of P., in New South Wales. He was fined under the terms of a by-law which contained the following clause:

"No corpse shall be interred in any existing cemetery now open for burials within the distance of one hundred yards from any public building, place of worship, schoolroom, dwelling-house, public pathway, street, road, or place whatsoever within the borough."

LORD HOBHOUSE delivered the judgment of their Lordships (1) and said, in part:—The sole question in this case is whether a by-law under which the appellant has been convicted and fined is valid or invalid. * * *

The appellant takes three objections to the validity of the by-law: first, that it is *ultra vires* because it destroys private property; secondly, that it is *ultra vires* because the council have only power of regulating interments, whereas in the cemetery in question, they have wholly prohibited them; and, thirdly, that it is unreasonable. These objections must be judged by reference to the provisions of the Municipalities Act, the material sections being those numbered 153 and 158. The former gives to the council the power of making by-laws to provide for the health of the municipality, as well as to regulate the interment of the dead. * * *

The interment of the dead is just one of those affairs in which it would be likely to occur that no regulation would meet the case except one which wholly prevented the desired or accustomed use of the property. It may well be that a plot of ground, having been originally far from habitations, and suitably used as the burying place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In

(1) Lord Hobhouse, Lord Herschell, Lord Macnaghten, Sir Barnes Peacock, Sir Richard Couch.

such a case, a power to regulate would be nugatory unless it involved a power to stop the burials altogether. Their Lordships hold that the by-law in question is not *ultra vires*, because, in certain circumstances, it may have, as in Mr. Slattery's case it unfortunately has, the effect of taking away an enjoyment of property for which alone that property was acquired and has been used.

The considerations applicable to the second objection have, to a great extent, been anticipated by the answer to the first.

And their Lordships cannot hold that a by-law is *ultra vires* because, in laying down a general regulation for the borough of Petersham, it has the effect of closing a particular cemetery. * * *

The jurisdiction of testing by-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But, in determining whether or no a by-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned.

We are dealing with the proceedings of a local authority in a colony, where the extent of area is large and population grows fast. The Act of 1867 provides methods for the more effectual establishment of local institutions. It creates a representative council, elected annually by the constituency, and gives to it jurisdiction over the large range of affairs enumerated in section 153 and some other sections. By sec. 158 it is enacted that "all by-laws consistent with the provisions of this Act, and not repugnant to any other Act or law in force in the colony of New South Wales, shall have the force of law when confirmed by the Governor and published in the Government Gazette, but not sooner or otherwise." And provision is made for laying copies of such by-laws before both Houses of Parliament.

It is certainly not clear that Courts of law are not precluded by sec. 158 from enquiry whether or no a by-law is reasonable. Sir Horace Davey argued on this point that it is a necessary condition of every by-law that it shall be reasonable, that a power to make by-laws means a power to make reasonable by-laws, and that no by-law can acquire the force of law under sec. 158 except such as are consistent with the implied as well as the express provisions of the Act. According to this argument, the question

whether a by-law is reasonable is only one branch of the question whether it is *ultra vires*.

If it were possible to conceive that a council such as that of Petersham could frame, and that the Governor of New South Wales could confirm and publish, a merely fantastic and capricious by-law, such as reasonable men could not make in good faith, such, for instance, as a by-law providing that the Roman Catholic cemetery should be closed to the Roman Catholic community, but remain available for others, it would raise in a very crucial shape the question whether a Court of law could set it aside as unreasonable. Let it be assumed, notwithstanding sec. 158 of the Act, that such a jurisdiction exists. It is quite a different question whether a by-law can be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of Judges.

Every precaution has been taken by the Legislature to ensure, first, that the council shall represent the feelings and interests of the community for which it makes laws; secondly, that if it is mistaken, its composition may promptly be altered; thirdly, that its by-laws shall be under the control of the supreme executive authority; and fourthly, that ample opportunity shall be given to criticise them in either House of Parliament. Their Lordships feel strong reluctance to question the reasonable character of by-laws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a Court of law, unless it be in some very extreme case, such as has been indicated (1).

Reasonableness of By-laws.

KRUSE v. JOHNSON.

[1898] 2 Q. B. 91, 67 L. J. Q. B. 782.

DIVISIONAL COURT.

The County Council of Kent, claiming to act under their statutory powers, made the following by-law: "4. Playing Musical Instruments, &c.—No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by an inmate of such house personally, or by

(1) See R. S. O. 1914, ch. 192, s. 249, s.-s. 2.

his or her servant, to desist." The appellant was summoned before the magistrates for offending against this by-law, when it was proved that on October 17, 1897, he persisted in singing in a public highway within fifty yards of a dwelling-house, after having been required by a police-constable to desist. It was further proved by the occupier of the dwelling-house that the singing of the appellant and those with him was an annoyance to such occupier. The occupier had not, on the day in question, set the constable in motion, but he had on previous occasions complained to the police of the appellant's singing. The magistrates convicted the appellant, and against that conviction the present appeal is brought. The question reserved for this Court is whether the by-law is valid. If valid, the conviction is to stand.

The appeal was heard before a specially constituted Divisional Court, presided over by LORD RUSSELL OF KILLOWEN, C.J., who said in part:—It is objected that the by-law is *ultra vires*, on the ground that it is unreasonable, and therefore bad. It is necessary, therefore, to see what is the authority under which the by-law in question has been made, and what are the relations between its framers and those affected by it. But first it seems necessary to consider what is a by-law. A by-law of this class we are here considering I take to be an ordinance affecting the public or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not to do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation—see *Edmonds* v. *Watermen's Co.* (1).

* * *

We find that Parliament has thought fit to delegate to representative public bodies in towns and cities, and also in counties, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for good rule and government in their own localities. But that power is accompanied by certain safeguards; there must be antecedent publication of the by-law, with a view, I presume, of eliciting the public opinion of the locality upon it, and such by-laws shall have no force until after they have been forwarded to the Secretary of

(1) [1855] 24 L. J. M. C. 124.

State. Further, the Queen, with the advice of her Privy Council, may disallow the by-law wholly or in part, and may enlarge the suspensory period before it comes into operation. I agree that the presence of these safeguards in no way relieves the Court of the responsibility of enquiring into the validity of by-laws where they are brought in question, or in any way affects the authority of the Court in the determination of their validity or invalidity. It is to be observed, moreover, that the by-laws having come into force they are not like the laws, or what are said to be the laws, of the Medes and Persians—they are not unchangeable. The power is to make by-laws from time to time as to the authority shall seem meet, and if experience shews that in any respect existing by-laws work hardly or inconveniently the local authority, acted upon by the public opinion, as it must necessarily be, of those concerned, has full power to repeal or alter them. It need hardly be added that should experience warrant that course, the Legislature, which has given, may modify or take away the powers it has delegated. I have thought it well to deal with these points in some detail, and for this reason—that the great majority of the cases in which the question of by-laws has been discussed are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think Courts of justice

ought to be slow to condemn as invalid any by-laws so made under such conditions on the ground of supposed unreasonableness. Notwithstanding what Chief Justice Cockburn said in *Bailey* v. *Williamson* (2)—an analogous case—I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. Surely it is not too much to say that, in matters which directly and mainly concern the people of the county who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than Judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of Judges as to what was reasonable—in the narrow sense of that word—the cases in the books on this subject are no guide, for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested. So much for the general considerations which it seems to me ought to be borne in mind in considering by-laws of this class.

I now come to the by-law in question. It is admitted that the County Council of Kent were within their authority in making a by-law in relation to the subject-matter which is dealt with by the impeached by-law. In other words, it is conceded—and properly so—that the local authority might make a by-law imposing conditions under which musical instruments and singing might be permitted or prevented in public places. But it is

(2) [1873] 42 L. J. M. C. 49; L. R. 8 Q. B. 118.

objected that they had no authority to make a by-law on that subject in the terms of this by-law. Further, it is not contended that the by-law should, in order to be valid, be confined to cases where the playing or singing amounted to a nuisance; but the objections are, as I understand them, that the by-law is bad—first, because it is not confined to cases where the playing or singing is in fact causing annoyance, and next because it enables a police constable to bring it into operation by a request on his part to the player or singer to desist. As to the first of these objections, if the general principles upon which these by-laws ought to be dealt with are those which I have already stated, it is clear that the absence of this qualification cannot make the by-law invalid. But, further, such a qualification, in my judgment, would render the by-law ineffective. What is to be the standard of annoyance? What may be a cause of annoyance to one person may be no annoyance, and may even be pleasurable, to another person. Again, who is to be the Judge in such a case of whether there is or is not an annoyance? Is it to be the resident of the house within fifty yards of the playing or singing, or is it to be the magistrate who hears the charge? It is enough to say that, in my judgment, the absence of the suggested qualification cannot make the by-law invalid, even if it be admitted that its presence would be an improvement. As to the second objection—namely, that the policeman has the power of putting the by-law into operation by requiring the player or singer to desist, I again say that, even if the absence of this power would be an improvement and would make the by-law in the apprehension of some more reasonable, it is not on the principles I have already stated any ground for declaring the by-law to be invalid. In support of this objection pictures have in argument been drawn (more or less highly coloured) of policemen who, without rhyme or reason, would or might gratuitously interfere with what might be a source of enjoyment to many. In answer, I say a policeman is not an irresponsible person without check or control; if he acts capriciously or vexatiously he can be checked by his immediate superiors, or he can be taught a lesson by the magistrates should he prefer vexatious charges. If the policeman persisted in saying that the musician should desist when the people in the neighbourhood desire his music, his gratuitous interference would promptly come to an end. Nor is it correct to say (as has been erroneously stated in some of the cases cited) that the magistrate would be bound in every case to convict where the musician did not desist when called upon. It is clear that, under sec. 16 of

the Summary Jurisdiction Act, 1879, the magistrate, if he thinks the case of so trifling a nature that it is inexpedient to inflict any punishment, may without proceeding to conviction dismiss the information. The facts of this case are certainly no illustration of the by-law having been gratuitously or vexatiously put in force. The case states that although it was not proved that the occupier of the house within fifty yards had on the day in question requested the constable to require the appellant to desist, yet it was proved that the singing was an annoyance to the occupier, and that he had on previous occasions complained to the police of such singing. Indeed, it was stated during the argument that the conviction here appealed from was the second conviction of the appellant for an offence against this by-law. * * *

I have said that there are few of the prior cases dealing with this matter which lay down the principles upon which the by-laws made by representative public bodies are to be considered. There is one notable exception. I refer to the case of *Slattery* v. *Naylor* (3). That was a case in the Privy Council, in which the members of that Court had to consider the validity of a by-law passed by the municipal council of the borough of Petersham, in New South Wales, under the provisions of the Municipalities Act, 1867. The Court consisted of Lords Hobhouse, Herschell, and Macnaghten, Sir Barnes Peacock and Sir Richard Couch. That case has been so fully discussed during the course of the argument that I do not think it necessary here to refer to it in detail. It is enough to say that, beyond doubt, the reasoning and principles on which it proceeds fully justify the views which I have expressed in this judgment. Nor are the weight and value of the reasoning in that case, as an authority in the present case, in any way lessened by the fact that the by-law there was made under the authority of a different statute. The cases are strictly analogous, and it was necessary for the judgment of the Privy Council that that tribunal should consider the principles upon which by-laws of representative governing bodies made under statutory authority should be considered. That it has done thoroughly and clearly. In my opinion, judged by the test of reasonableness, even in its narrower sense, this is a reasonable by-law; but, whether I am right or wrong in this view, I am clearly of opinion that no Court of law can properly say that it is invalid. In the result the conviction appealed from must, in my opinion, be affirmed; but, as the question is one of wide importance, and as to which there has been a contrariety of judicial opinion, it will be affirmed without costs.

(3) [1888] 57 L. J. P. C. 73; 13 App. Cas. 446.

Ultra Vires By-law.

TORONTO v. VIRGO.

[1896] A. C. 88, 65 L. J. P. C. 4.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

This was an appeal from a judgment of the Supreme Court of Canada reversing the decisions of the Court of Appeal for Ontario and of Galt, C.J.O. The question for decision was whether or not a section of a by-law passed by the City of Toronto was valid.

LORD DAVEY delivered the judgments of their Lordships and said in part:—It appears to their Lordships that the real question is whether under a power to pass by-laws "for regulating and governing" hawkers, &c., the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city, no question of any apprehended nuisance being raised. It was contended that the by-law was *ultra vires*, and also in restraint of trade and unreasonable. The two questions run very much into each other, and in the view which their Lordships take it is not necessary to consider the second question separately.

No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and, to a certain extent, as to place, where such restrictions are, in the opinion of the public authority, necessary to prevent a nuisance, or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it: and, indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit, it did so by express words. * * *

It is argued that the by-law impugned does not amount to prohibition, because hawkers and chapmen may still carry on their business in certain streets of the city. Their Lordships cannot accede to this argument. The question is one of substance, and should be regarded from the point of view as well of the public

as of the hawkers. The effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the city of buying their goods of, or of trading with, the class of traders in question. And this observation receives additional force from the very wide definition given to "hawkers" in the Act. At the same time, the "hawkers," &c., are excluded from exercising their trade in that part of the city. There was no evidence, and it is scarcely conceivable that the trade cannot be carried on without occasioning a nuisance. The appellants, in their printed case, wisely disclaim any intention on the part of the council to discriminate against hawkers and pedlars in favour of permanent shopkeepers. No other explanation of the object of the by-laws is offered. The question, therefore, is reduced to a bare question of power.

Their Lordships, on the whole, have come to the conclusion that it was not the intention of the Act to give this power to the corporation. They therefore agree with the majority of the Judges of the Supreme Court, and will humbly advise her Majesty that this appeal be dismissed with costs.

When By-laws Must be Strictly Construed.

MERRITT v. TORONTO.

22 O. A. R. 205.

COURT OF APPEAL FOR ONTARIO.

The City of Toronto refused to grant Merritt an auctioneer's license on the ground that he was a person of notoriously bad character. Merritt tendered the proper fee and brought this action to compel the city to grant him a license.

Rose, J., upheld the plaintiff's claim. The city appealed.

OSLER, J.A.:—So far as this appeal is concerned, the action is to be regarded as brought for a declaration that the defendants are not entitled to refuse to grant the plaintiff an auctioneer's license and to compel them to give such license, he having paid or tendered the proper fee as required by the defendants' by-law in that behalf, and for a declaration that so much of the said

by-law as purports to give the defendants or their officers power to refuse a license when the applicant's character is not satisfactory to the police or other officers of the corporation, or for any other reason than nonpayment of the license fee, is bad, as being beyond the powers of the corporation.

The defendants justify their refusal on the ground that from information received by them they in good faith believed that the plaintiff was a person of notoriously bad character and of ill-repute, to whom they would not be justified in granting a license to carry on the business of an auctioneer, and they rely upon their by-law.

To this defence there was a demurrer, which Rose, J., allowed, and his judgment is the subject of the appeal. There was a further question before him as to the defendants' right to refuse to consent to a transfer to the plaintiff of a license which they had previously granted to a third person, but the judgment on that point is not complained of by the respondent.

This case does not present any peculiar difficulty, but there is an important principle involved in it. Municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts. *A fortiori* should this be so where their by-laws are directed against the common law right, and the liberty and freedom, of every subject to employ himself in any lawful trade or calling he pleases.

The corporation has chosen to enact, first, that no one shall carry on the respectable business of an auctioneer without a license, and, second, that no one shall have a license to carry on such business unless his character shall be first reported on and approved by the police. The first is within their power; the latter as clearly is not.

Section 286 of the Municipal Act, [55 Vict. ch. 42 (O.)] enacts that no council shall have the power to impose a special tax on any person exercising any trade or calling within the municipality or to require a license to be taken out for exercising the same unless authorized or required by statute to do so. The Constitutional Act, [30-31 Vict. ch. 3 (Imp.)] sec. 92, sub-sec. 9, enables a provincial legislature to make laws in relation to shop, saloon, tavern, auctioneer and other licenses, for the purpose of raising a revenue for provincial, local or municipal purposes; and sec. 495, sub-sec. 2 of the Municipal Act enables a

city, town or county council to pass by-laws "for licensing, regulating and governing auctioneers and other persons selling or putting up for sale goods, wares, merchandise or effects by public auction, and for fixing the sum to be paid for every such license and the time it shall be in force."

No other section of the Act has been pointed out which can reasonably be construed as enlarging a power to license, regulate and govern auctioneers into one to refuse a license altogether in the discretion of an official named by the council, for that is the power which this by-law purports to confer. Taken by itself, an enactment which confers a power to pass by-laws for the purpose of licensing, negatives the existence of a power to prohibit. The common law right is or may be so far restrained, but no further, that a license to exercise it on payment of a nominal or reasonable fee may be required by the delegated authority of the legislature. Any one who is willing to pay this fee is entitled to the license, and when licensed must submit, if the legislative power has been further delegated, as it is by the section in question, to such reasonable provisions and restrictions for regulating and governing him in exercising his right as the council see fit to impose. The fallacy of the argument for the appellants as to the construction of the section is that in assuming the exercise of the trade or calling of an auctioneer to be a mere privilege grantable in the discretion of the council (in which case they might perhaps attach such conditions as they pleased to the acquirement of it) instead of a common law right, to the exercise of which they may attach by the authority of the Legislature the condition of taking out a license, and may regulate and govern the holder of such license. Where the Legislature has meant to confer a larger power on the council, as for example, to prevent the exercise of any trade or calling or to limit the number of those by whom it may be carried on, it has usually said so in plain language, and there is nothing in this section to shew that a larger interpretation of the language is called for than the words used, in their plain meaning, import.

The respondents relied on the case of *Slattery* v. *Naylor* (1) in support of the contention that under a power to license, a power to prohibit might exist. The power there considered was one to license, etc., cemeteries, and the Court had no difficulty in arriving at the conclusion, having regard to the subject of the enactment and to other provisions in another statute, that there was power to prevent altogether the use of cemeteries within the

(1) 13 App. Cas. 446.

municipality. That was a very different case from the present in every aspect of it, and it is, if I may say so, well distinguished in the judgment of Mr. Justice King, in *Virgo* v. *Toronto* (2) at p. 475, a case in which sub-sec. 3 of sec. 495 was in question, and in which this Court was of opinion, differing from the Supreme Court, that under a power to license, regulate and govern, the council might define a part of the municipality in which the business or calling of hawkers or petty chapmen should not be carried on.

If the council can enact as they have done here, what is to prevent them from requiring the applicant for an auctioneer's license to produce as a condition of obtaining it, a petition signed by a prescribed number of ratepayers? Yet that, in the case of a tavern license, depends upon the express authority of sec. 11 of the Liquor License Act (R. S. O. ch. 194), as also does the right to require a report as to the character of the applicant for such license. We can hardly infer the existence of the larger power from more limited words. And if the applicant for an auctioneer's license may be made dependent upon the opinion of the police as to his character, why may not any other personal disqualification be attached to him, as, for example, his having been convicted of felony or any other offence?

In *Regina* v. *Vine* (3) such a disqualification was only attached by the plain language of the statute, which enacted that no license should be granted to such a person. We should expect our Legislature to speak not less clearly. The decision now in appeal has indeed been recognized by them, as the sub-section of the section in question has been amended as to auctioneers by enabling the council to prohibit the granting of licenses, to persons "not of good character": 57 Vict. ch. 50, sec. 8 (O.). Persons not of good character may, however, still be hawkers and pedlars, though it might well be thought that the limitation ought also be applied to them.

We are not called upon to express an opinion as to the prudence of such legislation, penalizing persons who desire to earn an honest livelihood, but the facility with which it may be obtained ought at least to induce us not to give a larger reading to sections empowering a council to pass by-laws of this kind than the language strictly calls for. For myself, I must say that I have never felt any doubt that my brother Rose's decision was a right and just one, and therefore, that this appeal should be dismissed.

(2) 22 S. C. R. 447. (3) L. R. 10 Q. B. 195.

Responsibility of Public Corporation for Negligence of Officers and Servants.

MERSEY DOCKS v. GIBBS.
MERSEY DOCKS v. PENHALLOW.

L. R. 1 H. L. 93; 35 L. J. Ex. 225.

HOUSE OF LORDS.

A bank of mud was allowed to remain in the entrance of the Mersey Docks, on which the ship Sierra Nevada struck in endeavouring to enter the dock. The ship and the cargo were damaged. Actions for damages were brought by Gibbs, the owner of the ship, and Penhallow, the owner of the cargo, against the Docks Board. The Docks Board carried out duties for the general benefit of the public and the members of it received no emolument. No improper conduct on the part of the Board was established but the Board by its servants had the means of knowing the state of the dock. The Board claimed that as trustees for public purposes that they were not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants to perform the duties imposed on the corporation or at all events that their duty was limited to exercising due care in the choice of their officers and that if they had properly selected their officers any evil which ensued must be the fault of the officer and that redress for it must be sought from him.

LORD WENSLEYDALE.—The Court of Exchequer Chamber, in both these cases, founded their judgment on that of the Exchequer Chamber in the case of *The Lancaster Canal Company* v. *Parnaby* (1) in which case there was a company incorporated by act of parliament, for the purpose of maintaining a canal, to be open for the use of the public on payment of rates, which the canal company might receive for their own benefit (that is, the profits to be divided amongst the shareholders); and the Court held that the common law imposed a duty on the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for the use of all that might navigate it, that they might navigate it without damage to their lives or property.

(1) 11 Ad. & E. 230; s.c. 9 Law J. Rep. (N.S.) Exch. 338.

Of the propriety of this decision there could be no doubt, where the profits were received for the benefit of the company. In the present case, the dock board do not receive the rates for their own use, but to be applied to great public purposes for the benefit of all the subjects of the realm; that is, to maintain the docks for any who choose to frequent them, and to pay the debt incurred in their construction; and the Court decided that there was no difference between that case and the present.

If this question were *res integra*, not settled by the authority of decisions, I am strongly inclined to think that this decision of the Courts could not be supported. It would appear to me that this case falls within the principle of those cases which have decided that when a person is acting as a public officer on behalf of Government, and has the management of some branch of government business, he is not responsible for the neglect or misconduct of servants, though appointed by himself, in the same business. This was the principle of the decision in *Lane* v. *Cotton* (2) and *Whitfield* v. *Le Despencer* (3) and other cases. The subordinates are the servants of the public, not of the person or persons who have the superintendence of that department, even if appointed by them.

Thus, the Postmaster-General, who has the management of one department of the public service—the duly receiving and conveying and delivering letters from and to different places, which is eminently beneficial to the whole community, and causes profit to the Government—is not responsible for any of the servants of the Post-office department, though he might appoint or dismiss them; and whether the Postmaster-General be an individual, as he is now, or two, as in the case of *Whitfield* v. *Le Despencer* (3) or if more, however numerous, or the Crown were to make a corporate body for the regulation and government of the Post-office, neither individuals nor a corporate body would be responsible for the neglect of their servants. In this case, if there had been a Postmaster-General for all the ports of England, to take care that the receipts and discharge of goods and the repairs of ships should be easy and convenient, and the receipt of Customs duties convenient; or suppose his duties to be limited to a certain number of ports, or suppose a corporation were appointed instead of an individual, would it cause that corporation to be responsible for the defects of its officers, by whom alone they act in the management of the docks, and in the due discharge of its duties towards the public, on whose behalf it was acting?

(2) 2 Ld. Rayn. 646. (3) Cowp. 754.

If we had now only to review a great number of cases connected with this subject decided in different Courts, many contradictory and very many unsatisfactory, I should be disposed to abide by the decision of the case of *Metcalfe* v. *Hetherington* (4) where the trustees and managers of the harbour were held not to be responsible for the default of the persons actually employed in conducting the business of the harbour.

If this case depended only on the decision of the Courts below, I should feel great difficulty indeed in supporting the decision of the Court of Exchequer Chamber; but I cannot help thinking that the decisions of your Lordships' House, which are, no doubt, binding upon your Lordships and all inferior tribunals, have gone so far that they have concluded the question, and ought to be considered as deciding that the appellants are responsible. In the case of *The Mersey Docks and Harbour Board Trustees* v. *Cameron* (5) and *Jones* v. *The Mersey Docks and Harbour Board Trustees* (5), in July, 1864, your Lordships, upon a full review and consideration, after a difference of opinion between the consulted Judges, decided that the appellants, the Mersey Dock and Harbour Board, were liable to be rated as occupiers, though they occupied those docks for the purposes of those who frequented the port, and derived no benefit from the occupation; and that they did not occupy for public purposes in such a sense as to exempt them from liability to poor rates.

It seems to follow, therefore, that they were not considered as being on the same footing as occupiers of public buildings for Post-office or other Government purposes, but were liable as mere private individuals; and if so, it is difficult to say that they were acting on behalf of the public for the public benefit, and, therefore, were irresponsible for the neglect and default of their servants, by whom alone they could act. Whether they were acting for the benefit of the public or not, seems to be decided by that case.

As we are bound by your Lordships' decision, the opinion of the learned Judges, delivered by Mr. Justice Blackburn, must be considered as correct, and therefore ought to be affirmed.

The Lord Chancellor (Lord Cranworth) and Lord Westbury gave reasons for reaching the same conclusion.

(4) 11 Exch. Rep. 257; s. c. 24 Law J. Rep. (N.S.) Exch. 314.
(5) 35 Law J. Rep. (N.S.) M. C. 1.

Obstructing a Highway by Placing a Rail Across It.

WINTERBOTTOM v. DERBY.

L. R. 2 Ex. 316; 36 L. J. Ex. 194.

COURT OF EXCHEQUER.

The defendant wrongfully obstructed a public footway by placing across it certain rails whereby the plaintiff was prevented from passing and incurred expense in removing the obstruction. The jury gave a verdict of £4 damages for the plaintiff. The defendant moved the Court of Exchequer for a rule to enter a nonsuit.

KELLY, C.B.—I am of opinion that the rule should be made absolute to enter the verdict for the defendant, upon the issue joined upon the plea of not guilty. There is an issue joined on the right of way with which we do not intend to interfere, and the rule will simply be to make the rule absolute to enter the verdict for the defendant upon the plea of not guilty. It is an action of trespass, and, without going minutely into the pleadings, the point which arises for our consideration is, whether the action is maintainable. Now, I think the rule of law to be deduced from the cases from the very earliest in the books down to that recently decided in the House of Lords is, that in order to enable the plaintiff to maintain an action of this nature, he must shew a particular damage resulting to him, not the mere damage naturally and necessarily arising to all Her Majesty's subjects entitled to use the way. Let us look at one or two of the leading authorities on the subject. The great and leading case which, in truth, has laid the foundation of the rule of law on this subject, is the case of *Iveson* v. *Moore* (1). There it was very distinctly laid down by Lord Holt, and other Judges, that there must be a particular damage to a particular person to entitle him to maintain an action, and that, otherwise, this inconvenience and injustice would follow, that there might be an indefinite number of actions brought whenever there happened to be an obstruction to a public highway. It was observed in the course of the argument that people should take care not to violate the law by setting up illegal obstructions in a highway; but it must be remembered that,

(1) 1 Ld. Raym. 486.

in a great number of cases, public duties are cast on public officers, who are often obliged to set up what may be an obstruction to a highway. For example, commissioners of sewers, or gas companies, or commissioners for drainage or for paving and lighting, may necessarily require to create an obstruction in the highway. Suppose that it turns out there was some want of authority in their appointment, or some unintentional and accidental deviation from the strict language of the statute from which they derive their powers, so as to make the obstruction in question an illegal obstruction, they would be subject to an indictment; but if we were to hold that every one who had walked up to the spot and found the obstruction and walked back again, or thought it necessary to remove it, and incurred some expense in removing it for his own convenience, could bring an action of trespass, or an action on the case, I see no limit to the multiplicity of actions which would be brought, or to the vexation, inconvenience and injustice which would result from the establishment of such a rule of law.

Now, let us see what is the general nature of the case, in which it has been held, and properly held, that an action is maintainable. Take the case of *Iveson* v. *Moore* (1). There the plaintiff was possessed of a colliery, and in order to obtain the profits of his trade, he was obliged to take laden carts and waggons along the highway in question almost every day, and perhaps many times in the course of the day, for the conveyance of the coals from his colliery. He must be taken to have shewn that, by reason of the obstruction of the highway, he himself personally and particularly had sustained a serious and pecuniary damage. That was special damage, which clearly entitled him to maintain an action. Let us look at another case; and for that purpose, without going through a number of authorities cited on one side and the other, I take that which is apparently most in favour of the plaintiff of all the cases which have been submitted to our attention. I mean the case of *Harl* v. *Basset* (2). There the plaintiff, a farmer of tithes, was obstructed in carrying the tithes to or from his premises in the exercise of his office. It is impossible not to see that that must have been attended with considerable pecuniary loss and damage to him. He was obliged to take away the tithe within a reasonable time from every tithe-payer in the parish, and was liable to an action if he allowed it to remain there an unreasonable time, or till it sustained injury from wet weather or wet ground. Therefore, at the peril of a liability to an action, in

(2) T. Jones, 156; and 4 Vin. Abr. 519.

which substantial damages might be recovered against him, he was obliged to use the way in the exercise of his calling, and in the discharge of the duties of the office which he had undertaken. It is clear that that was a case in which there was a personal and particular pecuniary damage resulting to the one particular person or individual who brought the action. When we look to the cases on the other side in which it has been held that an action is not maintainable, I must say that I concur with what the Lord Chancellor said, in the House of Lords, in the case of *Ricket* v. *The Metropolitan Railway Company* (3), that it is impossible altogether to reconcile them; but it is impossible also to consider the circumstances of that case, and the observations of the learned law lords who ultimately decided it, without seeing that they were of opinion, and I think justly of opinion, that the law had been carried too far in the direction of allowing persons to maintain actions of this description. I think, therefore, that in a case like this, where there was no peculiar pecuniary damage (except that to which I will refer presently), where, as it appears, the plaintiff on one occasion, probably taking a walk for pleasure, met with the obstruction, and turned back again, and on other occasions removed the obstruction, suffering an inconvenience common to all who under any circumstances passed that way, to hold that an action is maintainable, would be to say that it is impossible to imagine a case in which any one who may go along the carriageway until he meets with an obstruction, would not be entitled to maintain an action.

Then we come to the particular allegation in this declaration, that by reason of the obstruction the plaintiff was obliged to incur a certain expenditure in order to remove the obstruction, and exercise the right of passing along the way in question. That raises the question whether that sort of pecuniary damage is such a special damage within the rule as would entitle the plaintiff to maintain an action. I think it is not. If it were so, again the action would be maintainable by any one of Her Majesty's subjects, who would thus be able to raise the question of the legality of the obstruction of the highway, not only by indictment, but also by action. No doubt a person who, for the purpose of using a highway, removes an obstruction, in most cases incurs some expense; but he does so in the exercise of a right, and for the purpose of raising the question of a right common to the whole of Her Majesty's subjects. That

(3) 5 Best & S. 156; s. c. 34 Law J. Rep. (N.S.) Q. B. 257; in Ex. Ch. affirmed in House of Lords, 36 Law J. Rep. (N.S.) Q. B. 205; s. c. 2 Law Rep. H. L. 175.

question must be raised by a person wishing to raise it, either by indictment or by his subjecting himself to an action of trespass by removing the obstruction; and to say that one who does that is entitled to maintain an action for the expense incurred, is again to say that, without sustaining any special damage, which is not common to all Her Majesty's subjects having a right to enjoy the highway, any person may maintain an action. Looking at all the authorities, and especially at *Iveson* v. *Moore* (1), and the last and greatest of all cases, *Ricket* v. *Metropolitan Railway Company* (3), I think that the true principle of the law is, that he only who has sustained a damage peculiar to his own person, or to him in the exercise of his trade or calling, is entitled to maintain this action. A person who merely passes along the highway and meets with an obstruction, and turns back, or thinks fit to remove the obstruction for the purpose of raising the question of the right to the highway in a Court of law, cannot do so. To hold otherwise would be to hold, in contravention of the principle of law to be deduced from the whole of the authorities, that it is open to all Her Majesty's subjects to do so. I am of opinion, under these circumstances, that the rule for a new trial must be discharged; but the rule for entering the verdict for the defendant on the plea of not guilty should be made absolute.

MARTIN, B., and CHANELL, B., agreed with the result.

Failure to Keep Waterpipes Charged at Statutory Pressure.

ATKINSON v. NEWCASTLE WATER CO.

2 Ex. D. 441; 46 L. J. Ex. 775.

COURT OF APPEAL.

Declaration for damages for breach of a statutory duty.
Demurrer and joinder.
The Court of Exchequer held the declaration good.
The defendant appealed.

CAIRNS, L.C.:—As to the first count in this declaration, it proceeds on a breach of a statutory duty. It refers to a local Act of Parliament and the general Act, and further avers, "That he was,

at the time of the grievances hereinafter mentioned, and after the passing of the said first-mentioned Act, the owner and occupier of a certain dwelling-house, timber-yard, and saw-mills, situate within the limits prescribed by the said first-mentioned Act for the supply of water by the defendants, and was at the time last aforesaid under the provisions of the said first-mentioned Act, and the said Waterworks Clauses Act, 1847, duly entitled for certain reward to be paid by the plaintiffs to the defendants in that behalf to a supply of water by the defendants, and had duly complied with all the provisions of the said Acts in order to entitle him to such supply for domestic and other purposes."

But for the present purpose, we may reject all that refers to the supply of water by the defendants for reward, for the breach complained of is independent of any payment of money. It is a breach of a duty to keep the pipes charged at a certain pressure, whether any money is paid for it or not; and the plaintiff further says "that before and at the time of the committing of the grievances hereinafter mentioned, the defendants had laid down certain pipes near to the said dwelling-house, timber-yard, and saw-mills of the plaintiff for the purpose of supplying water according to the said Acts, and had fixed to such pipes certain fire-plugs." Then he assigns as a breach that "the defendants neglecting their duty in that behalf did not at all times," and especially at the time of the fire, "keep charged with water their said pipes to which fire-plugs had been and were then so fixed as aforesaid, under such pressure as, by the said first-mentioned Act and the Waterworks Clauses Act, 1847, was required, although the defendants were not prevented from doing so by frost, unusual drought, or other unavoidable cause or accident." The plaintiff then goes on to say that during the time the pipes with the fire-plugs affixed to them were so laid as aforesaid, a fire broke out in the timber-yard and saw-mills of the plaintiff, and that by reason of the defendants not having kept charged the said last-mentioned pipes under such pressure as aforesaid, a proper supply of water could not be procured for the purpose of extinguishing the said fire, and in consequence the said timber-yard and saw-mills were burnt.

Now, the statutory duty there referred to arises under the 42nd section of the Waterworks Clauses Act, 1847, which is in these words:—"The undertakers shall at all times keep charged with water, at such pressure as aforesaid" (that is, at such pressure as will make the water reach the top storey of the highest house within the limits of the undertaking), all their pipes to which fire-plugs shall be affixed, unless prevented by frost, unusual drought, or other

unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to use and take such water for the purpose of extinguishing fire, without making compensation for the same." The general scheme of these clauses, and of any Acts in which they are incorporated, seems to be this. Certain undertakers apply to Parliament for leave to take land, springs, etc., and to charge rates for supplying the town or district with water, and in consideration of the privileges from them, come under certain obligations, among which is a special obligation with regard to fire-plugs, to affix them to their mains at certain intervals, and when required to do so, near manufactories and warehouses, and afterwards to keep the supply of water at a certain statutory pressure, unless prevented by frost, unusual drought, or other unavoidable cause or accident; and to allow, not particular persons—owners of houses or manufactories, but all persons, to take and use water for the extinguishment of fire. If the water is used for extinguishing fire, that is a public object, and the undertakers are willing to supply any amount of water for that purpose without receiving payment, and to accept the Parliamentary obligation to keep their mains charged at the statutory pressure for that purpose. That this creates a statutory duty there can be no doubt.

But it is a question for our consideration whether that public duty gives a right of action to individuals who can aver, like the plaintiff, that they had premises near a fire-plug, that a fire broke out on those premises, that they wanted water to extinguish the fire, and found no water in the pipes at the statutory pressure at the time. He does not aver that he was not allowed to take and use the water. The failure was in not keeping the pipes charged at the statutory pressure. Regarding these facts *a priori*, it would seem a startling conclusion that the company, being entitled to supply water under statutory restrictions and subject to penalties, should be further willing, or that Parliament should think it necessary, that they should be subject to actions at the suit of householders or anyone else who, when a fire broke out, might make out a case that the pipes were not charged at the statutory pressure at the particular time. In the one case, the company obtains a privilege, and becomes liable to, and is willing to run the risk of specific penalties; in the other case, the company would become insurers of the safety, so far as water can make them safe, of all the buildings round them, for which they would run the risk of paying unlimited value.

We must, therefore, examine section 43, the section with regard to penalties. It provides: "That if, except when prevented as

aforesaid, the undertakers neglect or refuse to fix, maintain or repair such fire-plugs" (that is the first neglect mentioned); "or to furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid" (that is the second, with regard to baths, wash-houses, etc.), upon such terms as shall have been agreed or settled as aforesaid, or, if except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid" (that is the third); "or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered" (that is the fourth neglect, making four cases of neglect or default in all), "then" (in all four cases) "they shall be liable to a penalty of £10, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of 40s. for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of such want of supply." Four cases are specified which cover all the duties imposed by the former sections of the Act. Neglect of any one of these duties subjects the company to a penalty of £10, and the neglect of two of them—to supply water for public purposes, and to supply it to individuals who have tendered the rate—is to be followed by a further penalty of 40s. per diem for every day on which the supply is insufficient. It is not material to this question, but it possibly might be held that negligence in reference to affixing and maintaining the fire-plugs is one of the cases to which the 40s. penalty applies. What, then, is the reason why in three or, at least, two of the cases there is a penalty which is to go into the pockets of the persons injured, and not in the fourth? Because in the case of the town commissioners and the person who asks for a supply and does not get it, you have a person or persons who are well known and ascertained. But in the case of the obligation to keep the fire-plugs and pipes charged at a certain pressure, and to allow all persons at all times to take and use the water for extinguishing fire, we have a provision apparently made for the benefit of the public, and not of a particular person or persons; and the guarantee for the performance of that duty is the liability of the company to a public penalty of £10 for the breach of it.

Apart from authority, I should be of opinion that the scheme of such an Act as this was not to create a duty such as would be the subject of an action at the suit of any individual who was in any way injured by the breach of it. It did not create a right, to be enforced in the ordinary way by action, but the scheme of the Act

was to lay down a series of duties to be performed by the company, and gave a guarantee for their performance by the imposition of penalties. And it has provided that where it is convenient those penalties, or some of them, are to go into the pocket of the person injured, but where that is not possible or convenient, the penalties are of a public nature, effecting their object in a different way, not by giving compensation to the persons injured, but by giving the public a security that the duties imposed upon the company shall be carried out. It appears to me that it would be impossible to split up the section and to hold that where, under the 43rd section, the penalty is to go into the pocket of an individual there is no right of action, but where it is not so, an action will lie. The result would be that persons who have paid for a supply of water for domestic purposes would have no right of action, however much they might have been injured by the failure to supply it, but any member of the public who has paid nothing and is not taking a supply, would have a right of action if his house had been on fire and he had been unable to get water gratuitously from a main belonging to the company. I do not think that would be a possible construction of the Act. I think the scheme of the Act must be judged of by the 42nd and 43rd sections, taken as a whole; and when you find in the majority of cases that there is a kind of penalty affixed which, it is admitted, would prevent an action for damages, it is an irresistible conclusion that in the remaining case the same consequence follows, and that the public penalty, as well as the penalty payable to the individual aggrieved, prevents a right of action from arising. That would be my opinion, apart from authority, and unless I were compelled by authority to arrive at a different conclusion.

COCKBURN, C.J., and BRETT, L.J., agreed.

Flooding Lands Adjoining Highway by Mode of Constructing Ditches.

DERINZY v. OTTAWA.

15 O. A. R. 712.

COURT OF APPEAL FOR ONTARIO.

This was an appeal to the Court of Appeal for Ontario by the defendants, the City of Ottawa, from a judgment of the Queen's Bench Division setting aside a nonsuit ordered at the trial.

HAGARTY, C.J.O., said, in part:—As the pleadings stood at the trial, the claim can be put in Mr. McCarthy's words in asking for a nonsuit:

"The claim is deliberately founded upon the fact that in constructing and repairing Daly, Nelson, Rideau, and Besserer Streets, the corporation have negligently made surface drains and water courses along and upon the surface of the said streets, and each of them, whereby large quantities of water which would not have otherwise flowed on his premises." * * *

Certain legal questions were raised by the defendants' counsel —the main one being, that the case disclosed no liability on the defendants to the plaintiff; that they only did their duty in changing the grade of the street, and in making side drains for the water which, from the level of the ground on which Rideau Street was laid out, naturally flowed there.

But before a municipality can raise the question of non-liability to a person on whose land their drains discharge water that would not otherwise be there discharged, they must at least shew that they have done their work without negligence; and that due care was used to discharge what they say was their statutable duty in the drainage and management of this highway. The plaintiff's witnesses point out what they consider to be faulty and negligent construction and management to the plaintiff's detriment.

Here the defendants seek not to disprove the charge, but to shelter themselves under their alleged public duty.

If they had succeeded in disproving all charges of negligence, they could then be in a position to raise the very serious question whether a private person may be ruined by their action for the general benefit of the public.

As far back as 11 U. C. R. 89, in *Brown* v. *Corporation of Sarnia*, the late Sir J. Robinson says:

"The plea cannot be a sufficient defence unless we admit that the municipal authorities, in order to drain a highway, may bring down water in any quantity upon the land of an individual, and may leave it to rest and stagnate there, or even to produce any amount of evil, etc., to his dwelling-house, etc., without shewing that the water could in no other way have been got rid of without throwing it on the plaintiff's land, and without shewing that it was not in their power to lead it away from the plaintiff's land after they had conducted it thither."

This language is peculiarly applicable to this case.

Perdue v. *Chinguacousy* (1), the last case is noticed and followed. The Court do not decide the main question now being discussed remarking:

"Without positive legislation, a grave doubt may be expressed as to the absolute right of the conservators of a highway to flood a man's land and destroy his property even if no other method of drainage be attainable. Generally, if public convenience requires the destruction of private property, the owner of the latter has the right to be compensated."

In *Rowe* v. *Rochester* (2), the present Chief Justice of the Queen's Bench, delivered the judgment of the Court, denying the right of the corporation to throw water on plaintiff's land to his injury, even though they did the work in the most scientific and skilful manner, and though it may have been absolutely necessary to drain in this manner to make a good road.

The same case came up in 22 C. P. 319, and the same rule is noticed.

In *McGarvey* v. *Strathroy* (3), in this Court, the general question was noticed, but negligence was averred and proved, and the case did not call for its decision.

I do not think we are called on at this stage of the present case to discuss it further.

I cannot see how on the evidence adduced, any defence can arise on the plea added at the trial of a twenty years use of the right to overflow the plaintiff's land.

Nor can I accede to the argument that the plaintiff can be barred by his voluntarily coming to reside and build a green-house, etc., on land known to be previously liable to be flooded.

I think the appeal must be dismissed.

(1) 25 U. C. R. 61. (2) 29 U. C. R. at 595.
(3) 10 A. R. 631.

Permitting Dwarf Wall on Highway and Not Providing Sufficient Light.

COWLEY v. NEWMARKET.

[1892] A. C. 345; 62 L. J. Q. B. 65.

HOUSE OF LORDS.

This was an action for negligence on the part of the respondents for allowing a certain dwarf wall to remain on the highway which was under their authority, and for not providing sufficient light, whereby the appellant, in walking along the footpath one evening in January, 1889, fell and sustained injury. The nearest lamp was about seventy yards off.

The judgment was entered for the defendants. The plaintiff appealed.

THE LORD CHANCELLOR (LORD HALSBURY):—The effective part of the plaintiff's complaint is to be found in the 3rd paragraph of the statement of claim: "That the defendants wilfully, wrongfully, and negligently built, and placed, and suffered to remain on a footway of the highway leading from Newmarket to Bury St. Edmunds, at a point opposite to the entrance of the yard and stables of one Captain Machell, a brick wall and a declivity formed thereby, without any guard or light, or means to prevent persons from falling over the same." And paragraph 6: "That the plaintiff, while lawfully using and walking upon and along the said footway after daylight had ceased, fell over the said brick wall and down the said declivity, and suffered damage accordingly."

The facts were that the defendants are the Newmarket Local Board of Health, and the footway and the highway referred to were within the limits and under the care and management of the defendants as such local board of health, and the question appears to resolve itself into whether the public authorities, in whom the highways are vested by the statute, can be held liable in an action for any defect in the repair. I think in this case the liability would have to be put upon the ground that there was default in the construction of the highways through which an accident happened to a passenger. The wide consequences of the existence of such a right of action would be very serious.

As long ago as 1788, a question of an analogous character was raised in the Court of King's Bench; and the argument then, as

now, was that where one person receives an injury by reason of any other person or persons omitting to do that which by law he or they are bound to do, he may maintain an action in the circumstances to recover satisfaction for the damage he has received in consequence of that omission. In that case, it was said (which seems to me decisive of this case) that the principle which decides against this kind of action is accurately stated in Brooke's Abridgment, tit. "Action on the Case," pl. 93, where it is said that, "if an highway be out of repair, by which my horse is mired, no action lies, *Car est populus et surra reforme per presentment*, which must be understood to mean that as the road ought to be repaired by the public, no individual can maintain an action against them for any injury arising from that neglect"—*Russell* v. *The Men of Devon* (1).

That that has been considered to be the law for now more than a hundred years is certain, and, as has been pointed out, the objection in point of form to an action against the surveyor of the highways was not only an objection of form, but underlying it there was the objection of substance.

The question whether it was form or substance came before the Court of Exchequer in *M'Kinnon* v. *Penson* (2). The effort there had been to argue that, inasmuch as the county could not in point of form be sued, and that previous judgments had referred to that fact, the 43 Geo. 3, ch. 59, sec. 4, which enacted that the county might be sued in the name of its surveyor, disposed of the objection of form—as, indeed, it did. But the Court went on to say that that statute did not give, and was not intended to give, an action for such an injury against the county; but in cases where rights could be maintained against the county, an action might be brought against them in the name of their surveyor. That was, therefore, a distinct authority that no new right of action was intended to be created; and, as far as I am aware, that has continued to be the state of the authorities down to the present time.

It is true that in the case of *Hartnall* v. *The Ryde Commissioners* (3), a construction was placed upon a particular local Act which, rightly or wrongly, was assumed from its particular terms to have established and created for the first time a right of action for an injury resulting from a breach of the duty cast upon the Ryde commissioners to repair their streets. Whether that case is

(1) 2 Term Rep. 667.
(2) 22 Law J. Rep. M. C. 22; Law Rep. 8 Exch. 319; 23 Law J. Rep. M. C. 97; Law Rep. 9 Exch. 609.
(3) 4 B. & S. 361; 33 Law J. Rep. Q. B. 39.

quite consistent with the principles upon which cases of the class now before your Lordships have been decided or not, it is immaterial to discuss. The language of the statute was different, and the ground of the decision was that a new and particular right had been created. No such question, to my mind, arises here. With the exception to which I have last alluded, the principle has been maintained for certainly more than a century, and I am of opinion that in this case no ground has been put forward on which the long current of authorities should be disturbed. I therefore move, your Lordships, that this appeal should be dismissed.

LORDS HERSCHELL, HANNEN and MACNAGHTEN concurred.

Permitting Bridge and Highway to be out of Repair and Dangerous.

PICTOU v. GELDERT.

[1893] A. C. 524, 63 L. J. P. C. 37.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LORD HOBHOUSE delivered the judgment of their Lordships and said in part:—The plaintiff in this case resides within the municipality of Pictou, and he sues the corporation for neglect of its duty to repair a bridge, whereby severe injuries were caused to the plaintiff. His allegations are that the defendants were in possession and had the management and control of the public highway over the bridge in question, and were liable and bound to maintain, repair, and keep in repair the said highway and bridge and the approaches thereto; and that the defendants negligently, improperly, and wrongfully suffered the said highway, bridge, and approaches to become out of repair and dangerous to persons passing. The Judge who tried the cause, and, on appeal, the majority of the Supreme Court, have found in favour of the plaintiff.

It is not denied that the approach to the bridge was out of repair, or that severe injury was caused to the plaintiff thereby.

* * *

By the common law of England, which is also that of Nova Scotia, public bodies charged with the duty of keeping public roads and bridges in repair, and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair.

This was first held in a case in which the inhabitants of a county were sued, and as they were not a corporation, there was a technical difficulty in suing them; but that the decision did not rest on this technical difficulty alone, but on the substantial ground of non-liability, was subsequently decided when the difficulty had been removed by enabling a public officer to sue and be sued on behalf of the county. And the same conclusion has been arrived at where the obligation to repair has been transferred to corporations.

The latest English case is that of *Cowley* v. *The Newmarket Local Board* (1), decided in the House of Lords. It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability, it must be shewn that the Legislature has used language indicating an intention that this liability shall be imposed.

The law was laid down by this Board in the case of *The Sanitary Commissioners of Gibraltar* v. *Orfila* (2), thus: "In the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the commissioners a duty towards himself which they negligently failed to perform."

The question, then, is, whether any statute has given to private persons the right of action now claimed against this municipality which does not exist at common law.

In the opinion of their Lordships, it is impossible to find in any of the legislative provisions the indication of an intention on the part of the Legislature that a person injured by the mere non-repair of a road or bridge should be entitled to sue the municipality for damages in respect thereof.

(1) 62 Law J. Rep. Q. B. 65.
(2) 59 Law J. Rep. P. C. 95; Law Rep. 15 App. Cas. 400.

Nonfeasance in Public Duties Performed for Payment.

BRABANT v. THE KING.

64 L. J. P. C. 161.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Consolidated appeals from an order of the Supreme Court of Queensland dated the 20th of July, 1894, by which the verdict and judgment entered on the trial of the appellants' action against the respondent were set aside and a new trial ordered.

The action was brought to recover damages for injury done to certain explosives which were stored by the appellants for hire in Government warehouses and spoilt by an exceptional rising of the adjacent river. The jury assessed the damages at the full value of the goods, but the verdict and judgment were set aside by the Supreme Court and a new trial ordered. The facts sufficiently appear in the judgment.

LORD WATSON delivered the judgment of their Lordships and said in part:—Mr. Justice Cooper, the dissentient Judge, thought that judgment ought at once to be entered for the defendant, being of opinion that the Government was under no liability to the appellant company, upon the principle recognized by this board in *The Sanitary Commissioners of Gibraltar* v. *Orfila* (1) and more recently in *The Municipality of Pictou* v. *Geldert* (2) and in *The Municipal Council of Sydney* v. *Bourke* (3). That principle has, in certain instances, been held to afford protection to commissioners or trustees representing public interests from the consequences of mere nonfeasance; but it has, in the opinion of their Lordships, no application to a case like the present, in which the parties charged with nonfeasance are under obligation to an individual member of the public to perform the duty which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance.

(1) 59 Law J. Rep. P. C. 95; Law Rep. 15 App. Cas. 400.
(2) 64 Law J. Rep. P. C. 37; Law Rep. [1893] A. C. 524.
(3) *Ante*, p. 140; Law Rep. [1895] A. C. 433.

Negligence with Reference to Snow and Ice on Sidewalk.

KINGSTON v. DRENNAN.

27 S. C. R. 46.

SUPREME COURT OF CANADA.

Appeal from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Common Pleas Divisional Court in favour of the plaintiff.

A by-law of the City of Kingston required frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action of damages against the city and obtained a verdict.

SEDGEWICK delivered the judgment of the majority of the Court and said in part:—In the present case it seems to me the evidence showed that the municipality were not only passively negligent in not removing the defect, but they were actively instrumental in creating it. They were not bound to pass a by-law compelling the removal of snow and ice from sidewalks, but having passed it it became obligatory on them to take all proper precautions, looking to the safety of those points where the crossings and sidewalks meet. Had there been no by-law both would have been on the same level or grade, there would have been no extraordinary slope and probably no accident. The case is not one with special features or involving peculiar principles of law, because it deals with ice or snow. The city was not bound to build sidewalks, but having done so it is bound to keep them in repair to this extent at least that they are not more dangerous than if they did not exist at all. It is the same case as if it was originally erecting a sidewalk and by defect of plan or specification or otherwise a particular part of it was so much more sloping than the natural way or necessity called for that an accident followed. Then, there would be liability as in any other case of structural defect.

(1) 23 Ont. App. R. 406.

A municipality (I repeat) is not liable for accidents occasioned solely by the presence of snow or ice upon a street or sidewalk. It is not, as a rule, bound to remove either. But if after a heavy rainfall a bridge is swept away there is a liability to replace it; so snow may so accumulate as to make particular places impassable and impose the obligation of removal. * * *

Upon the whole I am of opinion that the verdict cannot be disturbed upon the question of negligence.

There are however three subsidiary questions still to be referred to, all arising under the amendment of 1894 above set out. (2)

First, the appellants allege and the respondent denies that this amendment applies. The accident in question happened upon a "crossing." Was the crossing at that particular place a "sidewalk" within the meaning of the statute? The statute of which this amendment forms part in several places refers to sidewalks and crossings, and it is argued that these terms are mutually exclusive of each other. I have also in this opinion referred to them as different things. I am however of opinion that "sidewalks" here includes "crossings." In the case before us the street area covered by Princess and Montreal streets intersected has two names. Looking at it east and west it is Princess, north and south it is Montreal street. Here at the two sides of the first are walks or granolithic pavements for the special use of foot passengers walking up or down Princess street; they are called crossings but they are sidewalks *quoad* or in relation to Princess street. So also to the walks on each side of Montreal street. So far as my general observation goes a crossing is usually a sidewalk and I think that in the present case the statute should be so construed. We are doing no violence to the statute in so holding. On the contrary we are giving effect to what appears to me to have been the legislative intent.

(2) 57 Vict. ch. 50, sec. 13, is as follows: "Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks unless in case of gross negligence by the corporation; and provided also that no action shall be brought to enforce a claim for damages under this sub-section, unless notice in writing of the accident and the cause thereof has been served upon, or mailed through the post office to, the mayor, reeve, or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident; and provided also that in case of the death of the person by whom the damages has been sustained, want of notice shall be no bar to the maintenance of the action, nor in other cases shall the want or insufficiency of notice be a bar to the action if the court or judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence."

Secondly it is contended that although there may have been negligence here there was no gross negligence such as the amendment requires to create a liability.

I am not bold enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence. That question has been discussed by civilians and text-book writers to such an extent that Judges have been found to say that there are no degrees of negligence. However this may be we must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is "very great negligence." The jury have found that species of negligence in this concrete case. The trial Judge did not attempt, as I do not, to define. He merely put to the jury the contentions of fact and the supporting evidence stating that if these contentions were true there was gross negligence present here. That I think was the proper course and the jury's finding should not be disturbed on that ground.

Finally. The amendment provides that no action shall be brought unless notice in writing has been served within thirty days after the happening of the accident, but that the want or insufficiency of the notice should not be a bar if the Court or Judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence. Notice was not given, but at the trial the appellants admitted that they were in no way prejudiced by the plaintiff's failure to give notice and the trial Judge decided under the statute that there was reasonable excuse for the want of it. The appellants, although admittedly in no way prejudiced by want of notice, seek to set aside the verdict on that account. I do not feel called upon to decide whether in the present case the certificate of the trial judge is reviewable. The rule is universal however, that when a statute gives a Judge discretion to do a particular act his decision will not be interfered with by an appellate Court unless he has made a palpable mistake or has acted upon a manifestly erroneous principle. That cannot be the case here. The main object of notice is to give the defendant a chance of getting at the facts while evidence is available and fresh in the minds of witnesses. For this purpose no notice in the present case was necessary as admitted by counsel. It was proved that the plaintiff was in the hospital twenty-four weeks, during the first thirty days enduring great physical pain. Little during that time would she think of her Court remedies. She would probably not dream that she had any. Under the circumstances

I am not disposed to question the discretion of the trial Judge in dispensing with the notice.

The appeal should be dismissed with costs.

GWYNNE, J., gave a dissenting judgment in which he held that the cause of the accident was the inclement state of the weather and not any want of repair in the crossing.

Independent Contractor Leaving Heaps of Soil on Highway.

PENNY v. WIMBLEDON.

[1899] 2 Q. B. 72; 68 L. J. Q. B. 704.

COURT OF APPEAL.

Penny was injured by falling over a heap of surface soil and grass left unguarded on a roadway which was being made up by a contractor under a contract with the Wimbledon Urban Council. He brought an action against the contractor and the Council. The contractor denied negligence. The Council pleaded that the obstruction was left by an independent contractor and that though he might be liable the Council was not.

Judgment was given against both defendants.

The council appealed.

VAUGHAN WILLIAMS, L.J., said in part:—We rarely find any question of law as to which the course of the authorities is as uniform and as clear as it is on this point. The first origin of the principles laid down and since acted upon for many years is the case of *Pickard* v *Smith* (1). "Unquestionably," said Mr. Justice Vaughan Williams, in delivering the judgment of the Court of Common Pleas in that case, "no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. . . . That rule is, however, inapplicable to cases in

(1) 10 C. B. (N.S.) 470.

which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." The principles there laid down were subsequently applied in the cases of *Gray* v. *Pullen* (2), *Bower* v. *Peate* (3), *Dalton* v. *Angus* (4), *Hughes* v. *Percival* (5), and lastly in *Hardaker* v. *Idle District Council* (6). Where a contractor then is entrusted with a duty incumbent on the employer, the employer is liable for the non-fulfilment of that duty by the contractor. In cases of this sort, where a statutory authority is conferred to do something to a road involving the stopping or opening up of the road, so as to make it a source of danger, can any one doubt that there is incumbent on the persons clothed with that authority a duty to see that the work done in pursuance of the authority is properly carried out, and to take reasonable care that the Queen's subjects are not injured by a careless exercise of the authority? In this case the road had to be made up, so that the time was bound to come when from the necessary excavations and obstructions the road must become dangerous, when consequently a duty would arise to take reasonable means to avert danger, whether by posting watchmen, or placing lights, or otherwise, to warn persons of its presence. No means were taken either by means of watchmen or lights to warn this lady. In the words of *Pickard* v. *Smith* (1), the contractor was entrusted with a duty incumbent on the employer, and neglected its fulfilment, and therefore the employer is liable.

Mr. Justice Bruce (the trial Judge) has so accurately and tersely laid down the law on this point that there is no need to add to his statement of it. I have said thus much from a lawyer's wish to trace the doctrine from its source to the present time.

A. L. SMITH, and ROMER, L.JJ., gave reasons for reaching the same conclusion.

(2) 34 L. J. Q. B. 265; 5 B. & S. 970.
(3) 45 L. J. Q. B. 446; 1 Q. B. D. 321.
(4) 50 L. J. Q. B. 689; 6 App. Cas. 740.
(5) 52 L. J. Q. B. 719; 8 App. Cas. 443.
(6) 65 L. J. Q. B. 363; [1896] 1 Q. B. 335.

Injury to Lands by Flooding Resulting from Negligence in Construction of Ditch.

FOSTER v. LANSDOWNE.

12 M. R. 416.

COURT OF KING'S BENCH MANITOBA.

KILLAM, J., delivered the following judgment:—

It has long been settled that no action will lie against persons or bodies acting within the powers conferred on them by the Legislature, whatever the injury occasioned to others, provided such powers are not exercised arbitrarily, vexatiously or negligently. This was the principle upon which the decisions in *The British Cast Plate Manufacturers* v. *Meredith* (1), *Boyfield* v. *Porter* (2), *Sutton* v. *Clarke* (3), *Boulton* v. *Crowther* (4), *Grocers' Co.* v. *Donne* (5), *London & N. W. R. Co.* v. *Bradley* (6), and many other cases were based.

Usually, in conferring power to interfere with private rights, the Legislature provides for the giving of compensation and a method of establishing its amount; but, while the compensation clauses may aid in construing the extent of the powers conferred, it is not the provisions for compensation which restrict legal rights of action. The principle is that which the Legislature authorizes cannot constitute a legal wrong. If damage is done in the proper exercise of the power, it is *damnum sine injuria*, and no action will lie therefor, even though no provision is made for compensation: *The British Cast Plate Manufacturers* v. *Meredith* (1) *Boulton* v. *Crowther* (4), *Lawrence* v. *G. N. R. Co.* (7), *The Mayor, etc., of Montreal* v. *Drummond* (8).

In some cases, the fact that the acts complained of have been done for the public benefit, or that those proceeded against have been acting without recompense in the public interest, has been apparently treated as an important factor in determining the liability. But, again, while these circumstances may be important in settling the extent of the powers, they do not exempt from liability. "The principle is that the act is not wrongful, not because it is

(1) 4 T. R. 794.
(2) 13 East, 200.
(3) 6 Taunt. 29.
(4) 2 B. & C. 703.
(5) 3 Bing. N. C. 34.
(6) 15 Jur. 639.
(7) 16 Q. B. 643.
(8) 1 A. C. 381.

for a public purpose, but because it is authorized by the Legislature." *Per* Blackburn, J., in *The Mersey Dock Trustees* v. *Gibbs* (9).

It is also well settled that parties acting under these statutory powers must do so with some care for private rights.

In delivering the judgment of the Judicial Committee of the Privy Council in *The Sanitary Commissioners of Gibraltar* v. *Orfila* (10), Lord Watson said (p. 411): "Their Lordships do not wish to suggest that Commissioners or other public trustees who have no pecuniary interest in the trust which they administer can escape liability when they are negligent in the active execution of the trust. It is an implied condition of statutory powers that, when exercised at all, they shall be executed with due care."

In *Geddis* v. *The Proprietors of the Bann Reservoir* (11), Blackburn, J., said (p. 455): "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently."

A similar view was expressed at greater length by other learned Lords in the same case.

In *The Queen* v. *Selby Dam Drainage Commissioners* (12), Fry, L.J., said that, in 1885, "it was established law that commissioners of this description might be liable for negligence in the doing of the work which by their Act they were authorized to do."

Indeed, this principle in the abstract has, apparently, never been disputed in any decided case. It was the basis of the decisions in *Leader* v. *Moxon* (13), *Jones* v. *Bird* (14), *Lawrence* v. *The G. N. R. Co.* (7), *Ruck* v. *Williams* (15), *Whitehouse* v. *Fellowes* (16), *Clothier* v. *Webster* (17), and many other cases, and was admitted in such cases as *Sutton* v. *Clarke* (3), *Boulton* v. *Crowther* (4), and *Grocers' Co.* v. *Donne* (5), in which it was held that there was no negligence.

It is true that there was at one time, in England, much difference of opinion as to whether trustees or commissioners, constructing or managing public works from which they derived no profit,

(9) L. R. 1 H. L., at p. 112.
(10) 15 A. C. 400.
(11) 3 A. C. 430.
(12) [1892] 1 Q. B. 348.
(13) 2 W. Bl. 924, 3 Wills. 461.
(14) 5 B. & A. 837.
(15) 3 H. & N. 308.
(16) 10 C. B. N. S. 765.
(17) 12 C. B. N. S. 789.

were liable, individually or in their official capacity, for the negligence of those employed by them, or whether their duty was fulfilled by the exercise of proper care in the selection of their subordinates. See *Hall* v. *Smith* (18), *Harris* v. *Baker* (19), *Metcalfe* v. *Hetherington* (20), *Holliday* v. *St. Leonard's* (21), *Duncan* v. *Findlater* (22), as opposed to *Scott* v. *Manchester* (23), *Ward* v. *Lee* (24), and *Southampton, etc., Bridge Co.* v. *Local Board of Southampton* (25), and *Ruck* v. *Williams* (15), *Whitehouse* v. *Fellowes* (16), and *Clothier* v. *Webster* (17), just cited.

This conflict was settled by the decisions in *The Mersey Docks Trustees* v. *Gibbs* (9) and *Coe* v. *Wise* (26) (in the Exchequer Chamber).

In *Foreman* v. *The Mayor, etc., of Canterbury* (27), referring to the *Mersey Docks Case*, in which he had himself delivered the opinion of the judges for the assistance of the House of Lords, Blackburn, J., said (p. 218): "It was decided that a public body, like the local board of health, are answerable for the negligence of their servants just as if they were acting as the servants of a private person and not for a corporation incorporated for a public purpose."

In the *Sanitary Commissioners' Case* already cited, in the Privy Council, Lord Watson adopted these principles laid down by Blackburn, J., in the *Mersey Docks Case*, "that in every case, the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created," and, "in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose upon a private person doing the same thing."

In the Province of Ontario, whose municipal legislation is well known to be the model upon which our own is constructed, there has been a long and uniform series of decisions holding that municipalities are liable to actions for consequential damages arising from the negligent exercise of their statutory powers. See *Brown* v. *The Municipal Council of Sarnia* (28), *Farrell* v. *The Mayor, etc., of London* (29), *Croft* v. *Town Council of Peterborough* (30), *Reeves* v. *The City of Toronto* (31), *Scroggie* v. *The Town of*

(18) 2 Bing. 156.
(19) 4 M. & S. 27.
(20) 24 L. J. Ex. 314.
(21) 11 C. B. N. S. 192.
(22) 6 Cl. & F. 894.
(23) 27 L. T. 82.
(24) 7 E. & B. 426.
(25) 8 E. & B. 801.
(26) L. R. 1 Q. B. 711.
(27) L. R. 6 Q. B. 214.
(28) 11 U. C. R. 87.
(29) 12 U. C. R. 343.
(30) 5 U. C. C. P. 35.
(31) 21 U. C. R. 157.

Guelph (32), *McArthur* v. *The Town of Collingwood* (33), *In re Nickle and The Town of Walkerton* (34). This principle was approved by the Court of Appeal of the Province in *Coghlan* v. *The City of Ottawa* (35), *McGarvey* v. *The Town of Strathroy* (36), and *Derinzy* v. *The Corporation of Ottawa* (37), and by the Supreme Court of Canada in *Williams* v. *The Corporation of Raleigh* (38), and in a British Columbia appeal, *The Corporation of New Westminster* v. *Brighouse* (39). In this province, the same principle was accepted by Mr. Justice Bain, in *Atcheson* v. *The Rural Municipality of Portage la Prairie* (40), and by Mr. Justice Dubuc, in an action in this Court, of *Foster* v. *Municipality of Lansdowne*, not reported, except as to the decision affirming the judgment upon another ground (41).

That the responsibility extends to negligence of those employed by the corporation appears to have been the view of the Court of Queen's Bench for Ontario in *Farrell* v. *London* (29) and *Reeves* v. *Toronto* (31).

By the Municipal Act, R. S. M. ch. 100, sec. 8, every municipality is a body corporate, having all the rights and subject to all the liabilities of a corporation, with powers to sue and be sued. By secs. 663, 664, provision is made for enforcing executions against such a corporation, and sec. 662 provides for tender of amends and payment into Court in actions for damages for alleged negligence of the municipalities.

Upon the principles laid down by Mr. Justice Blackburn, it is impossible to hold otherwise than that these corporations are liable to actions for damages arising from the negligence of their employees, acting within the scope of their employment, in the execution of the statutory powers of the municipalities.

I have dealt thus at length with these questions, not because they seemed to me open to doubt upon principle or authority, but because they have never been definitely considered by the Full Court of this Province, and because the ultimate decision in *Raleigh* v. *Williams* (42) is so strongly relied on as authority against the view which I take.

That case arose through the construction by the municipality of a drainage work under special statutory provisions, which authorized a municipal council, after investigation and report by an

(32) 36 U. C. R. 534.
(33) 9 O. R. 368.
(34) 11 O. R. 433.
(35) 1 A. R. 54.
(36) 10 A. R. 631.
(37) 15 A. R. 712.
(38) 21 S. C. R. 103.
(39) 20 S. C. R. 520.
(40) 9 M. R. 192.
(41) 12 M. R. 41.
(42) [1893] A. C. 540.

engineer, to pass a by-law adopting the scheme of drainage recommended to it. The case was referred to a referee, who reported that a drain had been made without provision for a sufficient outlet, in consequence of which the plaintiff had sustained damage through the flooding of his land by the overflow of the drain. The report was confirmed and judgment was given for the plaintiff.

This judgment was reversed by the Court of Appeal, which held that a corporation, adopting and carrying out a drainage scheme duly presented to it by a surveyor under the statute, could not be held responsible in damages because the scheme might prove erroneous or deficient in some particular, though it was admitted that the municipality would be responsible for negligence in the execution of the work. Upon appeal to the Supreme Court of Canada the original judgment was restored (21 S. C. R. 103); but this decision was again reversed in the Privy Council ([1895] A. C. 540).

In delivering the judgment of the Judicial Committee, after shewing that the work was constructed under a by-law which the municipality had power to pass, even if the drainage scheme should injure a private owner, Lord Macnaghten said (p. 550): "It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of the insufficiency of the outlet, or by reason of some other defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument, in their Lordships' opinion, is wholly untenable. On the other hand, their Lordships do not agree with the argument of the appellants that municipalities are helpless instruments in the hands of the engineers they employ. They cannot, indeed, modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute."

Now, it would be strange indeed if the Judicial Committee should overrule in this off-hand way, and without further discussion, a principle established, not only by the uniform decisions of the Courts of the Province from which the appeal came, but also by

the English Courts; and it would be equally strange to find the Court of Appeal for Ontario thus abandoning its former opinions.

The true ground of decision in the Court of Appeal and the Privy Council was the same as that which Williams, J., in *Whitehouse* v. *Fellowes* (16), pointed out to be the basis of the decisions in *The British Cast Plate Manufacturers* v. *Meredith* (1), *Sutton* v. *Clarke* (3), and *Boulton* v. *Crowther* (4), that the municipality did no more than the statute authorized it to do, even though by so doing it prejudiced the rights of private owners. It had power, in its discretion, to adopt such a scheme and to render by a by-law the execution of it lawful. In such a case, no action would lie for damage occasioned by the execution of the scheme without negligence, and the only remedy which an injured party could have was under the compensation clauses.

In *Jones* v. *The Stanstead, etc., R'y. Co.* (43), Sir Montague E. Smith said (p. 115): "The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful; whilst the claim for compensation under the Railway Acts"—for which we may read the Municipal Act—"supposes that the acts are rightfully done under statutable authority."

The first question, then, is whether the statute gave to the municipality the power to cast the drainage of this ditch upon the plaintiff's land or to dispose of it in such a way that it might or would flow there. The decision in the *Raleigh Case* does not settle this question, for that case turned upon the special drainage clauses.

The power is nowhere expressly given by the Municipal Act. In the other case of *Foster* v. *Lansdowne* (44), it was suggested that this power might possibly be acquired by the enactment of a by-law under some of the provisions respecting drains, ditches and watercourses, but no such by-law was passed. There was a by-law authorizing the expenditure of money upon a certain ditch, but no provision, express or implied, as to whether it was to be deepened, widened, lengthened or cleaned out, or what was to be its course or outlet. Such a by-law could not make lawful an act causing damage by flooding private lands. In the *Raleigh Case*, the by-law adopted a certain scheme and made it lawful, even though such damage resulted from it.

This ditch was dug wholly upon land under the control of the municipality in pursuance of the statutory power and duty to repair the public highways. I assume that it was a lawful work, even without a by-law to authorize it. But I do not think that, from the

(43) L. R. 4 P. C. 98. (44) 12 M. R. 41.

power to make, maintain or repair highways, there can be implied the power to collect the drainage of a highway into a stream and pour it over the land of a private owner. The power actually given must be exercised with a due regard for private rights, except in so far as authority to interfere with such rights is expressly or impliedly given. That the powers respecting highways do not imply power to turn their drainage over private lands has been definitely settled in Ontario. See *Brown* v. *Sarnia* (28), *McGarvey* v. *Strathroy* (36) and *Derinzy* v. *Ottawa* (37), already cited, and *Perdue* v. *The Township of Chinquacousy* (45), *Rowe* v. *The Township of Rochester* (46), and *Northwood* v. *The Township of Raleigh* (47).

In *The Gas Light & Coke Co.* v. *The Vestry of St. Mary's* (48), the plaintiff both recovered damages for injury to its gas pipes, lawfully laid under the highway, occasioned by the use of heavy steam rollers in the repair of the highways and was granted an injunction to prevent the further use of such rollers. Lindley, L.J., delivering the judgment of the Court of Appeal affirming this decision, said (p. 5): "Now there is no dispute that the defendants can perform their duty without using steam rollers of such a weight as to injure the plaintiff's pipes; but they say it is their duty and right to repair the roads in the most economical and best way, and to avail themselves of all improvements regardless of the effect on the plaintiff's pipes, but Field, J., has held that this contention cannot be supported, and we are of opinion that his decision is correct. The authorities to which he referred, and particularly *The Metropolitan Asylum District Board* v. *Hill*, shew that an action lies for an injury to property, unless such injury is expressly authorized by statute or is, physically speaking, the necessary consequence of what is so authorized."

Even if there could be a case in which it would be impossible to drain a highway without thus injuring private property, the present case is not such. The evidence shews that the drainage could be made as effective and nearly, if not quite, as economically, without damage to the plaintiff.

The compensation clause of the Act, sec. 665, does not assist in determining the extent of the powers in the present case, as it only requires compensation to be made for any damage "necessarily resulting" from the use of the statutory powers, leaving it to be ascertained from other portions of the Act what the powers are. As Mr. Justice Osler pointed out, in *McGarvey* v. *Strathroy* (36),

(45) 25 U. C. R. 61.
(46) 29 U. C. R. 590, 22 U. C. R. 319.
(47) 3 O. R. 347.
(48) 15 Q. B. D. 1.

"The damages for which compensation is given must, however, be such as *necessarily* result from the exercise of the powers of the corporation, and, therefore, are not such as arise from negligence in doing the work."

Here the municipality made no inquiries and gave no specific instructions as to the nature, extent or outlet of the ditch. All was left to the discretion of the foreman and one councillor. If the work had been done with due care, and injury had ensued to the plaintiff from *vis major* or some event which could not reasonably have been foreseen and guarded against, the municipality might not have been liable. The overflow occurred in an unusually wet season, but not in consequence of any such extraordinary occurrence as to constitute *vis major* or that the possibility of its occurrence could not readily have been provided for.

It was argued that if the acts done were without the powers of the municipality, it could not be liable for them. But the employees of the corporation were acting within the scope of their employment in repairing the highways. If the municipality had had the power to turn the drainage over the plaintiff's land, both it and its employees could have justified under this power. But, as it had not this power, if the damage resulted from the negligence of the employees in doing the work which they were lawfully employed to do, the municipality is liable, as appears from the cases which I have cited. In addition, I may refer to such well known cases as *Yarborough* v. *The Bank of England* (49), *Smith* v. *The Birmingham, &c., Gas Light Co.* (50), *Eastern Counties Ry. Co.* v. *Broom* (51), and *Reeves* v. *Toronto* (31), as to the liability of a corporation for tortious acts of employees not appointed by by-law or under the corporate seal.

My decision in *Atcheson* v. *Portage la Prairie* (40), went upon the ground that the work had not been authorized by the municipal council or recognized or adopted by it as a municipal work, and could not, therefore, be considered as constructed by servants of the municipality acting within the scope of their employment.

I do not consider it necessary to discuss the evidence, which appears to amply warrant the findings of the learned Judge of the County Court.

In my opinion, it was not within the statutory powers of the municipality to cast the waters of the highway—not to speak of

(49) 16 East, 6.

(50) 1 A. & E. 526.

(51) 6 Ex. 314.

those of the swamp which a witness states the ditch was intended to drain—upon the plaintiff's land, or to discharge them where they would naturally flow there to his damage; but, this result having been due to negligence and improper construction of the ditch by the servants of the municipality acting within the scope of their employment, the plaintiff is entitled to recover compensation therefor by action.

Upon the argument a question was raised as to the principle upon which a portion of the damages was assessed, but the objection had not been raised by the *præcipe* or any notice given of an intention to set it up, or of an application to be allowed to do so. The plaintiff's counsel could not properly be expected to meet it, and it does not appear to me that the circumstances are such that the point should now be considered.

I would dismiss the appeal with costs.

Invitation to Use Unsafe Platform at Exhibition Grounds.

MARSHALL v. INDUSTRIAL EXHIBITION.

1 O. L. R. 319, 2 O. L. R. 62.

DIVISIONAL COURT AND COURT OF APPEAL FOR ONTARIO.

One of the plaintiffs purchased from an exhibition association, upon the terms mentioned in the agreement set out in the report, the privilege of selling refreshments under a certain building during the holding of the exhibition in grounds leased by the association from the corporation of a city for two months in the year for the purpose of holding an exhibition, the city by the lease covenanting to repair. During the period of her occupation, and while walking across a platform which was constructed between the building and the sidewalk to give access to people requiring refreshments, the female plaintiff put her foot into a hole in the platform which was out of repair and was injured.

The trial Judge ordered that the action be dismissed with costs. The plaintiff appealed to the Divisional Court.

STREET, J., delivered the judgment of the Court and said in part:—

The defendants, the Industrial Association, in my opinion, are liable to the plaintiffs, upon the simple ground that they invited Mrs. Marshall upon their premises and took her money, and by

their negligence caused the accident: *Lax* v. *The Mayor, etc., of the Borough of Darlington* (1), *Holmes* v. *North Eastern R. W. Co.* (2).

The measure of damages recoverable by her against the Industrial Association for the injury she met with is not the same as that recoverable by the Industrial Association (if any) from the city corporation for breach of its covenant to maintain, and there is therefore no circuity of action in giving a right of action against them: *Payne* v. *Rogers* (3).

The judgment in favour of the defendants, the Industrial Association, must therefore be set aside, and judgment entered against them in favour of the plaintiff, Mary Jane Marshall, for $985, and in favour of the plaintiff, James B. Marshall, for $50, together with the costs of the action, including those of the present motion: but the motion as against the city corporation, as well as the action against them, must be dismissed with costs.

An appeal was taken to the Court of Appeal and was dismissed for the reasons given in the Divisional Court.

Invitation to Use Unsafe Public Dock.

THOMPSON v. SANDWICH.

1 O. L. R. 407.

COMMON PLEAS DIVISION ONTARIO.

An appeal by the defendants, the municipal corporation of the town of Sandwich, from the judgment of the County Court of Essex in favour of the plaintiff, a contractor and builder, in an action to recover damages for the loss of a load of bricks owing to the alleged improper condition of a dock or wharf in the town of Sandwich built by the defendants. The plaintiff unloaded the bricks from a boat upon the dock, and almost immediately the dock broke and the bricks fell into the river and were nearly all lost. The plaintiff alleged that the dock at the time of the accident was in an unsafe condition, of which

(1) (1879), 5 Ex. D. 28. (2) (1869), L. R. 4 Ex. 254.
(3) (1794), 2 H. Bl. at p. 350.

the defendants had notice, and that it had been negligently constructed. The defendants set up that the bricks were unloaded by the plaintiff upon the dock without the permission or knowledge of the defendants, and counterclaimed for damages for the injury to the dock by the improper loading of the bricks upon it. The County Court Judge gave judgment for the plaintiff for $166.85 damages and for costs, and dismissed counterclaim with costs.

McMahon, J., said in part:—It would be sufficient to fasten liability on the defendants that the dock was there in such a position as invited any vessel owner desiring to unload a cargo to do so, if prepared to pay the dock charges which the statute gave them authority to levy. As said by the Court of Appeal, in the case of a harbour company: "Generally speaking, whenever, after a company, by receiving tolls, have asserted that their harbour is in a state to receive and shelter vessels, such harbour becomes unfitted for that purpose, either from danger in the approach or entrance, or insufficient protection when within its limits, the company are *prima facie* liable to compensate those who have suffered proximate damage from any such cause. They must relieve themselves from this *prima facie* liability:" *Sweeney* v. *Port Burwell Harbour Co.* (1), see also *Webb* v. *Port Bruce Harbour Co.* (2).

And see the opinion of all the Judges delivered by Mr. Justice Blackburn in answer to the questions submitted by the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (3), particularly at pp. 110 and 118, which opinion was concurred in by the House of Lords. This case was followed by the Supreme Court of Massachusetts in *Nickerson* v. *Tirrell* (4).

Meredith, C.J., said:—The proper inference from the evidence is, that, by the construction of the dock and the passing of the by-law establishing tolls for the use of it, the appellant municipality invited the public to make use of it for such purposes as public docks are ordinarily used for, and, in my opinion, if it was desired to limit the uses to which the dock was to be put below that standard, it was incumbent on the municipality to make that known in some public way, so that persons desiring to use the dock would have notice of the limited use for which it was designed, if indeed it was intended to limit the use of it, which is open to serious question upon the evidence.

(1) 19 C. P. at p. 380.
(2) 19 U. C. R. 615.
(3) (1864-6), L. R. 1 H. L. 93.
(4) (1879), 127 Mass. 236.

The evidence also justifies the conclusion that the mode adopted by the master of the vessel of unloading the bricks and piling them on the dock was that usually adopted at public docks.

Such being the result of the evidence, the loss of the bricks properly falls upon the appellants, as it was due to a breach of the duty which they owed to the respondent as one of the public invited to use the dock on the terms of the by-law of the municipality.

Sewage Deposited on Lands by Stream.

WEBER v. BERLIN.

8 O. L. R. 302; 3 O. W. R. 812.

KING'S BENCH DIVISION ONTARIO.

This was an appeal by the defendants, the corporation of the town of Berlin, against a report and findings of the Judge of the County Court of Waterloo, sitting as a special referee, under a judgment pronounced by Meredith, J., at the trial, by which he granted an injunction to restrain a nuisance committed by the defendants, and referred it to the special referee to inquire and report as to the damage sustained by the plaintiffs. The referee found that a heifer of the plaintiffs' worth $50 had died of anthrax brought down to the plaintiffs' farm from a sewer of the defendants; and he assessed the plaintiffs' damages arising from the pollution of the water of Snyder's creek running through their farm, into which the defendants' sewer emptied and the air in and about the plaintiffs' lands and dwelling houses, and for depreciation caused to the value of 65 3-10 acres of the plaintiffs' land by the acts and neglect of the defendants, at $2,350, including the value of the heifer.

The defendants appealed from this report, on the ground that they were not shewn to be liable; the plaintiffs cross-appealed, upon the ground that other portions of the plaintiffs' land had been depreciated in value by the defendants' acts, and compensation had been limited to the 65 3-10 acres only and as to that and as to the whole it was insufficient.

STREET, J., said in part:—In my opinion, the defendants are liable to the plaintiffs, under the circumstances, for the damage

sustained by the plaintiffs by reason not only of the sewage matter but also for the anthrax germs brought down upon the plaintiffs' land by reason of their sewage system. They are authorized by the Municipal Act to undertake and carry out the work in question, but they are not authorized to do it in such a way as to cause a nuisance or to injure other persons. They have by means of the works constructed under their by-law carried their sewage and the anthrax germs directly to the plaintiffs' land, and, having given leave to the tanneries from which these germs come to connect with their system of sewers, they are responsible for the result. It is true they have forbidden the throwing of the refuse, from which the germs are believed to come, into the sewers, but they have not exercised the power they reserved to themselves of enforcing this prohibition by stopping the connection. The defendants themselves have constructed this sewer system through their own land and have by means of it brought these injurious substances directly to the plaintiffs' land. A private person would undoubtedly be liable under similar circumstances, and I can find no good reason for distinguishing the liability of the defendants from that of a private person: *Attorney-General* v. *Council of Borough of Birmingham* (1), *Van Egmond* v. *Town of Seaforth* (2), *Close* v. *Town of Woodstock* (3), *Charles* v. *Finchley Local Board* (4). The last mentioned case is criticized and not followed in *Brown* v. *Dunstable Corporation* (5), and *Attorney-General* v. *Clerkenwell Vestry* (6), but an examination of the case and of the reasons given for the criticisms shews that the case would have been followed had the conditions which exist in the present case been present there.

There is here no absolute right on the part of the tanneries to connect with the main sewers and to retain their connection; their connection is only to be made with the consent of the engineer, etc., and when made is subject to good behaviour and may be cut off under the express terms of the by-law if they violate its terms.

The remedy is in the hands of the defendants themselves to prevent the tanneries from continuing to cast their refuse into the sewers, and they are not thrown upon the remedy of action, as was the case in *Attorney-General* v. *Dorking Guardians of Poor* (7).

(1) (1858), 4 K. & J. 528.
(2) (1884), 6 O. R. 599.
(3) (1892), 23 O. R. 99.
(4) (1883), 23 Ch. D. 767.
(5) [1899] 2 Ch. 378.
(6) [1891] 3 Ch. 527, 534.
(7) (1882), 20 Ch. D. 595.

I do not think I can find in the evidence sufficient ground for holding that the learned referee has erred in holding that the plaintiffs' farms lying to the east of his homestead have depreciated in value by reason of the defendants' acts, although no doubt the occupants of those farms have suffered the sensible loss of comfort and health caused by the pollution of the air common to all the dwellers in the neighbourhood of the sewage farm.

I do not think the damages should be assessed to the plaintiffs upon a niggardly scale. Their property before the trespasses committed upon it by the defendants was a comfortable and valuable farm watered by a clear stream of water which the refuse from the town had not seriously interfered with. The result of the negligence of the defendants in discharging their filth upon them and poisoning the air in which they live has been to innoculate their flat land with a germ which has depreciated the value of their homestead and rendered it almost unsaleable because of the bad reputation it has obtained, and to interfere very considerably with their comfort in living upon it. It was urged at the argument that the objections made were largely a matter of imagination; but, if the acts of the defendant have had the natural effect of giving rise to an apprehension which has destroyed the value of the plaintiffs' property, they are liable to make the loss good: *Cowper Essex* v. *Local Board of Acton* (8).

In my opinion, therefore, the appeal of the defendants should be dismissed with costs, and the cross-appeal of the plaintiffs should be allowed to the extent of increasing the damages to $2,850 with costs.

Loose Board in Sidewalk.

VANCOUVER v. McPHALEN.

45 S. C. R. 194.

SUPREME COURT OF CANADA.

DUFF, J., delivered the following judgment:—

The plaintiff while walking on a sidewalk, constructed by the Corporation of the City of Vancouver on a public highway within the municipal boundaries, tripped over a loose plank and in consequence suffered serious personal injuries. It was left to the

(8) (1889), 14 App. Cas. 153, 177.

jury by the learned trial judge to say whether or not the state of the highway was due to the negligent failure of the municipality to keep the sidewalk in repair and whether the condition of the sidewalk was the cause of the injuries suffered by the plaintiff; and these questions they decided against the corporation.

The statute in which the corporate powers and duties of the municipality (1900 B.C., ch. 54), are declared, imposes upon the municipality the duty of keeping highways in repair; and the controversy on this appeal turns upon the question whether this enactment confers a right to reparation upon an individual suffering a personal injury in such circumstances as those giving rise to this action, or whether, on the other hand, the enactment is, as the appellant municipality contends, declarative of a right which is only capable of being vindicated in proceedings instituted in the public behalf.

It is not denied, of course, in form, that this is a question which must ultimately turn upon the view one takes concerning the intention of the legislature as ascertained from the statute. The controversy is rather as to the effect of certain decisions (and certain dicta of very eminent judges) touching the responsibility of municipal corporations deriving their powers from other statutes passed by other legislatures in respect of negligent default in the matter of the repair of highways and as to the degree in which those decisions and dicta ought to be considered as regulating the construction of the special statute by which the appellant corporation is governed.

It is a general rule that where a duty rests upon an individual or a corporation of such a character that an indictment would lie for default in performing it, an action also will lie at the suit of a person who by reason of such default suffers some peculiar harm beyond the rest of His Majesty's subjects: *Mayor of Lyme Regis* v. *Henley* (2); *Sutton* v. *Johnstone* (3); *Ferguson* v. *The Earl of Kinnoull* (4); *McKinnon* v. *Penson* (5); *Hartnall* v. *Ryde Commissioners* (6); *Coe* v. *Wise* (7); *Maguire* v. *Liverpool Corporation* (8). Where, nevertheless, the duty arises out of statute the rule cannot be thus absolutely stated. The Statute of Westminster (1 Stat. W. 13 Edw. I.), ch. 50, does indeed profess in

(2) 3 B. & Ad. 77, at p. 93; 2 C. & F. 331, at p. 354
(3) 1 T. R. 493.
(4) 9 Cl. & F. 251, at pp. 279, 283, 310.
(5) 8 Ex. 319, at p. 327.
(6) 4 B. & S. 361, at p. 367.
(7) 5 B. & S. 440, at p. 464.
(8) (1905), 1 K. B. 767, at pp. 782 and 785.

terms to give a remedy by action on the case to all who are aggrieved by the neglect of any duty created by Act of Parliament. The effect of this statute, however, as stated in Comyn's Digest "Action upon Statute" (F), is that "in every case where a statute enacts or prohibits a thing for the *benefit of a person* he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law." Obviously, this leaves it to be determined in each case whether the alleged duty has or has not been created "for the benefit" of the person aggrieved; which, of course (if the duty be a public duty), is only another way of stating the question whether the enactment does or does not evince an intention on part of the legislature that a private remedy by action shall be available to a person suffering a special injury from the wrongful omission to observe its provisions.

There was at one time a disposition on the part of some very eminent judges to hold that public bodies charged with duties to be performed by them as trustees on behalf of, or for the benefit of the public, were not, in their trust or corporate character, answerable for the negligent acts or defaults of their servants; on the principle—which has been broadly applied in the United States in such cases—that such bodies, in discharging their public duties, act as agents or instrumentalities of government, and as such are not answerable for the torts of their servants. See the speech of Lord Wensleydale in *The Mersey Docks Trustees* v. *Gibbs* (9), at pages 124, 125; and Lord Cottenham's judgment in *Duncan* v. *Findlater* (10). This view concerning the responsibility of municipal and other bodies for negligence or default in the performance of the public duties imposed by statute was definitely rejected in a series of cases which culminated in the decision of the House of Lords in *The Mersey Docks Trustees* v. *Gibbs* (9). There Lord Blackburn (then Blackburn, J.), delivering the unanimous opinion of the judges, while adopting (p. 118) Lord Campbell's observation in the *Southampton and Itchin Floating Bridge and Roads Co.* v. *Local Board of Health of Southampton* (11), that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created, stated the proper rule of construction to be this:—In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of statute, shall have the same duties and its funds shall

(9) L. R. 1 H. L. 93. (10) 6 Cl. & F. 894.
(11) 8 E. & B. 801.

be rendered subject to the same liabilities as the general law would impose upon a private person doing the same things. The canon of construction thus enunciated met with the approval of the House of Lords; and it is from the standpoint here indicated that, since the date of that decision, the courts have examined claims preferred against municipal bodies created by modern statutes and based upon an alleged violation of duties said to arise out of the provisions of such statutes. The question in each case is, of course, as already mentioned, in the last resort a question of the intention of the legislature to be collected from the enactment as a whole interpreted in the light of such circumstances as may properly be considered, and according to the canons of construction properly applicable. There are, however, I think, some well ascertained principles upon which the courts have acted in such cases. It might be stated broadly, I think, with the support of the great weight of authority, that the breach (by way of omission or nonfeasance) by a municipal body of a legal duty created by statute, gives rise to an action at the suit of an aggrieved individual where, (*a*) the default is of such a character as to be indictable, (*b*) the grievance suffered involves damages peculiar to the individual, (*c*) the damage suffered is within the mischief contemplated by the statute, and (*d*) where there is no specific provision excluding the remedy of action and the provisions of the statute as a whole, taken by themselves or read in the light of the history of the legislation, do not justify an inference that the legislature intended to exclude that remedy. In other words, I think the effect of the actual decisions is that where there is a legal duty having attached to it the sanction of indictment which has been created by statute and conditions (*b*) and (*c*) are present, then in general it rests with those who deny the remedy by action to point to something in the statute itself or in the circumstances in which it was passed indicating an intention to exclude the remedy. I think that is established by a series of decisions of high authority; but there are dicta of very eminent judges (I shall be obliged to refer to them more particularly) which appear to conflict with this proposition and it will be sufficient to take a narrower ground, which is quite broad enough for the purposes of this case, and is, I conceive, demonstrably conformable both to the authorities and to most of the dicta referred to. The ground upon which I think the liability of the corporation may be put consistently with every relevant decision and with almost if not quite all the dicta I have seen, is this: where a municipal corporation acting under powers conferred by the statute

creating it, constructs a work for the use of the public, and invites the public to use it, the corporation having the ownership of and full authority to control the work, and to regulate the use of it by the public; and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal injury in consequence of the existence of the nuisance (while properly using the work in the exercise of the public right), the corporation must shew something in the statute indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances.

There is a large number of authorities in support of the proposition that as a general rule a municipal corporation is, apart from express enactment, under a legal obligation to make such arrangements as may be necessary to prevent the works which are under its care becoming a nuisance, and that, *prima facie*, persons suffering a special injury from the failure of the corporation to fulfil this obligation, have a right of action against it: *Re Islington Market* (12), at page 519; *White* v. *Hindley Local Board* (13); *Blakemore* v. *Vestry of Mile End Old Town* (14); *Corporation Bathurst* v. *McPherson* (15). We are, however, dealing with a case where the duty is created by express statutory enactment and as that relieves us from some of the difficulties which, in point of interpretation, have sometimes presented themselves, it will, perhaps, tend to simplify matters if we limit our attention to cases of a similar nature. In *Coe* v. *Wise* (16), the Court of Queen's Bench and the Exchequer Chamber had to consider the responsibility of drainage commissioners who had Parliamentary authority to make a cut and sluice and were required expressly by the statute from which they derived that authority to maintain the works when made. In the Court of Queen's Bench, Blackburn, J., after quoting the section in which this duty was declared, said, at pp. 464 and 465:—

"Nothing has been pointed out in the argument, and I have not myself discovered anything to qualify this enactment, which certainly seems to me to cast upon the Drainage Commissioners the

(12) 3 Cl. & F. 513.
(13) L. R. 10 Q. B. 219.
(14) 9 Q. B. D. 451.
(15) 4 App. Cas. 256.
(16) 5 B. & S. 440; L. R. 1 Q. B. 711.

duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who, in consequence, sustain damage. I entirely assent to the position that if the Legislature have shewn an intention to prohibit this right of action in the present case that will effectually prevent it, and I agree that such an intention need not be shewn in express words if it can be collected from the whole Act, but I think that the onus lies on the defendants to shew that it was intended to prevent the right of action, and not on the plaintiff to shew that it was intended to give it."

The majority of the judges in the Court of Queen's Bench having taken the view that there was no right of action, their decision was reversed in the Exchequer Chamber where it was held, following *Mersey Docks Trustees* v. *Gibbs* (9), that the action lay; and in delivering judgment the court (Erle, C.J., Willes, J., and Channell and Pigott, BB.), after referring to that authority said, at page 720:—"And we further hold that the action is maintained for the reasons stated by Blackburn, J., in this case in the court below."

In *Meek* v. *The Whitechapel Board of Works* (17), Lord Penzance, then Wilde, B., held the defendants answerable in an action for a nuisance arising from their neglect of their statutory duty (secs. 68 and 69 "Metropolis Local Management Act") to cause the sewers within their district to be kept clean. In *Baron* v. *Portslade Urban Council* (18), the Court of Appeal had to consider sec. 19 of the "Public Health Act of 1875," which required the local authority in whom sewers should be vested to maintain them so that they should not be a nuisance and to see that they are properly cleaned and emptied (p. 591). The council was held liable to an action at the suit of a person specially damnified by a nuisance arising from neglect of this duty. In none of these cases was there anything in the enactment pointing to the intention to give a right of action beyond the provision creating the duty; and in each case reparation was awarded to a member of the public suffering special injury from a mischief which was one of the character the legislature intended to prevent, and which, of course, was attributable to neglect of the duty prescribed. In *Maguire* v. *Liverpool Corporation* (8), at page 782, Vaughan Williams, L.J., said:—

"Are we to treat the liability which is imposed upon the corporation as a liability coming within the rule, where statutory

(17) 2 F. & F. 144. (18) [1900] 2 Q. B. 588.

duties are laid upon public bodies by statute, that in the case of any one suffering damage by reason of the neglect of such public body to perform the duties which are thrown upon it by the statute, an action will lie by the individual member of the public who sustains particular injury by reason of that neglect of duty."

The appellant corporation does not dispute the authority of these decisions or controvert the reasoning of Lord Blackburn in *Coe* v. *Wise* (7), at all events in so far as that reasoning applies generally to the responsibility of a public body for a nonfeasance giving rise physically to such a state of things as constitutes an indictable nuisance. The contention upon which the appeal is founded, as I have already indicated, is this: that according to the settled law of England the duty of maintaining a highway in a state of repair, where it is cast upon a municipal body, is (as regards the legal sanctions attached to it), *sui generis*, and the fact that such a duty is imposed expressly or impliedly by an Act of Parliament does not, *ipso jure*, give a remedy by action for failure to perform that duty and, moreover, is not, in itself, to be taken to indicate an intention on the part of the legislature that the remedy by action shall be available, and that such remedy is not available unless the legislature has in some other way clearly indicated an intention that it should be so. It is, of course, contended that no such intention can properly be implied from the provisions of the Act we have to consider. Before referring to the authorities upon which this contention rests it will be convenient to note broadly the character of the powers conferred upon the corporation of Vancouver touching the management and control of streets. The highways in the municipality are (sec. 217) vested in the corporation; and by the same section it is provided that these highways "shall not be interfered with" without the permission of the city engineer in writing. The council of the municipality, under sec. 125, has very full powers over highways and the public rights in respect of them. It may pass by-laws—by sub-sec. 52, for "opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up * * * roads * * * and other public communications"; by sub-sec. 82, "To regulate the width of new streets and roads, and for preventing the laying out or construction of streets and lanes unless in conformity with existing streets, etc., without the consent of the council first obtained"; for regulating plans level with surface inclination and material of the pavement, roadway, sidewalk of streets and roads (sub-sec. 83); for regulating roads, streets, bridges and

driving and riding thereon (sub-sec. 84); for dealing with nuisances, including "any structure or erection of any kind whatsoever * * * or any other matter or thing in or upon any * * * street or road." And finally, by section 219:—"Every * * * public street, road, square, land bridge and highway shall be kept in repair by the corporation."

The decisions on which the appellants mainly rely are *Municipality of Pictou* v. *Geldert* (19), and *Municipal Council of Sidney* v. *Bourke* (20); *Sanitary Commissioners of Gibraltar* v. *Orfila* (21), in the Privy Council, *Cowley* v. *Newmarket Local Board* (22), in the House of Lords, and *Campbell* v. *City of St. John* (23), and *City of Montreal* v. *Mulcair* (24). Of these decisions the first in order of time is *Cowley* v. *The Newmarket Local Board* (22). That decision turned upon the effect of secs. 144 and 149 of the "Public Health Act," which declared that the urban authority should have and be subject to all the powers, duties and liabilities of surveyors of highways, and should from time to time level, alter and repair the highways as occasion should require. It was held that an action could not be maintained by a person who in passing along a highway was injured by reason of its dangerous condition due to the negligent default of the Board to keep it in repair. The actual ground of the decision is thus stated by Lord Herschell (who took part in it) in delivering the judgment of the Privy Council in *Municipal Council of Sydney* v. *Bourke* (20), at pages 443 and 444:—

"In a series of cases ending with *Cowley* v. *Newmarket Local Board* (22), in which it has been held that an action would not lie for non-repair of a highway the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that though a duty to repair rested on the inhabitants subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to shew that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability."

(19) [1893] A. C. 524.
(20) [1895] A. C. 433.
(21) 15 App. Cas. 400.
(22) [1892] A. C. 345.
(23) 26 Can. S. C. R. 1.
(24) 28 Can. S. C. R. 458.

In *Maguire* v. *The Corporation of Liverpool* (8), in applying the decision in *Cowley* v. *The Newmarket Local Board* (22), Vaughan Williams, L.J., thus discusses it at pages 784 and 785:

"That statutory obligation having been created, how is it that by the decision in *Cowley* v. *Newmarket Local Board* (22), escape is made from the general proposition that where a statutory duty is created of such a nature that indictment would lie, or a remedy by criminal law be good for neglect to perform the statutory duty, an action will lie at the suit of a subject sustaining particular injury—I say, how is it that that undoubted general principle is escaped from in the decision in *Cowley* v. *Newmarket Local Board* (22)? According to my understanding of the judgments, both of Lord Halsbury and Lord Herschell, it is really escaped from by going back to what is the liability which is thrown upon the inhabitants of the parish in respect of liability to repair roads, and the limitation of procedure for neglect to perform that duty to procedure by the Crown. I arrive at the conclusion that this Act of 1846 was really mainly passed for purposes of convenience of remedy, and convenience of performing the duties in respect of a large aggregate of houses and streets such as one finds in the case of the town of Liverpool. The object of the legislation merely being that sort of convenience, the object of the Act is that and that alone. It was not intended to alter the liability of those upon whom for convenience the carrying out of this work was thrown, but to leave it exactly as it was in cases where the obligation to repair was thrown upon the inhabitants of the parish."

At page 787, he states the principle to be deduced from this and other cases following it in these words:

"I think that, having regard to the legislation that has taken place and to the various decisions which have been given, we ought, in construing this Act of Parliament, to start with a *prima facie* presumption that in the transfer of the common law obligation to repair lying upon the inhabitants of the parish at large and on other bodies for the purpose of the public convenience. *prima facie* it must be assumed that the legislature did not by such a transfer intend to impose any greater duty or any greater obligation upon the persons or bodies to whom the obligation was transferred than that which would have existed before the transfer."

To the same effect is the judgment of Romer, L.J., at page 790:—

"Furthermore, I think that certain other principles are now established with reference to the Acts of Parliament which create new bodies, with duties and obligations cast upon them to do the repairs of highways in lieu of the inhabitants of the parish. Modern authorities shew that the question whether in such cases the liability to an action for damages for non-repair is thrown upon the new body created by the Act of Parliament such as I have mentioned, and such as those of 1830 and 1846 in the present case, is one to be gathered from the wording of the special Act. And it was pointed out in the case of *Municipality of Pictou* v. *Geldert* (19), at page 527, by Lord Hobhouse, who delivered the judgment of the Privy Council in that case, that "it must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed." I need not go through these modern authorities in detail. I think the result of them, and in particular of the case of *Cowley* v. *Newmarket Local Board* (22), is accurately summed up by Mathew, J., as he then was, in the case of *Saunders* v. *Holborn District Board of Works* (25), at page 68, where he says: "The result of these decisions is plain—it is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the legislature is clearly disclosed, no action will lie." As I have said, those observations appear to me to accurately sum up the authorities, treating the observations of Mathew, J., as being confined, as I think they were intended to be, to the question of the construction of such Acts of Parliament as those that I have been referring to."

It is obvious that the decisions in *Cowley* v. *The Newmarket Local Board* (22), and cognate cases, are regarded by these learned judges as creating an exception to the general rule and it is quite plain that the Corporation of Vancouver cannot claim exemption from the operation of that rule upon any such grounds as those upon which these decisions rest. Vancouver was incorporated by an Act of the legislature in 1886 (49 Vict. ch. 32 [B.C.]), and secs. 217 and 218 of the present Act are reproductions of secs. 213 and 214 of that Act. It is clear enough that, at the passing

(25) [1892] A. C. 345.

of the Act of 1886, the locality affected by it was not within the limits of an incorporated municipality, as the Chief Justice states in the court below. Mr. Lewis directed our attention to the preamble of the Act; but I do not understand it to be suggested that the town of Granville there referred to was an incorporated municipality. The inference from the form of the preamble itself would be that it was not; and if there were any foundation for such a suggestion it would unquestionably have been put forward in the court below and we should have been furnished with positive information on the point.

There can, I think, be little doubt that the common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair was never introduced into British Columbia. By proclamation of Governor Douglas, on the 19th November, 1858, issued under the authority of an order-in-council of 2nd February, 1858, passed pursuant to chapter 99 of 21 & 22 Vict., it was ordained that "the civil laws of England as the same existed" on the 19th November, 1858, "and so far as the same are not from local circumstances inapplicable to the Colony of British Columbia are and will remain in full force in the colony till such time as they shall be altered" according to law. The local circumstances of the colony are pictured in the published correspondence between the Colonial Office and Governor Douglas in the years 1858 (the year in which the colony was established) to 1861, which correspondence has been a good deal considered in the last few years in the course of judicial proceedings in British Columbia. The Colony owed its establishment to the influx of population due to the discovery of gold in the interior; and the correspondence makes it clear that one important duty of the detachment of engineers which was early sent out, under the command of Colonel Moody, was the construction of roads and trails. The Government—of necessity—assumed the maintenance of these highways. The same necessity (arising partly out of the physical character of the country and partly out of the fact that great stretches of uninhabited territory had to be traversed in passing from one settlement or centre of population to another), explains the fact that down to the present time the duty of constructing and maintaining roads and other highways outside the limits of municipalities has always been assumed and carried out by the Government of the colony or that of the province. The common law rule has never been acted upon and was, in 1858, and still is, "from local circum-

stances inapplicable." There is, therefore, no presumption arising from the state of affairs at the passing of the Act which can bring this case within the reasoning upon which the decision in *Cowley* v. *The Newmarket Local Board* (22) proceeded. Lord Herschell suggested, in his judgment in that case, that there was another ground upon which the decision might stand, and that suggestion it is hardly necessary to say requires the most careful consideration. I will return to it after discussing the other decisions upon which the counsel for the corporation more particularly rely. The next in order of date is *Municipality of Pictou* v. *Geldert* (19). The statute under consideration in that case was the "County Incorporation Act," a statute of the Province of Nova Scotia, passed in 1879. Lord Hobhouse in delivering the judgment of the Privy Council points out first that the common law of Nova Scotia was the same as that of England in imposing upon the inhabitants the legal duty of maintaining highways while not subjecting them to liability in an action for non-observance of that duty. Of the statute in question he observes (page 529):

"The first observation that occurs on these provisions of law is, that under the Act of 1761, the liability to maintain road and bridges law upon the inhabitants, and that this liability is preserved by the 'County Incorporation Act,' which contemplates the enforcement of statute and highway labour.

"It is to be observed further that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges. It confers upon the council powers and authorities which extend to those objects; but the powers and authorities are conferred in precisely the same terms with reference to objects with regard to which the powers clearly must be discretionary and not matters of obligation."

These observations (which seem to give the gist of the decision) have no application to the statute before us. In *Municipal Council of Sydney* v. *Bourke* (20) the statute which the Privy Council had to examine contained no provision expressly imposing upon the municipal authority the duty to keep the highway in repair; and the effect of Lord Herschell's judgment is that that authority was charged with no duty in respect of such repair which the courts could take cognizance of. This is manifest from two paragraphs, on page 439 of the report, which I quote:—

"Attention has already been directed to the fact that the provisions of sec. 82 of the 43 Vict., relating to the maintenance of highways, are empowering only, and do not purport to impose a

duty. The terms of the section make it manifest that this was the intention of the legislature. The council have conferred on them in a single sentence power to alter, widen, divert, and improve public ways, as well as to 'maintain and order' them. It is obvious that the alteration, widening, diversion or improvement are matters left absolutely to the discretion and judgment of the council, and that there is no binding obligation enforceable by law to do any of these things. It is impossible to hold that whilst as to these matters a power only is conferred and no obligation imposed, the case is different as regards the maintenance of the highways.

"There is no doubt, in a certain sense, a duty incumbent on the council to see to the maintenance of the highways. It is for them to exercise the powers conferred upon them by law for the benefit of the community. In these matters they represent the citizens, and ought to have regard to their interests. For their discharge of these duties they are responsible to those whom they represent. The members of the council are the choice of the citizens, and if they do not use their powers well they can be displaced. But if they fail to maintain in good repair the highways of the city, it is not a matter of which the courts can take cognizance, or which can be the foundation of an action if any citizen should be thereby aggrieved."

Here again it is obvious that the reasoning of the Judicial Committee cannot be resorted to as governing the determination of the question before us.

Lastly, the ratio of the decision of the Privy Council in *Sanitary Commissioners of Gibraltar* v. *Orfila* (21), in so far as it affects the question under discussion is stated, at pages 412 and 413 of the report, in the following passage of Lord Watson's judgment:—

"The only duty laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any rules and regulations which the Governor may think fit to make.

"Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of retaining walls belonging to it remains in reality the principal, the commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the

sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road."

It is not argued that the Corporation of Vancouver can escape on the ground thus stated; and it is plain that the actual decision cannot afford any support to the appellant's contention. Some stress is laid, however, upon Lord Watson's language at page 411 in the following sentence:—

"But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the commissioners a duty toward himself which they negligently failed to perform."

It is impossible to contend that by this language Lord Watson meant to convey that "the duty towards himself" must be declared in express words; the remainder of the passage, in which he quotes Lord Blackburn's canon in *The Mersey Docks Trustees* v. *Gibbs* (9) as authoritative, shews that he intended to express no such idea. The passage means, I think, nothing more than this, that an intention to impute such a duty must be discoverable in the statute. I am not overlooking Mr. Macdonald's reference to the passage in the judgment of Matthew, J., in *Saunders* v. *Holborn District Board of Works* (25), at page 68. The observations on which Mr. Macdonald relies must be taken, I think, to be confined as Romer, L.J., points out in *Maguire* v. *Corporation of Liverpool* (7), at page 790, to Acts of Parliament such as those under discussion: viz., Acts which create new bodies with duties cast upon them to repair highways in lieu of the inhabitants of the parish.

It remains to consider the observations of Lord Herschell in *Cowley* v. *Newmarket Local Board* (22), at page 352, in which he suggests that the case falls within the scope of a remark of James, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (26). With the greatest possible respect for even a passing suggestion of Lord Herschell, I am constrained to think that there is no parallel between the statutory duty to provide a sufficient number of sewers for a given district, imposed by sec. 15 of the "Public Health Act" (which was the case to which the attention of James, L.J., was directed), and a statutory duty to keep a highway, or if you like, an existing system of sewers, from

(26) 12 Ch. D. 102, at p. 109.

becoming a nuisance. The first may to so great a degree rest in the discretion of the authority charged with it, that it would be difficult for a court of law to take cognizance of it at all; and in fact, since the decision in *Cowley* v. *Newmarket Board* (22), it has been held that the sole remedy for non-performance of the duty imposed by the enactment in question was provided by the enactment itself and was an appeal to the Local Government Board. The difference between the two classes of cases was pointed out by Kennedy, L.J., in *Dawson* v. *Bingley Urban District Council* (27), at page 311; and earlier, by Lord Halsbury, in *Baron* v. *Portslade Urban District Council* (28), at page 590, in these words:—

"There seems to be a wide difference between the obligation or duty to construct a new system of drainage and the obligation on the local authority to use sewers that are vested in them in a proper and reasonable manner."

That observation appears to indicate the distinction between the case referred to by Lord Herschell and the present case.

The statute which this court had before it, in *Campbell* v. *City of St. John* (23), contained no provision expressly imposing any duty upon the municipality in respect of repair of highways, and, having regard to the passages already quoted from Lord Herschell's judgment in *Sydney* v. *Bourke* (25), it is doubtful whether any duty, the breach of which could be the subject of an indictment, could be held to be implied. A decision that such a statute does not give a right of action for a special injury arising from non-repair, cannot, I think, properly be held to be conclusive of the interpretation to be placed upon a provision in another statute expressly imposing such a duty.

For these reasons I think the appeal should fail.

(27) 27 Times L. R. 308. (See below).
(28) [1900] 2 Q. B. 588.

Erroneous Statement as to Position of Fire Plug.

DAWSON v. BINGLEY.

[1911] 2 K. B. 149; 80 L. J. K. B. 842.

COURT OF APPEAL.

The Bingley Urban Council were bound by section 66 of the Public Health Act to cause fire plugs to be provided and maintained and to "paint or mark on the buildings and walls within the streets words or marks near to such fire plugs to denote the situation thereof."

A fire broke out and the fire brigade turned out at once and found the pointer to the fire plug put up by the Council, but the pointer was wrong and misdirected the searchers to the extent of six feet. The result was that fifteen minutes were lost in finding the plug and Dawson's building was consumed. Dawson brought action against the Council for damages. GRANTHAM, J., gave judgment for the Council and the latter appealed.

KENNEDY, L.J., said in part:—It is argued that the things of which the plaintiffs complain—the placing of a plate with a misleading direction as to the situation of the fire plug, contrary to the duty imposed by section 66 to paint or mark it so as to denote its situation, ought to be treated as, or as equivalent to, a nonfeasance, and therefore, say the defendant's counsel, not actionable.

Now, the general law as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or the obligation follows as an incident. The law is, I think, correctly stated in Addison on Torts (8th ed.), p. 104, referring to Comyns' Digest: "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law"—Com. Dig., Action upon Statute (F.). "Accordingly, where the statute is

silent as to the remedy the legislature is to be taken as intending the ordinary result; and the proper remedy for breach of the statute is an action for damages, and, in a proper case, for an injunction." In the present case, the plaintiffs, who have been injured by the defendants' breach of the duty imposed upon them by the Public Health Act, 1875, sec. 66, rely upon the general principle of law which is, as I have said, in my opinion, correctly stated in Addison on Torts in the passage which I have just cited. The defendants, however, claim immunity upon the authority of the judgment of the Court of Appeal in *Atkinson* v. *Newcastle and Gateshead Water Co.* (1), and of the decision of the House of Lords in *Cowley* v. *Newmarket Local Board.* (2) So far as regards the first and earlier of these two cases, it is to be noted that (*a*) the defendants there were not a public body, but a private company, so that the act, in the words of Lord Cairns, L.C., ought to be regarded as "not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers"; and both the Lord Chancellor and Chief Justice Cockburn lay stress upon this point; and (*b*) the Act, in that case, itself imposed remedies in the form of penalties —a circumstance upon which all the members of the Court of Appeal, questioning the judgment of the Queen's Bench in *Couch* v. *Steel* (3), largely based their conclusion. In the case before us, the Public Health Act, 1875, contains no specific provision for the recovery of penalties or for other remedy if sec. 66 is infringed, and the defendants are not a private company or corporation, but a public authority invested by statute with powers and duties for the benefit of the inhabitants of the district in which that public authority exists.

Cowley v. *Newmarket Local Board* (2), was a decision of the House of Lords that a local board in respect of their duties in regard to highways under secs. 144 and 149 of the Public Health Act, 1875, are not legally liable for mere nonfeasance, according to principles illustrated in old days by *Russell* v. *Men of Devon* (4) and in modern times by *Gibson* v. *Preston Corporation* (5) and *Pictou Municipality* v. *Geldert* (6). That is all the case actually decided. Lord Herschell, it is true, does, in the earlier part of his judgment, express a serious doubt of the soundness of the general proposition that, wherever a

(1) (1887), 46 L. J. Ex. 775; 2 Ex. D. 441.
(2) (1892), 62 L. J. Q. B. 65 [1892] A. C. 345.
(3) (1854), 23 L. J. Q. B. 121; 3 E. & B. 402.
(4) (1788), 2 Term Rep. 667.
(5) (1870), 39 L. J. Q. B. 131; L. R. 5 Q. B. 218.
(6) (1893), 63 L. J. P. C. 37; [1893] A. C. 524.

statutory duty is created, any person who can shew that he had sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed. He quotes with approval certain observations of Lord Justice James in *Glossop* v. *Heston and Isleworth Local Board* (7) on this point. But Lord Herschell does not found his decision upon this doubt. Like the other noble and learned Lords, he gives judgment for the defendants upon the narrower point of the non-liability of the local board for damage arising from mere omission to repair a highway. "I think it," he concludes, "to say the least, doubtful whether, apart from the reasons to which I am about to refer, the contention that an action lies against the local board for a breach of their statutory duty to repair the highways can be maintained"; and he then proceeds to the discussion of the narrower question, and to give judgment upon that.

In regard to the observations of Lord Justice James in *Glossop* v *Heston and Isleworth Local Board* (7), it is important, I think, to read them in connection with the class of action to which that case belonged. Not only was it not based, as the Lord Justice points out, upon any act done by the defendants, but not even upon the omission to do any particular or definite act. The alleged neglect was the neglect of the performance of their duty to provide a satisfactory and healthy system of drainage for a whole district; and, as the Lord Justice also points out, the defendants there were under no particular duty cast upon them with reference to any particular individuals. The present case belongs, obviously, to a different class.

Having regard, in the language of Lord Cairns, L.C., in *Atkinson* v. *Newcastle and Gateshead Water Co.* (1), "on the purview of the legislature in the particular statute, and the language which they have there employed"—the absence of provision for any other remedy, the precise enactment of a definite duty for the protection of the class of persons to which the plaintiffs, as local residents, belong, against the kind of mischief which has in fact occurred—I am not prepared to say that even if the breach of statute consisted in the omission to set up a denoting plate, an action on the case would not lie against the defaulting urban authority. It is not, however, necessary on the present case to decide this point. Here there has been not merely an omission to put up a plate truly denoting the position of the fire plug, but the putting up of a plate with untrue directions, calculated to mislead, as the circumstances have shown, at just such a time of

(7) (1879), 49 L. J. Ch. 89; 12 Ch. D. 102.

emergency as that for which the statute by sec. 66 was intended to provide. There has, it appears to me, been an actual misfeasance, causing damage to the plaintiffs, and, in my judgment, this appeal must be allowed.

VAUGHAN WILLIAMS and FARWELL, LL.J., gave reasons for concurring.

Trap in Highway—Defective Lighting.

McCLELLAND v. MANCHESTER.

[1912] 1 K. B. 118; 81 L. J. K. B. 98.

KING'S BENCH DIVISION.

The Manchester Corporation opened up a street called Sunderland Street, and made it up as a new street almost close up to the brink of a ravine.

They left a very small space on one side of the street not made up—a small triangular plot, which apparently was left as it was owing to its declivity towards the ravine. They lighted it by means of ordinary gas lamps, at a considerable distance apart, the last lamp in the street being placed near to the edge of the ravine. Across the ravine, and in the same line and on the same level as Sunderland Street, was another street called Windsor Road, also under the defendants' control. There was a lamp in that road approximately the same distance from the nearest lamp in Sunderland Street as that lamp was from the next lamp further up Sunderland Street. There was evidence that the effect of this system of lighting to any one passing down Sunderland Street was that that street and Windsor Road appeared to be one continuous lighted street, and there was nothing to indicate that the two streets were separated by a ravine.

One evening in December, 1910, while an election was pending, McClelland was being driven down Sunderland Street in a motor car at a moderate pace to fetch a voter to take him to the poll. It was a dark night. Neither McClelland nor the driver of the car knew the road or knew of the existence of the ravine, and while proceeding lawfully along Sunderland Street the driver having no warning, either by sufficient lighting or otherwise, of

the danger, drove over the brink, and the car fell down the ravine and fell over, McClelland suffering serious injuries through the fall.

McClelland brought an action for damages against the corporation.

LUSH, J., said in part:—If a highway authority leaves a road alone and it gets out of repair, there is, of course, no doubt that no action can be brought, although damages ensues. But this doctrine has no application to a case where the road authority has done something, made up or altered or diverted a highway, and has omitted some precaution which, if taken, would have made the work done safe instead of dangerous. You cannot sever what was omitted or left undone from what was committed or actually done, and say that because the accident was caused by the omission therefore it was nonfeasance. Once establish that the local authority did something to the road the case is removed from the category of nonfeasance. If the work is imperfect and incomplete it becomes a case of misfeasance and not nonfeasance, although damage was caused by an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority has chosen to do nothing at all.

It was a question, therefore, for the jury whether they did act reasonably and take proper care in exercising their powers under the special circumstances of the case. I have already said that the jury have, in my opinion, negatived the contention that they did, and the fact that they knowingly made up the street in such a way as to expose passers-by to a hidden trap seems to me of itself conclusively to shew that they did not. They could have made up the street, as was pointed out by plaintiff's counsel, leaving a sufficient space between the street and the ravine to enable a driver of a vehicle, motor or otherwise, to stop before he came to the ravine. The defendants left so small a space that that was impossible. Posts could have been placed in the part not made up and an efficient system of lighting could have been adopted which would have made it clear that the road came to an end.

Counsel for the plaintiff contended that if the defendants undertook to light and did light a street which they knew to be

dangerous they would be liable for an accident caused by insufficient and improper lighting, and he cites the case of *Lamley* v. *East Retford Corporation* (1) as an authority for his contention. I think that the principle of that case applies, and that as the defendants negligently and inadequately lighted the street, having regard to its condition, they are liable on that ground.

With regard to the contention that this was nonfeasance, the answer seems to me to be this: In the first place, I do not think that the doctrine applies to the performance of such a duty as this. It has nothing to do with the non-repair of a highway. There are many public duties, no doubt, for the non-performance of which a plaintiff cannot sue because he loses the benefit of what would have been done if the duty had been performed—as, for instance, the obligation to provide a system of sewerage for the benefit of a district, as in *Glossop* v. *Heston and Isleworth Local Board* (2); but if a duty is undertaken and improperly performed, and actual damage is occasioned thereby, the person injured has, as I have already stated, a perfectly good cause of action. The Court of Appeal obviously took that view in the case of *Lamley* v. *East Retford Corporation*. (1) The case of *Mersey Docks and Harbour Board* v. *Gibbs*, (3) to which I have referred, is another illustration of a similar principle, and for this purpose the light in Windsor Road is perhaps not without importance. It was an additional circumstance calling for additional care in the proper lighting of Sunderland Street.

Unprotected Opening in Sidewalk.

VANCOUVER v. CUMMINGS.

46 S. C. R. 457.

SUPREME COURT OF CANADA.

On the cement sidewalk in a very busy part of the busiest street in the City of Vancouver a hole fourteen inches square had been cut to enable someone to set in place a metal fixture. The

(1) (1891), 55 J. P. 133.
(2) (1879), 49 L. J. Ch. 89; 12 Ch. D. 102.
(3) (1866), 35 L. J. Ex. 225; L. R. 1 H. L. 93.

fixture was not big enough to fill the hole as cut but when set therein left a space large enough to receive Cummings' foot and he got caught, tripped up, and had some bones broken. The space had been partly refilled with clay. The packing had not been properly done and the street had not been restored by re-cementing. There was no evidence as to when or by whom the hole was made and the city had no notice of what had been done.

Cummings brought an action against the city for damages and recovered a judgment for $6,000. The city appealed.

THE CHIEF JUSTICE, SIR CHARLES FITZPATRICK, said in part: —I agree with Mr. Justice Idington. The highway was under the control of the appellant corporation subject to a statutory duty to keep it in repair: *City of Vancouver* v. *McPhalen* (1). It was for the jury to say whether that highway was out of repair by reason of some positive act done by the corporation, its officers, servants and others acting under its authority and whether or not the corporation was negligent. There was evidence upon which the case could be left to the jury upon both points. Assuming, as argued here, that the hole which caused the accident might have been made without the knowledge or consent of the city in view of the duty to repair which is imposed in absolute terms by the statute, the burden of explanation was on the appellants and they have not in any way attempted to meet it. I cannot think, in any event, that any authority given by the legislature to a gas or water company to break up the streets was intended to relieve the municipality from the obligation to maintain them in a safe condition. The right of the company to open the streets was subject to the consent of the corporation and the latter was responsible for any act of the company which might cause the streets to be out of repair.

IDINGTON, J., said in part:—Notice to, or knowledge on the part of, the authorities of a want of repair never formed part of the statute. * * *

The case of *Castor* v. *Township of Uxbridge* (2), relied on is no authority for the proposition. It was disposed of on the ground of contributory negligence of the plaintiff. No case is an authority binding any one but for, or in respect of, the point of law necessarily decided for the determination of the case. * * *

It is to be observed that the case was one arising out of the clear wrongdoing of someone who had no official relation with

(1) 45 Can. S. C. R. 194. (2) 39 U. C. Q. B. 113.

the municipality or colour of right to do what he had done. It was because the case was of that class and had never, till then, arisen for decision in a Superior Court that the Chief Justice took such pains.

It is, if I may be permitted to say so, that kind of case alone which can properly give rise to the question of notice. When it is sought to apply the doctrine to the cases where the road had merely worn out of repair, I think it is entirely misplaced.

No one would think of saying that when the forces of nature have suddenly destroyed or put out of repair a road, or someone has maliciously or negligently wrought the same result, and an accident has taken place as a result thereof, that the municipality must be held as insurers and so, regardless of all opportunity to have repaired the road so destroyed, be cast in damages.

It generally happens in the stating of such a case to any Court, that this is its nature and the question of notice or knowledge or opportunity thereof incidentally arises.

I am, despite dicta to the contrary, prepared to hold that, unless in some such case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out, or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.

The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become acquainted with such possible occurrences, and if it has done so can possibly answer the presumption.

It is beyond my province here to further define the limits of that presumption; I am only concerned with giving due consideration to arguments pressed upon us and rested upon the authorities which I have referred to.

In the case of *Kearney* v. *London, Brighton and South Coast Railway Co.* (3), where a railway company was in duty bound to keep in repair a bridge over a highway, a brick fell from it on a passenger below just after a train had passed, and he was held entitled to damages and had no need to shew more than these facts. The decision was upheld in the Exchequer Chamber. The duty was merely to keep in repair. *Res ipsa loqitur* was applied. Why should there be one rule of law as to the evidence

(3) L. R. 5 Q. B. 411.

needed or presumption arising from evidence in one class of cases involving a breach of duty to repair and another rule for other classes? One would suppose it would if anything be more stringently applied in the case of a breach of a plain statutory duty than in the other. I see no difference. * * *

In this connection regard may be had to the rule to be applied herein, laid down in the judgment of Blackburn, J., in delivering the opinion of the Judges in *Mersey Docks Trustees* v. *Gibbs* (4). In one of the cases and issues raised for consideration therein the contest was relative to the charge delivered to the jury which, according to the bill of exceptions tendered, raised this very issue of non-liability in the absence of knowledge on the part of the defendants there.

The Lord Chief Baron had charged the jury in effect that it was not necessary to prove knowledge on the part of the defendants or their servants of the unfit state of the docks and that proof that the defendants by their servants had the means of knowledge and were negligently ignorant of it, would entitle the plaintiffs to the verdict.

Do we need, even if knowledge or notice is to be an element, anything more in disposing of this case?

Indeed, when the duty to know is considered and what the Lord Chancellor said, at p. 122 of that case, holding that "they must be held equally responsible if it was only through their culpable negligence that its existence was not known to them," is fully appreciated, then the field for notice and knowledge to become an operative factor in these cases is an exceedingly narrow one. In any way I can look at this case I see no ground to support the appeal.

I think the Court below right in finding a case to submit to the jury that there had arisen a presumption on the evidence and inferences fairly deducible therefrom, which entitle the respondent to recover upon the statute if the jury chose to draw such inferences.

The appeal, I think, should be dismissed with costs.

(4) L. R. 1 H. L. 93.

Responsibility of City for Acts of Receiver of Taxes.

McSORLEY v. ST. JOHN.

6 S. C. R. 531.

SUPREME COURT OF CANADA.

Sandall, receiver of taxes for the City of St. John, demanded certain taxes from McSorley, who did not pay. Sandall then issued an execution under his hand for the amount and delivered the same to a city marshal to be executed. The marshal, finding no chattels, arrested McSorley and delivered him to the keeper of the city jail. The whole proceedings were purely statutory, over which the city had no authority or supervision. McSorley, though assessed, was not the owner of the lot. The statute authorized the assessment of owners and the issue of execution against them if in default.

McSorley brought an action against Sandall and the city for arrest and false imprisonment. The Supreme Court of New Brunswick set aside a verdict entered for the plaintiff at the trial and the plaintiff appealed.

STRONG, J., said, in part:—The important question, however, in the present case is whether the rule of *respondeat superior* applies so as to make the corporation of St. John liable for the acts of the other defendant, Sandall, in issuing his warrant upon the commissioners' report, and thus causing the arrest and imprisonment of the plaintiff. The general rule by which this liability is to be tested is so well stated by a learned Judge and text writer, whose authority on a question of this kind is pre-eminent, that I must be excused for extracting at some length what he says upon the subject. Mr. Justice Dillon thus states the rule:

"It may be observed, in the next place, that where it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal enquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if they duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be justly regarded as

its agents or servants, and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected or appointed by the corporation in obedience to the statute to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the Government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or statutory officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable. It will thus be seen that on general principles it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shewn that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved upon him by law or by the direction or authority of the corporation."

Tested by this general rule, it appears to me that the liability of the city for the act of Sandall is beyond question. He was an officer of the city specially appointed to receive the moneys to be collected and levied under the act in pursuance of the assessments of the commissioners. By the 14th section, the parties liable were to pay the sums of money assessed by the commissioners "to such person or persons as the said mayor, aldermen and commonalty of the city of St. John shall appoint to receive them," and it is then provided that in default of payment it should be lawful, and the duty of the receiver of taxes of the city of St. John, to issue execution under his hand, and to levy the amounts as prescribed by the section in question, namely, by distress or imprisonment. In exercise of this power, the city appointed William Sandall, who was already their officer, being by appointment of the city its chamberlain and general receiver of taxes. The official character of Sandall was, therefore, a double one: 1st, he was, by the special appointment of the city under the Act, the person to receive the moneys assessed by the commissioners under the statute, and as such it was his duty to make the demand of payment mentioned in the 14th section, and, secondly, he was the general receiver of taxes for the city, and in that character it was incumbent on him to issue execution and make levies for such of these special assessments as the commissioners should have legally imposed. It thus appears to me

that Sandall was beyond all doubt an officer for whose acts in respect of the collection of these assessments the city was liable, upon the principles stated in the extract from Mr. Justice Dillon's note, which I have before given. He was an officer appointed by the city in obedience to a statute, it is true, but in this respect his appointment in no way differs from that of the great majority of municipal officers whose appointments are prescribed by statute, he committed the wrongful act complained of in the discharge of a duty imposed by law, not for the benefit of the general public, but for the peculiar benefit of the corporate body whose servant he was, the mayor, aldermen and commonalty of the city of St. John, and the money which was exacted from the plaintiff, and which was the fruit of Sandall's illegal act, was received and applied to the benefit of the city. Moreover, it was in his character of receiver of taxes, a general officer of the city, not appointed under the statute, that he committed the trespass complained of by causing the false imprisonment of the plaintiff.

Responsibility of City for Acts of Health Inspector.

FORSYTH v. CANNIFF.

20 O. R. 478.

COMMON PLEAS DIVISION ONTARIO.

Canniff was Medical Health Officer of the City of Toronto. As such officer he, in good faith, reported that the milk sold by Forsyth, a milkman, was impure. The milk in fact was perfectly good. Canniff was appointed by the city but his duties were defined by statute.

Forsyth brought an action for damages against Canniff and the City of Toronto. Judgment was given against both defendants. The city appealed.

GALT, C.J.O.:—There is no doubt the action taken by Dr. Canniff inflicted an injury on the plaintiff; and that, although he acted in perfect good faith, the course pursued by him was one which was improper. There is no motion by him against the verdict.

The question now before us is, whether the city is responsible for what was done by Dr. Canniff acting as medical health officer.

By sec. 47 of R. S. O. ch. 205, any municipal council may appoint a medical health officer whose powers are defined by the statute. By sec. 113, power is conferred on every municipality for which there is a medical health officer, to pass by-laws regulating the duties of medical health officers; and it is manifest that it is in respect only to such duties he can be said to be an officer of the corporation.

In Dillon on Municipal Corporations, 4th ed., sec. 977, p. 1200, it is stated: "The power or even duty on part of a municipal corporation to make provision for the public health and for the care of the sick and destitute, appertains to it in its public and not corporate, or, as it sometimes called, private capacity."

The law on this subject is summed up in Wood on Master and Servant, 2nd ed., p. 927: "The same rule of liability prevails, in all respects, as to the liability of a municipal corporation for the acts of its servants, in a matter *intra vires*, as prevails in reference to individuals. The simple question in each case is, whether the person whose act is complained of was a servant of the corporation, and whether the work upon which he was employed was within the scope of municipal authority."

To apply that rule to the present case.

Dr. Canniff was appointed medical health officer under the provisions of the statute, but the duty he was called upon to perform had no reference to what may be called "the corporation," his duties had reference to the health, not to the property, of the inhabitants; and if he had not been appointed by the municipal council, he might have been by the Lieutenant-Governor. He made a mistake in the discharge of his duty for which he is personally responsible, but the corporation is not.

The rule will be absolute to set aside the judgment against the city with costs.

Responsibility of City for Acts of Police Officer.

McCLEAVE v. MONCTON.

32 S. C. R. 106.

SUPREME COURT OF CANADA.

The Canada Temperance Act was in force in the City of Moncton. A large number of ratepayers petitioned the City Council to appoint Belyea a police officer with the special duty of enforcing the Act. Belyea was appointed accordingly and laid an information against McCleave, a hotelkeeper, and obtained a search warrant under which he with other constables broke into McCleave's hotel and seized certain liquors. On the day on which the liquor was seized Belyea laid another information against McCleave for keeping intoxicating liquors for sale under which McCleave was convicted and the liquor declared to be forfeited and ordered to be destroyed by Belyea, who thereupon destroyed it. This conviction was quashed on the ground that Belyea, the informant, could not himself lawfully execute the warrant.

McCleave brought an action against the city and obtained a verdict from which the defendants appealed.

THE CHIEF JUSTICE (SIR HENRY STRONG) delivered the judgment of the Court:—We are all of opinion that the judgment appealed from is right and that the proper distinction has been drawn by Mr. Justice Gregory in coming to the conclusion that the city cannot be held liable for the acts of the constable Belyea in his effort to secure the observance of the statute.

In a case cited by Mr. Justice Gregory, *Buttrick* v. *The City of Lowell* (1), Chief Justice Bigelow, in delivering the judgment of the Supreme Court of Massachusetts, whose decisions are justly entitled to the greatest respect, says: "Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and

(1) 1 Allen (Mass.) 172.

arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as agents or servants of the city."

And again he says: "If the plaintiff could maintain his position that the police officers are so far agents or servants of the city that the maxim '*respondeat superior*' would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action, because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city."

This language is in effect repeated by Dillon in his work on Municipal Corporations (4th ed.), sec. 974, in discussing the applicability of the maxim "*respondeat superior.*" He says:— "When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation. . . . If . . . they are elected or appointed by the corporation in obedience to a statute, to perform a public service, not peculiarly local, for the reason that this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties, they are not to be regarded as servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the state confers upon them, and the doctrine of '*respondeat superior*' is not applicable."

I quite agree upon the question of fact with the Court below that Belyea held his appointment from the corporation for the

purpose of administering the general law of the land, and that the wrong complained of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely. * * *

The appeal must be dismissed with costs.

Responsibility of Railway Company for Acts of their Special Constables.

LAMBERT v. GREAT EASTERN RAILWAY CO.

[1909] 2 K. B. 776, 79 L. J. K. B. 32.

COURT OF APPEAL.

A special constable of the railway company arrested Lambert, a boy of seventeen, as a thief. He was taken to the police office and ultimately brought before the magistrates, who discharged him. An action was brought against the railway company by his next friend for damages for malicious prosecution and false imprisonment. The jury found that there was no reasonable and probable cause for the arrest. The jury found for the defendants on the question of malicious prosecution but on the question of false imprisonment they gave a verdict for the plaintiff for £10. Grantham, J., held that the constables were in the position of ordinary constables and were not acting as servants of the company and he directed judgment to be entered for the defendants upon the whole action.

The plaintiff appealed.

Cozens-Hardy, M.R., said in part:—What is the position of these constables? The county authorities who have to do with the ordinary police force are expressly exempted and excluded from all jurisdiction in the matter. They cannot either appoint or remove. They do not pay. It is the railway company who employ; it is the railway company who pay; it is the railway company who dismiss; and in these circumstances it seems to me these are men bound to obey the orders of the railway company, and bound to obey no other orders of any sort or kind, and that

in the acts which they did they acted as servants of the company. No doubt they are servants who are given a special immunity and protection, and they have the peculiar protection which other constables have, namely, that they are not liable if they have reasonable ground for believing that a felony has been committed, and that the person whom they have arrested was guilty of a felony. If they had such reasonable grounds, their employers, I take it, would not be liable for their acts, but if they had not reasonable grounds, then it seems to me that their employers must be liable.

Farwell and Kennedy, L.JJ., agreed.

Responsibility of Municipality for State of Lockup.

NETTLETON v. PRESCOTT.

16 O. L. R. 538; 11 O. W. R. 539.

DIVISIONAL COURT ONTARIO.

BOYD, C., said in part:—The gist of the complaint is that the defendants, through their servant, the chief constable, kept the plaintiff in the cell of the lock-up without any heat, bedding, or covering, through the night, which was bitterly cold, and that the exposure to this cold brought on an attack of disease to which the plaintiff had been subject. The action is, therefore, for negligence of the corporation in the management of the lock-up during the night in question. * * *

There is no case in Canadian Courts as to the civil liability of municipal corporations in relation to prisoners who complain of improper accommodation in their place of confinement. Admitting the existence of the duty set up in the statement of claim, that is, to maintain the place properly warmed and reasonably clean in order to furnish accommodation which would not endanger the prisoner's health—that was fulfilled. Everything was furnished to this end, and the failure to make due use of the appliances was not the fault of the municipality, and was not known to the municipality.

Are the defendants liable then because, as the accident of a night, the lock-up is too cold for the well-being of the plaintiff?

The question has, however, been much considered in American Courts, and a remarkably unanimous result arrived at. The cases proceed on an underlying principle affecting the composite character of municipal government. The municipal body may exercise its corporate powers for the benefit of the inhabitants in their local and particular interests, or it may act with delegated powers for the benefit of the community at large, and in the performance of a public service intrusted to it as a convenient method of exercising some of the functions of general government. In the former case civil responsibility attaches to the municipality, its servants and agents, as to any other corporate body. In the latter case officers elected or appointed by the municipality are not regarded as servants or agents of the corporation, but as public officials, for whose acts or decisions civil responsibility does not attach to the municipality, and as to whom the doctrine of *respondeat superior* does not hold good. This principle has obtained recognition in several Canadian cases. Thus, in *McSorley* v. *The Mayor, etc., of the City of St. John* (1) Ritchie, C.J., accepted the exposition of the law given by Dillon in these words: "If the duty, though devolved by law upon an officer elected or appointed by the corporation is not a corporate duty, the officers of the corporation, in performing it, do not act for the corporation, and hence the corporation is not responsible (unless expressly declared so to be by statute) for the omission to perform it or for the manner in which it is performed." And in *McCleave* v. *City of Moncton* (2), Strong, C.J., expresses the same theory thus: "The police officer or constable held his appointment from the corporation for the purpose of administering the general law of the land, and the wrong complained of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely." And in that case the decision of the Court was that a police officer is not the agent of the municipal corporation which appoints him to a position, and, if he is negligent in performing his duty as guardian of the public peace, the corporation is not responsible.

At a much earlier date, in 1871, Mr. Justice Badgeley adopted the pertinent language of Chief Justice Bigelow in an oft-quoted case of *Buttrick* v. *City of Lowell* (3): "The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws and other similar powers and duties with

(1) (1881), 6 S. C. R. 531, p. 548. (2) 32 S. C. R. 106.
(3) (1861), 1 All. 83 (Mass.) 172.

which police officers and constables are entrusted, are derived from the law, not from the city or town under which they have their appointment. . . . Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts:" *Corporation of Montreal* v. *Doolan* (4). Again, reference is made in *Schmidt* v. *Town of Berlin* (5) to the American doctrine that there is no liability to the tenants for the failure of a municipal corporation to keep buildings used exclusively for public purposes in a reasonably safe condition for use, inasmuch as these buildings are held for public purposes only, and the corporation acts in its governmental character in maintaining them.

In *Kelly* v. *Barton* (6) it was held that (constables) police officers were not officers or agents of the city corporation, but were independently appointed by the board of police commissioners as an agency of good government for the benefit of the municipality.

And in *Forsyth* v. *Canniff and the City of Toronto* (7) it was decided that the medical health officer of a municipal corporation—a permissive appointment under the Public Health Act by the corporation—was not a servant of the corporation, to render it liable for mistakes made by him in the pursuance of his statutory duties. The same head of law is very fully discussed in *McCleave* v. *City of Moncton* (8) and also considered by Mr. Justice Clute in *Butler* v. *City of Toronto* (9).

I may note that *Forsyth* v. *Canniff* was cited in the important English case of *Stanbury* v. *Exeter Corporation*, which I am about to dwell upon.

This same test, characteristic of American law, appears for the first time to have been serviceably applied in England by the Judges in the late decision of *Stanbury* v. *Exeter Corporation* (10). Local authorities were held not liable for the negligence of an inspector appointed by them, who detained some sheep in a market on the supposition that they were infected with disease. Passages from the judgments illustrate the present litigation. Alverstone, L.C.J., said: "This is not an ordinary case of delega-

(4) (1871), 19 Math. R. R. 125, at p. 131.
(5) (1893), 26 O. R. 54, at p. 58.
(6) (1895), 26 O. R. 608, at p. 623.
(7) (1890), 20 O. R. 478.
(8) (1901), 35 N. B. 296.
(9) (1907), 10 O. W. R. 878.
(10) [1905] 2 K. B. 838.

tion by the corporation of duties which they had to perform. . . It is analogous to that of police and other officers appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts:" p. 841. Still more explicit is Mr. Justice Wills: "This case is almost exactly analogous to the case of a police officer. In all boroughs the watch committee, by statute, has to appoint, control and remove the police officers, and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties. . . . If the duties to be performed by the officers appointed are of a public nature, and have no peculiar local characteristics, then they are really a branch of the public administration for purposes of general utility and security, which affect the whole kingdom, and if that be the nature of the duties to be performed, it does not seem unreasonable that the corporation who appoint the officer should not be responsible for the acts of negligence or misfeasance on his part:" p. 843. And, more briefly, Mr. Justice Darling: "To my mind the question whether the local authority are liable for the inspector's negligence depends upon whether the act done purported to be done by virtue of corporate authority or by virtue of something imposed as a public obligation to be done, not by the local authority, but by an officer whom they were ordered to appoint. The particular things which the inspector did here were things which the corporation could not do themselves, and they were not, in fact, doing them. They had to carry out the Act, and had to do that by appointing an officer:" p. 843. * * *

I venture to think that reasons of public policy are against allowing actions of this kind to prevail against prison authorities, of whatever grade the place of incarceration may be. * * *

But, taking the view I do of the entire failure of the groundwork of this claim as against the municipality, I would dismiss the action. Being a new case, it may be without costs, alike as to action and appeal.

Magee, J., concurred. Mabee, J., gave a dissenting judgment.

Loss of Trade from Exercise of Statutory Powers.

RICKETT v. THE METROPOLITAN RAILWAY COMPANY.

36 L. J. Q. B. 205; L. R. 2 H. L. 175.

HOUSE OF LORDS.

The plaintiff is the lessee of a public-house called "The Pickled Egg." situate in Crawford Passage, in the parish of St. James, Clerkenwell. The company, in forming a tunnel under a public carriage-way called Coppice Row, and in the lawful exercise of their powers, caused a temporary obstruction of part of the carriage-road in Coppice Row, and placed a hoarding on each side of it. The footway of Coppice Row was not thereby obstructed; the company constructed a bridge by which foot-passengers could cross over Coppice Row from one footway to another. The obstruction was continued for such time only as was necessary to enable the company to construct the tunnel, being about twenty months, and at the end of that time all the streets and public highways in the neighbourhood of the plaintiff's house were restored to their former state. During the time that the obstruction continued the number of foot passengers coming towards the public-house was greatly diminished, and the custom to and trade of the public-house greatly fell off, and it did not again improve whilst the hoarding remained nor after it was removed.

The plaintiff claimed compensation under the Lands Clauses Consolidation Act, 1845, sec. 68 (1) or under the Railway Clauses Consolidation Act, 1845, sec. 6 (2) or sec. 16.(3)

The company disputed their liability.

(1) LXVIII. If any Party shall be entitled to any Compensation in respect of any Lands, or of any Interest therein, which shall have been taken for or injuriously affected by the Execution of the Works, and for which the Promoters of the Undertaking shall not have made Satisfaction under the Provisions of this or the special Act, or any Act incorporated therewith, and if the Compensation claimed in such Case shall exceed the Sum of Fifty Pounds, such Party may have the same settled either by Arbitration or by the Verdict of a Jury, as he shall think fit; and if such Party desire to have the same settled by Arbitration, it shall be lawful for him to give notice in Writing to the Promoters of the Undertaking of such his Desire, stating in such Notice the Nature of the Interest in such Lands in respect of which he claims Compensation, and the Amount of the Compensation so claimed therein; and unless the Promoters of the Undertaking be willing to pay the Amount of Compensation so claimed, and shall enter into a written Agreement for that Purpose within Twenty-one Days after the Receipt of any such Notice from any Party so entitled,

THE LORD CHANCELLOR (LORD CHELMSFORD) said, in part:—Upon a review of all the authorities, and upon a consideration of the sections of the statutes relating to this subject, I have satisfied myself that the temporary obstruction of the highway which prevented the free passage of persons along it, and so incidentally interrupted the resort to the plaintiff's public-house, would not have been the subject of an action at common law, as an individual injury sustained by the plaintiff in error, distinguishing his case from that of the rest of the public. That, therefore, he altogether fails to bring himself within the general principle upon which a claim to compensation under the acts in question has been determined to depend; that, upon the construction of the clauses on which his claim is rested, the 6th section (2) of the Railways Clauses Act and the 68th section (1) of the Lands Clauses Act are both inapplicable, as his damage arose from the temporary operations of the company, and not from their permanent works. And upon the 16th section (3) of the Railway Clauses Act, which is applicable to his case, his damage was not of such a nature as to entitle him to compensation; the interruption of persons who

the same shall be settled by Arbitration in the Manner herein provided; or if the Party so entitled as aforesaid desire to have such Question of Compensation settled by Jury, it shall be lawful for him to give notice in Writing of such his Desire to the Promoters of the Undertaking, stating such Particulars as aforesaid, and unless the Promoters of the Undertaking be willing to pay the Amount of Compensation so claimed, and enter into a written Agreement for that Purpose, they shall, within Twenty-one Days after the Receipt of such Notice, issue their Warrant to the Sheriff to summon a Jury for settling the same in the Manner herein provided, and in default thereof they shall be liable to pay to the Party so entitled as aforesaid the Amount of Compensation so claimed, and the same may be recovered by him, with Costs, by Action in any of the Superior Courts.

(2) VI. In exercising the Power given to the Company by the special Act to construct the Railway, and to take Lands for that Purpose, the Company shall be subject to the Provisions and Restrictions contained in this Act and in the said Lands Clauses Consolidation Act; and the Company shall make to the Owners and Occupiers of and all other Parties interested in any Lands taken or used for the Purposes of the Railway, or injuriously affected by the Construction thereof, full Compensation for the Value of the Lands so taken or used, and for all Damage sustained by such Owners, Occupiers, and other Parties by reason of the Exercise, as regards such Lands, of the Powers by this or the special Act, or any Act incorporated therewith, vested in the Company; and, except where otherwise provided by this or the special Act, the Amount of such Compensation shall be ascertained and determined in the Manner provided by the said Lands Clauses Consolidation Act for determining Questions of Compensation with regard to Lands purchased or taken under the Provisions thereof; and all the Provisions of the said last-mentioned Act shall be applicable to determining the Amount of any such Compensation, and to enforcing the Payment or other Satisfaction thereof.

(3) * * * Provided always that in the Exercise of the Powers by this or the special Act granted the Company shall do as little Damage as can be, and shall make full Satisfaction in manner herein and in the special Act, and any Act incorporated therewith, provided, to all Parties interested, for all Damage by them sustained by reason of the Exercise of such Powers.

would have resorted to his house but for the obstruction of the highway being a consequential injury to the plaintiff in error too remote to be within the provisions of that section.

LORD CRANWORTH said in part:—Both principle and authority seem to me to shew that no case comes within the purview of the statute unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature.

Obstruction of Highway in Connection with Exercise of Statutory Powers.

HERRING v. METROPOLITAN BOARD.

19 C. B. (N. S.) 510; 34 L. J. M. C. 224.

COURT OF COMMON PLEAS.

The Metropolitan Board had sewers vested in them with power to keep them in repair. They erected a hoarding in connection with the work of repairing their sewers which obstructed in part the access to Stebbing's livery-stable.

Stebbing claimed compensation under Lands Clauses Consolidation Act, 1845, sec. 121 (1). The magistrate refused compensation. Stebbing appealed.

(1) CXXI. If any such Lands shall be in the Possession of any Person having no greater Interest therein than as Tenant for a Year or from Year to Year, and if such Person be required to give up Possession of any Lands so occupied by him before the Expiration of his Term or Interest therein, he shall be entitled to Compensation for the Value of his unexpired Term or Interest in such Lands, and for any just Allowance which ought to be made to him by an in-coming Tenant, and for any Loss or Injury he may sustain, or if a Part only of such Lands be required, Compensation for the Damage done to him in his Tenancy by severing the Lands held by him, or otherwise injuriously affecting the same; and the Amount of such Compensation shall be determined by Two Justices, in case the Parties differ about the same; and upon Payment or Tender of the Amount of such Compensation all such Persons shall respectively deliver up to the Promoters of the Undertaking, or to the Person appointed by them to take possession thereof, any such Lands in their Possession required for the Purposes of the special Act.

The appeal was heard by Willes, Byles and Smith, JJ.

BYLES, J.:—This case differs from that of *Ricketts* v. *The Metropolitan Railway Company* (1), in the Exchequer Chamber, to the decision in which I should be the first to bow. That case really has no bearing upon the point here; and I agree with my brother Willes that it is not necessary for us to say what damage is within the statute. The hoarding here was an obstruction, which rendered for a short time the occupation of the complainant more inconvenient that it would otherwise have been; but all persons have necessarily a right for a public purpose to obstruct a highway. Indeed, in a crowded thoroughfare, a stoppage may and does often occur: a cart stops at a proper time of the day to unload coals, and this may be rightly done, although it obstructs a highway; and I can conceive the case of a hoarding standing on a similar foundation. Houses must be repaired, and they cannot be otherwise repaired so properly and safely to the public as they can by having a board or hoarding to shield passengers from danger. But if these obstructions can be lawfully made by private persons, *à fortiori* may they be made by public bodies in the discharge of public duties. For this and other grounds, and considering this hoarding to be only a temporary obstruction which was necessarily used, and which was not shewn to have been so used for an unreasonable time, I think there has been no damage within the Act entitling the plaintiff to compensation.

Assessing Compensation for Compulsory Purchase of Barren Land.

STEBBING v. METROPOLITAN BOARD OF WORKS.

L. R. 6 Q. B. 37; 40 L. J. Q. B. 1.

COURT OF QUEEN'S BENCH.

COCKBURN, C.J.:—I think that our judgment must be for the defendants. The plaintiff is the rector of these parishes, the grave-yards of which have been in part closed under statutory authority, and the defendants have acquired by statutable enactment the power to take those grave-yards. The plaintiff being the owner of the

(1) 34 Law J. Rep. (N.S.) Q. B. (in error) 257; s. c. 13 W. Rep. 455.

soil is entitled to be compensated under the Lands Clauses Act (1) in respect of his interest in the land.

What is the effect of the parliamentary enactment as to compensation for an interest in land thus taken under compulsory powers? It is not a question to be solved simply with reference to the amount of interest which he may have, that is to say by the degree of estate which he may have, nor by determining whether he is a freeholder or a leaseholder, or what may be the extent of his interest. That is one of the elements, undoubtedly, upon which the compensation must be assessed; but there is another and equally important element to be taken into account, and that is, when the extent of his interest shall have been ascertained, the value of the land in which that interest exists. It never could have been intended that simply because a person has a freehold interest, he shall be compensated in respect of that freehold interest in the land taken from him, without reference to the character and the value of the land. It cannot be said that because a man has a freehold of barren land, that he is to receive the same amount of compensation as though he were the owner of an equal extent of rich alluvial soil. Therefore, although the statute speaks of compensation for the interest, it must be for the interest, whatever may be its extent or degree, with reference to the value of the thing in which the estate or interest exists.

In the present case, from the very character and nature of the land, the plaintiff never could have alienated it. He might have obtained a faculty to convert a part of it to some purpose of a *quasi* secular character, but he never would have been allowed to use it in any way for any secular purpose with a view to his own interest. It was, therefore, while in his hands practically inalienable, and consequently valueless, and could be applied to no purpose consistent with his interest, or his use of it. When the defendants are enabled to acquire it for a public purpose, why should he be benefited by the powers so given by the legislature to them? He certainly can have no equitable claim, nor any claim in justice or in reason to have immediately a new value attached to that which before was valueless simply because the legislature has said that it shall be transferred from one public purpose to another. There is nothing in the words of the Act nor is there anything, I think, in reason or sound sense, which can justify any such contention.

MELLOR, LUSH and HANNEN, JJ., gave reasons for coming to the same conclusion.

(1) See note (1) *Rickett* v. *Metropolitan Board*, *supra*, p. 106.

Loss of Access to the Thames by Exercise of Statutory Powers.

METROPOLITAN BOARD v. McCARTHY.

L. R. 7 H. L. 243; 43 L. J. (C. P.) 385.

HOUSE OF LORDS.

McCarthy's property fronted on a highway. On the opposite side of the highway was a public dock fronting on the river Thames. The Metropolitan Board built an embankment and destroyed the dock. McCarthy claimed compensation but the Board resisted his claim.

THE LORD CHANCELLOR (LORD CAIRNS) said, in part:—The present case appears to me to amount to this. The occupier or tenant of a house has got in front of his house two highways, the one highway being a road or a street, and the other, immediately beyond and abutting upon the road or the street, being a highway by water. The highway by water is taken away from him, the highway by land remains. It appears to me that it is impossible to say that the destruction of the highway by water, situate as I have described it, is otherwise *than a permanent injury* to the property in question, for whatsoever purpose that property may be occupied. The case appears to me to be extremely analogous to a case decided by the Court of Common Pleas, before the present case, of *Beckett* v. *The Midland Railway Company* (1), in which there was a front of the premises in question, in that case one single highway, the further half or the further third portion of which was taken off and blocked up by the execution of the defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question, and it appears to me to be a matter entirely indifferent whether you have one highway, the further half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and that part of the highway which consists of water is blocked up and destroyed.

In the argument at the Bar, Mr. Thesiger stated what he would rely upon as a definition of the right to compensation, and having considered this case very fully, I myself should not be disposed to find fault with any part of the definition, although definitions are always matters of very considerable difficulty. Mr. Thesiger, in his

(1) 37 Law J. Rep. (N.S.) C. P. 11; s. s. Law Rep. 3 C. P. 82.

very able argument, stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject was this: that "where by the construction of works there is a physical interference with any right, public or private, which the owner or occupier of any property is by law entitled to make use of in connection with that property, and which right gives it a marketable value apart from the uses to which any particular occupier might put it, there is a title to compensation, if by reason of such interference the property as a property is lessened in value.

A case was decided in your Lordships' House which, at first sight, was supposed to militate against this proposition, and against the decision in the present case, I mean the case of *Rickett* v. *The Metropolitan Railway Company* (2). But in truth that case has no application whatever to the present.

Prospective Value of Lands Taken Under Statutory Powers.

RIPLEY v. GREAT NORTHERN RAILWAY.

L. R. 10 Ch. App. 435.

COURT OF APPEAL.

SIR WM. JAMES, L.J., said:—Mr. Ripley had some of his land taken from him. He was entitled to have compensation awarded for that land. The Act of Parliament (8 Vict. ch. 18, sec. 63) says that in estimating that compensation the jury or the arbitrators are to take into consideration the damage occasioned by severance from other lands of the owner, or otherwise injuriously affecting such other lands. "Injuriously affecting" in that case must be another term for damaging, and does not mean injuriously affecting by way of violation of any legal right. He was to be compensated for any damage done to his other land. He says that he is very much damaged as to his other land by the diminution in value of a reservoir, which is left upon his hands, and which will probably supply some water, but which was

(2) 5 B. & S. 617; s.c. 34 Law J. Rep. (N.S.) Q. B. 257; s.c. in the House of Lords, 36 Law J. Rep. (N.S.) Q. B. 205; s.c. Law Rep. 4 E. & I. App. 175.

intended to supply a great deal more. This water he is now prevented from supplying by reason of the acts of the railway company, and that was a damage to be ascertained in some way or another. It was, therefore, a matter fully within the jurisdiction of the arbitrators and umpire to ascertain, in the best way they could, what the amount of reasonable compensation was to be. In ascertaining the amount, the word "profits" was used, upon which the whole thing seems to me to turn. It is said that that must mean profits of trade, and that the umpire could not go into profits of trade. That is a mere play upon words. It is spoken of as profit in the same way as the rents and profits of an estate are spoken of. The umpire had this in his mind; and if the argument founded on the word "profits" has any foundation, it was a clear ground upon which the Court of Queen's Bench ought to have set aside the award. That Court did not do so, and there is not anything before us that was not before that Court. It is said that we have nothing to do with the ultimate decision to which the umpire came, and that we have nothing to do with what passed in his mind, but that the mere fact that he accepted evidence addressed to something called "profits" is quite sufficient to shew that he usurped a jurisdiction which did not belong to him, and that therefore the whole award is void. But if that was so, the rule applied for in the Court of Queen's Bench ought to have been granted. The Judges, however, refused to grant the rule, and said they could see no objection to the award.

I, too, can see no objection to the award. I am bound to say that I do not know any other mode by which the learned umpire could have arrived at a conclusion and satisfied himself properly as to the damage than the mode which he adopted. Mr. Ripley says: "If you had left me alone I should have made so much profit; you have interfered, I shall suffer so much loss; pay me the difference." It appears to me quite shocking that a railway company should take a man's property and not pay him for the damage occasioned to him.

Expropriation of One Foot Strip of Land Across a Street.

IN RE HARVEY AND PARKDALE.

16 O. A. R. 468.

COURT OF APPEAL FOR ONTARIO.

In 1881 a tract of land between Roncesvalles avenue and Sorauren avenue was owned by the appellants and one Wright, Wright owning that half which adjoined Roncesvalles avenue and the appellants the half which adjoined Sorauren avenue. In that year the appellants laid out their part into building lots, and to facilitate the sale proposed to open a street through their land, and wished Wright to do the same through his, so as to connect the two avenues and form a thoroughfare. Wright objecting, the appellants opened the street (now called Duncan Street) through their land to within one foot of Wright's boundary, and this strip was retained by the appellants, as stated in their affidavit, "to prevent unfair advantage being taken of us whenever Mr. Wright might wish to extend the street through his property." The appellants sold all their land in lots, and have retained only this one foot strip. Early in 1887 Wright laid out his land in lots, and opened a street to within one foot of his boundary, this strip lying alongside of the strip retained by the plaintiffs.

The corporation of Parkdale, in October, 1887, passed a by-law, at the instance of the owners to be benefited, to expropriate these two feet reserved in the middle of the street, and to open up the whole at the expense of the land fronting or abutting on Duncan street. An arbitration has been had with the appellants and a majority of the arbitrators have awarded $1. The dissentient arbitrator thought that $2,000 should have been awarded. The appeal was mainly discussed in order to settle the principle whether nominal or substantial damages should be assessed.

The arbitrators made an award allowing only $1 as compensation. The owners moved against the award but their motion was dismissed with costs.

The owners then appealed to the Court of Appeal.

HAGARTY, C.J.O., said in part:—I am unable to understand any intelligible rule for the valuation of property to be expropriated except that adopted in the Court below.

A man owns a strip of land, one foot wide, across the centre of a street. He has previously sold all his land on the street except that foot. As against a public body, in whom the care and management of the public streets is vested, with powers of expropriation, I cannot see what can legitimately be considered in deciding what they must pay for the removal of that obstacle except its actual value to the owners. I fully recognize the principle laid down in such cases as *Ripley* v. *Great Northern R. W. Co.* (1) as to the right to consider any purpose or use whatever to which the property in question could be reasonably put or applied, or for which it was peculiarly adapted and might hereafter be available. But the considerations urged on behalf of the appellants as to matters that had previously occurred—as to their sale of their land on either side of the street; as to any higher price that they could probably have obtained if the street had been opened throughout; as to the reasons which induced them to reserve this otherwise wholly useless foot of land; and as to what parties interested in lots on the street might pay them to get this foot removed—all these seem to me, with much respect for those who hold a different opinion, beside the question on an enquiry as to value when it is sought to be expropriated.

A man might possess a large and most unsightly set of buildings in which he carried on a business, not necessarily indictable as a nuisance, but offensive and of evil repute. He might be surrounded by handsome residences, gardens, etc. Expropriation is resorted to either for a railway or for corporation purposes. I cannot believe that he could be heard to urge as an element of value that, if they would let him alone, he would be sure to receive a large sum from the surrounding wealthy landowners to induce him to sell or remove his objectionable premises. Every lawful use to which his property could be applied might be properly considered or to which it was specially adapted, but nothing in the nature of the argument to which I have just adverted.

I think the appeal must be dismissed, but without costs as suggested by my brother Osler.

(1) L. R. 10 Ch. 435.

Obstruction of Access as a Ground for Compensation.

CALEDONIAN v. WALKER'S TRUSTEES.

7 App. Cas. 259.

HOUSE OF LORDS.

LORD SELBORNE, L.C., said in part:—My Lords, the only facts in this case which I think material to the question of principle to be determined are that, before the construction of the appellants' works under the authority given by their Act of 1873, the property of the respondents had a frontage to Canal Street, in Glasgow, and had by that street a direct, straight, and practically level access (at the distance of about ninety yards), for all sorts of traffic, to Eglinton Street, one of the main thoroughfares of that city; and that, by the words of the appellants, that direct access to Eglinton Street has been altogether cut off and taken away, a more distant and circuitous access, crossing the railway by a bridge with a rather steep gradient, being substituted for it.
* * *

Upon the more important question of the respondents' right to the compensation which the oversman has awarded them, reliance was placed, in the argument at the Bar, on decisions of your Lordships' House. For the appellants it was contended that compensation was excluded by *Caledonian Railway Co.* v. *Ogilvy* (1) and *Rickett* v. *Metropolitan Railway Co.* (2). The respondents relied on *Metropolitan Board of Works* v. *McCarthy* (3).

It is your Lordships' duty to maintain, as far as you possibly can, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting. The reasons which learned Lords who concurred in a particular decision may have assigned for their opinions, have not the same degree of authority with the decisions themselves. A judgment which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and

(1) 2 Macq. 229. (2) Law Rep. 2 H. L. 175.
(3) Law Rep. 7 H. L. 243.

circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House.

With this preface, I think it right to say that all the three decisions of this House, to which I have referred, appear to me to be capable of being explained and justified upon consistent principles; the propositions which I regard as having been established by them, and by another judgment of your Lordships in the case of *Hammersmith Railway Co.* v. *Brand* (4), being these:

1. When a right of action, which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts. 2. When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation. 3. Loss of trade or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. 4. The obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation. * * *

There is, at first sight, some apparent similitude between the circumstances of *Rickett's Case* (2) and those of the present; but it disappears when the facts of that case and the exact nature of the claim made in it are rightly understood. * * *

In the present case, as in *Chamberlain* v. *West End of London Railway Co.* (5) and *Beckett's Case* (6) (both which were approved and followed by this House in *Metropolitan Board of Works* v. *McCarthy* (7)), the claim was made in respect of a direct and immediate injury to the respondents' estate by cutting off their direct and immediate access to Eglinton Street. The circumstances of *Chamberlain's Case* (5) closely resembled those of the present case. In *Beckett's Case* (6) the width of the public road immediately opposite the plaintiff's premises was reduced, so as to render it, not useless to those premises for the purpose of access, but less convenient than before. In *McCarthy's Case* (3) this House gave compensation for the obstruction of access to the River Thames from the plaintiff's premises through a

(4) Law Rep. 4 H. L. 171.
(5) 2 B. & S. 617.
(6) Law Rep. 3 C. P. 82.
(7) Law Rep. 7 H. L. 243.

public dock lying on the other side of a public road adjoining those premises.

It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property by a public road, when such obstruction is not immediately *ex adverso* of the property. This limitation, however, seems to me arbitrary and unreasonable, and not warranted by the facts either of *Chamberlain's* (5) or of *McCarthy's Case* (3). A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinfon Street, at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote. The Court of Session has so decided, and I think your Lordships cannot, consistently with your decision in *McCarthy's Case* (3), do otherwise than affirm their judgment.

Interference with Right of Access and Personal Inconvenience Caused Thereby.

FORD v. METROPOLITAN RAILWAY COMPANIES.

17 Q. B. D. 12; 55 L. J. Q. B. 296.

COURT OF APPEAL.

Ford was tenant of three back rooms which he used for business purposes. He reached the rooms through a hall and by a staircase. The railway companies purchased the front part of the building through which the hall ran and pulled it down.

Ford claimed compensation under section 6 (1) of the Railway Clauses Consolidation Act, and section 68 (2) of the Lands Clauses Consolidation Act. The company contested the claim.

(1) See note (2) in *Rickett* v. *Metropolitan*, *supra*, p. 107.
(2) See note (1) in *Rickett* v. *Metropolitan*, *supra*, p. 106.

BOWEN, L.J.:—The first question is, whether the plaintiff has sustained injury or damage which is properly the subject-matter of compensation. It is well settled that in order to found a claim under the Act in question there must be some injury to the house or land in respect of which the plaintiff has an interest, as held in *McCarthy's Case* (3). A mere personal inconvenience, obstruction or damage to a man's trade or the goodwill of his business will not be sufficient, although any one of them might, but for the Act of Parliament which authorises the doing of the thing occasioning the injury, have been the subject of an action against the party occasioning it. It remains to consider what is the character of the damage or injury which will give rise to a right to compensation. The true definition has been established by the House of Lords in the case of *The Metropolitan Board of Works* v. *McCarthy* (3), where it is said by Lord Cairns, "Where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with that property, and which right gives it marketable value apart from the uses to which any particular occupier might put it, there is a title to compensation if by reason of such interference the property as a property is lessened in value."

We are driven, therefore, to consider what is the right, if any, which has been interfered with here, and whether it has been interfered with so as to affect the value of the property as property, as in that case. The defendants have, in fact, taken away the whole of the rooms through which access to the demised premises was enjoyed by the plaintiff. What right had the plaintiff to access to the hall in its original state, and what title had he to claim compensation if it was so altered as to change the physical character of the access? It seems to me that that right falls distinctly within the class of rights alluded to in *Wheeldon* v. *Burrows* (4), and that by the grant of part of a tenement there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewith.

It was said that this right is a way of necessity; but that seems to me to be an imperfect appreciation of its character. The right to a way of necessity is one which arises by implication, but the true distinction between the present right and a right of way of necessity is explained in *Pearson* v. *Spencer* (5). The present

(3) 43 Law J. Rep. C. P. 385; Law Rep. 7 H. L. 243.
(4) 48 Law J. Rep. Chanc. 853; Law Rep. 12 Ch. D. 31.
(5) 3 Best. & S. 761.

right, to use the language of Chief Justice Erle in that case, " falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement."

Therefore, it is a kind of right which the occupier of these rooms was entitled by law to use in connection with the property, and I think that it was a right which gave an additional value to the property.

Has that right been interfered with according to the discussion in *McCarthy's Case?* (3) It is said that the injury caused to the house by this room being taken away was caused only during the progress of the works, and, therefore, was not intended to be compensated under sec. 6 of the Railway Clauses Act, 1845. I cannot help thinking that, upon the plain reading of the Act, injury, if it affects the value of the property, may none the less be done to houses and land by the execution of the works during their progress as after they have been constructed. Although Lord Chelmsford, in *Rickett* v. *The Metropolitan Railway Company* (6), seems to indicate a contrary opinion, I also agree with the other members of the Court that that language was no necessary part of the decision, as was explained by Lord Selborne (7), and cannot be really taken as law. Therefore, compensation was rightly claimed in respect of the alteration of the whole of that which formed the access to the demised premises.

But it is said that the arbitrator has also considered matters which were beyond the scope of his inquiry, and in respect of which compensation could not be assessed. It seems to me that there is no proof that he allowed any sum in respect of any of those matters. In one sense, he did consider them because they were brought before him, without objection, in evidence. But that is not sufficient, for it must be shewn in such a case that he gave effect to it and allowed his mind to be influenced thereby as regarded the amount of his award. I have come to the conclusion that he did not do so, and that the amount awarded was amply explained by the existence of a substantial matter of compensation to which the plaintiff was entitled. I am, therefore, of opinion that the award should not be disturbed.

(6) 36 Law J. Rep. Q. B. 205; Law Rep. 2 H. L. 175.
(7) See *Caledonian* v. *Walker's Trustees; supra*, p. 116.

Determining Value of Land Taken Under Statutory Powers.

COMMISSIONERS OF INLAND REVENUE v. GLASGOW AND SOUTH-WESTERN R.W. CO.

56 L. J. P. C. 82; 12 A. C. 315.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

In the House of Lords, THE LORD CHANCELLOR (LORD HALSBURY) said, in part:—The only thing which the jury had here to assess was the value of the land. Of course, the word "value" is itself a relative term; and in ascertaining what is the value of the land, it is extremely common, indeed it is inevitable, to go into a great number of circumstances by which that which is proper compensation to be paid for the transfer of one man's property to another is to be ascertained. A whole nomenclature has been invented by gentlemen who devote themselves to the consideration of such questions, and sometimes I cannot help thinking that the language which they have employed, so familiar and common in respect of such subjects, is treated as though it were the language of the Legislature itself. We, however, must be guided by what the language of the Legislature is. Now the language of the Legislature is this, that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as "damages for loss of business" or "compensation for the good-will" taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land —that land with all the potentialities of it, with all the actual use of it, by the person who holds it, is to be considered by those who have to assess the compensation.

Taking Lands for Sewage Works.

COWPER ESSEX v. ACTON.

14 A. C. 153; 58 L. J. Q. B. 594.

HOUSE OF LORDS.

The Acton Local Board took for sewage works a piece of Cowper Essex's land, which did not physically adjoin other land of his close by. He claimed compensation for the injurious affection of this other land. The Board opposed the claim.

THE LORD CHANCELLOR (LORD HALSBURY) said, in part:—I should hesitate very much to affirm the proposition that a belief in imaginary injury, though in fact an existing belief, and in fact affecting the marketable value of property, furnished any ground either for damages in an action or for compensation under the Lands Clauses Act.

The under-sheriff appears to have assumed that no possible injury, in the true sense of that word, could arise from the establishment of these sewage works, but that a compensation jury might award a sum of money if they came to the conclusion that a belief, however unfounded, that the sewage works would inflict injury upon the neighbourhood, were established to have affected the marketable value of the land in the immediate vicinity of such sewage-works. I should hesitate very much to acquiesce in such a view. But we are here discussing a question raised by the issue of a writ of *certiorari*, which writ, as it is expressly taken away by statute, can only issue where the jurisdiction has been exceeded; and if the jury had before it materials upon which it was entitled to award anything in respect of the injury actually likely to result from the establishment of the sewage works, then, as your Lordships have nothing to do with the amount, you cannot say that the jurisdiction was gone because the jury may have awarded too much, nor because the under-sheriff overstated or understated the result of the evidence given.

Now, upon full consideration, I think there was evidence justifying the jury in awarding something. The account of the proceedings before the under-sheriff, imperfect and fragmentary as it is, nevertheless discloses this: that part of the argument directed to shew that no injury would result rested upon the proposition that

if the works were not carefully and properly conducted, they could be restrained by injunction as often as any annoyance arose to the neighbourhood from the improper mode of conducting them.

Now I think that the liability of a neighbourhood to such even occasional and exceptional annoyances is a real injury to property, and not fanciful or imaginary.

It is doubtless attributed to Lord Hardwicke that he once said "the fears of mankind, though they may be reasonable ones, will not create a nuisance" (1). But if Lord Hardwicke ever really did say so, it is quite clear that that is not now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance—see *The Queen* v. *Lister* (2).

The good sense of mankind recognises the fact that occasional negligence is one of the ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common-sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood, that if and when the sewage works become a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary right of citizens to engage in litigation against such works when they become a nuisance. I have, therefore, come to the conclusion that it was open to the jury to find that the appellant's land not taken by the local board would be injuriously affected by the construction and use of the sewage works.

With reference to the main question, I have had less difficulty, since I take it that two propositions have now been conclusively established. One is, that land taken under the powers of the Lands Clauses Act, and applied to any use authorised by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not less conclusively established—and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.

(1) Anon. 3 Atk. 751. (2) 26 Law J. Rep. M. C. 196.

It may seem at first sight a little strange that what is "injurious affecting" in one case should not be in the other. But it is possible to explain that apparent contradiction by the consideration that the injurious affecting by the use, as distinguished from the construction, is a particular injury suffered by the proprietor, from whom some portion of his land is taken, different in kind from that which is suffered by the rest of Her Majesty's subjects.

Closing a Highway and Making an Inconvenient Substitute.

THE KING v. MACARTHUR.

34 S. C. R. 570.

SUPREME COURT OF CANADA.

Appeal from a decision of the Exchequer Court of Canada (1) in favour of the suppliant.

The judgment of the Court was delivered by NESBITT, J., who said, in part:—In this case, all the evidence shews is that the suppliant, in common with all others, is cut off from one access to Prescott, by what is known as the old highway, but all other methods of access or egress to or from the village remain the same, and the Government, under the Expropriation Act, sec. 3, sub-sec. f, substituted another road in lieu thereof, so that the suppliant still has access to Prescott, although by not so convenient a road. This is an inconvenience which he suffers in common with all the other persons desiring to use that portion of the highway which is cut off. I do not think that any case can be found which, under the English law, would hold that for such an obstruction the plaintiff could himself maintain an action. I think the remedy being by indictment, it is absolutely clear, from all the authorities, that mere inconvenience of a person, or loss of trade or business, is not the subject of compensation.

It was urged that because the substituted road was constructed with a swing bridge, which, owing to the traffic in the canal, sometimes caused delay, that this gave rise to a claim, but I think that is answered by the circumstances, first, that this arises from the subsequent use of the canal, not from its construction, and secondly,

that it is an inconvenience which the suppliant may suffer more often than others, yet it is an inconvenience common to the whole public.

The evidence makes it quite plain that the reason the witnesses said that the property was depreciated in value is because it is less convenient, as it is a somewhat longer road, and parties are held by the opening of the bridge, and also because railway tracks are upon the bridge, which, of course, is not an item which can be considered in this case.

I do not find that any of the English authorities extend the rule to cover cases where there may be said to be a general depreciation of property because of the vicinage of a public work. And *Walker's Trustees Case* (1), which goes further than any case upon the subject, is, as I have pointed out, put upon the special grounds of the dependence of the property upon the existence of the access, so that the cutting of it off diminished its value irrespectively of any use to which it might be put. To extend the rule, which has been widely laid down in cases where damage is occasioned to a person by any public works which have been constructed by an Act of Parliament for the purposes of public improvement, so as to embrace cases here the person injured is being injured as one of the public, and not to confine it, as it has been confined, to persons whose land has been injuriously affected, as land itself would be in this country, would be to unduly hamper the prosecution of public works and the consequent development of the country.

It was never intended that where the execution of works, authorized by Acts of Parliament, sentimentally affected values in the neighbourhood, all such property owners could have a claim for damages. In most of our large cities values are continually changing by reason of necessary public improvements made, and if, although no lands are taken, everybody owning lands in the locality could, by reason of the changed character of the neighbourhood or interference with certain convenient highways, claim compensation by reason of a supposed falling of the previous market value of property in the neighbourhood, it would render practically impossible the obtaining of such improvements. I think the property in this case is not so dependent upon the existence of the access which was so cut off as to constitute an injurious affection within the authority of the statute. I do not think that there is substantially much difference between the various Expropriation Acts which were referred to. The real question is whether or not the

(1) 7 App. Cas. 259; *supra*, p. 116.

claimant could have maintained a cause of action at common law for damages occasioned by the obstruction. I see no real distinction between the effect which the closing up of the nine-mile road south of the canal, and the opening up of the new road across the swing bridge, had upon the value of the suppliant's land, and its effect upon all the lands in the village of Cardinal, between the two canals and the point just mentioned. The suppliant's land suffered no special damage distinguishable from that which all these special lands suffered. *Mayor of Montreal* v. *Drummond* (2); *Bell* v. *Corporation of Quebec* (3); *North Shore Railway Co.* v. *Pion* (4).

Lands Injuriously Affected by Closing Highway.

IN RE TATE AND TORONTO.

10 O. L. R. 651; 6 O. W. R. 670.

COURT OF APPEAL FOR ONTARIO.

The judgment of the Court was delivered by OSLER, J.A., who said, in part:—In the case before us we have two highways—it can make no difference that they happen to be highways by land—in front of the plaintiff's premises, though one of them lies alongside of or abuts upon the other, corresponding to those with which the Court was dealing in the *McCarthy Case, supra,* p. 111, viz., the way across Manning Avenue and Herrick Street, these two affording access from and to the premises by the latter street from and to highways to the east, such as Bathurst Street, and in closing that street the plaintiff was as regards his property placed in a situation similar to that in which the plaintiff in the *McCarthy Case, supra,* p. 111, was placed by the closing of the dock.

I have read the case of *The King* v. *Macarthur* (1), but I do not think it governs the case before us.

(2) 1 App. Cas. 384, at p. 406.
(3) 5 App. Cas. 84.
(4) 14 App. Cas. 612, at p. 624.
(1) 34 S. C. R. 570; *supra,* p. 124.

Nature of "Interest" in Land Necessary to Give Right to Compensation When Taken or Injuriously Affected.

WARR v. LONDON COUNTY COUNCIL.

[1904] 1 K. B. 713; 73 L. J. K. B. 362.

COURT OF APPEAL.

The defendants, acting under statutory powers, took for the purposes of their works certain premises on which a theatre was situated. The plaintiffs had by agreement with the owner an exclusive right to sell refreshments in the theatre. The plaintiffs claimed an interest in land entitling them to compensation.

COLLINS, L.J., said in part:—The agreement upon which the House of Lords in *Edwardes* v. *Barrington* (1) came to their conclusion was one for the same class of privilege—namely, an agreement with a person who was to sell refreshments in a theatre; and certainly the two agreements, if they differ, do so only to this extent—that there was more indication of an intention in the agreement in *Edwardes* v. *Barrington* (1) by the use of words, to grant an ordinary lease and demise of the premises themselves, for there were more words pointing to that conclusion than there are in the present case. But, notwithstanding that, the House of Lords came clearly to the conclusion that the agreement amounted to the grant of a privilege and not of an interest in land.

Lord Justice Rigby, in giving judgment in the Court of Appeal, whose decision was confirmed in the House of Lords, said: "On the whole, I think that the proper conclusion is that "they took no estate or interest in land, but that they were entitled, for all reasonable purposes, to consider themselves as having an exclusive license to provide refreshments and all that follows from that privilege, and nothing else at all." (2) Then Lord Justice Vaughan Williams said: "No one has contended, so far as I can understand, that the grant of a license and right to the use of all the refreshment rooms, bars, smoke rooms, &c., during the term of this agreement would amount to an assignment or demise of

(1) 85 L. T. 650; affirming C. A. *sub. nom. Daly* v. *Edwards*, 83 L. T. 548.

(2) 83 L. T., at p. 551, *sub. nom. Daly* v. *Edwards*.

any estate or interest in the subject-matter of the principal indenture if in truth and in fact such grant of a license and right was a grant upon the basis that the landlord should in fact retain dominion and control over the whole of the premises. In my judgment, although the lawyers have chosen to dress up this grant of a license, or this grant of a privilege, in the dress of a lease of land, yet when one comes to look closely at the provisions of the document it is plain that it is really a grant of a privilege and license merely masquerading as a lease." (3) That applies to the present agreement except that it does not, in my opinion, even masquerade as a lease here. It does not suggest on its face that it is a demise of an interest in land. That judgment was approved and adopted on appeal to the House of Lords, and it seems to me to be indistinguishable in any sense favourable to the plaintiffs from the case before us. We are, therefore, concluded by that authority, which decides this case.

I am relieved by that decision from discussing in any detail the arguments of counsel for the plaintiffs as to the distinction betwen a mere license to go upon land and a license to take a profit out of that land—the distinction between a *profit à prendre* and an ordinary license. The principal proposition put forward by plaintiffs' counsel upon that matter seems to me to break down. Counsel was obliged to contend that a license to make a profit on the land by trading on the land itself was equivalent to a right to a *profit à prendre*. It does not, however, seem to me that it is. I think that the profit must be a profit out of the land itself—something out of the land itself—and it is because it is something out of the land itself that a license to a *profit à prendre* has been held to be within the Statute of Frauds as being an interest in land. There is a right to take part of the soil, and the animals on the soil were deemed to be part of the soil and because they were part of the soil a person who acquired the right to take them acquired an interest in land. I have not seen any authority to shew that that is not the law or that that right has been enlarged to extend it to the right of making a profit by carrying on a trade under a particular license on a particular piece of land.

(3) 83 L. T., at p. 551.

Failure to Observe Statutory Requirements Before Exercising Powers.

PARKDALE v. WEST.

12 A. C. 602; 56 L. J. P. C. 66.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The town of Parkdale in order to abolish a dangerous level railway crossing entered into an agreement with the railway companies concerned by which the town was to take control of the proposed works with power to let contracts. The work was to be carried out under the direction of the engineer appointed by the railways. The town let a contract and the work was commenced with the result that the property of West was injured very seriously. No plan or book of reference relating to the alterations was deposited as required by the Railway Act. West brought this action against the town for an injunction and for damages. The town set up by way of defence that it was acting under the powers of the railway companies.

LORD MACNAGHTEN said in part:—It was argued that this agreement was *ultra vires* the municipality of Parkdale. But it has frequently been pointed out that the doctrine of ***ultra vires*** must be applied reasonably and not unreasonably, and it does not appear to their Lordships that, under the circumstances, there was anything *ultra vires* in the agreement in question. * * *

In the present case it is admitted that no plan or book of reference relating to the alterations required by the Railway Committee has been deposited.

It appears to their Lordships, therefore, that the railway companies have not taken the very first step required to entitle them to commence operations. * * *

Their Lordships, therefore, are of opinion that the railway companies were bound to make compensation under the Act of 1879 before interfering with the respondents' rights, and on this ground, as well as on the ground of non-compliance with the provisions of the Act as to plans and surveys, they hold that the appellants cannot justify their acts by pleading the statutory authority of the railway companies.

Mr. Jeune, in his reply, referred to the case of *Jones* v. *The Stanstead Railroad Company* (1), which was before this Board in 1872. He pointed out that many of the provisions of the Railway Act then under consideration were identical with the provisions of the Act of 1879, and he contended that their Lordships were bound by that decision to hold that in the present case compensation was not a condition precedent.

Their Lordships consider that *Jones* v. *The Stanstead Railroad Company* (1) is not an authority for that contention. The circumstances of that case were very peculiar. The appellant, who was the plaintiff in the action, was the owner of a bridge over the river Richelieu, which had been built under the powers of an Act of Parliament, and had certain privileges and a sort of statutory monopoly within certain defined limits. Within those limits, under the powers of their Act, the railroad company constructed a railway bridge. The plaintiff complained of the construction and use of the railway bridge as an invasion of his rights, and brought an action for the demolition of that bridge, which was said to be the proper mode of claiming damages in such a case. On appeal the plaintiff's claim was mainly founded on the authority of *The Queen* v. *The Canadian Railway Company* (2), which was supposed to be distinguishable from the case of *The Hammersmith Railway Company* v. *Brand* (3), but which was afterwards overruled in *Hopkins* v. *The Great Northern Railway Company* (4).

* * *

It was urged that if compensation was to be paid in respect of rights over land interfered with by the construction of a railway, as a condition precedent before doing the work, railway companies would be liable to be treated as wrongdoers in a variety of cases, and would be seriously hampered in exercising their statutory powers.

Their Lordships do not feel pressed by this difficulty. The cases in which railway companies, in the construction of their railway, unwittingly interfere with the rights of other persons must be very few. In the present case, certainly, the interference complained of is not due to any inadvertence.

If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for an injunction. But even in that case the Court would probably not

(1) 41 Law. J. Rep. P. C. 19; Law. Rep. 4 App. Cas. 98.
(2) 40 Law. J. Rep. Q. B. 169; Law. Rep. 6 Q. B. 42.
(3) 38 Law. J. Rep. Q. B. 265; Law. Rep. 4 H. L. 171.
(4) 46 Law. J. Rep. Q. B. 265; Law. Rep. 2 Q. B. D. 224.

interfere with the construction of the works by an interlocutory injunction, if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation. As Lord Romilly pointed out in *Wood* v. *The Charing Cross Railway Company* (5), the granting an injunction which stops the works of a railway company, is not merely a question between the plaintiff and the company. The public have an interest in the matter. As a general rule, it would only be right to grant an injunction where the company were acting in a high-handed and oppressive manner, or guilty of some other misconduct.

Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships, that as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted.

Their Lordships express no opinion as to the rights of the appellants to recover over again against the railway companies, either under the general law of principal and agent, or under the express provisions of their agreement with those companies. Whatever those rights may be, they are untouched by their Lordships' judgment.

In the result, their Lordships will humbly advise her Majesty that the appeal must be dismissed. The appellants will pay the costs of the appeal.

Damage Resulting From Lowering Street Grade.

NEW WESTMINSTER v. BRIGHOUSE.

20 S. C. R. 520.

SUPREME COURT OF CANADA.

The City of New Westminster lowered the street grade in front of the property of Manuella Brighouse and the soil of her lot fell into the excavation. She brought an action for damages. Her claim was allowed and the city appealed.

(5) 33 Beav. 290.

STRONG, J.:—I am of opinion that this appeal must be dismissed. First, it is an undeniable fact that no by-law was passed authorizing the interference with her property for which the respondent brought this action. The case is not therefore within the statute authorizing expropriation or encroachment on private property. This is so plain as a legal conclusion that no authority need be cited to sustain it. It is a general proposition of law, that in the case of all statutes authorizing the taking or interfering with private property for public purposes the procedure directed by the statute must be followed with exactitude.

But even if there had been a by-law, and the statute had been followed so far as concerned procedure, I should still have thought the respondent entitled to retain the judgment she has recovered on another and distinct ground.

It is, I take it, an established rule that in all cases where public works are executed under statutory authority to the extent of an infringement on private rights of property the statutory powers must be executed without negligence and in such a way as to do the least possible injury to the private owner. This principle received the approbation of the House of Lords in *Geddis* v. *Bann Reservoir* (1), and is particularly enunciated in the judgment of Lord Blackburn in that case.

In the present case negligence in the execution of the work is distinctly alleged in the statement of claim and is, in my opinion, amply proved. The neglect to build a revetement wall, or to put up some support to the respondent's property after making the escarpment complained of, is conclusive proof of negligence.

Upon both grounds I am of opinion that the judgment ought to be sustained and this appeal dismissed with costs.

The majority of the Court agreed with Strong, J.

(1) 3 App. Cas. 430.

Restraining Unauthorised Acts.

SAUNBY v. LONDON WATER COMMISSIONERS.

C. R. [1906] A. C. 1; [1906] A. C. 110; 75 L. J. P. C. 25.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LORD DAVEY delivered the judgment of their Lordships and said in part:—The appellant is the owner and occupier of lands adjoining the river Thames in the province of Ontario, and of a watermill operated by water from that river. He complains in this action that the respondents by the erection of a dam with flash boards across the river Thames at a point some miles below the appellants' mill have penned back the water in the river, with the result that in certain seasons of the year his lands are flooded, and the water-power of his mill is interfered with. There is no serious dispute that the appellant has in fact been injured by the respondents' works, and if this were all his right of action would be clear. But the respondents, the Water Commissioners, who are incorporated by a Provincial Act, 36 Vict., ch. 102 (Ontario), for supplying the City of London with pure water, contend at their Lordships' Bar that they are authorized by their Act to execute the works complained of, and the appellant's remedy (if any) is to proceed by arbitration for damages under the provisions of the Act.

Their Lordships are of opinion that, before the Commissioners can expropriate a landowner, they must first set out and ascertain what parts of his land they require, and must endeavour to contract with the owner for the purchase thereof. In other words, they must give to the landowner notice to treat for some definite subject-matter. And a similar procedure seems to be necessary where the Commissioners desire to appropriate a person's water rights, or to acquire some easement over his property. The arbitration clauses only come into operation on disagreement as to the amount of purchase-money, value, or damages, which, in itself, implies some previous treaty or tender involving notice of what is required. Their Lordships therefore are of opinion that the Commissioners have not put themselves into a position to compel the appellant to go to arbitration. Provisions for that purpose, such as are found in the present Act, are only applicable to acts done under the sanction of the Legislature, and in the

mode prescribed by the Legislature. In this instance the Commissioners have not proceeded in accordance with the directions of their Act, and consequently the appellant has not lost his ordinary right of action for the trespass on his property. In coming to this conclusion, their Lordships follow the principle laid down by this Board in *Parkdale Corporation* v. *West* (1), and *North Shore Railway* v. *Pion* (2), though the provisions of the Acts in question in those cases were somewhat different.

It was contended by Mr. Aylesworth that at any rate the Court, in the exercise of its discretion, should have given the appellant a judgment for damages only, and not for an injunction. The acts complained of in the present case are an illegal taking of the appellant's land, and an interference with the free use by him of his property, and the damages have been found to be of a substantial character. It has been frequently pointed out that to refuse an injunction in such a case would be to enable the defendant to expropriate the plaintiff without statutory authority, or without following the procedure pointed out by the statutory authority (if any). See *Imperial Gas Light and Coke Co.* v. *Broadbent* (3), and *Shelfer* v. *City of London Electric Lighting Co.* (4). If and when the respondents think fit to proceed under the Act to expropriate the appellant the injunction will come to an end, but it is not necessary to qualify it by any words for that purpose.

Value of Street Railway on Expiration of Franchise.

TORONTO STREET RAILWAY CO. v. TORONTO.

[1893] App. Cas. 511; 63 L. J. P. C. 10.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The City of Toronto granted a franchise to lay down street railways and to work them under such regulations as might be necessary for the protection of the citizens for a period of thirty years. It was provided that at the expiration of thirty years the corporation might, after giving six months' prior notice, assume

(1) (1887), 56 L. J. P. C. 66; 12 App. Cas. 602.
(2) (1889), 59 L. J. P. C. 25; 14 App. Cas. 612.
(3) (1859), 29 L. J. Ch. 377; 7 H. L. C. 600.
(4) 64 L. J. Ch. 216; [1895] 1 Ch. 287.

the ownership of the railway on payment of its value to be determined by arbitration, and it was further provided that if the corporation failed to exercise the said right at the expiration of thirty years, it might in like manner exercise the right at the expiration of every five years thereafter. The corporation gave notice of intention to assume ownership at the end of thirty years. An arbitration took place. The street railway contended that it had a qualified or base fee which had a possibility of enduring forever and that a value was attached to it beyond the value for thirty years. The arbitrators rejected this contention.

The Street Railway Company appealed. But their contention was rejected by Robertson, J., and by the Court of Appeal for Ontario. They then appealed to the Judicial Committee of the Privy Council.

Sir Richard Couch delivered the judgment of their Lordships and said in part:—The first question in this appeal is whether this valuation is right, the appellants contending in the lower Courts and before their Lordships that the Act of 1861 conferred a perpetual franchise or statutory right to use the streets for the purpose of the railway, and that this is property in connection with the working of the railway which should be valued. Their Lordships do not accede to this. Their opinion is well expressed in the judgment of Mr. Justice Burton, who says: "The agreement and the by-law expressly limit the grant of the privilege to thirty years, a definite and certain date; but they contain an additional provision that on notice six months previously to the expiry of that term of the intention of the corporation to assume the ownership of the railway, and all real and personal property in connection with the working thereof, they may do so at a valuation. It is true that the agreement provides that if the corporation should fail to exercise its option of assuming the ownership, the grant shall continue for a further period of five years, and so at the expiration of each succeeding five years; but that contingency never arose. We are dealing, therefore, with the license or consent given for that fixed term of thirty years, at the expiry of which, according to my reading of the agreement, the corporation having elected to exercise its option of purchasing, the privilege or franchise of the railway company ceased." Their Lordships cannot usefully add anything to this opinion.

Exclusive Rights Wrongly Claimed by Street Railway Company.

WINNIPEG STREET R.W. CO. v. WINNIPEG ELECTRIC STREET R.W. CO.

[1894] App. Cas. 615; 64 L. J. P. C. 10.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The City of Winnipeg granted a franchise to the Winnipeg Street R. W. Co. Subsequently the corporation granted a franchise to the Winnipeg Electric Street R. W. Co., but it was provided that nothing in the second franchise should in anyway affect or take away any right vested in the Winnipeg Street R. W. Co. The latter company brought an action against the corporation and against the Electric Street R. W. Co., claiming that by their agreement they were entitled to the exclusive use of the whole of the streets upon which they were operating their line and asking for an injunction restraining the defendant company from operating their line of railway.

Bain, J., dismissed the action with costs. His order was upheld by the Court of Queen's Bench for Manitoba. The defendants appealed to the Judicial Committee of the Privy Council.

LORD WATSON delivered the judgment of their Lordships and said, in part:—The company's Act (sec. 9) gives them power and authority (subject always to the consent of the city) to "use and occupy any and such parts of any of the streets and highways aforesaid as may be required for the purposes of their railway track, the laying of the rails, and the running of their cars and carriages." The same clause authorises the city to grant permission to the company to construct their railway, as aforesaid, "across and along, and to use and occupy the said streets or highways, or any part of them, for that purpose, upon such condition, and for such period or periods, as may be respectively agreed upon between the company and the said city."

It appears to their Lordships that the language of the statute confers upon the company no right to use and occupy any part of the streets and highways within the city beyond what is strictly necessary for the temporary purpose of constructing their railways, and for the permanent purpose of maintaining them in repair and conducting traffic upon them. Their Lordships do not find a

single expression tending to shew that the Legislature either intended that no tramways, other than those of the company, were to occupy the streets of Winnipeg, or had it in contemplation that the company were to obtain a monopoly from the council of the city. There is no indication of any such monpoly to be found among the matters specially enumerated in section 17 of the Act as the subjects of the agreement which the city council have statutory authority to make with the company. It necessarily follows that the exclusive privilege claimed by the company, if has any existence, must be derived from the indenture of the 7th July, 1882.

By the terms of the indenture, the mayor and council of the city grant to the company, their successors or assigns, the right to construct, maintain, and operate, and from time to time to remove and change, "a double or single track railway with the necessary side tracks, switches, and turn-outs for the passage of cars, carriages and other vehicles adapted to the same, upon and along any of the streets or highways of the City of Winnipeg, and to run their cars, take transport, and carry passengers upon the same by the force and power of animals, or such other motive power as may be authorized by the said council of the said city." The only authority given is expressly limited to the construction, maintenance, and operation, in each street which the company may select for that purpose, of a railway, consisting of a single or double line of rails, with needful appurtenances; and the words which confer that authority are immediately followed by the declaration, "and such railway shall have the exclusive right of such portion of any street or streets as shall be occupied by the said railway," and shall be worked under such regulations as may be necessary "for the protection of the citizens of said city."

That declaration appears to their Lordships to have been inserted in the agreement with the object of defining the extent of the uses which the company were to have of the streets of the city for the purposes of their undertaking. The company argued that the words last quoted ought to be construed as a declaration that the company's railway was to be the only railway permitted to occupy any part of those streets into which it might be introduced by them. In their Lordships' opinion, any such construction would be contrary to the plain meaning of the words of the agreement, which, in substance, import that the company are to have no use or occupation of, and no concern with, those portions of any street which are not actually occupied by their double or single line of rails.

The main, and the only, plausible argument addressed to this Board for the company in support of their claim to a monopoly, was founded on the terms of a clause which occurs towards the end of the indenture. It runs thus: "In the event of any other parties proposing to construct street railways on any of the streets not occupied by the parties to whom the privilege is now granted, the nature of the proposal thus made shall be communicated to them, and the option of constructing such proposed railway on similar conditions as are herein stipulated shall be offered, but if such preference is not accepted within two months, then the parties of the first part may grant the privilege to any other parties."

Their Lordships do not think that it is going too far to say that, laying aside the terms of that stipulation, there is not a single expression in the deed of agreement which gives the least countenance to the suggestion that the municipal council intended to grant to the company an exclusive right to use and occupy any street for railway purposes. Those clauses of the deed which deal directly with the use and occupation of the streets which are to be enjoyed by the company are not only silent upon the question of exclusive right, but are conceived in terms which it is exceedingly difficult to reconcile with the theory of an intention to create such a right. Had there been any such intention, nothing would have been easier than to indicate its existence in the proper place, either expressly or by implication. In such circumstances, their Lordships are of opinion that the leading clauses of the agreement, which define the company's rights of user and occupation, cannot be qualified by a subsidiary clause such as that upon which the company relies, unless its terms are clear and coercive. They are unable to hold that the terms of the clause in question are in themselves sufficient to control the plain meaning of the previous stipulations and to constitute the right of monopoly which the appellant company claims.

The clause in question assumes that other parties than the company may propose and obtain powers to construct, maintain and work street railways within the limits of the city of Winnipeg; and, in that event, all that it really provides is that the company are to have a preference over these rivals to the extent of having the first opportunity of making a railway in streets to which their undertaking has not yet been extended. Its terms are certainly calculated to suggest that neither the council nor the company did, at the time, anticipate that the rival schemes of those other parties would be carried to the length of competing with the company in streets where they had already constructed, or in streets where they would

be the first to construct their railway lines. But a mere expectation of that kind falls far short of a legal obligation. It cannot imply an undertaking on the part of the council that in the event of a rival company obtaining statutory powers and desiring to compete with the appellant company in those streets in which their system has already been established, the council shall be bound, although against the interest of the community which it represents, to refuse its assent to the new scheme and to allow the company to remain in the enjoyment of a monopoly.

Attempt to Compel Street Railway Company to Run Cars as Agreed.

KINGSTON v. KINGSTON P. & C. ELECTRIC R.W. CO.

25 O. A. R. 462.

COURT OF APPEAL FOR ONTARIO.

An agreement between the City of Kingston and the Kingston P. & C. Electric R. W. Co. provided among other things that the company should operate over the whole of its lines cars at certain stated intervals. The company refused to operate a certain portion of their line, although requested so to do. The city corporation brought an action against the company for a mandamus commanding the company to operate as agreed or for specific performance of the agreement or for an injunction restraining the company from operating in violation of their agreement.

Street, J., dismissed the action with costs. The plaintiffs appealed.

Moss, J.A., said, in part:—The case seems to fall within the description given by Lord Justice Knight Bruce to the bill of complaint in *Johnston* v. *Shrewsbury and Birmingham R. W. Co.* (1). It is an action by parties to the agreement against the other parties with two objects—one, to obtain a declaration from the Court of the true construction of the terms of the agreement, and the other, to obtain an injunction to restrain the defendants from

(1) (1853), 3 D. M. & G. 914, at p. 922.

breaking the agreement in certain respects. If, therefore, it is not an action for specific performance in form and letter, it is so in substance and spirit. True, there is in addition the claim for a mandamus, but obviously that is made in aid of the claim for performance in specie of the terms of the contract. It is, in substance, an action to compel the performance in specie by the defendants of an agreement amounting to a covenant on their part to do certain acts continuous in their nature and extending over a period of thirty-six years from the present year. These are continuous duties involving personal labour and care of a particular kind and if the Court should direct their performance in specie it would have to assume their superintendence in order to enforce obedience to its judgment.

The obvious inconvenience, not to say impossibility, of imposing upon the Court any such task is a sufficient reason for holding that this relief should not be accorded.

But it is argued that it is open to the Court to compel the defendants to perform the agreement to run the cars or sleighs over the whole track on all lawful days by means of an injunction prohibiting the defendants from operating their cars or sleighs otherwise than over the whole system, in accordance with the provisions of clause 16, sub-clause (*c*).

It is to be observed that the agreement contains no negative covenant with regard to this part of it. And if, as I think, it is an agreement of such a nature that it cannot be specifically enforced, there can be no importing into it of a negative covenant.

I am not aware of any authority which goes the length of doing what is thus sought. It is not to restrain the defendants from doing some particular act, the doing of which is a breach or violation of the agreement. This the Court may do and has frequently done in certain cases and under certain special circumstances. But what is sought is an order restraining the defendants from doing something which the agreement requires them to do, and which they are willing to do and are doing, because something else which the agreement calls for is not being done.

The plaintiff's complaint is that the defendants are omitting or neglecting to do one act which they have agreed to do. It is not the case of their doing or intending to do some positive act which would be a violation of, or a derogation from, their agreement, as in *Lumley* v. *Wagner* (2), and the numerous other cases in which an injunction has been awarded. It is the case of the

(2) (1852), 1 D. M. & G. 604.

defendants falling short of performance of the full obligation they undertook. It is not an act done or threatened or intended in direct derogation from the essence of the agreement.

To enjoin the defendants from working or running any part of the system unless the whole is worked or run according to the terms of the agreement seems to me but to intensify the evil complained of. It reduces the relief to the compelling under colour of an injunction of the performance in specie of every term of the agreement, and, therefore, an operation of the line with all the resulting circumstances, including a complete performance of the detailed duties. And this again involves supervision by the Court in order to see that all the provisions of clause 16 are complied with.

It is also claimed that the plaintiffs are entitled to a mandamus commanding the defendants to operate cars or sleighs upon or along the portion of Princess Street in question.

So far as such claim is founded upon the right given by Consolidated Rules 1081-1083 inclusive, it is settled that the Court does not award the writ in an action where the duty to be fulfilled arises out of a covenant or agreement, the performance of which in specie is not deemed enforceable by the Court.

As said by Byles, J., in *Fotherby* v. *Metropolitan R.W. Co.* (3), in speaking of the provision of the Common Law Procedure Act, 1854, the language of which is the same as that of Rule 1081: "A claim for a mandamus cannot be added in every action for a breach of a duty, notwithstanding the large words of the 68th section of the Common Law Procedure Act, 1854, 'any duty in which he is personally interested,' for it cannot have been intended that specific performance should be enforced of every personal contract."

But the argument is also advanced that the duty is a public duty enforceable by means of the prerogative writ of mandamus and that the plaintiffs are entitled to such a writ in this action.

I am not satisfied that the rules and practice do extend to the award of a prerogative writ of mandamus in an action. I am rather inclined to the opinion that if the remedy of the prerogative writ has to be invoked, it should be in the form of a motion.

But I think the plaintiffs have not shewn themselves entitled to such a writ in this action.

The agreement between the parties, though ratified by an Act of the Legislature, still remains a private contract: see *per* Lord

(3) (1866). L. R. 2 C. P., at p. 195.

Watson in *Davies* v. *Taff Vale, etc., R. W. Co.* (4). As pointed out by Gwynne, J., in *In re London, Huron and Bruce R. W. Co.* (5), and *Grand Junction R. W. Co.* v. *County of Peterborough* (6), and by Harrison, C.J., in *In re Hamilton and North Western R. W. Co.* (7), the remedy by the prerogative writ of mandamus is not an appropriate remedy for the enforcement of rights arising out of contract.

Granting that a public right may arise out of a private contract and be enforceable by means of the prerogative writ of mandamus, the public duty is owed to the public and not necessarily to the party to the contract. The latter must for the purpose of obtaining the writ be able to shew that he is directly interested in the fulfilment of the public duty, not as a party to the contract, but as one of the public.

But in this case, any public detriment resulting from the defendant's default is suffered by those of the public who desire to make use of the portion of the line in question and not by the municipal corporation represented by the plaintiffs.

The action was dismissed, with costs.

Refusal of Street Railway Company to Sell Workmen's Tickets.

HAMILTON v. HAMILTON STREET RAILWAY COMPANY.

10 O. L. R. 594; 6 O. W. R. 207; 39 S. C. R. 673.

COURT OF APPEAL FOR ONTARIO, SUPREME COURT OF CANADA.

This action was brought for a mandamus to compel the defendants to sell workmen's tickets on their cars.

COURT OF APPEAL ONTARIO.

Moss, C.J.O., said, in part:—Objections that the agreement, the enforcement of which is sought in this action, was *ultra vires* have been dealt with adversely to the defendants in another action upon the same agreement. * * *

(4) [1895] A. C., at pp. 552, 553. (6) (1883), 8 S. C. R. 76.
(5) (1875), 36 U. C. R. 93. (7) (1876), 39 U. C. R., at p. 111.

There remain the questions whether by the terms of the agreement, the defendants are bound to sell on their cars tickets known as "workmen's tickets" or "limited tickets" and to receive them from all persons tendering them as fares during certain specified hours of the day; whether the plaintiffs can maintain this action, or whether the Attorney-General alone has the right to sue; and whether performance of the contract can be enforced by the Court by means of an injunction or otherwise.

As to the first question, it is argued from the use of the phrase "workmen's tickets" in sec. 19 (*c*) of by-law 634, which deals with the fares to be collected by the defendants, that they are not obliged to accept such tickets from all persons travelling on their lines during the specified hours, but only from such persons as answer the description of workmen. But this is not the language of the section. The defendants agree to issue these tickets not during specified hours or to any special class. There is no attempt made at description of persons who and who alone are to be deemed of the class entitled to demand or purchase such tickets. It was, no doubt, the intention to benefit the class of citizens commonly spoken of as "workmen" by enabling them to secure transport at reduced rates during certain periods of the day when they were going to or returning from their daily employment. And that may account for the phrase "workmen's tickets." But it never could have been in the minds of either party that it should be left open to controversy as to who were or were not entitled to use these tickets. Obviously the best and most convenient way of avoiding such questions was to provide generally, as has been done, for the issue of tickets at the reduced rate, followed by a declaration that they are to be "good," *i.e.*, available for use by the holder, during the specified hours. They were designated "workmen's tickets" for purposes of reference only, and not because they were intended for use by some special class of citizens supposed to come under the undefined description of "workmen." And for years the defendants acted upon that understanding of the term; and in their amending by-law they speak of these tickets, not as "workmen's," but as "limited" tickets. There appears to be no substantial reason for now saying that the construction thus early adopted and long adhered to was wrong.

Then is there any reason for saying that the defendants are under no obligation to keep tickets of this class for sale on their cars? The language of sub-clause (*p*) of sec. 19 of the by-law is explicit. It says that the defendants shall keep tickets for sale . . . upon their cars. It does not mention any particular kind

of tickets. No limitation is placed upon the word unless—as the defendants contend—the words which follow impose some. They are: "And they shall sell tickets to persons desiring the same at a rate not exceeding twenty-five cents for six tickets for fare to any point within the city limits."

The sales referred to are not limited to sales on the cars. Sales at the office are included. And all that is intended is to repeat, for greater caution apparently, the maximum rate at which sales are to be made, whether at the office or upon the cars. The defendants are to sell at a rate not exceeding twenty-five cents for six tickets. There is nothing to cut down the general application of the words "tickets" and "upon their cars" in the earlier part of the sub-clause. Whatever may have been the reason for the insertion of the concluding words, there is no reason to suppose that they were put there with any intention of cutting down the earlier part.

Next comes the question whether the plaintiffs are entitled to maintain this action. It is to be borne in mind that here there is an express contract between the parties which has been broken by the defendants. If the effect of the breaches was to create a public nuisance, such as an obstruction of the public highway, the Attorney-General, as representing the public, could no doubt maintain an action for its abatement, though probably the plaintiffs would be necessary parties either as relators or defendants. See *Attorney-General* v. *Toronto Street R. W. Co.* (1). It is to be observed that in that case, Mowat, V.-C., expressed the opinion (p. 674) that a suit against the street railway company to enforce the agreement with the city corporation must be brought by the latter. In such a case the question of damage is not material. As pointed out in *Attorney-General* v. *Mid-Kent R. W. Co. and South Eastern R. W. Co.* (2), there is a manifest difference in this respect between cases depending on nuisance and those depending on contract. Sir John Rolt, L.J., said (p. 104): "It is shewn by the case of the *Rochdale Canal Co.* v. *King* (3), and many other authorities, that where there is a contract, the Court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance, but that the main point is whether the contract has been broken."

The plaintiffs have a material interest in the contract and the proper observance of it by the defendants, and the rights of the public in the large and general sense are not so exclusively involved

(1) (1868), 14 Gr. 673. (2) (1867), L. R. 3 Ch. 100.
(3) (1851), 2 Sim. N. S. 78.

as to displace the plaintiffs' right to maintain the action as parties to the contract, though the result may be to benefit certain of the public.

The last question is as to the relief awarded to the plaintiffs. The defendants urge that it involves the Court in seeing to the performance of continuous acts for a length of time—which the Court will not undertake. But here the Court is not asked to go the length to which it was necessary to go in order to give the relief claimed in *City of Kingston* v. *Kingston, etc., Electric R. W. Co.* (4), and the many cases which preceded it. In these cases the Court withheld its hand, although convinced that a breach of agreement had been committed in respect of which the party wronged was entitled to some remedy, because of the difficulties surrounding a specific performance of the agreement. But where the circumstances are such that the Court can prevent such a breach of a legal engagement by holding the parties specifically to obstain from breaking it, there the Court will interfere by injunction to restrain the breach of the positive engagement so entered into: *Holmes* v. *Eastern Counties R. W. Co.* (5). And in a proper case will even import a negative quality into an affirmative agreement. See *Doherty* v. *Allman* (6), where Lord Chancellor Cairns says (p. 720): "I entirely admit that an affirmative covenant may be of such a character that a Court of Equity, although it cannot enforce affirmatively the performance of the covenant, may, in special cases, interfere to prevent that being done which would be a departure from, and a violation of, the covenant. That is a well-settled and well-known jurisdiction of the Court of Equity;" and then proceeds to state the considerations by which the Court ought to be governed in dealing with such cases.

Applying those considerations to the present case, they tend to support the exercise of the discretion in favour of the plaintiffs. The defendants are restrained from a breach of one term of the agreement, and, as pointed out in *City of Kingston* v. *Kingston, etc., Electric R. W. Co.* (*supra*), the Court may and frequently does restrain parties from doing some particular act, the doing of which is a breach or violation of an agreement.

OSLER, MACLAREN, MACLENNAN and GARROW, JJ.A., concurred.

The defendants appealed to the Supreme Court of Canada, which dismissed the appeal, with costs, adopting the reasons given in the Courts below.

(4) 25 A. R. 462.
(5) (1857), 3 K. & J. 675.
(6) (1878), 3 App. Cas. 709.

Regulating Routes of Street Cars.

TORONTO v. TORONTO RAILWAY CO.

76 L. J. P. C. 57.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

One question raised on this appeal was whether under the terms of an agreement granting franchise it was for the company or the city to determine what routes should be adopted and stopping places chosen in connection with the operation of street cars by the company.

LORD COLLINS delivered the judgment of their Lordships and said in part:—Next with regard to the last question, which involves what has been called in the argument the "routeing" of the cars, and the places of stoppage.

As has been already shewn from the passages cited, the exclusive right of "operating" the street railways has been in the most explicit terms conferred upon the company. Now, whatever else the word "operating" may include, it seems to their Lordships most certainly to embrace the right to determine the routes of the different cars and their interrelations. This seems to lie at the root of successful management of the enterprise, and ought to be in the hands of those who are responsible for getting the best monetary return out of it. How far, then, has this exclusive discretion, which would seem, *prima facie* at all events, to be conferred on the company, been displaced by other provisions in the bargain?

The clause mainly, if not exclusively, relied on for the corporation was the 26th of the conditions of sale:

"The speed and service necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council."

This clause is the last of a fasciculus, of which the heading is "Track, &c., and Roadways," and, as was held in *Hammersmith and City Railway* v. *Brand* (1) such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation. On looking through the clauses down to the 26th,

(1) [1869] 38 L. J. Q. B. 265; L. R. 4 H. L. 171.

it is clear that "Tracks, &c., and Roadways" refer to the physical condition of these entities, and not to the course or direction of the cars, which is the governing idea in the word "Routes." The words of clause 26, therefore, *prima facie*, are not addressed to the routes at all, in the sense involved in the controversy in this case—namely, as their Lordships understand it, the course which each car is to take from the start to the end of its journey. It is said that the word "service" embraces it, but it seems to their Lordships that *prima facie* in its context it ought not to be so construed; and further, that, if service were to be construed in a sense wide enough to include the marking out of routes, a great many of the special provisions which follow (2) would be superfluous, as already covered in the wide interpretation of "service." Indeed, clause 33 seems to be inconsistent with such an interpretation, for it assumes that the arrangements necessary to enable a passenger to have a continuous ride from any point on the railway to any other point on the main line or branch within the city limits are to be made by the company, though "with the approval of the engineer and the endorsation of the corporation." Therefore, on the question of "routeing" also their Lordships agree with the view of Mr. Justice Sedgewick.

With regard to the question of stopping, which arises more specifically on the second appeal, the argument in favour of the company seems to their Lordships still stronger, for here there is a specific provision—clause 39—regulating the matter and negativing any other implied power in the engineer.

Assumption of Ownership of Street Railway by Municipality—Value of Franchise.

RE BERLIN & W. STREET R. W. CO. AND BERLIN.

19 O. L. R. 57; 13 O. W. R. 157.

COURT OF APPEAL ONTARIO AND SUPREME COURT OF CANADA.

Moss, C.J.O.:—Appeal by the railway company from a judgment of Britton, J., affirming an award of arbitrators appointed to determine the value of the railway owned by the Berlin and

(2) For example, 27, 28, 33, 36, 37, 38, 39.

Waterloo Street R. W. Co. and of all the real and personal property in connection with the working thereof.

The arbitrators, by their award, found the actual present value of the railway and the real and personal property in connection with the working thereof to be the sum of $75,200. They stated in their award that, in arriving at the above value, they valued the railway as being a railway in use and capable of being used and operated as a street railway, and did not allow anything for the value of any privilege or franchise whatsoever either in the town of Berlin or in the town of Waterloo.

They also stated that it was contended before them, on behalf of the street railway company, that the mode and principle of valuation should be to ascertain the amount of the present net earning power of the railway and to capitalize this amount, so as to reach the correct value of the railway and the real and personal property in connection therewith, but they had not assented to that contention, and had not reached their valuation in any way on that basis, but had considered only the actual present value. * * *

Having regard to the special Act, the matter must be treated as one arising under sec. 41 of the R. S. O. ch. 208.

The only question, therefore, that is now open on appeal is whether the principles which the arbitrators adopted in ascertaining the value of the railway and the real and personal property in connection with the working thereof were those proper to be applied. There are a few subsidiary questions, but they do not affect the main question, though their determination affects to some extent the amount of the award.

Section 41 of the revised statute provides that "* * * * the municipal corporation may, after giving six months' notice prior to the expiration of the period limited, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the value thereof, to be determined by arbitration." And that is the situation in this case. The prescribed notice was duly given, the parties proceeded to an arbitration, an award was made, and the special Act has authorized the town of Berlin, upon payment of the amount of the award, to take over and enter into possession of the street railway and all property and effects thereof (with certain trifling exceptions), as set out in the award.

The basis upon which the arbitration proceeded—indeed, it was the only basis on which it could proceed—was that the

privileges of the street railway company of working its railway within the two municipalities terminated upon the expiry of the twenty years during which the privileges existed under the respective agreements with the municipalities, and that the town of Berlin was entitled to assume the ownership of the railway and the real and personal property connected with the working thereof, shorn of all privileges rendering it a going concern in the hands of the railway company.

This fundamental fact has a most important bearing on the question of value and largely governs the method of its ascertainment.

To a great extent, it disposes of the contention that, in ascertaining the value, allowance should be made for past or future profits or that the element of profits should be taken into consideration.

It is also important to bear in mind that, so far as the evidence discloses, the town of Berlin is not assuming the ownership of the railway as a commercial venture, with a view to letting or selling it to a company to operate, but in order to carry it on as a municipal undertaking, and that the powers of the town to so carry it on are not derived from the railway company, but from the Municipal Act, the present enactment being sec. 569 (2) *et seq.* of the Act of 1903. So that, when the town assumes the ownership of the railway, the railway company gives nothing in the way of powers or rights of maintaining or operating the railway in or upon the streets of the town.

It follows that the railway company, not having any rights of the character above mentioned of which they can dispose, are not to be treated as giving up to the town a going concern, in the sense that it is one capable of earning profits in the company's hands. That of which the town assumes the ownership, and which the railway company are able to give to it, appears to be aptly described by the arbitrators in their award as a railway in use, and capable of being used and operated, as a street railway, but without any privilege or franchise enabling them to operate it either in the town of Berlin or the town of Waterloo.

The compensation is to be assessed with reference to the value of the railway company's interest, and not with reference to the value to the town: *Stebbing* v. *Metropolitan Board of Works* (1).

It is said that to value the railway and the real and personal property in connection with the working thereof on this basis

(1) (1870), L. R. 6 Q. B. 37.

works a great hardship on the railway company and its shareholders, who by expending and risking their capital have established a profit-earning concern.

But if that is the effect of the legislation, it must be accepted, and it may be said of the railway company, as it was said by Lord Adam of the "promoters" in the case of *Edinburgh Street Tramways Co.* v. *Magistrates of Edinburgh* (2) that "they knew when they entered on their undertaking that it was in the power of the defenders, the local authority, to terminate by notice their exclusive use at the end of the time. . . . The local authority were themselves the owners of the streets on which the tramway lines lay, and I can quite understand that the Legislature considered that when they became owners of the tramways they should not be called upon to pay for the right of using the streets, which were their own property, in this particular way, for the benefit of the inhabitants, and that it was sufficient that the pursuers should be paid for the material subjects which had cost them money, but that they should not be paid for these powers which had cost them nothing."

The decisions under the English Tramways Act, 1870, and the London Tramways Act must, of course, be considered with reference to the language used by Parliament, but an examination of the speeches of the Law Lords who formed the majority in the cases of *Edinburgh Street Tramways Co.* v. *Lord Provost, etc., of Edinburgh* and *London Street Tramways Co.* v. *London County Council* (3) tends to shew that the decisions turned not so much upon the significance of the parenthetical words in sec. 43 of the Tramways Act, 1870, as upon the fact that the value of the thing purchased and sold was not of the "undertaking," which was not defined in the Act, but of the tramway and all lands, buildings, works, materials, and plant, etc., and that such value was to be ascertained in view of the further fact that the property was devoid of any privilege or franchise enabling it to be further operated by the tramway companies. Lord Herschell, L.C., said (p. 465): "It was contended for the appellants that the presence of the parenthesis indicated that, in the opinion of the Legislature the term 'value of the tramway' would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have

(2) (1894), 21 Court Sess. Cas., 4th series (Rettie), 688, at p. 698.
(3) [1894] A. C. 456 and 489.

been enacted by way of precaution, to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure."

There were difficulties in the construction of the Tramways Act, 1870, owing to the use of language which does not occur in R. S. O. 1897, ch. 208. Here the town is to assume the ownership of the railway, etc., on payment of the value thereof. And the conditions under which it is held are the same in effect as those under which the tramways were held in the cases cited.

The principles which the arbitrators adopted in this case seem to be the proper ones under the circumstances.

The foregoing was a dissenting judgment. Garrow, Osler and Maclennan, JJ.A., held that the award should be set aside.

On appeal to the Supreme Court of Canada (reported 42 S. C. R. 581) the Court unanimously allowed the appeal with costs. The Chief Justice and Duff, J., expressly adopted the reasons given by the Chief Justice of Ontario. The Privy Council refused leave to appeal.

Compulsory Purchase of Gas Works Plant and Goodwill.

HAMILTON GAS CO. v. HAMILTON CORPORATION.

79 L. J. P. C. 76.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The Hamilton Gas Co., under a special Act, had power to construct and maintain gas works in the town of Hamilton, New Zealand. Under the Act the town of Hamilton were entitled at any time "after the expiration of twelve years from the date of the coming into operation of this Act to purchase the gas works and plant at a price to be determined by arbitration." The power of the town corporation to purchase gas works was under the Municipal Corporations Act of New Zealand limited as follows:—"The Council may . . . purchase any gas works theretofore constructed in the borough; . . . where gas works are at any time established . . . under the authority of an Act . . . it shall not be lawful for the Council to establish any other gas works to supply the same locality or any part

thereof except under the authority of a special Act in that behalf. The town corporation decided to purchase the gas works and plant of the company. On the arbitration the company contended that the price to be paid should be the commercial value of the undertaking as a going concern. The umpire stated a case.

The Court of Appeal of New Zealand held against the company's contention and the company appealed to the Judicial Committee of the Privy Council.

LORD SHAW delivered the judgment of their Lordships and said, in part:—Being stated in the briefest terms, the controversy between the two parties is accordingly this—whether the gas works and plant should be treated as merely the material thing or as truly the undertaking for which that thing existed. This alternative, however, produces great difference in the amount of the award arrived at, and their Lordships are not surprised to observe the care with which the case has been considered by the learned Judges of the Court of Appeal. Such an alternative has not infrequently been presented in previous cases, which seems to have been fully under the consideration of that Court. Their Lordships, however, are of opinion that each of these cases, and also the present case, depended and depends, not upon any rule or principle of law of general application, but solely and entirely upon what is the just construction of the language, whether of statute or agreement, regulating the measure and nature of the claim. Illustrations might easily be given of this fact—as, for instance, the decision in the case of *Stockton and Middlesbrough Water Board* v. *Kirkleatham Local Board* (1). In that case, a water board constituted by a special Act was bound, when so required, to sell to the sanitary authority the mains, pipes, and fittings belonging to the board within that district. It was held, upon a construction of certain statutory provisions, and upon the terms above quoted, that the sum to be awarded was merely as a price for the mains, pipes and fittings themselves, and not as a compensation for the loss of statutory rights of supply as a revenue-earning undertaking. The case was treated purely as one of construction, and the same method of treatment appears in *Toronto Street Railway Co.* v. *Toronto Corporation* (2), and the other cases cited in the Court of Appeal (3).

(1) [1893] 63 L. J. Q. B. 56; [1893] A. C. 444.
(2) [1893] 63 L. J. P. C. 10; [1893] A. C. 511.
(3) *London Street Tramways Co.* v. *London County Council*, [1894] 63 L. J. Q. B. 769; [1894] A. C. 489. *Edinburgh Street Tramways Co.* v. *Edinburgh Corporation*, [1894] 63 L. J. Q. B. 769; [1894] A. C. 456. *Dudley Corporation* v. *Dudley, Stourbridge, and District Electric Traction Co.*, [1907], 97 L. T. 556. *Otago Land Board* v. *Higgins*, [1894]: N. Z. L. R. 3 C. A. 66.

In none of these did the decision invoke any general principle whatever, except that the language employed by the parties must be carefully looked to in order to attach to it its accurate meaning.

Much reliance was placed by counsel for the respondents upon the view that language such as "gas works and plant" must, in the first instance, be given only its primary and natural meaning—that is to say, a meaning which is confined to the material thing and not to the business or undertaking without which that thing would disappear. In this connection, the language used by Lord Watson in *Edinburgh Street Tramways Co.* v. *Edinburgh* (*Lord Provost*) (4) was referred to and with perfect propriety relied on. It is as follows: "I see no reason to doubt that these words, 'the tramway,' are capable of being so employed as to indicate that they embrace the use and occupation of the fabric as well as the fabric itself, or even to indicate that they apply to the whole stock and goodwill of a tramway undertaking. But, in their primary and natural sense, the words appear to me to denote nothing more than the fabric of the tramway lines upon which traffic is conducted. In order to give them a wider meaning as they occur in the enumeration of particulars to be valued under section 43, I think it is incumbent upon the appellants to shew, by reference to their context or to the general scheme of the statute, that they were intended by the Legislature to have that wider significance." Lord Watson had already (5) classified the right of property in a tramway line as possibly of three different degrees, stating that "Although physically the subject is the same, the interest in it, which must be regarded as the true subject of valuation, is very different in these three cases." Their Lordships do not think further reference to the authorities would carry the matter beyond the point stated.

After examining the special acts in question, their Lordships held that the price to be paid ought to include the value of the whole undertaking, including goodwill.

(4) 63 L. J. Q. B., at p. 775: [1894] A. C., at p. 471.
(5) 63 L. J. Q. B., at p. 774: [1894] A. C., at p. 469.

Fatal Objection to Validity of Tax Sale.

DEVERILL v. COE.

11 O. R. 223.

QUEEN'S BENCH DIVISION ONTARIO.

Action by a tax purchaser to recover land from the original owner in possession. The trial Judge gave judgment for the defendant. The plaintiff appealed.

ARMOUR, J.:—In my opinion, the substantial performance of the provisions of R. S. O. 1877, ch. 180, secs. 108, 109, 110, and 111 (1), is a condition precedent to the right to sell non-resident land for taxes.

(1) R. S. O. 1877, ch. 180 (The Assessment Act).

108. The Treasurer of every County shall furnish to the Clerk of each Municipality, except Cities and Towns, in the County, and the Treasurer of every City and Town shall furnish to the Clerk of the Municipality, a list of all lands in his Municipality in respect of which any taxes have been in arrear for the three years next preceding the first day of January in any year; and the said list shall be so furnished on or before the first day of February in every year, and shall be headed in the words following: "*List of lands liable to be sold for arrears of taxes in the year one thousand eight hundred and* ;" and, for the purposes of this Act, the taxes of the first year of the three which have expired under the provisions of this Act, on any land to be sold for taxes, shall be deemed to have been due for three years, although the same may not have been placed upon a Collector's roll until some month in the year later than the month of January. 32 V. c. 36, s. 110; 40 V. c. 7, *Sched.* A (192).

109. The Clerk of the Municipality is hereby required to keep the said list, so furnished by the Treasurer, on file in his office, subject to the inspection of any person requiring to see the same, and he shall also deliver to the Assessor or Assessors of the Municipality, in each year, as soon as such Assessor or Assessors are appointed, a copy of such list; and it shall be the duty of the Assessor or Assessors to ascertain if any of the lots or parcels of land contained in such list are occupied, or are incorrectly described, and to notify such occupants and also the owners thereof, if known, whether resident within the Municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes, and enter into a column (to be reserved for the purpose) the words "*Occupier and Parties Notified*," or "*Not Occupied*," as the case may be; and all such lists shall be signed by the Assessor or Assessors and returned to the Clerk with the assessment roll, together with a memorandum of any error discovered therein, and the Clerk shall file the same in his office for public use; and every such list, or copy thereof, shall be received in any Court as evidence in any case arising concerning the assessment of such lands. 32 V. c. 36, s. 111; 33 V. c. 27, s. 9; 40 V. c. 7, *Sched.* A (193). *And see post*, s. 185.

110. The Assessors shall attach to each such list a certificate signed by them, and verified by oath or affirmation, in the form following:—

"I do certify that I have examined all the lots in this list named; and that I have entered the names of all occupants thereon, as well as

These provisions first appeared in the Act 27 Vict. ch. 19, which was an Act passed, as stated in the preamble, for the greater protection of persons owning non-resident lands in Upper Canada, and also for the more sure collection of the taxes thereon. And it is impossible to construe these provisions so as to give effect to the intent and purpose of the Act, and to afford the protection it was designed to give, without construing them to be conditions precedent to the right to sell such lands for taxes.

If these provisions are to be construed as merely directory and as matters of mere procedure which the officers charged with the performance of them may omit or neglect as their ease or pleasure may prompt, without such omission or neglect being any hindrance to the valid sale of such lands for taxes, then the passing of the Act containing them was an idle ceremony, and the protection intended by the Act to be afforded to the owners of such lands will be rendered wholly futile.

The township officers in the case before us wholly neglected their duty, and did not even pretend to observe these provisions; and as these officers are the officers of the very municipality for the benefit of which these taxes were to be collected, I do not think the defendant's land should be practically confiscated through their neglect.

I do not appreciate very highly the hardship to the speculator in the purchase of land for taxes, whose chief hope of gain lies in the owner of the land being kept in ignorance that his land has

the names of the owners thereof, when known; and that all entries relative to each lot are true and correct, to the best of my knowledge and belief."

32 V. c. 36, s. 112.

111. The Clerk of each Municipality shall examine the assessment roll when returned by the Assessor, and ascertain whether any lot embraced in the said list last received by him from the Treasurer pursuant to the one hundred and eighth section is entered upon the roll of the year as then occupied, or is incorrectly described; and shall forthwith furnish to the said Treasurer a list of the several parcels of land which appear on the resident roll as having become occupied, or which have been returned by the Assessor as incorrectly described.

2. Except in the cases provided for by sections forty-four and forty-six, on or before the first day of July in the then current year, the County Treasurer shall return to the Clerk of each local Municipality other than a City or Town, and every City or Town Treasurer shall return to the Clerk of the City or Town, an account of all arrears of taxes due in respect of such occupied lands, including the percentage chargeable under section one hundred and twenty-four of this Act.

3. The Clerk of each Municipality shall, in making out the Collector's roll of the year, add such arrears of taxes to the taxes assessed against such occupied lands for the current year; and such arrears shall be collected in the same manner and subject to the same conditions as all other taxes entered upon the Collector's roll. 32 V. c. 36, s. 112; 40 V. c. 7, *Sched.* A (193 & 194).

been sold for taxes, and who trafficks upon the chance of this ignorance continuing until he may be able, as he hopes, to deprive him of his land.

I do not think that the taxes for which the land in question was sold could be said to be due and in arrear so long as this condition precedent was unperformed in such a manner as to support the sale of the defendant's land; nor could the defendant's land be said, in the absence of the performance of this condition, to be land sold for taxes due, or for arrears of taxes, within the meaning of the Assessment Act, so as to render the sale valid and binding after the intervals fixed by the Act.

The taxes must be legally due, and the arrears must be taxes legally in arrear, so that the land may be legally sold, for otherwise secs. 155 and 156 of the Assessment Act (2) do not apply.

I refer to *McKay* v. *Crysler*, 3 S. C., *per* Gwynne, J., at p. 489, and *per* Henry, J., at p. 471.

In my opinion, the motion must be dismissed, with costs.

Tax Sale a Nullity.

WHELAN v. RYAN.

20 S. C. R. 65.

SUPREME COURT OF CANADA.

This was an issue under the Real Property Act (Manitoba) between Whelan, the assignee of a purchaser of lands at a tax

(2) **155.** If any tax in respect of any lands sold by the Treasurer, in pursuance of and under the authority of "*The Assessment Act of* 1869" or of this Act, has been due for the third year or more years preceding the sale thereof, and the same is not redeemed in one year after the said sale, such sale and the official deed to the purchaser of any such lands (provided the sale be openly and fairly conducted) shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them—it being intended by this Act that all owners of land shall be required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the Treasurer's sale thereof. 32 V. c. 36, s. 130. *See* ss. 140, 147, 148.

156. Wherever lands are sold for arrears of taxes, and the Treasurer has given a deed for the same, such deed shall be to all intents and purposes valid and binding, except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction by some person interested in the land so sold within two years from time of sale. 32 V. c. 36, s. 155.

sale and Ryan, a mortgagee of the lands. The facts are sufficiently stated in the judgment.

Taylor, C.J., entered a verdict for the defendant Whelan. The plaintiff appealed to the Court of Queen's Bench, which set aside the verdict for the defendant. The defendant appealed.

STRONG, J.:—I am of opinion that the tax sale under which the appellant claims was void and that the deed made in pursuance of it was a nullity. * * *

The taxes for which the land was ostensibly sold were those claimed for the years 1880 and 1881.

The original contract for purchase from the Dominion Government was entered into by Adam Wilson Graham, under whom the respondent claims title, on the 4th of September, 1879. The patent was issued to Graham on the 27th September, 1881, at which date the purchase money was paid in full. On the 6th of March, 1882, the lands were sold for taxes by the municipality of Lorne, and on the 12th March, 1883, a deed was executed by the municipality purporting to convey them to John D. MacIntosh, the purchaser at the tax sale, under whom the appellant claims title. Therefore, the taxes for which the municipal authorities assumed to sell were taxes claimed to have accrued due whilst the legal title to the lands was vested in the Dominion Government.

The lands of the Dominion are by the British North America Act expressly exempted from provincial taxation.

A question has been raised as to the liability to taxation of lands which the Dominion Government have contracted to sell to a purchaser whose contract is a subsisting one. It was argued before this Court, and also in the Courts below, that so long as the Dominion retains, in addition to the legal title, a beneficial interest, as it undoubtedly does in the case of lands agreed to be sold, but which have not been fully paid for, the interest of the purchaser of such lands cannot be made the subject of taxation by provincial legislation. In the present case, as I have before stated, the purchase money was not paid until after the alleged assessment of the taxes for 1881. The legislature of Manitoba has made provision for the assessment and sale of the interests of purchasers of Dominion lands, expressly reserving the rights and interest of the Crown as represented by the Dominion. The 11th sub-section of the 39th section of 43 Vict. ch. 1, which was passed on the 4th February, 1880, clearly implies that the interest of a purchaser of

Crown lands, or his pre-emption right, should be liable to taxation and sale saving the rights of the Crown. The learned Chief Justice was of opinion that the legislature of Manitoba had the power thus to impose taxation on the interests of purchasers in unpatented Dominion lands, saving the interest of the Crown, and that by the section referred to they exercised this power, or rather indicated that the general provision for taxing lands included such interests. I am not at present prepared to say that this was not a correct conclusion, but as this appeal can be decided upon other grounds, I refrain from expressing any opinion on the point.

The next inquiry, however, which is as to the legality and sufficiency of the assessment of the taxes for which the lands were sold, must be answered adversely to the appellant. As regards the taxes claimed for both the years 1880 and 1881, it appears to me to be very clear that there was no imposition of rates such as the law required, and consequently the land was sold for taxes not legally due. The legality of the taxes claimed for those two years depends on different statutes, that for 1880 being regulated by 43 Vict. ch. 1, and that for 1881 by 44 Vict. ch. 3, but they each contain a clause, identical in terms, providing that the council shall in each year after the revision of the roll pass a by-law "for levying a rate on all the real and personal property in the said roll to provide for all the necessary expenses of the said municipality." Then not only did the appellant fail to prove that there was any such by-law for either of these two years, but the respondent, so far as it was possible to do so, established that there was none. Mr. Crawford, the clerk and treasurer of the municipality and the custodian of its records, being called upon to produce the by-law under which the rate was levied in 1880, answers: "I cannot. I don't think there ever was one. I cannot find one." And being asked as to a by-law in 1881, he says he cannot produce that for the same reason. He adds: "The minutes do not show that there was one passed and I cannot find that there was any such by-law." And to the question: "You would know if there was one passed?" He answers: "Yes, certainly." The same witness also produced the minute book and no trace of any by-law for either year was found in it.

After this evidence, it is useless to talk of presumptions; the fact is established that there never was a by-law in either year. It is true that it does appear that on the 2nd August, 1880, a resolution was passed that a rate of five mills on the dollar be struck on the total of the assessment roll and a similar resolution was passed

on the 11th July, 1881. But these resolutions are not the equivalents of by-laws, not being passed with the same solemnities and being wanting moreover in the seal of the municipality and the signature of its head officer which are required to be affixed to every by-law. Therefore, there was no valid or legal rate for these two years 1880 and 1881 and the imposition of the taxes for which the land was sold was wholly illegal and void.

Then sec. 58 of 51 Vict. ch.. 101, is invoked. This statute was not passed until 18th May, 1888, more than five years after the deed was executed. It is as follows: "All assessments made and rates heretofore struck by the municipality are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby." Against giving this the *ex post facto* effect contended for the most rigid construction must be adopted, and I think the plain answer to it is that given by Mr. Justice Bain that it is to be restricted to defective proceedings in the nature of irregularities and not to absolute nullities such as we have here. And further that, as Mr. Justice Killam points out, it is to be read as applying only to validate existing rates and assessments for the purpose of subsequent proceedings to be afterwards taken for their enforcement, and not as making good sales made on the basis of absolutely void proceedings. The legislation appears to have been passed in the interest of municipalities and not in aid of purchasers. The rates being satisfied by the sale the municipality has no longer any interest inasmuch as no rates or assessments any longer exist to which the clause can apply. Lastly, the 45 Vict. ch. 16, sec. 7 (1), is insisted upon as an enactment curing all defects as well in the assessment as in the sale and giving to the deed by itself the effect of conferring an indefeasible title without regard to the validity of the assessment.

In *O'Brien* v. *Cogswell* (2), I rested my judgment upon a construction which restricted a section, similar in its terms to this, to irregularities and defects in the proceedings for sale as distinguished from the proceedings for the assessment and levying of the tax. The latter procedure I considered to be analogous to an adjudication whilst the sale is in the nature of an execution.

(1) "And wherever lands are sold for arrears of taxes, and the warden and treasurer have given a deed thereof, such deed shall, notwithstanding any informality or defect in, or preceding such sale, be valid and binding to all intents and purposes, except as against the Crown, if the same has not been questioned before some court of competent jurisdiction by some person interested in the land so sold, within one year from the execution of such deed."

(2) 17 Can. S. C. R. 420.

In the Ontario statute in question in *McKay* v. *Crysler* (2), the language did not admit of this so easily. I say this, however, not by way of questioning the decision of the Court in that case by which I am of course bound; I merely wish to point out that *McKay* v. *Crysler* (3) was a stronger case for the absolute construction contended for by the appellant than either *O'Brien* v. *Cogswell* (1) or the present case. Here the words are "notwithstanding any informality or defect in or preceding such sale." These words I construe, as I did similar words in *O'Brien* v. *Cogswell* (1), as applying only to informalities and defects in the sale or in the proceedings relating to the sale. I think I am entitled so to confine the words "preceding such sale," and to read them as referring to the preliminaries of the sale as distinguished from the levying of the assessment and the imposition of the tax, for the reason that in so doing I am carrying out the principle laid down by the Court in *McKay* v. *Crysler* (3) (in which at the time I certainly did not concur) that the Courts are bound to place on such enactments as these the most restricted construction possible in order to prevent the gross violation of common right and justice which would follow if a comprehensive construction were adopted. At all events, *McKay* v. *Crysler* (3) and *O'Brien* v. *Cogswell* (2) have settled, so far as this Court is concerned, a principle of construction applicable to this section which makes it impossible to construe it as the appellant contends. If it is asked what scope or application can then be given to this clause, I answer that there is abundant room for its application, since it shuts out all objections on the ground of irregularity in the preliminaries of the sale such as irregular advertisements and other defects of a similar kind.

I am of opinion that the appeal should be dismissed with costs.

Penalties for not Paying Taxes.

LYNCH v. CANADA NORTH-WEST LAND CO.

19 S. C. R. 204.

SUPREME COURT OF CANADA.

The question raised on this appeal was as to the power of the Legislature of Manitoba to pass an Act authorizing municipalities

(3) 3 Can. S. C. R. 436.

to impose an addition of ten per cent. on taxes unpaid after a certain time.

SIR W. J. RITCHIE, C.J.:—It is obvious that the matter of interest which was intended to be dealt with by the Dominion Parliament was in connection with debts originating in contract, and that it was never intended in any way to conflict with the right of the local legislature to deal with municipal institutions in the matter of assessments or taxation, either in the manner or extent to which the local legislature should authorizes such assessments to be made, but the intention was to prevent individuals under certain circumstances from contracting for more than a certain rate of interest and fixing a certain rate when interest was payable by law without a rate having been named.

R. S. C. ch. 127, sec. 1 provides:

1. Except as otherwise provided by this or by any other Act of the Parliament of Canada any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.

2. Whenever interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be 6 per centum per annum.

The statute then deals with the question of interest on monies secured on mortgage in sections from three to eight inclusive. The three next sections apply to Ontario and Quebec, and next six to the Province of Nova Scotia, and the next six to the Province of New Brunswick, then four to British Columbia, and three to Prince Edward Island.

It is abundantly clear that taxes are not contracts between party and party, either express or implied, but they are the positive acts of the government through its various agents binding upon the inhabitants, and to the making or enforcing of which their personal consent, individually, is not required.

In the local legislature is vested the power to create municipal corporations and deal generally with municipal institutions, and to confer the right to impose or levy local rates, taxes and assessments upon the inhabitants and upon all property within the limits of the designated taxing district and to regulate the levying and collecting of such taxes in any manner it may deem most efficient. I care not by what name this 10 per cent. may be called; it was to all intents and purposes in the case before us, an additional tax

as the words of the Act appear to me most unquestionably to indicate:—

"All taxes remaining due and unpaid on the 1st or 31st day of December (as the case may be) shall be payable at par until the 1st day of March following, at which time a list of all the taxes then remaining unpaid and due shall be prepared by the treasurer or collector (as the case may be) and the sum of 10 per cent. on the original amount shall be added on all taxes then remaining unpaid.

What is this but an addition to the tax originally imposed? But we are asked to read this as not an additional tax, but as interest for an indefinite period without the slightest indication of any such intention, except the fact that 10 per cent. is to be added to the tax, and thus producing the most unreasonable result that if the tax was paid the next day (say the 2nd day of March) the interest imposed would be 10 per cent. for the forbearance of payment for one day, a proposition to my mind too unreasonable to suppose the legislature ever could have contemplated such a consequence. But treating it as an increased assessment, imposed to stimulate the ratepayers to pay promptly, and if they do not, then approximately to equalize the assessment rendered necessary by reason of the delinquency of the ratepayers, no such difficulty arises. It may be too large or it may be too small for the accomplishment of either of these purposes, but with this we have nothing to do. The legislature has vested in the municipality the power to impose taxes, and if they have acted within the power confided to them no Court has a right to say that the amount imposed is too large or too small. But had it been specifically named as interest I am of opinion that it was an incident to the right of taxation vested in the municipal authority and, though more than the rate allowed by the Dominion statute in matters of contract, in no way in conflict with the authority secured to the Dominion Parliament over interest by the British North America Act, but must be read, consistently with that, as within the power given to the local legislature under its power to deal with municipal institutions.

Authentication of Collector's Roll.

TRENTON v. DYER.*

24 S. C. R. 474.

SUPREME COURT OF CANADA.

THE CHIEF JUSTICE (SIR HENRY STRONG) :—The only question for decision in this appeal relates to the proper construction of the concluding paragraph of the 120th section of the Ontario Assessment Act (now 55 Vict. ch. 48, formerly R. S. O. 1887, ch. 193). The respondent Dyer was in 1891 the collector for the town of Trenton and his co-respondents were his sureties. This action was brought to make him liable for the taxes which it was alleged he ought to have collected but had failed to collect.

The defence, so far as it is now material on this appeal, was that he had not been furnished by the town clerk with a properly certified roll. This action was tried before Chief Justice Armour without a jury, when judgment was entered for the appellants. On appeal this judgment was reversed by the Court of Appeal. Mr. Justice Burton dissented from the majority of the Court.

The 120th section is as follows:

"All moneys assessed, levied and collected under any Act by which the same are made payable to the treasurer of this province, or other public officer for the public uses of the province, or for any special purpose or use mentioned in the Act, shall be assessed, levied and collected in the same manner as local rates, and shall be similarly calculated upon the assessments as finally revised, and shall be entered in the collector's rolls in separate columns in the heading whereof shall be designated the purpose of the rate; and the clerk shall deliver the roll, certified under his hand, to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality."

It was argued before us that this section had no reference to the roll for purposes of local taxation, and that the requirement that the roll should be certified by the clerk was only for the purpose of collecting provincial taxes. This contention we disposed of at the conclusion of the argument of the learned counsel for the appellant, the Court holding that such was not the true legal construction of the clause in question, but that the requirement

that the roll should be certified under the hand of the clerk applied as well to municipal as to provincial taxes. The sole question which remains is, therefore, whether the words "shall deliver the roll certified under his hand to the collector" are imperative or directory only. The *prima facie* presumption, as well under the Interpretation Act as without it, is that they are imperative. It is for the appellant to demonstrate that they are directory merely. This has not in my opinion been done. I see a great distinction between the provision as to the time of the delivery of the roll and that as to the certificate of the clerk. The first may well be directory. A failure to comply with it is in the power of the municipality to remedy and the omission does not affect the ratepayers. Such is not the case, in my opinion, as regards the want of authentication. If the object of requiring a certificate only concerned the municipality itself and its officers, and could be regarded as a mere direction to the clerk as to the course he was to pursue in performing his duty to the municipality, I should have no difficulty in holding it to be not obligatory. But is this so? Clearly not, for it concerns the taxpayers that the person to whom they pay their taxes, and who may distrain on their goods in case of non-payment, should be in possession of, and able to produce to them, proper authority for those purposes. An unauthenticated list of taxes, however formally made out in other respects, would not be such an authority, and if on such a list taxes could be collected the ratepayers might be called upon by a fraudulent collector to pay money as and for taxes never legally imposed. The roll in effect operates as a warrant, and usage and convenience alike require that such a document should bear upon its face some authentication or certificate to shew that it was regular, and that it emanated from the official who had authority to issue it. I think therefore we must consider the provision as one introduced for the protection of the ratepayers and therefore obligatory. The cases of *Whitby* v. *Harrison* (1) and *Whitby* v. *Flint* (2), referred to in the judgment of the learned Chief Justice of Ontario, are both authorities in support of this view, though in neither of them was the point now raised actually decided. It was, however, decided by these cases that the authority of the collector to collect the taxes did not depend on his appointment but on the receipt of such a roll as the statute requires, and the language of both the Chief Justices who gave the judgments in those cases certainly implies that they

(1) 18 U. C. Q. B. 603. (2) 9 U. C. C. P. 453.

considered that the roll to be valid should be certified. Then a roll not authenticated by the signature of the clerk is not such a roll as the statute requires. The case of *Vienna* v. *Marr* (3) was in my opinion well decided, and shews that the collector was not bound to act under an uncertificated roll. The case of *Welland* v. *Brown* (4), on which it was determined that the signature of the clerk without any formal certificate was sufficient, is not in any way inconsistent with this view, but on the contrary that case also implies that the Court considered such a signature to be necessary. I am compelled with much respect to dissent from the view of Mr. Justice Burton that the omission of the statute to make some provision for the case of the incapacity or death of the clerk, which latter event was in the present case the reason why the omission could not be remedied, is a reason why we should not hold signing to be imperative. I think we must rather regard that as *casus omissus*, and that it is an insufficient reason for holding that the payment of taxes may be enforced under a roll which upon the *prima facie* meaning of the words of the statute is a nullity.

The appeal must be dismissed with costs.

Illegal Business Assessment.

CITY OF LONDON v. WATT.

22 S. C. R. 300.

SUPREME COURT OF CANADA.

The plaintiffs brought an action against the City of London to recover a tax paid under protest under circumstances set out in the judgment given below. Armour, C.J., gave a verdict for the defendants. The Court of Appeal for Ontario allowed an appeal and the defendants thereupon appealed to the Supreme Court of Canada.

The judgment of the Court was delivered by THE CHIEF JUSTICE, SIR HENRY STRONG:—I am of opinion that this appeal

(3) 9 U. C. L. J. 301. (4) 4 O. R. 217.

must be dismissed. First, I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act (R. S. O. ch. 193) does not make the roll, as finally passed by the Court of Revision, conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.

To this effect were the decisions in *Scragg* v. *City of London* (1); *Nickle* v. *Douglas* (2); *Nicholls* v. *Cumming* (3). Several other Ontario cases might be cited to the same effect. All these cases were founded on principles laid down in English decisions of the highest authority.

I cannot assent to Mr. Meredith's argument that *McCarrall* v. *Watkins* (4), has any application to the present case. The distinction is that the property assessed in *McCarrall* v. *Watkins* (4), was real estate, in which case the property itself is the subject of assessment; here the property is personal in which case not the property but the owner is assessed. I adhere to what is said in *Nickle* v. *Douglas* (2), as to this distinction.

Then if the roll was not conclusive the only question remaining can be whether the case of the respondents comes within the 15th section of the Assessment Act which provides that—

"Where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such person shall be assessed in the municipality in which such personal property is situated."

It is not disputed that the personal property—merchandise consisting of sugar—assessed in the present case was actually in a warehouse within the appellant municipality at the time it was assessed; nor can it be disputed that the respondents are residents of the city of Brantford and do not reside in the city of London. The sole question is, therefore, whether upon the evidence it can be said that they carried on business in London. The proof upon this head is that the sugar was stored in a public warehouse kept by a Mr. Slater in the city of London; that this warehouse was used for bonded as well as for unbonded goods, and by other persons as well as by the respondents; and that the respondents paid Slater the usual warehouse charges upon these goods. It further appears that they had no clerk or agent

(1) 26 U. C. Q. B. 271.
(2) 35 U. C. Q. B. 126; 37 U. C. Q. B. 51.
(3) 1 Can. S. C. R. 395.
(4) 19 U. C. Q. B. 248.

in charge of the goods, but that when they made sales of sugar they gave a delivery order which Slater acted upon; that once a week or so their commercial traveller, who resided in London, attended there to take orders for goods, including sugar, but that the sales of sugar out of the stock in Mr. Slater's warehouse were not confined to transactions entered into at London.

I am of opinion that this does not shew that the respondents carried on business at London. It only shews that some of their stock in trade incidental to the business they carried on at Brantford was stored in a warehouse in London. The proper presumption is, therefore, that they were assessed for this same sugar at Brantford where they exclusively carried on business. To maintain this assessment at London would therefore be to impose upon the respondents a double tax upon the same property which would be illegal and oppressive.

The case of *Kingston* v. *Canada Life Assurance Company* (5), which appears to me to have been properly decided, is an authority for the respondents as is also *Ex parte Charles* (6) referred to in the judgment of Mr. Justice Osler in the Court of Appeal.

The appeal must be dismissed with costs.

Assessment of Gas Pipes.

CONSUMERS' GAS CO. v. TORONTO.

27 S. C. R. 453.

SUPREME COURT OF CANADA.

This action was brought to test the validity of the assessment for taxes of the appellants' mains and pipes.

THE CHIEF JUSTICE (SIR HENRY STRONG) said in part:—I am of opinion that the gas pipes of the appellants laid under the streets of the city were under this Act real property belonging to them, and as such liable to assessment. I regard the case of *The Metropolitan Railway Company* v. *Fowler* (1), as con-

(5) 19 O. R. 543. (6) L. R. 13 Eq. 638.
(1) [1893] A. C. 416.

clusively showing that these pipes are not to be considered as chattels placed beneath the public streets and highways, in the exercise of a mere easement, but being affixed to the land, as actual real property within the meaning of the interpretation clause. No matter in whom the fee in the soil of the surface of the streets was vested, so much of the subsoil as is occupied by the appellant's pipes must be held to constitute part of the land, unless we are altogether to disregard the decision of the House of Lords in the case cited.

Assessment Depending on Domicile.

JONES v. ST. JOHN.

30 S. C. R. 122.

SUPREME COURT OF CANADA.

The City of St. John assessed Jones as a resident. He had for some years carried on business and lived in New York. He applied for a writ of *certiorari* to quash the assessment.

The Supreme Court of New Brunswick discharged the rule *nisi* and Jones thereupon appealed to the Supreme Court of Canada.

By the St. John City Assessment Act (59 Vict. ch. 61), sec. 2, "for the purposes of assessment any person having his home or domicile, or carrying on business, or having any office or place of business, or any occupation, employment or profession, within the City of St. John, shall be deemed * * * an inhabitant and resident of the said city."

The judgment of the Court was delivered by KING, J., who said in part:—In his examination before the committee of the Common Council, Mr. Jones was questioned by the respondent as to his intentions, and he testified that since leaving in 1893, he always had the settled intention of not again returning to St. John to reside, and that his intention was to remain in New York indefinitely, although prior to 1898 (at which time he was giving his evidence) he had thought that he might yield to pressure from his daughter in Scotland and go there when he should close up his business, but that he had since abandoned the idea.

In *Thorndike* v. *Boston* (1), a case, like this, of municipal domicile for taxation purposes, Shaw, C.J., says:—

"The questions of residence, inhabitancy or domicile,—for although not in all respects precisely the same, they are nearly so and depend upon much the same evidence,—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances; but, from the whole taken together, it must be determined in each particular case. It is a maxim, that every man must have a domicile somewhere; and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another; and, *vice versa*, by acquiring a new domicile, he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question."

And in *Lyman* v. *Fiske* (2), the same learned Judge says:—

"It is manifest that it (habitancy) embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances leaving the question in so much doubt that a slight circumstance may turn the balance. In such a case, the mere declaration of the party made in good faith, of his election to make the one place rather than the other his home, would be sufficient to turn the scale."

While the circumstance is not conclusive, it is held in *Platt* v. *Attorney-General of New South Wales* (3) that:—

"It is always material in determining what is a man's domicile to consider where his wife and children live and have their permanent place of residence, and where his establishment is kept up."

As to inferences from the mode of living, Lord Chelmsford in *Moorehouse* v. *Lord* (4) says:—

"In a question of change of domicile, the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired."

(1) 1 Met. 242.
(2) 17 Pick. 231.
(3) 3 App. Cas. 336.
(4) 10 H. L. Cas. 272.

And in *Guier* v. *O'Daniel* (5) it is said:—

"The apparent or avowed intention of constant residence, not the manner of it, constitutes the domicile.

In *Aikman* v. *Aikman* (6), Lord Wensleydale says:—

"I do not say that in order to obtain a domicile in a country, a man must necessarily have a house of his own and reside in it. Circumstances may be so strong as to shew a fixed purpose of abandoning his own country and making his home in another, and to shew also the accomplishment of that object, though he lives in inns or temporary lodgings, but such cases are rare."

And in the same case Lord Cransworth says:—

"I will not say in point of law that a person may not acquire a domicile by residence at a hotel; but it can rarely happen, as a matter of fact, that such residence is intended to be of a permanent character."

It is however to be borne in mind that in recent times a practice of living in hotels has become more common than formerly, especially upon this continent.

In *Udny* v *Udny* (7), Lord Westbury says on the general subject:—

"Domicile of choice is a conclusion or inference which the law draws from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time."

There must be therefore, as so frequently expressed, both the fact of residence, and the intention to so reside for an unlimited time. The fact and the intention must concur, and both, therefore, are relevant facts to be proved by appropriate evidence.

In *Thorndike* v. *Boston* (1), already referred to, the plaintiff had gone from Boston to Scotland and the following direction was held to be correct:—

"That if the jury were satisfied that the plaintiff went abroad, not for the mere purpose of travelling, or for any particular object, intending to return when that was accomplished, but with the intention of remaining abroad for an indefinite length of time, or with the intention of not returning to Boston to live in the event of his return to the United States, then he ceased to be an inhabitant of Boston liable to taxation."

(5) 1 Binn. 349, note. (6) 3 Macq. H. L. 854.
(7) L. R. 1 H. L. Sc. 441.

The circumstances chiefly militating against the acquisition of a domicile in New York by Mr. Jones, are two, his mode of living there, and the facts in connection with the maintenance of the family home in St. John. The materiality of these circumstances lies in their bearing upon the question of his intention to make a permanent, or indefinitely continuing, home in New York.

As to the first two things are to be taken into account, the continuance of the hotel life for a period covering five years, and the fact that Mr. Jones was a widower. And as to the second, the facts are to be regarded in the light of Mr. Jones's open and avowed purpose to divest himself of all proprietary interest in the house at St. John and its furnishings, and fall short of proving that he maintained the establishment.

The case presented upon the evidence is similar to that instanced by Chief Justice Shaw, of Massachusetts, in *Lyman* v. *Fiske* (2), where in a case of nicely balanced circumstances the mere declaration of the party, made in good faith, of his election to make the one place rather than the other his home, was considered to be sufficient to turn the scale. Here we have explicit and repeated declarations of Mr. Jones, before the making of the assessment in question, which can leave no reasonable doubt as to his intention to abandon St. John as a place of residence and to make his home in New York (irrespective of whether he succeeded in the eye of the law in accomplishing it). His entire good faith in making the declaration has not been, and can not well be, impugned. We have therefore the fact of a long continued actual residence in New York as his chief place of abode, coupled with an avowed and *bona fide* intention to make it his home permanently, or, at least, for an indefinite time, and his fixed determination not to return to St. John to reside. There was, consequently, the acquisition of a new home or domicile, and the abandonment of the former one within the meaning of the Act.

As to Mr. Jones's attendance at the meetings of the Board of Directors of the Bank of New Brunswick, in 1897, while temporarily sojourning in St. John, this seems to be relied on merely as a circumstance tending to shew that there had really been no change of domicile. As such it is without real significance.

The result is that the appeal is to be allowed, the order appealed from set aside and a rule to be entered in the Court below granting the writ of certiorari.

Assessment of Plant of Street Railway—Conclusiveness of Assessment Roll.

TORONTO RAILWAY COMPANY v. TORONTO.

[1904] A. C. 809; 73 L. J. P. C. 120.

JUDICAL COMMITTEE OF THE PRIVY COUNCIL.

LORD DAVEY delivered the judgment of their Lordships and said in part:—The principal question on this appeal is whether the cars used by the appellants on their system of electric tramways in the city of Toronto and adjoining municipalities are liable to be taxed as real estate. * * *

In their case on this appeal, the respondents submit that "the cars are so actually or constructively affixed to land or buildings as to render them real property and assessable as such," and this was the point argued before their Lordships. * * *

The subject of assessment is not the appellants' system or undertaking, but only that part of it which can properly be described as real estate. The cars are no doubt adapted for use in connection with the railway and trolley wires, but they are not part of the railway, and are not fixed in any sense whatever to anything which is real estate. Their Lordships cannot attach any legal meaning to the expressions "in the nature of fixtures," or "constructively affixed," except as on admission that the articles in question are not in fact fixtures or actually affixed. They are, therefore, of opinion that the cars remain and are personal estate only and are unassessable. * * *

It appears to their Lordships that the jurisdiction of the Court of Revision, and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision, is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the Assessment Commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The Order of the Court of Appeal of June 28th, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

This point was not argued in the Court of Appeal in the present case, as that Court only followed its own decision in the appeal from the Revision Court in the previous year. It is therefore a satisfaction to their Lordships to know that their decision is in accordance with the opinions expressed by learned Judges in the Court of Appeal for Ontario and in the Supreme Court in other cases. In *Nickle* v. *Douglas* (1), the exact point arose. The appellant had unsuccessfully appealed to the Court of Revision, and it was held, after an elaborate examination of the previous authorities in the English and Canadian Courts, that that Court had no jurisdiction to decide any question whether particular property was assessable, and also that the party was not estopped by having previously appealed to the Revision Court. In *London Mutual Insurance Co.* v. *City of London* (2), the decision of the County Court Judge was treated as final, because the question was within the jurisdiction of the assessor; but Chief Justice Hagarty held that, if the property had not been assessable, that would have shewn that *ab initio* the assessor and the appellate tribunals had been dealing with something beyond their jurisdiction, and their confirmation of the assessor's act would go for nothing; and Paterson, J.A., expressed himself to the same effect. In *City of London* v. *Watt & Sons*, (3) Chief Justice Strong said: "I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act does not make the roll, as finally passed by the Court of Revision, conclusive as regards questions of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it."

Functions of Courts of Revision.

SISTERS OF CHARITY v. VANCOUVER.

44 S. C. R. 29.

SUPREME COURT OF CANADA.

The plaintiffs claimed that the Court of Revision under the Vancouver Incorporation Act, 64 Vict. ch. 54 (B.C.), had not disposed of their assessment in a proper manner.

(1) [1875] 37 Up. Can. Q. B. 51. (2) [1887] 15 Ont. App. R. 629.
(3) [1893] 22 Sup. Ct. Can. 300.

DUFF, J.:—Under sec. 46, sub-sec. 3, ch. 54 of 64 Vict (B.C.), the appellants are, I think, *prima facie* exempt from taxation in respect of "the buildings and grounds attached and belonging to" their institution in so far as such buildings and grounds are actually used and occupied by them for the purposes of that institution. The same sub-section confers upon the Court of Revision the power to limit this exemption. It is quite clear, I think, that the function thus vested in the Court of Revision is *quasi judicial* and must be exercised in each case with respect to the merits of that case alone; no administrative authority is conferred upon the Court of Revision empowering it to lay down a general rule based only upon general considerations. The principal contention of the appellants is that in this case the Court of Revision did not apply itself to the merits, but acted upon some such self-imposed general rule.

I express no opinion upon the question whether had the appellants succeeded in establishing this, the substance of their contention, they might still have been successfully met by the objection that the case is not a proper one for certiorari; they fail, in my opinion, because on the whole of the evidence before us we are not entitled to conclude that the Court of Revision acted otherwise than in accordance with its legal duty. There is in evidence a minute of that body in these words:

"That all charitable institutions mentioned in sub-sec. 3 of sec. 46 of the Vancouver Incorporation Act be exempted from taxation to the extent of the area occupied by the buildings thereon and an additional amount of land equal to 25 per cent. of the area, and that the assessment roll for 1900, as amended, be confirmed.

And that the Court then adjourned *sine die*."

And it is upon this minute that the appellants chiefly rely in support of the contention just indicated. The existence of this minute does not appear to me to be conclusive. In itself it is not incompatible with the view that the Court of Revision had examined each particular case falling within the enactment before deciding to act in the sense of this memorandum. We have no evidence as to the number of these institutions in Vancouver, and it is quite conceivable that in respect of all of them there is such a similarity of relevant circumstances that the direction contained in the minute would be a reasonable and proper direction in each individual case. We are bound, of course, to assume that this municipal body did, pursuant to its duty, examine each case until

there is some solid reason for otherwise deciding. The presumption that they did so is strengthened by the circumstance that the appellants' solicitor being present on the occasion on which the appellants' case was considered, took no objection to the mode of procedure, and further by the additional circumstance that in his affidavit he refrains from saying that the case of the appellants was not discussed or considered on its own merits.

I should not wish to be understood as undervaluing in the least degree the importance of a proper observance by Courts of Revision and the like bodies of the broad rules of judicial conduct when exercising judicial functions; but it is just as important that misconduct should not be imputed to such bodies upon evidence so meagre and equivocal as that upon which this proceeding is based. I have the less hesitation in dismissing the appeal in that the material before us appears to indicate that if the charge of misconduct be well founded there was palpable abuse of the statutory authority vested in the council. Abuse is only one form of excess; and whether the circumstances of this case do or do not now preclude these appellants from bringing forward fresh evidence in another proceeding—there seems to be no good reason for thinking that at an earlier state (assuming the assessment to have been, on the true facts, vitiated by the council's alleged *ultra vires* proceeding) they were not without a complete and satisfactory remedy.

Interpretation of "Total Exemption from Taxation."

HALIFAX v. NOVA SCOTIA CAR WORKS.

[1914] A. C. 992; 84 L. J. P. C. 17.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The City of Halifax brought an action against the Nova Scotia Car Works to recover the amount of a frontage tax imposed to meet the cost of a local improvement. The company, by agreement with the city, was entitled to total exemption from taxation for ten years, except as to water rates.

The Supreme Court of Nova Scotia held that the company was liable to pay the tax. This decision was reversed by the

Supreme Court of Canada. The City of Halifax appealed to the Judicial Committee of the Privy Council.

LORD SUMNER delivered the judgment of their Lordships and said in part:—So far as a simple question of interpretation is affected by presumptions at all, their Lordships are of opinion that this clause should be construed favourably to the respondents. They have performed the whole consideration on their side by establishing their works, and the consideration moving to them has been earned and ought not to be thereafter restricted. The matter is one of bargain and of mutual advantage; it is not a case of one citizen seeking to escape from his share of common burthens and so increasing *pro tanto* the burthen on the others.

In the case of *Cité de Montréal* v. *Ecclésiastiques du Séminaire de St. Sulpice de Montréal* (1), Lord Watson, speaking of an exemption from "municipal and school taxes," or "*cotisations municipales et scolaires,*" says of a district rate for drainage improvements: "*Prima facie,* their Lordships see no reason to suppose that rates levied for improvements of that kind are not municipal taxes." It will be observed that this was a case of exempting a certain class of ratepaying bodies—namely, educational institution—on public grounds. Hence what Lord Watson says applies *a fortiori* in the present case of a particular bargain. It is true that all that was decided by that judgment was that leave to appeal should not be given, but their Lordships had taken time to consider it, and this *dictum,* given in the course of it, is of great weight in the present case.

But apart from this their Lordships think that *prima facie* the exemption covers the charge in question. Put shortly, the appellants' argument must be, this liability "to pay to the City towards the cost of construction of such sewer, the sum of one dollar and twenty-five cents for each lineal foot of property so fronting," is not "taxation on buildings or on the land" on which the buildings are situated. If it is not taxation, what else is it? No doubt other words may be found to describe it aptly, but the word "taxation" covers it too. Even in England, where the expression "rates and taxes" is used sometimes as if it connoted the distinction between national and local imposts, "tax" and "taxation" are words familiarly used in this connection. The Sewers Act, 1841, for example, authorises Commissioners of Sewers to levy a "general sewers tax" for construction and upkeep of sewers, and this tax is included with other taxes and with

(1) [1889] 59 L. J. P. C. 20, at p. 22; 14 App. Cas. 660, at p. 663.

rates in the returns required by the Local Taxation Returns Acts, 1860 and 1870.

It is therefore incumbent upon the appellants to rebut this presumption, and to limit this exemption so that the liability in question will fall outside it. Three things are relied on—the nature of the charge, the terms of the charter, and the context of the clause.

Their Lordships are by no means satisfied that criticism of this sort would suffice to rebut the *prima facie* meaning of "taxation." The arrangement of the sections and the headings of the different parts of the Act are matters of orderly arrangement and convenience not directed to the present point but adopted *alio intuitu*. The charge is a capital instead of being a recurring charge, not because it is not a tax but because it is not a recurring tax; for a sewer, if once well laid, should last some considerable time. To say that the charge may be enforced as taxes are enforced, is a condensed reference to procedure without necessarily meaning that the charge is not a tax but only something like it. There is, however, another short answer to this kind of reasoning. The agreement scheduled to the special Act does not expressly refer to the charter, nor is any such reference implied or involved. It provides for help to the company much beyond what the charter provided for. It is really independent of the charter. The company is not to pay any taxes at all; what does it matter, for the purpose of the exempting agreement, what powers the city has or when, or how, or in what terms they can be exercised? The company has nothing to do with them; why should its privileges, for which it has given the agreed consideration, be limited by reference to powers and provisions which cannot be used to its prejudice? Reference to the charter would only be necessary if the agreement had bound the company to pay such taxes as the city might lawfully impose.

The third point turns on the latter words of the clause of exemption. First, limiting the annual valuation to $50,000 during the second ten years is supposed to shew that the exemption during the first ten was merely such as might have been effected by saying that the annual valuation on which the company should be taxed should be *nil*. Their Lordships can only say that this argument seems too shadowy to be of any service. In fact, the provision for the second ten years may not amount to an effective exemption at all. Secondly, the exemption is not to apply to ordinary water rates for fire protection or to the rates for water

used by the company. These words are quite consistent with a wide sense of "taxation." These two rates can only be taken out of the exemption by naming them. How does naming them shew that the exempted taxation is *ejusdem generis* with water rates alone? If the exemption enjoyed by the company has been only one which the charter empowered the city to grant by sec. 344, or only that which is referred to in sec. 335, it would by sec. 362 (3) have stopped short of exempting it from charges for sewers or other improvements, but it is an exemption under a special Act, and the charter anticipates that such exemptions may occur, and provides *ex abundanti cautela* that among things wholly free from taxation shall be (sec. 335 (1) (i)) "the property of any corporation exempted from civic taxation under any special Act as therein provided." Accordingly it is the provision in the special Act—that is in this case the clause in the agreement scheduled to the special Act—which must govern. That clause simply provides that the company is to be exempt from taxation and is to pay water rates, not that it is to pay water rates but no other taxation.

Their Lordships are of opinion that these considerations do not, either singly or in the aggregate, meet the *prima facie* meaning of the words of exemption, and that taken as they stand they cover the liability in dispute.

Local Improvement Rates and Covenants for Title.

CUMBERLAND v. KEARNS.

17 O. A. R. 281.

COURT OF APPEAL FOR ONTARIO.

The defendant petitioned for and obtained certain local improvements. Before the by-law imposing rates on the land benefited was passed he sold a parcel to the plaintiff and conveyed it by deed made in pursuance of the Act respecting Short Forms of Conveyances and the usual statutory covenants. Subsequently the plaintiff was compelled to pay one of the yearly assessments and brought this action against the defendant under the covenants

in the deed. The trial Judge gave judgment in favour of the plaintiff. This was affirmed by the Chancery Division. The defendant appealed to the Court of Appeal.

OSLER, J.A., said in part:—I think the Court below were right in saying that the plaintiff and his friends set the council in motion and that the tax was imposed by his instrumentality and procurement. Through his act and by his request the council imposed the tax and *occasioned* the encumbrance. And through an act done by him by inducing them to make the improvement and impose a tax for it the premises sold to the plaintiffs were encumbered. As he himself puts it, the city *lent* him and the others the price of the expropriated land and advanced money in paying for the improvements and assessed it back upon the frontages, and this was done at their request. That is the pith of the matter, and I think it comes within the defendant's covenants. Suppose the defendant had procured a burden or encumbrance to be imposed upon the land by means of a private Act, I see not but that upon the principles applicable to such acts they would come within the qualified covenants: Maxwell, p. 363; Wilberforce, pp. 220, 222; *King* v. *Toms* (1). I have noticed one case in which the point was raised but it did not become necessary to decide it: *Blatchford* v. *Plymouth* (2).

The final by-law distributing the assessment upon the several properties was not passed until after the conveyance to the plaintiffs, but that was only the necessary act for the completion of the proceedings which had been already taken at the defendant's instance.

No argument was addressed to us on the subject of the damages, and I have no doubt the Court below rightly held that the amount recoverable was the smallest amount necessary to discharge the encumbrance, viz.: the amount at which the assessment might be commuted under the by-law.

(1) 1 Dougl. at p. 406. (2) 3 Bing. N. C. 691.

Mandatory Statutory Requirements as to Seal.

YOUNG v. LEAMINGTON.

52 L. J. Q. B. 713.

HOUSE OF LORDS.

The plaintiffs appealed from the decision of the Court of Appeal.

The plaintiffs had contracted to complete, and had completed, certain works for the corporation of Leamington, required by that body in its capacity of urban sanitary authority. The contract was above the value of £50, and was not under the seal of the corporation. The question was whether sec. 174 of the Public Health Act, 1875 (1), barred their right to recover payment.

LORD BLACKBURN said in part:—We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than £50 are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament, and depriving the ratepayers of that protection which Parliament intended to secure for them.

* * *

It is true that this works great hardship on the now appellants. They had an agreement, but it was not sealed; and though it is possible that if the agreement had been under seal the defendants might have established a defence on the merits to all or part of what is claimed, it is hard on the appellants that they should not be allowed to raise the question. It is, however, for the

(1) "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed—namely, 1. Every contract made by an urban authority, whereof the value or amount exceeds £50, shall be in writing, and sealed with the common seal of such authority. 2. Every such contract shall specify the work, materials, matters or things to be furnished, had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed."

Legislature to determine whether the benefits derived by enforcing a general rule are, or are not, too dearly purchased by occasional hardships. A Court of law has only to enquire, What has the Legislature thought fit to enact?

I therefore move that the order appealed against be affirmed, and the appeal dismissed with costs.

Executed Contract—No By-law—No Seal.

BERNARDIN v. NORTH DUFFERIN.

19 S. C. R. 581.

SUPREME COURT OF CANADA.

Grant agreed with the Council of the municipality of North Dufferin to build a bridge. The contract, though in writing and signed by Grant, was not executed by any person on behalf of the municipality or under its seal and there was no by-law authorizing the work. The bridge was completed and accepted by resolution of the Council. Grant assigned his claim for payment to Bernardin, who brought an action against the municipality.

The Court of Queen's Bench for Manitoba ordered a nonsuit with costs. The plaintiff appealed.

PATTERSON, J., said, in part:—It should be noticed, in connection with the topic of the power of the council to act for the corporation, that the Manitoba statute does not prescribe the method by which the council is to act. While it is enacted that every by-law is to be sealed with the corporate seal, there is no general provision, such as is contained in the Ontario Municipal Acts, that the powers of the council shall be exercised by by-law. The omission is, I think, significant and it strikes me as being well advised.

It would be useless for me to enter into an examination of the general subject of the liability of a corporation when it has not bound itself by any instrument under its common seal. The subject will be found discussed with sufficient fulness in one or two judgments which I intend to read as part of my argument. The ancient rule, as it is called, has long lost the attribute of inflexibility. The

present rule may, not inaptly, be thus expressed: A corporation can be bound only by its common seal unless when it is convenient that it should be bound without it. The range of the so-called exceptions to the rule has reached an extent which will be shewn by the judgments to which I allude. I shall merely remark at present that I do not agree with an observation made in the Court below that cases such as the *Mayor of Stafford* v. *Till* (1) and *Beverley* v *Lincoln Gas Light Company* (2), where the immediate point was the form of action, are to be regarded as a distinct class of cases on the subject. When the right or liability of a corporation to sue or be sued in assumpsit is discussed, the question is the capacity of the corporation to be a party to a simple contract, which is the main question.

Dicta of Judges have now and then been addressed to the explanation of the principle of the exceptions, but the explanations given vary a good deal from one another. If stress is to be placed on opinions thus expressed, it will be found that the reasons sometimes given for adherence to the general rule shew its inapplicability to cases like the present. Take the case of *The Mayor, etc., of Ludlow* v. *Charlton* (3), which is so much relied on against the relaxation of the rule where municipal corporations are concerned. Lord Cranworth (then Rolph, B.), who delivered the judgment of the Court, said, amongst other general observations:—

"The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be purely a matter of form and not of substance. * * * The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows that he is bound by what is done under the corporate seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation, and the attempt to get rid of the old doctrine by treating as valid contracts made with particular members, and which do not come within the exception to which we have adverted, might be productive of great inconvenience."

(1) 4 Bing. 75. (2) 6 A. & E. 844.
(3) 6 M. & W. 815.

Now let us see how the doctrines thus formulated apply to the case before us. The corporation under the statute of Manitoba (4) consists of the municipality and the inhabitants thereof, a comprehensive definition even if savouring of tautology. The seal would not express the sense of every member of the corporation. It would, if so understood, be a delusion. The statute which creates the corporation invests certain members of it, viz.: the reeve and six councillors, with authority to bind the whole body. "The powers of the municipality shall be exercised by the council thereof." There is no such thing as a general meeting or any other method of managing the affairs of the corporation or ascertaining the corporate will. The seal is, therefore, a matter of form and not of substance. It may bind the corporation as being affixed by persons authorised to act for the corporation, but is only a formal act.

The rule in the United States is thus stated by Mr. Dillon, in sec. 450 of his treatise on municipal corporations:—

"Modern decisions have established the law to be that the contracts of municipal corporations need not be under seal unless the charter so requires. The authorized body of a municipal corporation may bind it by an ordinance, which in favour of private persons interested therein may, if so intended, operate as a contract; or they may bind it by a resolution, or by a vote clothe its officers, agents or committees with power to act for it; and a contract made by persons thus appointed by the corporation, though by parol (unless it be one which the law requires to be in writing) will bind it."

Reading this passage along with that which I have quoted from the judgment in *Mayor of Ludlow* v. *Charlton* (3), and with reference to this Manitoba corporation, it seems to me that the action of the council in the matter of the contract in question can be brought under the American doctrines without transgressing the principle expounded by Lord Cranworth.

I do not think that what was said by Patteson, J., in *Beverley* v. *Lincoln Gas Light Company* (2), partly with reference to the American law, a leading decision of which is that of the Supreme Court of the United States, in *Bank of Columbia* v. *Patterson* (5), has ever been disapproved. He said:—

"It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the

(4) 7 Vict. ch. 11, sec. 43. (5) 7 Cranch 299.

Courts of the United States in America. The decisions of those Courts, though intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law than would be proper for ourselves. It should be stated, however, that, in coming to the decision alluded to, those Courts have considered themselves, not as altering the law, but as justified by the progress of previous decisions in this country and in America. We, on our part, disclaim entirely the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out; but when we have to deal with a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to engraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it which we find to have been established by previous decisions. If that principle, in fair reasoning, leads to a relaxation of the rule for which no prior decision can be found expressly in point, the mere circumstance of novelty ought not to deter us; for it is the principle of every case which is to be regarded; and a sound decision is authority for all the legitimate consequences which it involves."

These remarks seem very pertinent in the present case. The state of society in the province of Manitoba differs widely from that of the ancient days in England. Whatever were the conditions that pointed towards the discussion of the ancient rules of the common law in the United States with less restraint than might be felt in England, the same conditions repeat themselves in the new province.

The question whether an executory contract made by the council of one of these municipalities, not under the corporate seal, can be enforced against the corporation should, I think, be considered as an open question. It is not necessary now to decide it, because this contract is executed. It has not, for the same reason, been fully argued. I, therefore, say no more with regard to the point than that there is room for argument on both sides of the question.

Regarding the contract as executed, and I have shewn why I think that beyond dispute, I think the preponderance of authority amounting to an overwhelming preponderance, as well as the reason of the thing and the plain demands of justice, concur in favour of the plaintiff's right to recover, even if by reason of the

absence of the seal, the council could have withdrawn before the work was done. * * *

The difficulty which the plaintiff has encountered in this case seems to have been to a great extent due to the effect attributed by the Court to two comparatively recent English decisions, *Hunt* v. *Wimbledon Local Board* (6) and *Young* v. *The Mayor and Corporation of Royal Leamington Spa* (7); and the difficulty, if not suggested, seems at least to have taken apparent bulk, by reason of something said in the Ontario Courts respecting those cases.

I cannot help thinking that the decisions have been misunderstood. I do not think they have nearly so much bearing on the present controversy as has been supposed.

FOURNIER, TASCHEREAU and GWYNNE, JJ., agreed with the result reached by PATTERSON, J., and RITCHIE, C.J., and STRONG, J., gave dissenting judgments.

Executory Contract under Seal— No By-law.

WATEROUS v. PALMERSTON.

21 S. C. R. 556.

SUPREME COURT OF CANADA.

Appeal from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division (2) in favour of the defendants.

STRONG, J.:—The appellants brought this action to recover the price of a fire engine which, as they allege, the respondents contracted to purchase from them. Mr. Justice Rose, before whom the cause was tried, the Divisional Court of Chancery, and the Court of Appeal, have all successively held that the contract was never executed but was wholly executory. In this conclusion, I entirely agree. The much debated question as to the liability of a corporation on an executed contract not entered into with the requisite formalities imposed either by common law or by statute does not, therefore, arise here.

(6) 4 C. P. D. 48 (1878).
(7) 8 Q. B. D. 579; 8 App. Cas. 517 (1883).
(1) 19 Ont. App. R. 47.
(2) 20 O. R. 411.

The question we have to determine is whether the municipal corporation of an incorporated town is liable on a contract for the purchase of a fire engine which has been entered into without the authority of a by-law under seal, and which contract has remained unexecuted.

By sec. 480, sub-sec. 1, of the Municipal Act, power is given to a municipal council to purchase or rent for a term of years, or otherwise, fire apparatus of any kind, and fire appliances and appurtenances belonging thereto respectively.

A fire engine is manifestly an appliance and apparatus within the meaning of this section.

By sec. 282, the powers of a municipal council shall be exercised by by-law when not otherwise authorized or provided for, and sec. 288 requires that every by-law shall be under the seal of the corporation and shall be signed by the head of the corporation, or by the person presiding at the meeting at which the by-law has been passed, and by the clerk of the corporation.

It requires no demonstration to shew that the purchase of a fire engine by a municipal corporation is the exercise of a power conferred upon it by the statute. Then no by-law was ever passed authorizing the purchase of the fire engine in question, although the Fire and Water Committee passed a resolution to that effect. This resolution does not, however, appear to have been followed by a by-law with the formalities of signing and sealing required by the statute.

Under the circumstances, the result is inevitable that there never was any contract legally binding on the municipality respecting the purchase of this fire engine.

The statute of 1890, authorizing the special fund for fire protection purposes, so far from dispensing with a by-law expressly requires one.

The only possible escape from the conclusion that there never was a contract would be by holding that the formalities presented by secs. 282 and 288 were not indispensable, but merely directory.

We cannot, however, do this in the face of such clear and distinct authorities to the contrary as we find in the cases of *Young* v. *Leamington* (3) and *Hunt* v. *Wimbledon Local Board* (4), cases which are express decisions on the point that contracts of a municipal corporation are absolutely void, whether executed or executory, unless they comply with all statutory requirements as regards formality of execution, a result which I should have thought clear

(3) 8 App. Cas. 517. (4) 4 C. P. D. 48.

unless the Courts have power to override and dispense with statutory provisions in their discretion. In the cases referred to, decisions holding contracts with corporations void for want of statutory formalities were, indeed, unsuccessfully impugned, even as regards executed contracts, to which class of contracts, however, this contract does not belong. For further reasons and authorities, I refer to my judgment in *Bernardin* v. *North Dufferin* (5), which was, it is true, not in accordance with the opinion of the majority of the Court in that case, but the contract there was executed. There is nothing, however, in the judgment of the Court in that case against applying the principle of *Young* v. *Leamington* (3) and *Hunt* v. *Wimbledon* (4) to an executory contract such as the present.

The appeal must be dismissed, with costs.

Contract Authorized by By-law and Under Seal.

CHATHAM v. CANADIAN PACIFIC RAILWAY.

22 O. A. R. 330, 25 S. C. R. 608.

COURT OF APPEAL FOR ONTARIO AND SUPREME COURT OF CANADA.

The plaintiffs brought this action to recover the cost of building, pursuant to a contract under the municipality, a culvert rendered necessary after a drain authorized by by-law had been constructed because the opening provided for by the by-law was found insufficient. The plaintiffs built the culvert and the defendants accepted and used it, but refused to pay for it. No by-law had been passed authorizing the construction of the culvert, nor were any of the proceedings required by the Municipal Act taken.

STREET, J., at the trial, dismissed the action.

The plaintiffs appealed to the Divisional Court, which affirmed the judgment, ROSE dissenting. The plaintiffs appealed to the Court of Appeal. HAGARTY, C.J.O., delivered the following judgment:—

I have come to the conclusion that this work of cutting the culvert under the railway cannot in the most liberal construction of

(5) 19 Can. S. C. R. 581.

the drainage clauses, be considered as falling within the scope or meaning of the by-law of August, 1890. No intimation whatever was given by that by-law or by the report therein cited of any such work being in contemplation. The mode of passing through the company's property was stated to be an existing opening, the cattle pass. On this understanding, the assessment was levied on the prescribed area in the two townships. The next year, there was the large work of having a stone culvert made by the company; the cost running up to $4,304—an amount nearly equal to the assessed cost of the original undertaking. I think the new work required a special report, a by-law, and the ordinary assessment and revision thereof, under the drainage law. I cannot, therefore, agree with the opinion of the council and its legal adviser that the amount could be raised by amending the by-law under sec. 573 (1), even if such section applied to a case like this of the area of assessment extending over two townships.

This case would seem to fall within sec. 585 (2), as held by the Common Pleas Division, being "to make a new outlet" to

(1) **573.**—(1) In case a by-law already passed, or which may be hereafter passed by the council of any municipality, for the construction of drainage works by assessment upon the real property to be benefited thereby, and which has been acted upon by the construction of such works, in whole or in part, does not provide sufficient means, or provides more than sufficient means for the completion of the works, or for the redemption of the debentures authorized to be issued thereunder as the same become payable, the said council may, from time to time, amend the by-law in order fully to carry out the intention thereof, and of the petition on which the same was founded, and to refund the surplus (if any) to the then owners of the land *pro rata* according to the original assessment. 46 V. c. 18, s. 574 (1); 49 V. c. 37, s. 26.

(2) Where a by-law which has been heretofore passed, or which may be hereafter passed under the provisions of the preceding sub-section, has been or shall hereafter be published in the manner required by section 571 of this Act, or in case of a city, town or incorporated village, has been or shall be notified in the manner required by section 622, section 572 shall apply to such by-law, and any by-law passed under the said preceding sub-section need not be published unless the council sees fit; and the provisions of *The Municipal Drainage Aid Act* shall apply to any debentures issued under the authority of the said sub-section which have heretofore been or shall hereafter be purchased by direction of the Lieutenant-Governor in Council. 46 V. c. 18, s. 574 (2).

(2) **585.** In any case wherein the better to maintain any drain constructed under the provisions of this Act, or of *The Ontario Drainage Act* and amendments thereto, or of *The Ontario Amendment Act* of 1873, or of any other Act respecting drainage works and local assessment therefor, or of *The Municipal Drainage Aid Act* or *to prevent damage to adjacent lands*, it shall be deemed expedient to change the course of such drain, or *make a new outlet*, or otherwise *improve*, extend or alter the drain, the council of the municipality, or of any of the municipalities whose duty it is to preserve and maintain the said drain, may, on the report of an engineer appointed by them to examine and report on such drain, undertake and complete the alterations and improvements or extension specified in the report under the provisions of sections 569 to 582 inclusive, without the petition required by section 569. 46 V. c. 18, s. 586; 47 V. c. 32, s. 19; 48 V. c. 39, s. 27; 49 V. c. 37, s. 28; 50 V. c. 29, s. 39.

an existing drain, in which case all the machinery provided by the Act should be set in motion (except the originating petition); there should have been the report, assessment, revision, etc.

If, therefore, these requirements were not followed, the case seems narrowed to this point, whether the agreement sued on standing by itself, unsupported by by-law, report or fresh assessment, is legally binding on the ratepayers of Chatham as a debt against them, merely on the strength of the corporate seal attached to it, and the action of their council in passing resolutions approving of the work, paying large sums on account, etc. It is also urged that they have accepted the work, and, therefore, there is an executed consideration.

The water has been turned into and passes through the culvert. It is not exactly the kind of acceptance of which we usually hear as of the public use of a road or bridge by the general public, or the use and acceptance of a building erected for the corporation.

If we cannot go outside the document to determine its validity, the argument may be strong for the plaintiffs. One of the learned Judges in the Division Court considered that the decision of the majority of the Supreme Court in *Bernardin* v. *North Dufferin* (1) covers this case. I hardly so understand it. A large portion of the elaborate judgments in that case is devoted to the consideration of the necessity of a corporate seal to create a liability on a municipal body.

I do not propose to decide this case on any such point.

I will assume that the Supreme Court hold that a municipal body can contract for executing a work in their township falling within their ordinary corporate powers and duties, such as roads, bridges, etc., and that if the work is done, accepted, and used by them, they are bound and they can bind their constituents, the ratepayers of their township, to pay for it.

We have now to consider whether this work falls within the law of that case.

It is not a work which under the general municipal powers the council may of their own motion direct to be done. It is a work resting wholly on the drainage powers given by the Legislature. It is a work affecting not the township as such, but an area of territory partly in Chatham, partly in Camden, at whose expense and for whose benefit this special legislative remedy is resorted to.

The contract with the plaintiffs professes to be based upon the necessity for providing a new outlet to existing drains.

(1) 19 S. C. R. 581.

The correspondence and papers leading up to its execution clearly shew that it was in relation to proceedings under the drainage clauses, and an understanding that the corporation's means of payment would be by amendment of and addition to the by-law already passed under these clauses.

We are at once confronted with the objection which appeared unanswerable to the learned Judge, my brother Street, and to the majority of the Divisional Court.

I can understand a municipality having taken all necessary steps under the statute in the levying the required funds from the assessable area in their own and adjoining township then making the contract in their own name for the construction by the plaintiffs of the required culvert. It is with them that the contractors would naturally make their bargain.

I find it most difficult on the evidence to place the contract in such a position. On its face, it professes to be an original dealing with the company by Chatham and on Chatham's own resources, "to be raised by by-law or on their credit in the bank."

I hold it to be, both on its face and on the proved knowledge of the contracting parties, a drainage contract, which had to be and must be governed by the drainage clauses of the Act which regulates the powers and duties of each municipality in dealing with drainage matters.

Lord Bramwell said, in *Hunt* v *Wimbledon* (2): "I am by no means sure that persons who are exercising their authority daily should not execute that authority in a proper manner; and I think it desirable that persons who make contracts with those who have an authority delegated to them should not act in a slovenly manner; and if they do not care to inquire what authority such persons possess, they must take the consequences."

In speaking of executed contracts, the same learned Judge points out that the work should be work which if the corporation had not ordered they would not have done their duty, or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence.

The same great Judge says (in the Lords), in *Young* v. *Leamington* (3): "The Legislature has made provisions for the protection of ratepayers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of

(2) 4 C. P. D. 48, at p. 55. (3) 8 App. Cas. 517, at p. 528.

certain solemnities and formalities which involve deliberation and reflection."

It has been suggested here that Chatham is bound by this contract, and, therefore, there should be judgment against them and the ratepayers, and it is for them to consider whether they can recoup their expenditure by forcing payment against the assessable area. I cannot accept this argument so as to rest our decision upon it.

I find that on any reasonable construction of the statute, the construction of this large work on and under the property of the railway cannot be considered either as authorized or contemplated by the by-law, and that a new report and assessment was necessary.

It follows from this view that section 573 is inapplicable, even if it be held that it applies to work assessable on another municipality.

I am not questioning the views of the Judges below who held it did not so apply.

I also hold that the contract with the plaintiffs must be read with and held to be wholly governed by the drainage clauses, which are the sole authority for the action of this corporation.

It may appear an ungracious defence by a municipal body that they are not bound by a contract under their own corporate seal.

But it is essential to allow such a defence to be urged on behalf of the constituent ratepayers, if their corporation for the time being attempt to exercise their delegated powers in a manner beyond and in excess of the limited jurisdiction allowed by the statute, and in many cases the burden and the duty of seeing that such delegated and limited authority is not exceeded is necessarily thrown on those who enter into contracts with such a corporate body.

BURTON and MACLENNAN, JJ.A., agreed that the appeal should be dismissed. OSLER, J.A., gave a dissenting judgment.

In the Supreme Court of Canada, TASCHEREAU, J., in a dissenting judgment, adopted the reasoning of HAGARTY, C.J.O.

GWYNNE, J., said, in part:—As to the ground of defence, that the contract is *ultra vires* of the defendants, it must, I think, be admitted, to the credit of the defendants, that this defence is entered at the instance of the corporations of the township of Camden, who insist that the lands in Camden should not be held to be liable to contribute to the cost of the work constructed under the contract sued upon.

Whether the township of Camden should or should not contribute to the cost of the work to any and, if any, to what, extent is a question with which we are not concerned in this action. The only question with which we have to deal is whether the contract into which the defendants have entered was *ultra vires* or on the contrary is binding upon them. If the latter, with what may be the consequences we are not concerned. Now that the construction of a sufficient culvert at the place where the drain was designed to pass under the railway was an absolute necessity in the construction of the work designed and authorized by by-law, and that it was in point of fact part of the work contemplated to be constructed under the by-law, cannot, I think, admit of a doubt. The residue of the work would have been of no use whatever without such sufficient culvert, its sufficiency consisting not merely in dimensions capable of carrying off the waters brought down to it from the Big Creek, but in strength capable of supporting the weight of the superincumbent earth constituting the railway bed. We have the evidence of the engineer who designed the drain that the culvert as contracted for was just such a one and that it was an absolute necessity to the efficient completion of the drain. I am of opinion, therefore, that the case does, as the township council appear to have been advised, come within sec. 573 of ch. 184, R. S. O.(1), and that the contract under which the work has been executed is binding upon the defendants.

The appeal must be allowed, with costs, and the case be remitted to the Court below to be dealt with by that Court by reference to the proper officer or otherwise as the Court shall direct for ascertaining what amount, if any, remains due to the plaintiffs under the contract.

SEDGEWICK, KING and GIROUARD, JJ., concurred with GWYNNE, J.

Contract Not under Seal.

LAWFORD v. BILLERICAY.

[1903] 1 K. B. 772, 72 L. J. K. B. 554.

COURT OF APPEAL.

Appeal by the plaintiff from judgment entered at the trial for the defendants.

VAUGHAN WILLIAMS, L.J., said, in part:—This is an action in which the plaintiff claims against the Billericay Rural District Council for money alleged to be due from the defendants to the plaintiff under an agreement by the defendants to employ the plaintiff as their engineer, and for services rendered by the plaintiff to the defendants at their request, and also damages for breach of their agreement by the defendants. That is the claim upon the writ. In the statement of claim, the plaintiff claims, *inter alia*, upon a *quantum meruit* for services rendered at the defendants' request. The defence, so far as we have to deal with it here, is based upon the absence of the seal of the defendant corporation, and we have now to consider whether that is a good defence. * * *

The choice in this case really is whether we consider we ought to follow the case of *Clarke* v *Cuckfield Union* (1), or whether we ought to follow the cases which conflict with that case. In *Nicholson* v. *Bradfield Union* (2), these cases are dealt with at considerable length. That case was argued by Sir Richard Harington, and in the course of his argument, he marshalled the authorities on one side and on the other with very great care. First, he set forth a list of those cases which are based on the assumption that in a case like the present, a corporation must contract under seal, and afterwards he set forth a list of the contrary cases, amongst which he included *Clarke* v. *Cuckfield Union* (1). * * *

Mr. Justice Blackburn, at the conclusion of his judgment in *Nicholson* v. *Bradfield Union* (2), said: "The case of *Clarke* v. *Cuckfield Union* (1) is in its facts distinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present at least, the case was rightly decided; there may be cases in which the circumstances are different from those in *Clarke* v. *Cuckfield Union* (1) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke* v. *Cuckfield Union* (1), we prefer to follow the authority of *Clarke* v. *Cuckfield Union* (1), which we think founded on justice and convenience." With that view of Mr. Justice Blackburn, I entirely agree. I think that the

(1) 21 L. J. Q. B. 349, 354.
(2) 35 L. J. Q. B. 176; L. R. 1 Q. B. 620.

decision in *Clarke* v. *Cuckfield Union* (1) and the other cases cited to us which were decided upon the same lines, are to be preferred to the contrary decisions.

Before passing from the case of *Nicholson* v. *Bradfield Union* (2), I may mention that it was a case in which the plaintiff from time to time supplied coals to the guardians of the Bradfield Union for the use of their workhouse. It was, therefore, a case as to which it was very difficult to say either that the matter was so trivial or of such frequent recurrence that there was no necessity for contracting under seal, or that there was any necessity for giving the orders without waiting for a contract under seal. The case, as I understand it, was decided upon the basis that coals having been supplied to and accepted by the defendant corporation, thereupon the law raised an implied contract to pay for the coals from the supply of the coals to and their acceptance by the corporation, and that, the contract being thus a contract implied from acts, the defence founded on the absence of the seal was not available. I do not understand that the case was decided in any way on the old recognized exceptions of necessity or convenience or any similar ground. As I understand it, it is a case which was decided purely upon the implied contract to pay raised by implication of law from the acceptance of the coals supplied.

This was the view taken by Mr. Justice Wightman in *Clarke* v. *Cuckfield Union* (1), and I will read a passage from his judgment, which shews that it was so. After having pointed out the conflict of authorities, he said: "I greatly regret the present state of the law upon a subject so important. It would, perhaps, have been better, and have avoided the uncertainty which now exists, if the old rule had never been relaxed"—that is, the old rule that a corporation must contract under seal—"but being as it is, the question is whether the demand in question comes within any of the recognized exceptions to the general rule. I am disposed to think it does, and that wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, as in the case of the guardians of a poor law union, and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that, though the members of the corporation who ordered the goods or work were competent

to make a contract and bind the rest, the formality of a deed or of affixing the seal were wanting, and then say, no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability. I come to this conclusion (though not without much doubt from the authorities in some respects contrary), as I think it is warranted by the cases of *Sanders* v. *St. Neot's Union* (3), *Beverley* v. *Lincoln Gaslight and Coke Co.* (4), *Church* v. *Imperial Gaslight and Coal Co.* (5), and others of the cases to which I have adverted, by the peculiar constitution and purposes of such a corporation as the board of guardians, and by the apparent justice of the case." It seems to me that there again the exception is recognized as based upon a contract arising upon the receipt of the benefit of the act done, in the same way in which it was subsequently recognized by Mr. Justice Blackburn in *Nicholson* v. *Bradfield Union* (2).

In my judgment, therefore, the appeal must be allowed.

NOTE.—The question how far corporations are liable at common law *quasi ex contractu* to pay for work ordered by their agents and done under their authority was expressly left open by the House of Lords in *Young* v. *Leamington* (*supra*, p. 180) and the conflicting decisions on the point were at last dealt with by the Court of Appeal in *Lawford* v. *Billericay*.

Contract—No Seal—No By-law.

EAST GWILLIMBURY v. KING.

20 O. L. R. 510; 15 O. W. R. 601.

COURT OF APPEAL FOR ONTARIO.

Representatives from the townships of East Gwillimbury and King and other townships considered the advisability of opening a road between Queensville and Bradford. The Council of King passed a resolution to build the portion of the road through the township of King if East Gwillimbury would contribute $100 toward the cost. Thereupon the Council of East Gwillimbury passed a resolution agreeing to pay the amount. East Gwillimbury then built the portion of the road within its limits. King

(3) 15 L. J. M. C. 104; 8 Q. B. 810.
(4) 7 L. J. Q. B. 113; 6 Ad. & E. 829.
(5) 7 L. J. Q. B. 118; 6 Ad. & E. 846.

refused to build the portion within its limits. East Gwillimbury then brought an action against King claiming (1), specific performance, (2) mandamus, (3) damages.

McMahon, J., dismissed the action without costs. The plaintiffs appealed.

The judgment of the Court of Appeal was delivered by GARROW, J.A., who said, in part:—It is not disputed that no by-law to acquire or open the new road, or to authorize an agreement to be made concerning it, was ever passed by the defendants' council; the resolution * * * covering the formal corporate action so far as appears. To overcome the legal objections of no by-law and no corporate seal, counsel for the plaintiffs contend that the contract has been fully executed by the plaintiffs, of which the defendants have had the benefit, and that, therefore, the defendants should either be compelled to a performance of their part, or made to pay damages for non-performance, on the authority of such cases as *Bernardin* v. *Municipality of North Dufferin* (1), *Canadian Pacific R.W. Co.* v. *Township of Chatham* (2), and *Lawford* v. *Billericay Rural District Council* (3).

Canadian Pacific R.W. Co. v. *Township of Chatham* has, I think, no bearing upon the question, because there was in that case an agreement under seal, and the real question was as to the authority of the council to make such an agreement in a drainage matter: *Bernardin* v. *Municipality of North Dufferin*, in effect, what has been declared to be the law in this province in *Pim* v. *County of Ontario* (4), by the then Court of Appeal, since followed in a number of cases; while *Lawford* v. *Billericay Rural District Council* finally resolves a long conflict in the English decisions by adopting the opinion of Wightman, J., in *Clarke* v. *Cuckfield Union* (5), and Blackburn, J., in *Nicholson* v. *Bradfield Union* (6), thus bringing the law as laid down in the English Court of Appeal practically in line with that of our own Court of Appeal and of the Supreme Court in the *Bernardin* case. And what the law upon the subject, both in England and in this province, seems to be, is very well and with great precision summarized in the headnote to the case of *Lawford* v. *Billericay Rural District Council*, thus: "Where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into

(1) 19 S. C. R. 581.
(2) 25 S. C. R. 608.
(3) [1903] 1 K. B. 772.
(4) 9 C. P. 304.
(5) (1852), 21 L. J. Q. B. 349.
(6) (1866), L. R. 1 Q. B. 620.

effect, and orders are given by the corporation in relation to work to be done or goods to be supplied to carry into effect those purposes, if the work done or goods supplied are accepted by the corporation and the whole consideration for payment is executed, there is a contract to pay implied from the acts of the corporation, and the absence of a contract under the seal of the corporation is no answer to an action brought in respect of the work done or the goods supplied."

The claim now made by these plaintiffs is not for work done or goods supplied to the defendants. What the plaintiffs did was to build a road in their own township, useful as far as it goes to the inhabitants of that township, but which would have been more useful if it had been continued as contemplated through the defendants' township. The remedy by mandamus could not, on the facts, be applied. Nor is the remedy by specific performance on the ground of part performance applicable. See the remarks of Strong, J., at pp. 586, 587, of the *Bernardin Case*, and the authorities to which he refers. The action really is one to recover damages from the defendants for their breach of the agreement, said to be evidenced by their resolution of the 28th September, 1907, to construct such continuation. And, assuming everything else in the plaintiffs' favour, such as that an agreement although not complying in form with the statute, was proved, that such agreement was in its nature within the proper competence of the defendants' council, and a performance to the extent alleged by the plaintiffs on their part, I am of the opinion that the case is clearly not one within the exception defined and laid down in these cases, and for this reason that the appeal fails.

The plaintiffs are, however, entitled to recover from the defendants the sum of $100 which they paid or allowed in account under the resolution before set out, as upon a consideration which failed. And there should, under the circumstances, be no costs of the appeal.

Employment of Counsel—No Seal—No By-law.

MANNING v. WINNIPEG.

21 M. R. 203.

COURT OF APPEAL FOR MANITOBA.

The plaintiff, a barrister, was employed as counsel to conduct an inquiry by resolution of the council. He completed the inquiry according to his instructions. His work was not formally accepted by the council and he brought this action against the city for the amount of his bill.

Mathers, C.J.K.B., dismissed the action.

The plaintiff appealed to the Court of Appeal.

HOWELL, C.J.M., said in part:—The English Act is: "Any local authority may enter into any contract necessary for carrying this Act into execution."

"With respect to contracts made by an urban authority under this Act the following regulations shall be observed: (1) Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority."

Section 5 of the City Charter is as follows: "The powers of the City under this Act shall be exercised by the Council thereof."

Section 472 is as follows: "The jurisdiction of the Council shall be confined to the city, except where authority beyond the same is expressly given; and the powers of the Council shall be exercised by by-law when not otherwise authorized or provided for."

Section 479 declares that the by-law shall be under the seal of the City and shall be signed by the mayor and clerk.

The Act under which the *Bernardin Case* was decided had not the imperative language used in section 472, and this imperative language became a part of our municipal law only after that case was decided against the municipality by the Manitoba Full Court. At the time of the enactment of section 472, the Legislature knew the construction which the Court had put upon the very general language as to the necessity of a by-law and proceeded to enact the more imperative requirement of such a method of

(1) 19 S. C. R. 581.

action. The statute in force, when that case was decided, is set forth in Mr. Justice Strong's decision and the permissive terms of it are, as above stated, referred to in the judgment of Mr. Justice Gwynne on page 618.

The English Act says the contract shall be in writing and sealed with the common seal.

The Manitoba Act says the powers of the municipality shall be exercised by the Council and the powers of the Council shall be exercised by by-law. The Manitoba Interpretation Act declares that "the expression 'shall' shall be construed as imperative."

There was no contract entered into pursuant to, or ratified by, by-law, nor did the Council by by-law accept, or receive or use the work. The Council have no more power than any ratepayer to bind the municipality outside of the methods laid down by the Act. The Council is not the municipality; it is simply its agent and gets its power only under the Act.

In my view of the law this case is governed by, and is within the lines of, *Young* v. *Leamington* (2), and the plaintiff cannot recover, unless he comes within the exception referred to in section 472, viz.: "When not otherwise authorized or provided for." * * *

I do not think the plaintiff has brought his case within the exception in section 472.

Having arrived at this conclusion it is not necessary to consider whether the defendants have accepted or taken the benefit of the plaintiff's work, but let it be considered for a moment. The powers of the city shall be exercised by the Council and they shall exercise these powers by by-law, and no by-law was passed accepting the work. It is not a question of the Council or the committee accepting the work or taking the benefit of it. Did the defendants "the Inhabitants of the City of Winnipeg," the corporation, accept the work or take the benefit of it within *Lawford* v. *Billericay?* (3) As to this fact I entirely agree with the finding of the Chief Justice of the King's Bench.

I should think the law decided in *Young* v. *Leamington* (2) might well be extended further and it might be held that, although there was no by-law authorizing the contract, yet if, after work was performed for the municipality, the Council had passed a by-law accepting it, then it might well be that there would be a liability, assuming, of course, that the matter was within the powers of the municipality.

The appeal is dismissed with costs.

(2) 8 A. C. 517.

(3) [1903] 1 K. B. 772.

Acts of De Facto Officer.

PONTIAC v. ROSS.

17 S. C. R. 406.

SUPREME COURT OF CANADA.

The respondent's action was to recover from the Treasurer of the Province of Quebec $50,000 worth of municipal debentures of the appellant, which, it is alleged, had been deposited with the said Treasurer as trustee both for appellant and a certain railway company known as the Pontiac Pacific Junction Railway Company. The debentures had been granted to the company under a by-law passed the 14th September, 1881, and were to be handed over to the company as the construction of the road progressed in the County of Pontiac, to wit, at the rate of $2,500 per mile, at the completion of every ten miles of road, "and in the manner and subject to the same conditions in which the bonus payable under the Act passed at the last Session of the Legislature of the Province of Quebec (1880-81) is to be paid to the said company":—The company transferred the right to obtain the bonus from the Treasurer to plaintiff, who alleged in his declaration that the said railway company had conformed with the conditions of the by-law and had built within the County of Pontiac more than twenty miles of said railway, which have been completed and "admitted to be in good running order, to the satisfaction of the Lieutenant-Governor in Council."

At the trial it appeared by the minutes of the council that at a special session of the council Warden Poupore refused to sign the debentures and verbally tendered his resignation "in order to let some other gentleman carry out the behest of the council in signing the debentures," and that at a subsequent special session of the council Warden Poupore's resignation was accepted, and Mayor McNally was elected to sign the debentures, which he did.

Counsel on behalf of the corporation contended in part as follows:—We also contend that the bonds are worthless and never could or should legally issue. W. J. Poupore was, on the 14th September, 1881, Warden of Pontiac. By the Municipal Code, Wardens are elected annually, to wit, in March of each year.(1)

(1) See Mun. Code L. C. Art. 248.

His signature is subscribed to the by-law of the 14th September, 1881. The bonds purport to have been signed and delivered on or about the 13th February, 1882.

Therefore, it would be an unmistakeable fact to any one reading the by-law that W. J. Poupore would still be Warden on the 13th February, 1882, and the only legally qualified functionary who could validly sign bonds, unless in the meantime the office of Warden had become vacant by death, resignation or other valid cause, and a successor appointed.

In the present instance Poupore did not resign. It was held that there is evidence of Poupore's resignation as Warden, but we claim that he did not resign and that it is not shown in the record. The only presumable reason the courts below could have for reaching the conclusion that Poupore had relinquished the office would appear because of what purports to be the minutes of two special sessions of the County Council of Pontiac, at the first of which, held on the 18th January, 1882, Poupore is stated to have said that "he would rather resign than sign the debentures," but at which he did not actually resign, and this is not sufficient, Art. 126, Mun. Code C. L.; *Pattison* v. *Corporation of Bryson* (2); *Paris* v. *Couture* (3), etc.

But respondent meets appellant's argument by a special answer, affirming that McNally was at all events the *de facto* officer and agent of the corporation, appellant, and that his act, that of signing the bonds, would make them binding upon the county.

But such pretensions can hardly avail against the fact that there was no vacancy in the Wardenship, and that there could be but one Warden, to wit, W. J. Poupore. How could McNally be a *de facto* officer at a period when there existed a real, a *de jure* officer? Poupore's refusal to sign the bonds, if that were in issue, would not give a right to appoint McNally. He, Poupore, could be compelled by action to sign such bonds, or under art. 251 he could regularly be removed from office, and somebody else legally appointed to sign them.

If there was no vacancy there could be no valid election, and all the proceedings surrounding McNally's pretended appointment are bad.

TASCHEREAU, J., said in part:—As to the second plea that the debentures were illegal, we are unanimously of opinion that it is

(2) 9 L. N. 169. (3) 10 Q. L. R. 1.

altogether unfounded in law. The proceedings of the council show that Poupore, who had been the Warden, voluntarily resigned his office, and that his resignation was accepted, and that a regularly convened meeting for the purpose of electing his successor having been called, McNally was duly elected in his place, and took and held possession of the office without any objection, until the expiration of the term, when he was re-elected and has been Warden ever since. The debentures signed by the warden *de facto* are perfectly legal, and the two judgments of the Courts below declaring them to be so are unassailable.

Quashing By-laws—Failure to Give Notice of Intention to Pass By-law Opening Road.

RE OSTROM AND SIDNEY.

15 O. A. R. 372.

COURT OF APPEAL FOR ONTARIO.

This was an appeal from the judgment of Mr. Justice Street discharging an order nisi to quash a by-law for opening a road.

OSLER, J.A., said in part:—The by-law was moved against on several grounds, among others, (1) That notice of intention to pass it was not given one month previously to the passing thereof; (2) That the notices posted up and published were of an intention to establish and open up a longer and entirely different road from that described in the by-law; (3) That the by-law was passed to serve the private interests of some property holders in the locality, and not in good faith for the general benefit of the public.

The learned Judge refused to quash the by-law, holding that the circumstances disclosed in the affidavits removed any suspicion that it had been passed to serve private interests. That the variance between the petition and notices, and the by-law, as to the length of the proposed road was not a fatal objection being covered and overruled by the decision in *Baker* v. *Saltfleet* (1)

(1) 31 U. C. R. 386.

and that although the notice seemed to be insufficient under the statute he would not on that ground alone quash a by-law, good upon its face.

These objections with others were renewed before us on the argument of the appeal, and are now so far as necessary to be considered.

It appears to me, with great respect for my learned brother Street, that the objection to the sufficiency of the notice is a very formidable one, and one which when clearly made out the Court is bound to give effect to.

It is essential to the validity of a by-law establishing or stopping up a road, by which the property of private persons may be compulsorily taken or the rights of the public extinguished, that the provisions of the statute under which it is passed shall be strictly observed. * * *

In many of the reported cases the Courts have refused to quash the by-law, on motion, because it had not been made to appear clearly that the requisite notice had not been given and they would assume nothing against its validity. *Ianson* v. *Reach* (2); *Stanley* v. *Roper* (3).

Here it appears on the face of the by-law, and is admitted by the affidavit filed by the defendants in shewing cause to the motion, that the notice was not posted up until the 29th of July. If that was not a month previous to its passing, the by-law should have been quashed, since there was an entire absence of any of the considerations which have sometimes induced the Court to refuse to interfere summarily.

The motion was promptly made; nothing had been done under the by-law, and its illegality is manifest. In such circumstances the proper course is to quash the by-law at once, and prevent expense and future litigation: *Mace* v. *Frontenac* (4).

The defendants' contention that it could be properly passed on the 29th of August, cannot prevail, for the day on which the notice was given being excluded, in accordance with the general rule in such cases, the 29th of August was the last day of the month,—the whole month—which was required to elapse before they could enter upon the business of passing it. * * *

Here the defendants are to give notice a certain time before a particular act, the act, namely, of passing the by-law, can be done by them.

(2) 19 U. C. R. 591. (3) 17 U. C. R. 69.
(4) 42 U. C. R., pp. 87-88.

That notice is to be given in the prescribed manner to the persons who may be prejudicially affected by the act, in order, it may be supposed, to enable them to deliberate upon the course they will adopt in reference to it and unless both the first and last days are excluded they do not get a whole month for that purpose.

It was urged that the month should be computed from the time of day on which the notices were posted to the time of day on which the by-law was passed. No authority was cited for that, and the general rule is, that except when it is necessary in order to settle which of two acts *done on the same day* is to prevail, the law takes no notice of part of a day.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

Municipal Contracts Involving Expenditure not Payable out of Ordinary Rates of Current Financial Year.

IN RE OLVER AND OTTAWA.

20 O. A. R. 529.

COURT OF APPEAL FOR ONTARIO.

This was an appeal from the judgment of Rose, J., quashing certain resolutions passed by the council of the city on the 20th of June and 4th of July, 1891.

The purport of these resolutions was to accept certain tenders for the construction of a new bridge across the Rideau river between the city of Ottawa and the county of Carleton, and to authorize the execution of the contracts for the carrying out and performance of the work. The bridge was a work within the joint jurisdiction of the two corporations, and it had become necessary to reconstruct it or to close it altogether in consequence of its being so much out of repair as to be dangerous. The city's share of the cost of reconstruction was estimated to be about $13,000 or $14,000.

No provision had been made for this in the estimates for the ordinary expenditure for the year 1892. Nor had any special by-law been passed for raising the money by rate in that year, or for

incurring a debt by the issue of debentures in order to pay for the work. Contracts were entered into about the 9th of August, 1891, between the two corporations and the contractor for the execution of the works, which were to be completed on or before the 15th of November, 1892.

On the 25th of August the applicant gave notice of motion to be made on the 2nd of September, 1892, to quash the resolutions in question on several grounds, of which it is necessary to notice only the two following, viz.:

"That the municipal corporation of the city of Ottawa have no unappropriated money on hand to meet the expenditure necessitated by the construction of the bridge, and no provision, by rate or otherwise, has been made to raise the required amount.

"That the expenditure authorized by such resolution being beyond the ordinary and usual expenditure and not payable within the present municipal year can only be legally authorized by by-law after receiving the assent of the electors."

At this time the only provision made by the council to meet the expenditure which might become necessary if the bridge should be rebuilt was by a resolution said to have been passed on the 5th of March, 1892, which authorized a special appropriation of $15,000 to be granted to pay the city's share of rebuilding the bridge; "on the understanding that one-half of this amount will be charged to the general expenditure account of this year and the remainder to the appropriation for 1893."

When the motion came on to be heard it was objected that the applicant had not given the security required by section 332 of the Municipal Act, R. S. O. ch. 184, to be given "before any such motion is made or entertained," and it stood over, presumably by arrangement, in order that this defect in the proceedings might be corrected. In the meantime, on the 29th of August, 1892, the council had passed another resolution, resolving and enacting that "a sufficient sum of money out of the unexpended revenue of this year be set apart for the payment of the contractors for the city's share of the cost of the bridge according to the terms of the contracts, and that all resolutions inconsistent herewith heretofore passed by the council be repealed."

It appeared that there was on the 31st of July, 1892, at the credit of the various appropriations to which the estimates had been devoted a balance of $65,000. That which had been made to the board of works, viz., $25,000, had however been exceeded and overdrawn. In the estimates this item appeared under the

head of "street improvements, general repairs on streets, bridges, etc., snow cleaning, etc.," total $25,000.

The motion was heard on the 9th of September, 1892, before Rose, J., who granted the application and an order was issued quashing the resolutions in question, with a declaration that the contracts entered into consequent upon the resolutions were not binding upon the ratepayers of the city.

The city appealed and the appeal was argued before Hagarty, C.J.O., Burton, Osler, and Maclennan, JJ.A.

The judgment of the Court was delivered by OSLER, J.A.:—

[The learned Judge stated the facts as above set out, and continued]:

Section 332 of the Municipal Act, R. S. O. ch. 184, enacts that any resident of a municipality, or any other person interested in a by-law, order, or resolution of the council thereof, may by motion apply to the High Court to quash the by-law, order, or resolution in whole or in part for illegality. The question is whether the resolutions which have been quashed by the order which is the subject of this appeal have been shewn to be illegal as offending against any of the provisions of the Act. They authorize the execution of a contract or contracts for the construction of a work within the authority of the corporation, which is to be completed, but not to be paid for, as the specifications shew, within the financial year.

It is clear that the expenditure which would be rendered necessary by the work was not one contemplated by or expressly provided for in the estimates for the year 1892, which were adopted and passed on the 3rd of March, and the rates required for which as regards local and school rates were imposed by several by-laws of the corporation passed on the 7th of March. Assuming that such expenditure, whether regarded as an extraordinary expenditure, or as part of the ordinary yearly expenditure of the municipality, might be considered as provided for by, or at all events properly legal part of, the items "general repairs on streets, bridges, etc.," yet the resolution of the 5th of March shews very clearly that the cost of the work was not intended to be wholly defrayed out of that item, one-half of it only being charged thereto for the current year 1892, while the balance was to be deferred to be paid out of the corresponding item for the year 1893. It is indeed manifest that the whole could not have been added to the estimates for the ordinary expenditure of 1892,

which, as I have said, were prepared without reference to this particular expenditure, without infringing upon the limit imposed upon the taxing power of this corporation (1½c. in the $ exclusive of school rates) by 41 Vict. ch. 37, sec. 12 (O.), for those estimates extend to the full limit.

The expenditure, however, authorized in effect by the resolutions in question was, in my opinion, a special, extraordinary and unusual expenditure and cannot properly be described as part of the ordinary expenditure of the city. Doubtless the whole of it might have been provided for in the yearly estimates, and raised by special rate or included in the general local rate, so long as the whole was kept within the one and a-half cent limit. It was not in fact so provided for, but on the contrary a part of it was left to be raised by the council of a future year out of the rates of that year, a course which in my opinion rendered these resolutions illegal, as being directly opposed to the provisions of sections 344, 357 and 359 of the Municipal Act (1), since the council were thereby entering into contracts and incurring an expenditure for which they had not made provision in the estimates for the year.

(1) **344.**—(1) Every by-law (except for drainage, as provided for under section 569 of this Act, or for a work payable entirely by local assessment) for raising, upon the credit of the municipality, any money not required for its ordinary expenditure, and not payable within the same municipal year, shall, before the final passing thereof, receive the assent of the electors of the municipality in the manner provided for in section 293 and following sections of this Act; except that in counties the county council may raise, by by-law or by-laws, without submitting the same for the assent of the electors of such county or counties, for contracting debts or loans, any sum or sums not exceeding in any one year $20,000 over and above the sums required for its ordinary expenditure.

(2) Provided always, that where a county and city are united for judicial purposes, the council of the county or city may, by by-law or by-laws passed at any meeting of such council, without submitting the same for the assent of the electors of such county or city, as the case may be, for contracting such debt, raise such sums of money as may be required for erecting, building and furnishing a court house and offices, to be used in connection therewith, and for acquiring such land as may be necessary or convenient for the purposes of such court house and offices. 46 V. c. 18, s. 346.

(3) And provided always that the council of a town heretofore or hereafter withdrawn from the county, and continuing so withdrawn pursuant to the provisions hereof, or of a city heretofore or hereafter erected, may, by by-law or by-laws, passed at any meeting of such council, without submitting the same for the assent of the electors of such town or city as the case may be, raise such sum or sums of money as may be required to liquidate their share of the county debt as awarded or agreed upon pursuant to this Act, and to issue debentures for that purpose at such rates, for such times and upon such terms as they may theretofore have done, or be entitled to do for meeting any other liability of said town or city as the case may be. 49 V. c. 37, s. 7.

357.—(1) The council of every municipal corporation, and of every provisional corporation, shall assess and levy on the whole rateable property within its jurisdiction, a sufficient sum in each year to pay all valid debts of the corporation, whether of principal or interest, falling due within the

and were casting it in large part upon the council of a future year without the authority of a by-law passed under section 344. Thus the matter stood when the plaintiff commenced the present proceedings. I cannot see that the resolution of the 29th August mends the defendants' case. I assume that they are entitled to say that it was passed before those proceedings had become effective; but before that time the whole of the fund out of which alone the expenditure could be made had disappeared, the residue of the funds in their hands being already devoted to other purposes and to the ordinary expenditure provided for by the yearly estimates.

To hold that the council could remedy the defect in the way they have attempted to do would be merely to enable them to do indirectly what they have no power to do directly, viz., to throw the cost of carrying out the lawful purposes of the municipality for one year which have been provided for by the estimates of that year upon the council of a succeeding year. I am therefore of opinion that the order of my brother Rose, so far as it directs the resolutions to be quashed, is right. * * *

year, but no such council shall assess and levy in any one year, more than an aggregate rate of two cents in the dollar on the actual value, exclusive of school rates.

(2) If in a municipality the aggregate amount of the rates necessary for the payment of the current annual expenses of the municipality, and the interest and the principal of the debts contracted by the municipality on the 29th day of March, 1873, exceed the said aggregate rate of two cents in the dollar on the actual value of such rateable property, the council of the municipality shall levy such further rates as may be necessary to discharge obligations up to that date incurred, but shall contract no further debts until the annual rates required to be levied within the municipality are reduced within the aggregate rate aforesaid: but this shall not affect any special provisions to the contrary contained in any special Act now or hereafter in force. 46 V. c. 18, s. 359.

359. The council of every county or local municipality shall every year make estimates of all sums which may be required for the lawful purposes of the county or local municipality, for the year in which such sums are required to be levied, each municipality making due allowance for the cost of collection, and of the abatement and losses which may occur in the collection of the tax, and for taxes on the lands of non-residents which may not be collected. 46 V. c. 18, s. 361.

Ratification of Invalid Borrowing.

FITZGERALD v. MOLSONS.

29 O. R. 105.

QUEEN'S BENCH DIVISION ONTARIO.

This was an action brought by certain ratepayers of the village of Hintonburgh against the Molsons Bank, the corporation of the village, and the sheriff of the county of Carleton, to restrain the collection and enforcement of a judgment recovered by the bank against the village corporation under the following circumstances:—

On the 23rd August, 1895, the council of the village, by by-law No. 49, passed under the authority of sec. 413 of the Consolidated Municipal Act of 1892, 55 Vict. ch. 42, as amended by sec. 10 of the Municipal Amendment Act of 1893, 56 Vict. ch. 35 (O.), authorized the reeve and treasurer to borrow from the Molsons Bank at Ottawa sums not exceeding in all $5,000, to meet current expenditure until such time as the taxes levied therefor could be collected.

At the same meeting they passed by-law No. 50 authorizing the levying of the rates for the year. The amounts to be levied for each separate purpose were left separate in the by-law, and amounted in the whole to $5,179.45, of which only $1,200 was for village rate, $2,775 was for school rates, $825 for debts under former debentures, and the balance for county rate.

By-law No. 49 was amended by by-law No. 56, on 29th November, 1895, by substituting $7,000 for $5,000 as the amount to be borrowed.

Under these by-laws the reeve and treasurer borrowed from the Molsons Bank at Ottawa $6,000, giving the notes of the village corporation therefor, as authorized by the by-laws.

The amount so borrowed was expended in the repair and alteration of certain roads, and in diverting the course of a certain stream, within the corporation. These works were within the general powers of the corporation, but no provision had been made for the outlay in the estimates for the year.

The bank at the time of the advances had no notice that the money borrowed was not required to meet current expenditure, but they might by inquiry have ascertained that the taxes levied for village purposes were greatly below the amount borrowed under the by-law.

The notes given to the bank were not paid at maturity and were renewed, and the renewals not having been paid, the bank in October, 1896, brought an action against the village corporation and obtained judgment by default for $6,201.04, the amount of the notes and interest, and placed execution in the hands of the sheriff of the county.

On the 23rd January, 1897, the plaintiffs, who were ratepayers of the village, began this action, on behalf of themselves and the other ratepayers, to declare the by-laws 50 and 56 to be *ultra vires* the corporation and void, also to declare the judgment obtained by the bank to be void by reason of fraud and collusion between the bank and the council, and to restrain the sheriff from levying under the execution issued upon it.

After the issue of the writ in this action, and before the filing of the statement of claim, viz., on 16th February, 1897, the village council submitted to the ratepayers a by-law authorizing the issue of debentures to the amount of $8,000, reciting that the corporation had expended $7,100 in the opening of the roads in question and the diverting of the stream in question, and that a further sum of $900 was required for the further improvement of one of the roads in question. The expenditure here recited included that which had been made out of the money borrowed from the bank. This by-law was duly approved by the vote of the ratepayers, and was passed by the council, and debentures under it were issued, and the proceeds at the time of the trial remaind to the credit of a special account in the bank. The plaintiffs in their statement of claim set out the passing of this by-law and alleged that the defendants the corporation intended to pay the judgment of the Molsons Bank out of the proceeds of the debentures, although that purpose was not set forth in the by-law, and prayed that they might be restrained from doing so.

The defendants the Molsons Bank in their statement of defence alleged that they advanced the moneys in question to the corporation in good faith; that they had been expended for purposes of the corporation; that the by-law of February, 1897, was passed for the express purpose of paying their claim; and

that, having obtained judgment for the amount advanced, without any fraud or collusion, they were entitled to proceed upon it.

The defendants the corporation of the village by their statement of defence said that the $6,000 principal money represented by the judgment was advanced to them by the bank; that the corporation had received the benefit of it, and had always regarded it as a just debt, and were willing to pay it, and intended to pay it if this action had not been instituted, and submitted its rights and obligations to the Court.

The defendant the sheriff justified under the judgment and execution, and submitted to the order and protection of the Court.

The action was tried before Rose, J., without a jury at Ottawa, on the 17th September, 1897, upon the pleadings and admissions which are set forth in substance above.

After argument the learned Judge dismissed the action with costs, upon the ground that under the amended Municipal Act of 1893 the bank were exempted from inquiry into the necessity for the passing of the by-law No. 49, and that the exemption from inquiry extended to the amount authorized, even though it should exceed the amount of the taxes for the year.

The plaintiff appealed.

The judgment of the Court was delivered by STREET, J.:— The whole amount of the taxes authorized to be levied in this municipality during the year 1895 was only $5,179.12, and it is clear, therefore, that, under the most favourable view of sec. 413 of the Municipal Act of 1892, as amended by sec. 10 of the Municipal Amendment Act of 1893, the council were not empowered to raise $6,000 to meet their "then current expenditure until such time as the taxes levied therefor" could be collected. I cannot entirely concur in the interpretation placed by my brother Rose upon the concluding portion of the section, which provides that "the person or bank lending such amount shall not be bound to establish the necessity for borrowing the same." With great respect, I think these words are to be read in connection with the preceding portion of the section, which confers the authority to borrow "such sums as the council may deem necessary to meet the then current expenditure of the corporation until such time as the taxes levied therefor can be collected," and limits the power of borrowing under this section to the amount of the taxes levied to meet the then

current expenditure. I think, therefore, that a bank or individual lending is bound to inquire into the amount of the taxes authorized to be levied to meet the then current expenditure, and cannot lawfully lend more than that sum, although not bound to inquire into the existence of an alleged necessity for borrowing that, or any other, amount (1).

Were the lender declared to be exempted from every inquiry, nothing would be more easy than for a council to pledge the credit of the corporation for amounts much greater than the section was intended to authorize, and the provisions confining the expenditure of each council to the taxes levied during its year, unless otherwise specially authorized by the ratepayers, would to a large extent cease to be a safeguard.

There is a later amendment to the clause in sec. 50 of ch. 45 of the Ontario statutes for 1897, further limiting the amount to be borrowed under it, which, however, does not affect this case.

It is admitted, however, that the money borrowed from the bank was expended by the council upon works within its jurisdiction, upon which money lawfully obtained for the purposes of the council might lawfully have been expended; and it is further admitted that the ratepayers, since this action was begun, have passed a by-law authorizing the council to borrow money to pay the outlay incurred in these works; that the council have issued debentures and raised money upon them and are willing to pay back to the Molsons Bank the money borrowed under sec. 413, and are only restrained from doing so by the proceedings in this action.

If the plaintiffs, upon the passing of this by-law by the ratepayers, had withdrawn their opposition to the payment of the claim of the bank, I think they would have been entitled to their costs, because they appear to me to have been right in their contentions to that point; but, instead of doing so, they have persevered in endeavouring to thwart the desire of the council to honestly repay the money which they had obtained and expended for the general benefit of the municipality. They have insisted that the council have no right to use the money raised upon these debentures in repaying the sums borrowed from the bank, because the by-law approved by the ratepayers does not specifically state that the money is to be paid to the bank.

I can see nothing in the Municipal Act which prevents a council, with the approval of the ratepayers, from raising money

(1) See R. S. O. 1914, c. 192, s. 319 (4).

for the repayment of such a debt as this. It is one thing to say that money borrowed by a council without the safeguards imposed by the statute may not be recoverable by the lender. It is quite another thing to say that a municipality having so borrowed money and expended it for the benefit of the ratepayers is to be restrained from being honest enough to pay it back. This is what the plaintiffs invite us to say in the present action, and I am clear we should refuse to say it.

In my opinion, the motion should be dismissed with costs.

Quashing By-laws—Internal Procedure of Council Considered.

RE JONES AND LONDON.

30 O. R. 583.

HIGH COURT OF JUSTICE FOR ONTARIO.

Application to quash two by-laws of the City of London.

ROSE, J., said in part:—The first objection to the sufficiency of the notice I, on the argument, stated in my opinion not to be well founded. I thought that any intelligent man would understand the nature of the business to be brought up, not only by reason of the notice, but by reason of what had previously taken place in the council. And I am glad to find support for the view I then took in the decision of Chitty, J., in *Henderson* v. *Bank of Australasia* (1), and I think I may well extract from his judgment the following observations, as being of general importance: "In cases of this kind it is settled that the notice which specifies the business to be done, or the objects of the meeting, is to be a fair notice, intelligible to the minds of ordinary men, the class of men who are shareholders in the company, and to whom it is addressed. The Court does not scrutinize these notices with a view to exercise criticism, or to find out defects, but it looks at them fairly. I think the question may be put in this form: What is the meaning which this notice would fairly carry to ordinary minds? That, I think, is a reasonable test. Another matter of very considerable importance in dealing with this as

(1) (1890), 45 Ch. D. at p. 337.

a practical question is, how did the meeting itself understand the notice? There were questions raised, and discussions at the meeting, but no one raised any objection on the ground that this addition of the words as to the qualification applied to each share, was not within the scope of the notice; and it is plain that the plaintiff, who took an active part in the meeting, did not raise the objection. It is plain he put no one on his guard, either the chairman or any of the shareholders there assembled." I would adopt this language as peculiarly applicable to the facts of this case, and without repetition state that I am confirmed in the view I took upon the argument that the notice was full and sufficient. The objection that a notice for the consideration of a by-law was not a notice that a by-law might be passed, is, if I may say so, hypercritical.

The second objection was really a double one, although the objection taken in the council does not state both grounds. The first objection is that the by-law should have been introduced on motion, and that notice of intention to introduce it should have been given; and the second part of the objection is that the by-law should not have received its three readings on one day. The rule of procedure under by-law 773 of the council provides as follows: "Every by-law shall be introduced on motion for the first reading thereof, and shall receive three several readings, each on different days, previous to its being passed, except on urgent and extraordinary occasions, when it may be read twice or thrice on one day.

Rule 29 provides: "Notice shall be given of all motions for introducing new matters * * * and no motion shall be discussed unless such notice has been given at the last regular meeting of the council."

Rule 11 provides: "That the mayor or other presiding officer shall preserve order and decorum and decide questions of order subject to an appeal to council."

Rule 12 provides: "When the mayor or other presiding officer is called on to decide a point of order or practice, he shall state the rule applicable to the case, without argument or comment."

And in *Re Indian Zoedone Co.* (2), in the Court of Appeal, the Earl of Selborne, L.C., stated that a chairman of a meeting "has *prima facie* authority to decide all emergent questions which necessarily require decision at the time."

(2) (1884), 26 Ch. D., at p. 77.

It seems to me that these were matters of internal regulation, and subject to the decision of the mayor, and that the only appellate tribunal was the council. The mayor determined that this was an urgent occasion; and in this I should agree, because it was manifest that if the by-law was not passed at that meeting, it could not be passed at all during that year. The mayor also determined in effect that this was not new matter, and that it was not necessary to give notice of the intention to introduce the by-law. I do not know whether he was right or wrong. I do not know what is meant by "new matter" in the by-law. I certainly do not consider myself competent to reverse him or the council upon the conclusion they came to, even if it were within my province to do so. I think it is not within my province, and that these objections fail.

The third objection has given me much more trouble. I have examined all the cases to which I have been referred, or which I have been able to find, as to the right of a chairman to adjourn a meeting. The Municipal Act provides, sec. 275: "Every council may adjourn its meetings from time to time." This differentiates this case form others to which I shall refer, where either nothing was said as to who had the power to adjourn, or where the power was vested in the chairman subject to the consent of the meeting. The first case that I have referred to is *Stoughton* v. *Reynolds* (3), where Hardwicke, C.J., said, referring to the power to adjourn: "The power must arise from the custom, or common law. Here is no custom found, and I know of no book that shews how it stands at common law. As to the vicar, he seems to have no share in the election of the second churchwarden, nor to have any right to preside. Is the right of adjourning in the churchwardens? There is no case for that; though if there was, this is found to be the act of one only. We must therefore resort to the common right, which is in the whole assembly, where all are upon an equal foot. And though there may be a difficulty in polling for an adjournment, yet as there is no other way, that must be taken. It would be giving the vicar too much influence, to fix it in him and his churchwarden."

This case was referred to in *The Queen* v. *D'Oyly* (4), where Lord Denman, C.J., said: "The case of *Stoughton* v. *Reynolds* (3), is a good authority, but should not be pressed to the extent to which the argument in support of this rule would

(3) (1736), 2 Str. 1045. (4) (1840), 12 A. & E. at p. 160.

carry it. As it has been explained, it does not decide that the rector may not adjourn the meeting, but only that, if he has done it so as to disturb the proceedings, the Court will interfere." In *The Queen* v. *D'Oyly* (4), the learned Chief Justice expressed the following opinion, at p. 159: "Setting aside the inconvenience that might arise if a majority of the parishioners could determine the point of adjournment, we think that the person who presides at the meeting is the proper individual to decide this. It is on him that it devolves, both to preserve order in the meeting, and to regulate the proceedings so as to give all persons entitled a reasonable opportunity of voting. He is to do the acts necessary for these purposes on his own responsibility, and subject to the being called upon to answer for his conduct if he has done anything improperly."

The Queen v. *D'Oyly* (4), is cited in Buckley on the Companies Acts, 7th ed., p. 519, as authority for the following propositions: "There is at common law a right of adjournment of a public meeting, and *semble* it lies in the chairman."

The question came up in *Salisbury Gold Mining Co.* v. *Hathorn* (5). There, however, there was an article of the association providing: "The chairman may with the consent of the members present at any meeting adjourn the same from time to time and from place to place," etc. And Lord Herschell said: "According to the terms of art. 66 it is the 'chairman' who may adjourn the meeting; it is to be his act, not that of the meeting or of those present at it. He cannot, it is true, adjourn it of his own mere motion, but the terms in which the members present are given a controlling voice strengthens the view that the adjournment is to be the act of the chairman."

In the argument in this case, *The Queen* v. *D'Oyly, supra, MacDougall* v. *Gardiner* (6), and *National Dwellings Society* v. *Sykes* (7), were referred to. In the last case Chitty, J., held that it was not within the scope of the chairman to stop the meeting at his own will and pleasure, and if he withdrew from the chair for the purpose of stopping the meeting improperly, the meeting by itself could resolve to go on with the business for which it had been convened, and appoint a chairman to conduct the business.

Having regard to these authorities, I should say that the power here was in the meeting to adjourn, but I find nothing in the rules of order in terms saying that the adjournment must be

(5) [1897] A. C. 268. (6) (1875), 1 Ch. D. 13.
(7) [1894] 3 Ch. 159.

upon formal motion, although possibly it is a fair inference to be taken from the rules, that the ordinary procedure for the adjournment of the meeting would be upon motion. But, having regard to the duties vested in the chairman to preserve order and to regulate the proceedings, I see no reason why he should not ask the council at any time whether, in the opinion of the members, it would not be better to adjourn, and upon an expression of opinion by the council in favour of an adjournment, why he should not declare an adjournment. And if his suggestion was opposed by some and carried only by a majority vote, I see no reason why an adjournment might not validly take place without the formality of a motion. And I think that that is what substantially was done here. There was a quorum present when he announced the adjournment; certainly a majority of those present were in favour of the adjournment for the ten minutes, because we find them in their places upon the expiry of the ten minutes. The two recalcitrant members, who were probably in the act of retiring when the adjournment was announced, for the purpose of breaking up the quorum, certainly did not object; perhaps it might be fairly said that they had little opportunity to object; but the fact remains that they did not object; and, as, by the last clause of the by-law regulating the proceedings, it is stated that "in all unprovided cases in the proceedings of council or in committee, resort shall be had to the law of Parliament as the rule for guidance on the question, and in such cases the decision of the mayor or other presiding officer shall be final and acquiesced in without debate," and it is clear from one's knowledge of the procedure in Parliament that as long as a member is within the precincts of the House he may be counted in ascertaining whether a quorum is present, so here, there being a sufficient number of members within the council chamber, it is manifest there was a quorum present when the adjournment took place.

Then, again, the members who composed the quorum upon the reassembling at the expiry of the ten minutes, were members who had been present during the prior proceedings. The fact that Alderman McPhillips was absent at the very moment of the adjournment makes, I think, but little difference. His absence has not been explained upon the material, but it is probable that he was not far distant, for we find that he was present when the council resumed upon the expiry of the ten minutes.

But, even if I am in error in my view that this was an adjournment by the consent of the majority of a quorum present, the validity of the objection is too doubtful to make it proper

for me to act upon it to quash the by-law. Here, I think, the discretion which is vested in me should be exercised to sustain the by-law against such an objection, an objection not founded in merit nor, as it seems to me, sustained by law.

License for Private Use of Highways.

ROSS v. EAST NISSOURI.

1 O. L. R. 353.

DIVISIONAL COURT ONTARIO.

This was an appeal from the judgment of Rose, J., dismissing an application to quash a by-law of the Township of East Nissouri whereby cattle were permitted to graze on the highways of the Township on payment of an annual fee for each animal.

The appeal was heard before BOYD, C., and LISTER, J.A.

BOYD C., said in part:—By the old common law it is trespass if cattle are found depasturing on a highway: *Dovaston* v. *Payne* (1); *Stevens* v. *Whistler* (2), confirmed by 41 Geo. III. ch. 109, sec. 11. But by the law of Ontario such a use of the highway may be legalized by the municipal authorities in whom the highway is vested. By the Pound Act, R. S. O. 1897 ch. 272, sec. 2 (originally part of the old Municipal Act), it is recognized that an animal may be permitted to run at large by the by-laws of the locality; and the power so to enact is found in the present Municipal Act, R. S. O. ch. 223, sec. 546 (2), providing for the restraining and regulating the running at large or trespassing of any animals.

The council of the local municipality has jurisdiction over the original allowances for roads and highways within the municipality: sec. 600; and every public road, etc., shall be vested in the municipality: sec. 601.

This gives at least a right over the surface and so much of the soil as is required for the purposes of the highway whereof the

(1) (1785), 2 H. Black. 527. (2) (1809), 11 East 51.

municipality is practically owner or public trustee. This would involve a right to keep the way in a proper state of repair and cut down grass or trees or weeds which might be in the way. It would equally involve the right to make money for the public out of what was thus removed. It therefore involves the right to let cattle graze on the herbage and make a charge therefor, if that is thought a fitting course by the council. The clause of the Municipal Act, sec. 546 (2), which enables the council to regulate the running at large of any animals, implies, if necessary, that such animals may lawfully graze upon the herbage growing on the roads where the cattle are allowed to be at large. If the cattle are thus permitted to pasture on the roads, it is reasonable that a proper sum as payment therefor should be required from the owner for the use of the municipality. In this aspect I think the present by-law unimpeachable. Though it is not said for what the $2 per head is to be paid, yet it is implied in connection with "each animal so permitted to graze" by clause 1 (a) of the by-law attacked.

Other expenses are also contemplated by the by-law: the keeping of books; supplying of tags, and the employment of inspectors to enforce the by-law, which may be met from this source.

The precise point is covered by late English authority. A street being vested in a local board it was held that the right to the grass on the street passed thereby. And it was held competent for the board to arrange as to pasturage with owners of cattle. The arrangement made in part was that if the cattle went on the street to feed, the board was to be paid so much; and this was regarded as a proper method of dealing with the herbage of the highway: *Coverdale* v. *Charlton* (3). See also *Haigh* v. *West* (4). What may be done particularly by individual contract may be done generally by public by-law; whereby all have equal right of access to the pasturage on reasonable terms.

The by-law is affirmed with costs of appeal—excluding costs of preliminary objection, as to which no costs.

LISTER, J.A., concurred.

(3) (1878), 4 Q. B. D. 104, at p. 121-3.
(4) [1893] 2 Q. B. 19.

Nature of Interest Necessary to Disqualify Member of Council from Voting.

IN RE L'ABBE AND BLIND RIVER.

7 O. L. R. 230; 3 O. W. R. 162.

DIVISIONAL COURT FOR ONTARIO.

A by-law of the municipality of Blind River reducing the number of liquor licenses was passed by the casting vote of L'Abbe, the reeve, who was at the time a mortgagee of licensed premises in the municipality. An application to quash the by-law was dismissed. The applicant appealed.

MEREDITH, J., said in part:—It is extraordinary that, in this province, where the powers of municipal councils are so large, and include so many common affairs, and the effect of the exercise of them so far reaching, there should be so little light thrown, by the decided cases of our Courts, upon the question of the disqualification of members of such councils in regard to voting upon subjects in which they have a personal interest; whilst in the neighbouring States the cases are numerous, and a well-defined rule may be said to be established. A rule which the District Court Judge adopted, and intended to act upon, in this case, and which is fairly well expressed in the language quoted by him in the judgment now in appeal, namely:—

"A member of a municipal council is disqualified from voting in proceedings involving his personal or pecuniary interests; and an ordinance or resolution, passed by the concurrence of one or more members so disqualified, is void."

I have been able to find but one case, in our Courts, in which any such principle has been acted upon; and in that case the judgment was also based upon the ground that the by-law was passed for private, not in the public, interests; and the judgment is that of a single Judge only: *In re Vashon and The Corporation of the Township of East Hawkesbury* (1).

In the case of *Re Baird and The Corporation of the Village of Almonte* (2), the subject was discussed, but both Courts based their judgment upon a statutable, and not upon a judicial, disqualification; though Hagarty, C.J., seems to have thought that

(1) 30 C. P. 194. (2) 41 U. C. R. 415.

the latter ought to exist. The holding in that case was that the statute—The Municipal Act—expressly disqualified any shareholder of any company voting, in the council, on any question affecting the company. But it would be an extraordinary anomaly if there were disqualification of a shareholder because of the company's interest in the question, and none because of the same member's personal interest in it.

If the Court is to stay its hand merely because the legislature has not expressly prohibited it, what flagrant breaches of duty might be committed, or attempted, by public trustees! There should be no encouragement to seeking public office for private ends.

The cases standing thus, the subject must be looked upon as one fairly open to, and calling for, consideration by this Court; and I have no hesitation in expressing my opinion in favour of disqualification upon this rule:—That no member of a municipal council should be permitted by his vote to decide any question in which he has a personal or pecuniary interest, except as a ratepayer and in common with other ratepayers. And that opinion is based upon the equity which prevents a trustee making a profit of his office. In this case, if the applicant is in the right upon the facts, the reeve of the municipality is not only making a profit of his office but is making use of it to injure the applicant, one of those whom he represents.

So far I agree with the District Court Judge in his judgment in this case.

But, upon the whole evidence, it is impossible for me to come to any other finding of fact than that the reeve had a personal and pecuniary interest—not as a ratepayer—in the passing of the by-law in question, and that his action in respect of it was affected by such interest; though the latter finding is not necessary to invalidate it: see *Re Baird and The Corporation of the Village of Almonte* (2), and *The Queen* v. *Meyer* (3).

(3) (1875), 1 Q. B. D. 173.

Nature of Interest Necessary to Disqualify Member of Council from Voting.

ELLIOTT v. ST. CATHARINES.

18 O. L. R. 57; 13 O. W. R. 89.

DIVISIONAL COURT FOR ONTARIO.

MEREDITH, C.J., delivered the judgment of the Court and said in part:—The by-law is a local improvement one, and is attacked by the respondent, suing as a ratepayer, on behalf of himself and all other ratepayers, on the ground that it was promoted by one McBride, a member of the council, who was a property owner to be benefited by the sewer; that it was finally passed at a meeting of the council, seven members voting for its adoption, of whom McBride was one, and that by reason of his interest he was disqualified from voting; and that it was, therefore, not validly passed, a two-thirds vote of the members of the council, which was composed of ten members, being required to pass it.

My brother Anglin was of opinion that McBride, by reason of the circumstances I have mentioned, was disqualified from voting on the motion to adopt the by-law, and that the by-law was therefore not duly passed.

My learned brother, in reaching this conclusion, followed, as he said, *L'Abbe* v. *The Corporation of Blind River* (1), which he treated as conclusive in the respondents' favour, and he also referred to *Re Baird and the Corporation of Almonte* (2), and *Re Vashon and the Corporation of East Hawkesbury* (3).

Re McLean and the Township of Ops, (4), is not referred to, and it was said, upon the argument before us, was not cited on the argument before my brother Anglin.

In that case the motion was to quash a drainage by-law, and one of the objections to it was similar to that raised in the case at bar.

There the allegation of the applicant was that the by-law was carried by the vote and influence of one Fitzpatrick, a member of the council, and affidavits were filed shewing that he had been for years an active supporter and promoter of the proposed drain-

(1) 7 O. L. R. 230.
(2) 41 U. C. R. 415.
(3) 30 C. P. 194.
(4) 45 U. C. R. 325.

age; that he and his brother owned some of the land proposed to be drained; and that he had a large pecuniary interest in the proposed drainage; and that he and his brother would have to pay from one-fourteenth to one-sixth of the assessment imposed by the by-law.

The *Vashon* and *Baird Cases* were both cited, but the Court refused to quash the by-law, holding that no interest can disqualify a councillor or a member of a Court of revision from performing his duties as such that springs solely from his being a ratepayer in the municipality, and that Fitzpatrick had no other interest but such as sprang from being a ratepayer in the municipality to be benefited and in the locality to be drained.

The principle of that decision is clearly applicable to the case at bar, and the judgment appealed from cannot be supported without overruling that decision.

In the *Vashon Case* the by-law was one for closing a road, and the only persons interested in the maintenance or closing of it were the applicant and the member of the council who was instrumental in having it passed, and by whose vote it was carried in council.

In delivering the judgment of the Court, Osler, J.A., said that the case "was quite distinguishable from one where the motives merely of the member of the council are in question or where, though he is personally interested, his interest is not different from that of the community in general, *e.g.*, the imposition of a tax rate" (p. 203).

The by-law was held to be objectionable on the further ground "that it was passed to serve private interests and not *bona fide* in the interest of the public."

In the *Baird Case* the question was as to the validity of a by-law to grant a bonus to a manufacturing company proposed by a council consisting of five members, of whom four were shareholders in the company.

The by-law was quashed because of the provisions of sec. 75 of the Municipal Act (3 Vict. ch. 48, O.), which prohibit a shareholder from voting on any question affecting his company.

Section 75 deals not with by-laws, but with contracts with or on behalf of a corporation, and it was held that the granting of a bonus came within it.

In the *L'Abbe Case* the distinction pointed out in the *Vashon Case*, to which I have referred, was recognized (p. 237). The

by-law was one for reducing the number of licenses in the municipality, and it was quashed on the ground that the reeve, by whose casting vote the by-law was adopted, was mortgagee of one of the properties likely to be affected by it, and therefore disqualified from voting.

The result of these cases is that there is a consensus of opinion that where the personal or pecuniary interest of the member is that of a ratepayer, in common with other ratepayers, or, as put by Osler, J.A., "where, though he is personally interested, his interest is not different from that of the community in general," the member is not disqualified.

The community of interest spoken of I understand to be a community in the kind, not in the degree, of the interest.

It remains to be considered whether this rule is applicable as was held in the *McLean Case*, where the community of interest is not between all the ratepayers, but between all the ratepayers to be affected by the by-law, as is the case where the by-law is a drainage by-law or where, as in the case at bar, it is a local improvement by-law.

I see no reason for differing from the view taken in the *McLean Case*. As I view it, the principle upon which the rule is founded is the same whether the by-law is one affecting all the ratepayers of the municipality or only those within a section of it.

Making Regulations Pursuant to Statutory Powers.

LIVERPOOL COMPANY v. LIVERPOOL.

33 S. C. R. 180.

SUPREME COURT OF CANADA.

The town of Liverpool by resolution prescribed regulations governing a certain railway crossing. The regulations were called in question in an action between the town and the railway company.

In the Supreme Court ARMOUR, J., said in part:—It is plain that the Towns Incorporation Act of 1895 conferred upon the

council of the respondents the power to pass by-laws for making such regulations as are referred to in 63 Vict. ch. 176, and such power so conferred *impliedly excluded the power to make such regulations otherwise than by by-law*, and this is the mode of making such regulations that should have been adopted by the council of the respondents.

It was essential, therefore, to the validity of the regulations set forth in the resolution of the council of the respondents of the 31st May, 1901, that they should have been made by by-law and that such by-law should have been approved by the Governor in Council.

The resolution, therefore, of the council of the respondents of the 31st May, 1901, had no legal validity and even if it could be treated as a by-law, as was suggested, had not the force of law, not having been approved by the Governor in Council and the appellants were not bound to conform to it.

TASCHEREAU, C.J., SEDGEWICK and MILLS, JJ., concurred; DAVIES, J., dissenting.

When Council may Act by Resolution.

TORONTO v. TORONTO R. W. CO.

12 O. L. R. 534; 8 O. W. R. 179.

COURT OF APPEAL FOR ONTARIO.

The plaintiffs, the City of Toronto, approved by resolution of certain recommendations of their engineer regarding the regulation of the street railway service.

In the Court of Appeal, OSLER, J.A., said:—Then, have the plaintiffs approved of their engineer's determination? They have done so by resolution, and, though I cannot say that I am entirely free from doubt, I incline to the opinion that this was sufficient, and that a by-law was not necessary, and that the case is not governed by secs. 325-326 of the Municipal Act. The defendants were not exercising powers under that Act. The matter was one

dependent upon the contract of the parties, and where a by-law is required, as under clause 14, it is so expressed. The action of the council upon the engineer's report in other matters entrusted to his determination is elsewhere variously expressed as "approval," "confirmation," or "endorsation." The thing which becomes operative is the engineer's determination, and the approval of the council may, I think, be manifested by a resolution adopting it. The decision of this Court in *Port Arthur High School Board* and *Town of Fort William* (1), warrants us in so holding. And see *Lewis* v. *Alexander* (2).

This case is not within the decision of the Supreme Court in *Liverpool and Milton R.W. Co.* v. *The Town of Liverpool* (3), which merely holds, upon the construction of the two statutes there in question, that a power conferred upon the town by the one to make certain regulations respecting the crossing of the railway through the town, must by force of the other be made, not by resolution, but by by-law, the terms of the latter Act impliedly excluding all power to make it otherwise when the matter to be regulated was one *by law* within the control of the council.

Improvements and Repairs to Highways Distinguished.

TAYLOR v. GAGE.

30 O. L. R. 75; 16 D. L. R. 686; 5 O. W. N. 489.

APPELLATE DIVISION ONTARIO.

The members of a township Council met Gage on a certain road allowance in the township and authorized him to remove gravel from the road and to grade in a certain manner. There was no by-law or formal contract. Gage removed certain gravel and thereby Taylor suffered damage by deprivation of access.

Taylor brought an action for an injunction and for damages.

Falconbridge, C.J.K.B., gave judgment for the plaintiff. The defendant appealed.

MEREDITH, C.J.O., said, in part:—It was contended by Mr. Lynch-Staunton that what was done by the appellant in removing

(1) 25 A. R. 522. (2) 24 S. C. R. 551, 557-558.
(3) 33 S. C. R. 180.

the gravel from the highway was done under the authority and by the direction of the council; that, if the council had done it by its own officers, it would have been a lawful act done in the performance of its statutory duty as to the repair of highways; and that it was not the less lawful because it was done by the appellant, who was in the same position as if he had been employed by the council to do the work; that it was not necessary that a by-law should have been passed to authorize the doing of the work; and that, for these reasons, the action did not lie, and that the respondent's remedy was to obtain compensation under the provisions of the Municipal Act; and in support of that contention counsel cited and relied on *Pratt* v. *City of Stratford* (1). * * *

I do not think that the decision in the *Pratt Case* is binding on this Court to the extent of requiring that we should hold that in all cases, and under all circumstances, an alteration of the grade of the highway by a municipal corporation is a work of repair which may be done without a by-law; but that the decision must be taken to have depended on the particular circumstances of that case; and that the Court was mainly influenced, in coming to the conclusion which it reached, by the fact that the raising of the level of the highway, of which the plaintiff complained, had become necessary owing to the raising of the level of the bridge, and was, therefore, practically a part of or incidental to that work.

In my opinion, the line of separation between acts which a municipal corporation may do in the discharge of its duty to keep in repair a highway under the jurisdiction of its council, without passing a by-law authorizing them to be done, and acts done for the improvement of a highway, for which a by-law is necessary, is nowhere better pointed out than by Macaulay, C.J., in *Croft* v. *Town Council of Peterborough* (2), and I entirely agree with what is there said. See also *Reid* v. *City of Hamilton* (3).

In the case at Bar, the two by-laws to which I have referred seem to me plainly to indicate that what was proposed to be done was not to be done in the exercise of the corporation's powers or duties as to the repair of highways, but was practically a sale to the appellant of the gravel under the surface of the road allowance, the consideration for which was to be the spreading of part of the gravel upon other roads under the jurisdiction of the council of the municipality. If what was done was, in effect, a sale of the gravel to the appellant, a by-law authorizing the sale was clearly necessary (Consolidated Municipal Act, 1903, sec. 647).

(1) 14 O. R. 260, 16 A. R. 5.
(2) (1856), 5 C. P. 35, 45-6, 141, 148-9, 150.
(3) (1856), 5 C. P. 269, 287.

It may be that, incidentally, what the appellant would do in removing the gravel would have had the effect of grading the highway, but that was not the primary purpose of what was proposed to be done; and the fact that the gravel was to be removed only up to the line of the respondent's fence, which encroached upon the highway to the extent of from 20 to 27 feet along the whole length of his lot, is an indication that the removal of the gravel was not for the purpose of improving the highway, but of benefiting the appellant.

The contention of the appellant at the trial was, that the road allowance had never been opened, and that it could not be used for vehicular traffic; and indeed that it could not be used even as a means of access to the respondent's land.

In *Hislop* v. *Township of McGillivray* (4), it was decided that the duty of maintaining and keeping in repair roads under the jurisdiction of councils, imposed on corporations by the Municipal Act, only applies to roads which have been formally opened and used, and not to those which a township corporation in its discretion, has considered it inadvisable to open; and it follows from that decision that, the road allowance in question never having been opened and used, no duty to keep it in repair rested upon the corporation, and on this ground this case is, in my opinion. distinguishable from *Pratt* v. *City of Stratford*.

Great inconvenience would result from holding that what it is said the appellant was authorized by the council to do might be lawfully done without a by-law. There is no record of any such authority having been given, and the respondent might find great difficulty in establishing a claim for compensation against the corporation. Had the council determined to open the road allowance, and to improve it, property-owners that would or might be injuriously affected by what was proposed to be done, would have had an opportunity of knowing of the intention of the council, and, if they had desired to do so, of objecting to its being carried into effect.

I would affirm the judgment, upon the ground that what was being done by the appellant was not a work of repair which had been undertaken by him under the authority or by the direction of the corporation, and that it was not such a work as might be lawfully done by the corporation itself, unless under the authority of a by-law of its council.

(4) (1890), 17 S. C. R. 479.

Responsibility of Members of Councils as Trustees.

BOWES v. TORONTO.

1858 C. R. [3] A. C. 10; 11 Moore's Privy Council Cases 463.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Bowes was a member of a firm of Bowes & Hall, stockbrokers, and at the same time Mayor of Toronto. A large amount of city debentures were sold through the instrumentality of Bowes & Hall and Bowes received £4,100 as his share of the profit. Bowes' relation to and participation in the transaction were discovered and an action was brought to recover the sum received by him.

Judgment was given against Bowes, who appealed.

Lord Justice Knight Bruce, in delivering their Lordships' judgment, said, in part:—This appeal originates in a suit which, in the year 1853, was instituted in the Court of Chancery of Upper Canada, by certain inhabitants of the City of Toronto, on behalf of themselves and all other inhabitants of that city, against Bowes, the appellant here, and the Corporation of the City of Toronto, the respondents here. In the course of it, after Bowes had answered, the Corporation was, by an order, substituted as plaintiffs for the original plaintiffs, and ceased accordingly to be defendants. Witnesses having been examined on each side, the Court, at the hearing, pronounced a decree in favour of the respondents, which, affirmed on appeal in the Court of Error and Appeal of Upper Canada by the opinions of the majority of the Judges, has been brought for final review hither. The appeal has been fully and ably argued before us, on the part of the appellant.

The object of the suit was to charge the appellant in favour of the Corporation of the City of Toronto, the respondents, with the amount of profit made by the appellant, of the firm of Bowes & Hall (of which the appellant was the principal member), by means of the acquisition and subsequent disposal of certain debentures issued by the corporation. The claim was grounded on the connection of the appellant with the corporation, he having been, in the year 1850, one of the aldermen, and throughout the years 1851, 1852 and 1853, the Mayor of Toronto, and so a leading member of the corporate body. * * *

The decree deals with the appellant as an agent or a trustee who, while acting in the agency or trusteeship acquired for himself by contract, without the knowledge of the persons for whom he was agent or trustee, an interest in the subject of the agency or trusteeship, and is accordingly incapable of retaining from them the benefit, if any, of the acquisition. And, it has scarcely been denied in argument that if the appellant stood in the relation of agent or trustee towards the corporation or inhabitants of Toronto, the decree (subject to the point of Hall's absence) has charged the appellant rightly. The relation, however, was disputed; but, as their Lordships think, unsuccessfully. He may not have been agent or trustee within the common meaning or popular acceptance of either term, but he was so substantially, he was so within the reach of every principle of civil jurisprudence, adopted for the purpose of securing, so far as possible, the fidelity of those who are entrusted with the power of acting in the affairs of others. * * *

The defence has been also to a great extent rested on the alleged ground that the appellant did not give wrong advice to the governing body of the corporation, or exercise influence over it in the matter of the debentures; that the governing body would have acted exactly as it did if the appellant had not been a member of it; that the corporation took altogether a prudent and correct course, and has lost nothing; and that any person not connected with it might honestly, safely and effectually have made the bargain with Hincks and the contractors which the appellant did make. Assuming the alleged facts thus stated to be stated accurately, we conceive that they make no difference. * * *

The secrecy and disingenuousness with which the appellant conducted himself do not improve his case, especially as, if he had, on the 28th of June, disclosed the true state of things to the Council, its other members might have taken a different course from that in fact taken by them (a point as to which it can be scarcely necessary to refer, particularly to the evidence of Joshua Beard, Tully and Samuel Thompson). But we do not say, that had the appellant, on the 28th of June, made a full communication to the Council, and nevertheless its members had acted as they did act, that would have prevented the success against him of a suit on behalf of the inhabitants, which in effect and substance this suit still is.

It has been also argued that the governing body of the corporation was a deliberative body, and on that ground out of the operation of any civil rules or principles applicable to agents and

trustees; and the reported cases of *Lord Petre* v. *The Eastern Counties Railway* (1) and *Simpson* v. *Lord Howden* (2) were mentioned; and it was said, that members of the British Legislature often vote in Parliament respecting matters in which they are personally interested, and do so without censure or risk. We are of opinion, however, that neither the governing character nor the deliberative character of the Corporation Council makes any difference, and that the Council was in effect and substance a body of trustees for the inhabitants of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly. With regard to members of a legislature, properly so called, who vote in support of their private interests; if that ever happens, there may possibly be insurmountable difficulties in the way of the practical application of some acknowledged principles by courts of civil justice, which courts, however, are nevertheless bound to apply those principles where they can be applied. The Common Council of Toronto cannot in any proper sense of the term be deemed a legislative body; nor can it be so treated. The members are merely delegates in and of a provincial town for its local administration. For every purpose at present material, they must be held to be merely private persons having to perform duties, for the proper execution of which they are responsible to powers above them. We agree that the cases of *Lord Petre* v. *The Eastern Counties Railway* (1) and *Simpson* v. *Lord Howden* (2) must at present be viewed as correct expositions of English law, but so viewed, they do not, we conceive, affect the controversy before us. * * *

The recommendation of the Committee to Her Majesty must be the dismissal of the appeal, with costs.

(1) 1 Railway Cases, 462. (2) 3 Myl. & Cr. 97.

Liability of Members of Councils in Connection with Illegal Payments.

PATCHELL v. RAIKES.

7 O. L. R. 470; 3 O. W. R. 457.

COURT OF APPEAL ONTARIO.

This was an action by a ratepayer on behalf of himself and all other ratepayers against the members of the council of the town of Midland and the Canada Furnace Company to compel a refund to the town corporation of a sum which it was alleged had been illegally paid over by the Town Council to the company.

GARROW, J.A., said in part:—That members of municipal councils are to be regarded in many respects as trustees, with a trustee's duties and responsibilities, needs but little citation of authority: *Attorney-General* v. *Compton* (1); *Attorney-General Belfast Corporation* (2); *Attorney-General* v. *Wilson* (3); *Bowes* v. *Toronto* (4). And this must of course be assumed to be known to all parties dealing with such a council.

As trustees the council could only pay away the trust fund under their control to persons having legal claims to receive it. To pay it to a person having no legal claim was to commit a breach of trust for which both the members of council and the person receiving the money would be responsible to the *cestuis que trust*, the ratepayers. The first question, therefore, in my opinion to be determined is, was the claim to interest made by the company a legal claim, capable of enforcement? To that there can be only one answer, and that in the negative. * * *

The only remaining defence of any importance is that relating to the consequences which ought to follow from the parties having taken the opinion of counsel, and apparently acted upon it. The mere opinion of counsel, however eminent, is in itself no defence to a claim for breach of trust: *Boulton* v. *Beard* (5); *In re Knight's Trusts* (6); although of course a very important circumstance in considering, not whether a stranger to the trust may be allowed to retain the trust money improperly obtained

(1) (1842), 1 Y. & C. C. C. 417
(2) (1855), 4 Ir. Ch. 119.
(3) (1837), 9 Sim. 30.
(4) (1856), 6 Gr. 1, (1858), 11 Moo. P. C. 463.
(5) (1853), 3 DeG. M & G. 608.
(6) (1859), 27 Beav. 45, at p. 49.

from the trustees, but whether the trustees should themselves be held personally responsible to make good the loss.

Upon the whole, I think the appeal must be allowed, the defendants the company ordered to refund with interest from the time of payment, the other defendants to make good any deficiency; and that the defendants must pay the costs of the action and of this appeal. The record may be amended, and indeed should be, by adding the corporation of the town of Midland as a defendant in order to receive the money, and that all parties may be bound by the litigation; but there should be no costs of such amendment, which should be made at the plaintiff's expense.

Misapplying Public Moneys by Order of Council.

ATT.-GEN. v. DE WINTON.

[1906] 2 Ch. 106; 75 L. J. Ch. 612.

CHANCERY DIVISION.

FARWELL, J.:—This is an action by the Attorney-General, on the relation of a burgess and town councillor of the borough of Tenby, against the defendant, who is the treasurer of the borough, an office to which he was appointed on July 6, 1903; and the object of the action is to impeach the accounts of the defendant so far as they relate to payments of interest with which the defendant has credited himself and debited the borough funds, and to restrain similar charges in the future.

The facts are not in dispute. When the defendant was appointed the borough had exhausted its borrowing powers, and had, in addition, an overdraft with its bankers of 4,956*l.*, which had increased to 5,975*l.* by June 18, 1904. The writ in this action was issued in September, 1904. During the period between July 6, 1903, and the issue of the writ, the borough had accounts of their borough fund under the Municipal Corporations Act, 1882, and of their district rates and water rates under the Public Health Act, 1875, and of harbour and pier rates under private Acts and Orders; all these accounts fluctuated from time to time, but were always overdrawn to some extent, and on all of

them the defendant had debited the borough—and credited himself—with interest at 4½ per cent., with quarterly rests. The plaintiff does not ask for any order for payment—none of the sums have, in fact, been paid; but he asks for a declaration that they are improperly debited to the borough in the treasurer's account, and for an injunction to restrain similar debits in the future.

The defendant takes the objection at the Bar that the borough are necessary parties to the action. The suit is, no doubt, somewhat unusual, but no claim is made against the borough; they will not be bound by any decision in this action, and their interests are not likely to be prejudiced by any lack of information on the defendant's part, inasmuch as the town clerk happens to be the defendant's solicitor in the action. If the plaintiff succeeds, the borough benefits; if he fails, it is no worse off than before. I therefore overrule this objection.

The defendant's next contention is that he is not personally liable; that the overdrafts and interest thereon were made and debited by the order of the borough; and that he merely acted as their servant. I am of opinion that this contention is not well founded. The question before me relates to the funds collected by and on behalf of the borough for public purposes under the Municipal Corporations Act, 1882, and the Public Health Act, 1875, and the private Harbour Acts; and it has been settled, at any rate since Lord Cottenham's decision in *Att.-Gen.* v. *Liverpool Corporation; Att.-Gen.* v. *Aspinall* [1837] (1), that property held for public purposes is held upon charitable trusts: "If the property in question be subject to any public trust, and if the appropriation complained of be not consistent with such trust, but for purposes foreign to it, and if there be not, in the Municipal Corporations Act"—now the Act of 1882—"any provision taking from the Court its ordinary jurisdiction in such cases, then it will follow that the Attorney-General has, under the circumstances stated, a right to file the information, and to pray that the fund may be recalled, secured, and applied for the public, or in other words, charitable purposes, to which it is by the Act devoted." I have recently had to consider this case in *Stevens* v. *Chown; Stevens* v. *Clark* [1901] (2), and I will merely say that I remain of the opinion then expressed, and all the more so because it has been approved by Lord Lindley in *Yorkshire Miners' Association* v. *Howden*

(1) [1837] 7 L. J. Ch. 51, 58; 2 Myl. & Cr. 613, 618.
(2) [1901] 70 L. J. Ch. 571; [1901] 1 Ch. 894.

[1905] (3). It is plain, therefore, that this Court would have jurisdiction to restrain the borough from misapplying these funds on the ground of breach of trust.—*Att.-Gen.* v. *Newcastle-on-Tyne Corporation and North-Eastern Railway* [1889] (4). But the defendant is their treasurer, and knows that the moneys which he has credited to himself are trust moneys, and he is clearly amenable to the jurisdiction of the Court and cannot escape by pleading the wrongful orders of his employers. There is no question of repaying here; but, even if there were, the defendant knew that this was a trust fund, and "those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment" —*per* Mr. Justice Fry in *Foxton* v. *Manchester and Liverpool District Banking Co.* [1881] (5). But the treasurer is not a mere servant of the council; he owes a duty, and stands in a fiduciary relation, to the burgesses as a body; he is the treasurer of the borough (sec. 18); all payments to, and out of, the borough fund, must be made to, and by, him (sec. 142); he has to account to three auditors, two appointed by the burgesses and one by the mayor (sec. 25); and, although he holds office during the pleasure of the council only (sec. 18), this does not enable him to plead the orders of the council as an excuse for an unlawful act. In my opinion the observations of Mr. Justice Erle in *Reg.* v. *Saunders* (5) with relation to a county treasurer, apply with equal force to a treasurer under the Municipal Corporations Act, 1882: "if an order be made on the county treasurer to pay expenses wholly disconnected with county matters, such an order is without jurisdiction, and one which the treasurer would be bound to disobey; and if the treasurer did pay it, it would be the duty of the Quarter Sessions not to allow the items of such expenses in the treasurer's account."

It was next contended by one of the defendant's counsel that the overdrafts were not illegal on some suggested analogy to the class of contracts that may bind a corporation, although not under seal; but the borrowing powers of the borough in this case are subject to statutory conditions, restrictions, and prohibitions, and these cannot be dispensed with. As Mr. Justice Bayley says in *Richter* v. *Hughes* (6): "The Act of Parliament, therefore, gives a special power, and that power ought to be strictly

(3) [1905] 74 L. J. K. B. 511, 523; [1905] A. C. 256, 280.
(4) [1889] 58 L. J. Q. B. 558; 23 Q. B. D. 492.
(5) 44 L. T. 406.
(6) 2 L. J. [o.s.] K. B. 61, 63; 2 B. & C. 499, 505.

followed, and as it authorizes them to borrow a certain sum of money, and afterwards, by rates, to pay the interest of the money borrowed, they have no right to borrow beyond the specified amount, or to raise rates to pay interest upon any higher sum" —see *Wenlock* (*Baroness*) v. *River Dee Co.* [1885] (7). In the present case the borough have not merely overdrawn from time to time, but they have a normal floating debt, as appears from their resolution of July 23, 1903, limited only by their creditors' willingness to advance. This case is to my mind undistinguishable in principle from the decision of the Divisional Court in *Smith* v. *Southampton Corporation* (8). In that case a borough council in their estimate for a general district rate for the borough included items which consisted of debts contracted in former years and which had from year to year been carried to a "suspense account" opened for that purpose, and a balance due for works executed in previous years. The council from time to time paid these old debts by money borrowed from their bank by overdrafts, but, so far as the ratepayers were concerned, the items remained unpaid so long as they appeared in the suspense account. The appellant appealed against the rate on the ground that it contained charges incurred more than six months before the making of the rate, and it was held that the rate was bad. The Lord Chief Justice (Lord Alverstone) says: "It was contended that they had borrowed from their bankers and had by that means paid their tradesmen; that the whole had become a debt due to the bank, and that it must be assumed that the rate was raised to meet that debt. But if that argument were allowed to prevail, it would only be necessary to borrow money from the bankers to pay the debts in order to defeat altogether the provisions of section 210" (9). Then Mr. Justice Channell explains clearly the true ground on which a ratepayer is entitled to complain: "I should like to point out what is the real meaning of the objection that a rate is retrospective, which I think this rate clearly was. It means that any ratepayer is entitled to say that he is being charged with a sum which ought to have been charged upon and paid by the ratepayers in previous years. The principle is that these bodies are only entitled to charge upon future ratepayers present expenditure so far as they have statutory borrowing powers; the effect of their borrowing powers is to enable them to charge instalments of present expenditure upon future ratepayers,

(7) 54 L. J. Q. B. 577; 10 App. Cas. 354.
(8) 71 L. J. K. B. 639; [1902] 2 K. B. 244, 251, 253.
(9) NOTE.—Section 210 of the Public Health Act, 1875 (1) referred to in the above judgment is as follows:

and borrowing powers are granted upon the understanding that the capital expenditure benefits the future ratepayers. Subject, therefore, to their borrowing powers, corporations and bodies of this character have no right to charge future ratepayers with present expenditure." I can see no ground for holding the overdrafts in the present case to be lawful, still less for allowing the treasurer to credit himself at the expense of the borough funds with 4½ per cent. interest thereon with quarterly rests.*

Action by Ratepayer to Recover Amount of Illegal Expenditure.

MACILREITH v. HART.

39 S. C. R. 657.

SUPREME COURT OF CANADA.

This action was brought by the plaintiff, Hart, who sued on behalf of himself and all other ratepayers of the City of Halifax other than the two defendants (because the City Council refused to sue or allow the corporate name to be used in a suit) to recover for the defendant, the City of Halifax, against the defendants, MacIlreith and Doane, certain money received by them for personal expenses incurred in attending a municipal convention of Winnipeg. MacIlreith was Mayor and Doane engineer of the City of Halifax.

*210. For the purpose of defraying any expenses chargeable on the district fund which that fund is insufficient to meet, the urban authority shall from time to time, as occasion may require, make by writing under their common seal, and levy in addition to any other rate leviable by them under this Act, a rate or rates to be called "general district rates."

Any such rate may be made and levied either prospectively in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate: in calculating the period of six months during which the rate may be made retrospectively, the time during which any appeal or other proceeding relating to such rate is pending shall be excluded.

Public notice of intention to make any such rate, and of the time when it is intended to make the same, and of the place where a statement of the proposed rate is deposited for inspection, shall be given by the urban authority in the week immediately before the day on which the rate is intended to be made, and at least seven days previously thereto; but in case of proceedings to levy or recover any rate it shall not be necessary to prove that such notice was given.

The trial Judge dismissed the action holding that it could only be brought in the name of the Attorney-General. The Supreme Court of Nova Scotia reversed this decision and the defendants appealed.

DAVIES, J., said in part:—We were all of the opinion, after hearing the argument, that the trial judge and the majority of the Court of Appeal were right in holding the payments complained of to have been *ultra vires* of the corporation, and, having been so, could have been recovered back in a suit by the City of Halifax corporation.

The city having, however, refused to allow its name to be so used, the main question argued before us remained:—Could, in such a case, a ratepayer and resident, suing as the plaintiff has done here and making the city a defendant in his suit, successfully claim the declaration he prayed for, or must such a suit be brought in the name of the Attorney-General?

The trial judge, holding that the Attorney-General was a necessary party, dismissed the action, and the Court of Appeal in Nova Scotia unanimously reversed that decision and held that the action, as brought, could be maintained.

We think it is not open to doubt that granting the payment impeached to have been *ultra vires*, and made to an officer of the corporation such as the mayor, the action could have been maintained in the corporate name of the city against him for its money, and that, in such case, the Attorney-General need not have been a party. The fact that it was money and not other property of the city that was in question could not make any difference in the right of the city corporation to sue, and I did not understand Mr. Bell, in his very able argument at bar, to contend that it did.

The sole point, therefore, that remains for consideration is whether, in a case where the municipial authorities refuse to allow the corporation name to be used to test the legality of the payment of municipal funds proposed to be made or already made, or the legality of the appropriation of other property of the municipality made or to be made, questions which seem to me to stand practically on the same footing, the action to test the question must be brought in the name of the Attorney-General, with or without relators, and cannot be brought in that of the resident ratepayers who are members of the corporation.

Many years ago, that important question was decided in Ontario in the case of *Paterson* v. *Bowes* (1) in favour of the right of the ratepayers to sue in the circumstances suggested. That case has been consistently followed in that province ever since and may now be considered as the settled rule of law and practice there.

The decision of the Supreme Court of Nova Scotia in the case now under review, reversing that of the trial judge, follows on the same line, while in Prince Edward Island, Hodgson, M.R., in *Tanton* v. *The City of Charlottetown* (2), after a lengthy review of the English cases, holds that the Attorney-General must be a party plaintiff.

The necessity of the Attorney-General being a party to *any action* against corporations which involve only public rights or interests, or for the protection, in any way, of public interests, as such, and as distinct from cases where there is a distinct private injury arising from the act complained of, is admitted.

What is contended by the respondent is that where the act complained of is *ultra vires* of the corporation, and works a distinct private injury separable from the wrong to the public, the private individual or individuals may, in cases where the user of the name of the corporation is refused, sue for his own protection in his own name without the Attorney-General.

On the whole and admitting that there is some conflict of authority, I conclude that the balance alike of authority and reason, to say nothing of convenience, are in favour of such an action as the present being maintainable.

Action by Ratepayer to Compel Council to Collect a Debt.

NORFOLK v. ROBERTS.

28 O. L. R. 593; 4 O. W. N. 1231; 50 S. C. R. 283

APPELLATE DIVISION ONTARIO; SUPREME COURT OF CANADA.

The judgment of the Appellate Division was delivered by MEREDITH, C.J.O., who said in part:—The respondent sues as a ratepayer of the town of Brampton, on behalf of himself and

(1) 4 Gr. 170. (2) 1 East. L. R. 282.

other ratepayers of the town, and, so far as the matters complained of by him remained to be dealt with at the trial, seeks a mandatory order requiring the defendants the Corporation of the Town of Brampton to collect from the appellants a sum of money alleged to be due by them to the corporation for arrears of water rates.

Although in his reasons for judgment the learned trial judge says, "There will be judgment requiring the defendant municipality to collect from the defendants the executors of the Dale estate, and requiring the last-mentioned defendants to pay to the municipality, the sum of $1,591.72," he endorsed on the record a direction that judgment should be entered "against the defendants the executors of the Dale estate and the Municipal Corporation of the Town of Brampton declaring that the said municipality wrongly abstained from collecting arrears of water rates and water rates from the said executors amounting together to $1,591.72, and that the said municipality is entitled to collect and the said executors to pay such sum:" and the formal judgment has been drawn up in accordance with that direction.

It is to me a somewhat startling proposition that a ratepayer is entitled to bring into Court a municipal corporation and a person who is alleged to be indebted to it, for the purpose of having it declared that the corporation has wrongfully refrained from collecting the alleged debt, and that it is owing by the alleged debtor; and the case at bar is the first, as far as I am aware, in which the attempt has been made, and certainly the first in which it has succeeded.

Even in the case of a trust fund, a *cestui que trust* cannot maintain an action against a debtor to the estate. It was so held in *Sharp* v. *San Paulo R. W. Co.* (1); and, after so stating, James, L.J., said (pp. 609, 610): "I had lately occasion to consider that question, and I came to the conclusion, very clearly, that a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file a bill against the trustee for the execution of the trust, or for the realization of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole

(1) (1873), L. R. 8 Ch. 597.

estate, institute the proper action, or the proper suit in this Court. That view I still adhere to, and I say it would be monstrous to hold that wherever there is a fund payable to trustees for the purpose of distribution amongst a great number of persons, every one of those persons could file a separate bill of equity, merely on the allegation that the trustees would not sue."

In the case of a corporation "the broad rule is that, with the exception of *ultra vires* transactions, whatever concerns a corporation as such can be dealt with by the majority of the corporators, or the governing body if they have vested in them the capacity to exercise the powers of the corporation:" Brice on Ultra Vires, 3rd ed., p. 731. To this rule there are exceptions, but none of them applies to such a case as is put forward by the respondent in the case at bar.

The trend of modern judicial decisions is to depart from the practice of former times of applying to bodies of a public representative character, intrusted by Parliament with delegated authority, the rules which were applied in the case of trading corporations, and to recognize the right of such bodies, while acting *bona fide* and within the limit of the powers conferred upon them by the Legislature, to transact their business without interference by the Courts: *Slattery* v. *Naylor* (2); *Kruse* v. *Johnson* (3); *Thomas* v. *Sutters* (4).

It is, in my judgment, erroneous to treat either the corporation or its council as trustees for the ratepayers. They are, no doubt, in the sense in which the Sovereign is spoken of as a trustee for the people, trustees for the inhabitants of the municipality; but they are, in my opinion, in no other sense trustees, but a branch of the civil government of the province; and, within the limits of the powers committed to them by the Legislature, at all events in the absence of fraud, should be free from interference by the Courts.

I entirely agree with what was said by Middleton, J., in *Parsons* v. *City of London* (5) and by the learned Chief Justice of the King's Bench in delivering the judgment of the Divisional Court (1912), *ib.* 442, as to the powers of municipal councils.

It would be an intolerable state of things if, whenever a council, acting in good faith, has determined that it ought not to enforce a claim which technically it may have against some

(2) 13 App. Cas. 446.
(3) [1898] 2 Q. B. 91.
(4) [1900] 1 Ch. 10.
(5) 25 O. L. R. 172.

one alleged to be indebted to it, a ratepayer may bring the corporation and the alleged debtor into Court in order that it may be declared that the indebtedness exists, and that the corporation wrongfully refrains from collecting it; and what good would result from such a declaration being made? If the corporation still thinks that, for reasons which appear to it sufficient, it ought not to enforce payment of the debt, is another action to be brought to obtain the relief which the respondent claimed by his pleading, a mandatory order to the corporation to enforce payment or an order that the person who has been adjudged to be a debtor pay to the corporation the amount of the debt; and, if the latter order were made, how could the corporation be compelled to issue execution or other process on the judgment if it were minded not to do so?

The possession of such a power by the Courts would mean practically that the body which has been intrusted by the Legislature with the management of the affairs of the municipality is to be subject, at the instance of a single ratepayer, to be brought into Court to answer as to why this debt or that debt due to the corporation is not collected, and to have its discretion as to the justice of enforcing payment of money technically due to it overruled by the Court.

The Supreme Court of Canada dismissed an appeal from the foregoing judgment.

Attempt to Convert Public Park into Market.

ATT.-GEN. v. GODERICH.

5 Grant Chy. 402.

CHANCERY DIVISION ONTARIO.

The facts appear in the judgment.

THE CHANCELLOR:—When the town of Goderich was laid out by the Canada Company, in the year 1828, a plot in the centre of the village, containing about eight acres, was set apart as a market-place; and on the 26th of April, 1854, this parcel of land was conveyed to the Municipal Council of the town of Goderich,

to hold to them and their successors, "as and for a public market-place for the use of the inhabitants of the said town of Goderich for ever."

The Municipal Council of the United Counties of Huron and Bruce being about to erect a court-house in the town of Goderich, which is the county town, certain negotiations took place as to the site, which resulted in the adoption by the Counties Council of the following resolution, viz.:—

"That the court-house be erected on the centre of the market-square, in compliance with the wishes of the inhabitants of the town, and on the terms and conditions named in the resolution of the Town Council, namely—that they give the Counties Council a deed of the land required, and form approaches thereto, and pay for the required alterations in the buildings a sum not exceeding £250; and further, that the Town Council shall guarantee that no building be erected within sixty-six feet of the walls of the building."

This resolution was laid before the Town Council on the 9th of May, 1854, when it was adopted by a majority of the members of that body then present, four having voted in its favour and two against it.

It was stated in argument that a deed had been executed in accordance with the above arrangement, but that fact has not been proved. It is clear, however, that the Counties Council proceeded with the erection of the court house shortly after the resolution in question had been adopted; and it is admitted that a letter was addressed to them on the 14th of the next month, remonstrating against the proceedings as illegal and informing them distinctly that in case they persisted, an application would be made to this Court for relief.

The bill in the present suit was filed on the 20th of February, 1855, and when the cause was brought to a hearing, the court-house which the plaintiff seeks to have removed had been nearly, if not altogether, completed.

Apart from the question of laches, I cannot say that I have any doubt as to the plaintiff's right to relief. Had the defendants covenanted not to use this land otherwise than as a market-place, it is quite clear, I apprehend, that this Court would have interfered to prevent the erection upon it of a court-house or any structure of that sort (1); and the right of the public to that

(1) *Tulk* v. *Moxhay*, 2 Phil. 744; *Coles* v. *Sims*, 1 Kay 56; S. C. in Appeal, 5 D. McN. & G. 1.

sort of protection is, I think, equally clear, when the land has been granted in the way it has been here, expressly as a market-place for the use of the inhabitants of the town of Goderich. We acted upon that principle in the *Municipality of the Town of Guelph* v. *The Canada Company* (2), and the cases in the American Courts are clear and numerous.

ESLEN, V.-C., and SPRAGGE, V.-C., gave reasons for reaching the same conclusion.

Attempt to Use Land Acquired for One Purpose for Another.

ATTORNEY-GENERAL v. HANWELL URBAN COUNCIL.

[1900] 1 Ch. 51; 69 L. J. Ch. 626.

COURT OF APPEAL.

The Hanwell Urban Council obtained powers to purchase lands of the Earl of Jersey for sewage purposes and after acquiring the lands they proposed to use parts for other purposes.

An action was brought against the Council by the Attorney-General at the relation of the Earl of Jersey for an injunction.

Kekewich, J., granted an injunction. The Council appealed.

RIGBY, L.J., in the Court of Appeal, said in part:—The point which weighs with me—not that I at all impeach the *bona fides* in this matter of the appellants—is that the argument of the appellants, if it were sound, would give an opening for manipulating these sections of the Act for unjustifiable purposes. People might say: "We will obtain land for a sewage farm; and in taking that we had better take more than we want, or something we do not want, in order that we may erect a hospital." I do not for a moment suggest that such a consideration was in the minds of this local authority; but if it is lawful, why should not a transaction be carried out in that way? The authority would say: "Some objection might be taken to the hospital if we asked for the land for that purpose, but if we take the land for another purpose then we should be free to build the hospital when we have acquired the land and obtained liberty to

(2) 4 Grant, 632.

retain it. After that we can apply it to any purpose for which we are authorized by Act of Parliament to apply land." I think, for the reasons that have been given by the Master of the Rolls, and having regard to those considerations, the appeal ought to be dismissed.

Lease of Public Park to Baseball Club.

HOPE v. HAMILTON PARK COMMISSIONERS.

1 O. L. R. 477.

COURT OF APPEAL FOR ONTARIO.

The judgment of the Court was delivered by ARMOUR, C.J.:— The plaintiffs in this case were residents in and ratepayers of the city of Hamilton, which city had purchased a property called Dundurn for a public park, and had afterwards duly adopted the Public Parks Act, by virtue of which the said park became open to the public free of all charge, subject to such by-laws, rules, and regulations as the board of park management might make as to the use thereof, and they sought to have it declared that the following resolutions of the board of park management were *ultra vires* and null and void, viz. "1. That the portion of Dundurn park fenced in and used as baseball grounds, be declared by this board to be not immediately required for park purposes. 2. That the portion of Dundurn park heretofore used as baseball grounds be let to William Stroud for purposes of baseball games for $15 per day if he becomes a member of the Eastern league, or if only of the International league $10 per day, not exceeding sixty days in all during the present year, excepting July 12th and Labour day, said grounds to be let to societies or other organizations on other days, on terms to be arranged with the board. Mr. Stroud to furnish schedule of the days he will require said grounds for May. No intoxicating liquors to be sold on the premises." They also sought an injunction against the granting the said lease to Stroud or other persons, or withdrawing from the use of the public free of charge that portion of the said park known as the ball grounds, and an injunction against the receiving the lease by Stroud, and a declaration setting aside and declaring null and void any lease or agreement for a lease which might be made or executed by the defendants for withdrawing from the use of the public free of charge all that portion of the park known as the ball grounds.

The learned trial Judge, finding that the plaintiffs had not, nor had any of them, been individually wronged in any way, none of them having ever been excluded from that part of the park resolved to be leased, and none of them having suffered any injury not common to all the rest of the public from the action of the defendants, dismissed the action.

In my opinion the judgment of the learned trial Judge was right and should be affirmed.

The rule is that no person may institute proceedings with respect to wrongful acts, which if of a private nature are not wrongs to himself, and if of a public nature do not specially affect himself, and this rule applies equally to *ultra vires* transactions: Brice, 3rd ed., p. 751.

It is unnecessary, in the view I take of this case, to determine whether in doing what they essayed to do, the board of park management were acting within the powers conferred upon them by the Legislature or within what might fairly be regarded as incidental to or consequential upon such powers, for no one of the public has any right to complain whenever parliamentary powers, such as those conferred upon this board, have not been strictly followed or are intended to be transgressed, unless he can shew that he has an interest in preventing the doing of that which may well be called a violation of their contract with the Legislature. He must not only shew that they are committing or intend to commit a wrong, but also that the wrong complained of does occasion or will occasion loss or damage to him, that he has a special or private interest in confining them within the limits of their parliamentary powers: *Mayor, etc., of Liverpool* v. *Chorley Waterworks Co.* (1).

And unless he can shew this, it is only the Attorney-General who has any right in such case to complain.

I do not think that the fact of the plaintiffs' being ratepayers of the city of Hamilton, which had purchased the park and had adopted the Public Parks Act, thereby constituting the board of park management an independent corporation, gave them a special or private interest in confining the board of park management within the limits of their parliamentary powers, or that their transgressing them, as it was alleged they were essaying to do, did or would occasion any loss or damage to them.

The appeal must, therefore, be dismissed with costs.

(1) (1852), 2 D. M. & G. 852.

Doctrine of Irrevocable Dedication.

ATTORNEY-GENERAL v. TORONTO.

6 O. L. R. 159; 2 O. W. R. 539.

CHANCERY DIVISION ONTARIO.

This action was brought by the Attorney-General for Ontario at the relation of Richard A. Donald, President of the Island Association, and Mary T. Smith, as well on behalf of themselves as on behalf of all other lessees of the corporation of Toronto of lots upon the Island, within the liberties of Toronto, as also on behalf of all other ratepayers of the city of Toronto, and also by Mary T. Smith, as a co-plaintiff in her own right.

The plaintiff claimed:—

1. A declaration that by-law No. 4168 passed by the council of the corporation of Toronto on the 2nd June, 1902, by which the corporation purported to take certain lots out of the lands dedicated for park purposes by by-law No. 1028, passed in November, 1880, was illegal and invalid.

2. A declaration that the corporation could not lawfully revoke the dedication of the said park lands.

3. An injunction restraining the corporation from granting to the defendant Lemon a lease of a certain part of the said park lands proposed to be leased to him, or from erecting a dwelling house on the said lands.

The corporation alleged that at the time of passing by-law No. 1028 in November, 1880, the Island lots in question, Nos. 56 to 60, inclusive, although included in that by-law, were under lease and were in fact therefore not dedicated. It appeared in evidence that prior to the alleged dedication of November, 1880, the lessees of these lots had incurred forfeitures of their respective leases through breach of covenants therein, and that prior to the passing of the by-law the council of the corporation had passed a resolution declaring the leases in question null and void. Notwithstanding this resolution of the council, but subsequent to the by-law of November, 1880, rent appeared to have been accepted from all these lessees, and buildings erected upon the several lots according to provisions contained in said leases, but since that time the terms for which the original leases had been granted

had fallen in, and the city had entered into possession of the greater portion of some of the lots in question.

It was stated by counsel for the plaintiffs that all that they in fact claimed were the lands which were now actually in possession of the corporation.

The case was tried before BOYD, C., without a jury. In the course of his judgment the learned Chancellor said:—This corporation acted on the belief that there was power to deal with the land designated as park land by leasing it, imposing and collecting rents and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners, though some regard for the enjoyment and benefit of the public has been always kept in view. The park scheme had not been abandoned, but the details, and the area of its occupation on the Island, have been modified from time to time by successive councils. If the city has the power to exercise such control, it is not for the Court to interfere, nor can the wishes of the residents on the Island control the situation as against the legislative and directory powers of the corporation. After the best consideration I can give, and in the absence of any distinct authority, my conclusion is, that the city has not exceeded its corporate or legislative powers in dealing as has been done with this Island Park. It does not appear to me that the doctrine of irrevocable dedication is applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee simple. The fact of corporate action being embodied in a by-law implies its revocability. Having enacted such a by-law to establish a park, the same body or its successors may repeal, alter, or amend as is deemed proper, so long as no vested right is disturbed: R. S. O. 1897, ch. 1, sec. 8 (37), and ch. 223, sec. 326.

This right, as applied to public places "dedicated" to the public out of corporate property owned by the municipality, is recognized by the Court, and has been based upon the reading of the statute in that behalf: R. S. O. ch. 223, sec. 637 (1). In *Attorney-General* v. *Toronto* (1), VanKoughnet, C., construes the statutory word "square" as meaning not merely an open space used as a means of a communication like a street, but as having the wide meaning inclusive of a park—an open or enclosed space devoted to such a use. This, though dedicated by a corporation, may be afterwards shut up or have taken from it its use and character as a park. That such was the decision is to be seen

(1) 10 Gr. 439.

also from the observations of Mr. Justice Osler, in *In re Peck and Town of Galt* (2), where he says: "A square or park which the corporation lay out upon lands acquired by them . . . untrammelled by any trust as to its disposal, may be dealt with under the ample powers conferred upon them by sec. 509" (*i.e.*, of R. S. O. 1897, ch. 174), which is an earlier appearance of the present sec. 637.

The plaintiff Mrs. Smith claims under a lease made in 1874, which was renewed in 1897, though made to date back as from 1895, for which the term is for 21 years. The house originally built is occupied by her family now, and is about a quarter of a mile from the house being put up by the defendant Lemon, which is on the lot adjoining Mallon's house.

The evidence does not satisfy me that she has any such interest as gives her the right to appear as a private plaintiff. No special grievance, personal or proprietary, attaches to her, as owner on Manitou Avenue, which is injured by the erection of the Lemon house. Besides, the original lease under which she took was made in 1874, prior to the park scheme, and the renewal in 1895 or 1897 was after registration of the plans made in 1883 and 1890, shewing that the city had sanctioned the subdivision of lots 56, 57, and 59 into lesser lots for the purpose of being leased, and so incompatible with that locality possessing or being likely to possess the character of a park.

The joint information and action fails and should stand dismissed, but, as the motives of the relators and plaintiff are most commendable, I do not give costs if this ends the litigation. Should an appeal be lodged, however, then I think costs should be paid to the city as a proof of good faith in prolonging the controversy.

(2) 46 U. C. R. at p. 219.

Limit of Municipal Power to Abate Public Nuisances.

TOTTENHAM v. WILLIAMSON.

[1896] 2 Q. B. 353, 1896, 65 L. J. Q. B. 591.

COURT OF APPEAL.

Williamson & Sons deposited refuse on their lands and created a nuisance. The Tottenham Urban Council, the local authority for the district, brought an action for an injunction to restrain Williamson & Sons from using their lands for the purpose. They did not allege any special damage.

The trial Judge refused an interim injunction. The plaintiffs appealed.

KAY, L.J., said in part:—The ordinary law is that whenever any person desires to complain of a public nuisance he must apply to the Attorney-General for his sanction, and he can then bring an action in the name of the Attorney-General, his own name appearing as relator. Otherwise, he cannot bring an action unless he alleges special damage, in which excepted case he can bring an action in his own name. These are the two ways in which, according to the ordinary law, an action can be brought in respect of a public nuisance. I cannot see that section 107 of the Public Health Act, 1875 (1), gives a local authority any additional remedy. It provides that they may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior Court of law or equity to enforce the abatement or prohibition of any nuisance under the Act. That provision does not mean that a local authority can take proceedings to abate the nuisance which are not known to the law, and which no other person has power to take. If the Legislature had intended to give a new right of action, and had intended to give local authorities the right to bring such an action without alleging special damage, surely the

(1) "Any local authority may, if, in their opinion, summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior Court of law or equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties from or for the punishment of any persons offending against the provisions of this Act relating to nuisances, and may order the expenses of and incident to all such proceedings to be paid out of the fund or rate applicable by them to the general purposes of this Act."

Act would have said so. The Act clearly means that they may cause such proceedings to be taken as are now known to the law. The proceedings taken in the present case are proceedings which are not known to the law, because the local authority has not obtained the sanction of the Attorney-General, and does not allege special damage. The local authority have therefore no right to bring the action. For these reasons, I think that the decision of the Judge was right.

Compelling Council to Accept Carnegie Offer.

ATTORNEY-GENERAL v. HALIFAX.

36 N. S. R. 177.

SUPREME COURT OF NOVA SCOTIA.

Andrew Carnegie offered $75,000 to the City of Halifax to erect a library on certain conditions, and the City Council by resolution accepted the offer and expressed its thanks and caused a copy of its resolution to be forwarded to Mr. Carnegie. Subsequently this resolution was rescinded and thereupon this action was commenced by the Attorney-General on the relation of one Mackintosh, a ratepayer of the city, for an injunction to restrain the Council from carrying into effect the rescinding resolution.

Weatherbe, J., granted an interlocutory injunction. The city appealed to the Supreme Court of Nova Scotia.

The appeal was dismissed without costs, the Court being equally divided.

The view which prevailed is given in the following extract from the judgment of Graham, E.J.

The principal contention urged by the defendants is, that the Attorney-General has not the right to maintain such an action against the City Council, that they have a discretion, that it is interfering with the internal arrangements, and that the only remedy is a political remedy.

There appears to be no doubt that a municipal body or corporation, such as this, may accept or acquire a donation made to

it in trust, for the purposes of a charitable or public nature. *Attorney-General* v. *Shrewsbury* (1); *Attorney-General* v. *Leicester* (2); *Higgins* v. *Turner* (3).

That it is a charity I cite *Attorney-General* v. *Marchant* (4).

And although the corporation is not bound to accept the donation, yet, if it does so, it is bound by the acceptance and the terms thereof. *Attorney-General* v. *Catherine Hall* (5); *Attorney-General* v. *Caius College* (6). It is quite clear that the city council, previous to this contract, were, by force of the statute, trustees for the Citizens' Free Library, both of the property of the Library, and of the rates collected from the ratepayers, and to be applied from its maintenance.

I think it is also clear, that passing the rescinding resolution, and communicating it to Mr. Carnegie, and thus disabling the Council from carrying out the first one, would constitute a breach of the contract.

When this donation was proposed, they, as trustees, and no doubt at expense, obtained an Act enabling them to enter into an agreement with Mr. Carnegie, and to pledge the rates and funds to the extent of $7,000 annually, to support this Library, and they thereupon entered into the agreement, and I have no doubt it is enforceable by Mr. Carnegie against the ratepayers. *Grand Junction, &c., Railways* v. *Peterborough* (7).

This was done on behalf of the citizens to obtain the donation for their benefit. In so far as the donation is advantageous, the rates of the ratepayers and the charity are affected proportionately.

There is no settlement of the $75,000, or it would be within the authority of the cases just cited, and I do not say that this money has become trust funds; but there is a contract for valuable consideration to furnish that sum to the Council to erect the Library building. I am of the opinion that the citizens, or persons entitled to the benefit of that contract, and in whose behalf the City Council entered into it, should not be prevented from obtaining the benefit of it by the proposed breach of it by the Council, or by enabling Mr. Carnegie to rescind it through their act.

It is well understood that an agent or a quasi trustee, as well as a trustee, must not put himself in a position which is antag-

(1) 6 Beav. 220.
(2) 7 Beav. 78.
(3) 171 Mass. 591.
(4) L. L. 3 Eq., at p. 430.
(5) Jac. 391, 392.
(6) 2 Keen, 150.
(7) 13 App. Cases 136.

onistic to the interest of the principal. Loyalty is required of him.

In *Ellis* v. *Barker*, a testator was tenant of a farm. It was his wish and desire, and he authorized his trustees to give up the tenancy in favour of the plaintiff, if the landlord would accept him as a tenant, in which case he was to have the stock on it. James, L.J., said:—

"It was a breach of duty on the part of the trustees to endeavour to induce the landlord to refuse his consent on any grounds to what the testator shewed by his will that he wished and intended."

I refer also to Perry on Trusts, sec. 433; Pomeroy on Equity, secs. 1075, 1079; 1 Am. & Eng. Ency., 2nd ed., 1071.

In *Dietrichsen* v. *Cabburn* (8), the Lord Chancellor (Cottenham), said:—

"The equitable jurisdiction to restrain by injunction an act which the defendant, by contract or duty, was bound to abstain from, cannot be confined to cases in which the Court has jurisdiction over the acts of the plaintiff; for if that were so, it could not interfere to restrain the violation of contracts by tenants, or of duty by agents, as in the case *Yovatt* v. *Winyard* (9), and *Green* v. *Folgham* (10), or by an attorney as in *Cholmondeley* v. *Clinton* (11), in none of which cases was there anything to be done by the plaintiff which equity could enforce." . . . "If the bill states a right or title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement, which cannot be otherwise brought under the jurisdiction of a Court of Equity."

If the Court would interfere with any trustees of a charity in respect to the trusts, I suppose there is no greater considertaion to be attached to these trustees because they constitute the city council. *Bowes* v. *Toronto* (12). But even if their duty to this object is to be placed upon the same plane as their other statutory duties, the Court does interfere even there. In *Frewin* v. *Lewis* (13), the Lord Chancellor said:—

"Now I apprehend that the limits within which the Court interferes with the acts of a body of public functionaries constituted like the Poor Law Commissioners, are perfectly clear and unambiguous. So long as those functionaries strictly confine

(8) 2 Phil. 57.
(9) 1 J. & W. 394.
(10) 1 S. & S. 398.
(11) 19 Ves. 261.
(12) 11 Moo. P. C. 463 at p. 523.
(13) 4 M. & C. 254.

themselves within the exercise of those duties which are confided to them by the law, this Court will not interfere. The Court will not interfere to see whether any alteration or regulation which they may direct, is good or bad. But they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them. This Court no longer considers them as acting under the authority of their Commission, be they a corporation or individuals, merely as persons acting with property without legal authority." . . . "While the Court avoids interfering with what they do, while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; and if, under the pretense of an authority, which the law does give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this Court by injunction."

I also cite *Anderson* v. *Corporation of Dublin* (14).

And I think the Court has jurisdiction to restrain the council, as the agents or trustees of the citizens interested in the rates and the library, from disregarding their duty to them to secure this $75,000 for the charity, and of course at the suit of the Attorney-General. I refer to Lewin on Trusts, 8th ed., p. 67; *Attorney-General* v. *Eastlake* (15).

It is well understood that the Attorney-General may sue with or without a relator, and I do not know why the position of the relator in this case is to be discussed as if he was a party.

The mere statutory power to rescind or to commit a breach of the contract is wanting, because, while the statute enabled the council to enter into the agreement, there is no authority to be applied that, having entered into it, they might cancel or commit a breach of it. *Xenos et al* v. *Wickham* (16). And as to the power to restrain an excess of authority or illegal act, I cite *Frewin* v. *Lewis* (13); *Anderson* v. *Corporation of Dublin* (14), already cited, and *Attorney-General* v. *London and N. W. Ry. Co.* (17).

(14) 15 L. R. Ir. (1885) 44.
(15) 11 Hare 205.
(16) 2 E. & I. App. 296.
(17) (1900), 1 Q. B. 78.

Attempt to Compel Construction of Sewers.

GLOSSOP v. HESTON.

12 Ch. D. 102, 1879; 49 L. J. Ch. 89.

COURT OF APPEAL.

The plaintiff Glossop owned an estate through which a watercourse passed. The defendants, a local authority, had control of the sewers of the district. The defendants' sewers polluted the watercourse. The nuisance increased. The defendants took no steps to abate it. The plaintiff brought this action for an injunction. The Vice-Chancellor (Malins) being satisfied that there was a nuisance granted an injunction. The defendants appealed to the Court of Appeal.

JAMES, L.J., said in part:—We are dealing with a matter of Chancery jurisdiction, and the Court of Chancery never granted a mandamus to a public body to compel it to do things for the benefit of private persons who might be benefited thereby. A mandamus to compel a man to erect a building was never granted, except in one case, I think, where a railway company, after severing a man's land, did not make a bridge. That was almost the only exception of an injunction granted to compel the doing of work. A mandamus might, on proper evidence of refusal, of which I see none here, be applied for in the Queen's Bench Division, for the exercise of its great prerogative jurisdiction, to compel all bodies having an authority under an Act of Parliament to perform the duties the Legislature has imposed on them. That mandamus might be applied for by any individual who could shew a sufficient cause, and the Court might grant it if it could see that something the public body ought to do was neglected to be done. The statute that has created that duty has given a very special provision for enforcing it—a provision (section 299) which is very material in considering what the Court ought to do—that is, there is power to apply to the Local Government Board, and if they think the local authority has made default in providing their district with sufficient sewers, or in the maintenance of existing sewers, or in providing their district with a supply of water, and so on, they can apply for a mandamus, or they may appoint some person (which is a very special additional power) to perform

the duty and order the costs of performing that duty to be provided for at the expense of the district by its own authority. There is that remedy given by that section which seems to me to make the whole system reasonably complete. I think myself that the Court ought to hesitate considerably before it interferes with respect to a wrong done to a whole district, when there is a remedy complete for the purpose provided by the Legislature. That provision does not, of course, oust the jurisdiction of any Court, either the old Court of Chancery or any Division of the existing High Court, in the case of any legal wrong done. I use that word as distinct from neglect to perform the duties cast upon this board by this Act. If this board were to create a nuisance, for which they were not excused—if they were, in the apparent exercise of their duties, using or making a sewer which would convey sewage or filthy water into any natural stream or watercourse, or any canal, pond or lake, that provision would not prevent the jurisdiction attaching which existed before, or prevent it being exercised to remedy the wrong being done. That is the case of an actual legal wrong, accompanied with special damage, such as in those cases at common law where actions for damages have been maintained against such bodies. If the same thing had occurred here—if this local board, while exercising or in the course of exercising its duties and rights under this Act of Parliament, were to make a hole or cut a drain in a public thoroughfare, or put a heap of stones or drain-pipes, unlighted, as in the case of *Foreman* v. *The Mayor of Canterbury* (1)—if anything of that kind were done, and damage arose which could be attributed to the unlawful neglect of persons whom they employed, they would be liable for their action, just as any private person making a hole and not sufficiently lighting it, or putting a heap of stones or other matter and not sufficiently warning people against it, would be liable. But these cases have no application to the present, where all that can be alleged against the defendants, even if the allegation were sustained, which it does not appear to me to be, is, that they have not within a reasonable time performed the public duty which they owed, not to the plaintiff, but to the whole district in which the plaintiff dwells and owns land. The only case which the plaintiff has alleged, or attempted to prove, is, that he has not been relieved from a damage to which he was subject before this body was called into existence, in the way in which he hoped to be, and as he would be, if that body had done their work in draining this district.

(1) 40 Law J. Rep. Q. B. 138; Law Rep. 6 Q. B. 39.

Under all these circumstances I am of opinion that the order of the Vice-Chancellor cannot be sustained, and that the action was brought upon an inaccurate view of the relations existing between the several landed proprietors in the district and the sanitary board.

Indictment of Municipality for Non-Repair of Highway Causing a Nuisance.

REX v. PORTAGE LA PRAIRIE.

2 W. L. R. 141.

COURT OF KING'S BENCH MANITOBA.

In the autumn of 1903 the defendant municipality were, under proceedings by indictment, found guilty of allowing to remain out of repair a highway lying south of section 3 in township 14, range 7, west of the principal meridian, which highway it was the duty of the municipality to keep in repair.

The trial Judge ordered the nuisance to be abated by 31st July, 1904, at the cost of the municipality.

The municipality neglected to obey the order, and at the autumn assizes in 1904 counsel for the Crown, acting also for David Love, at whose instance the prosecution had been had, moved for an order directing the sheriff to repair the highway. No sufficient ground for the delay on the part of the municipality was shewn. But, as nothing could be done to repair the highway, until after the then approaching winter, the giving of judgment on the motion was allowed to stand.

RICHARDS, J.:—The municipality have, as I am informed by counsel who made the motion, repaired the road, so that only the question of costs remains to be dealt with.

I am of opinion that the motion was properly made, and that, but for the subsequent action of the municipality, the order should be made as asked for, and a writ *de nocumento amovendo* issued to the sheriff.

I, therefore, order the municipality to pay the costs of the motion at once after taxation thereof.

Protection Given by Law to Person Executing a Municipal By-law.

CONNOR v. MIDDAGH.

HILL v. MIDDAGH.

16 O. A. R. 356.

COURT OF APPEAL FOR ONTARIO.

Connor and Hill each owned a farm in the united counties of Stormont, Dundas and Glengarry. The United Council passed a by-law to open a road and by subsequent by-law appointed Middagh a commissioner to remove obstructions from the road in question. Middagh under the authority of the two by-laws cut down trees on both farms and also removed fences. Connor brought an action against Middagh for damages for trespass and Hill brought a similar action against Middagh and the County Corporation. Judgment was given for the plaintiff in each action. The defendants appealed from both judgments and the appeals were argued together.

CONNOR v. MIDDAGH.

HAGARTY, C.J.O., said, in part:—This action was tried some six months before the case of *Hill* v. *this defendant and the United Council*. The defendant here did not call witnesses to contradict the plaintiff's evidence as to the true position of the road allowance. His defence was rested almost wholly on the protection given by law to persons executing a by-law.

This protecting clause (1) has been in our statutes since 1849, since the Act which recasts the early Act of 1841, and created the township municipalities.

The Legislature was creating several hundred inferior representative bodies and endowing them with large powers of interference with private rights and properties.

Their by-laws would have to be enforced by individual officers or servants, and it was felt that the strict rules of law might be not unfrequently violated, and claims for damages incurred, both as to the council and the executors of its mandate.

(1) See below, *Hill* v. *Middagh*.

In the passing and preparation of these by-laws and in ascertaining whether all the statutable requirements and conditions precedent had been fulfilled, very great care was necessary, and, as the innumerable cases before our Courts during the last forty years can testify, it was very hard to be always free from some omission or miscarriage which Judges would be compelled to hold fatal to the legality of the whole proceeding. It would be a most unfortunate state of the law if, in actions of trespass against the municipality enacting the by-law or against those to whom its execution was committed, at the trial every objection should be open and if the success or failure of the action were to depend on the proof of exact fulfilment of all conditions necessary to warrant the passing of the by-law.

I think our Legislature recognized fully the position of persons acting like constables in carrying into effect the directions of a by-law interfering possibly with private rights, by the protection extended to them under the municipal Acts.

It would be as unreasonable as it would be unfair to require the executive officer to obtain a legal opinion as to the validity of a by-law before venturing to enforce it.

I think the defendant here is protected against this action.

HILL v. MIDDAGH.

HAGARTY, C.J.O., said, in part:—I have set forth at length my reasons for holding in the case of *Connor* v. *Middagh*, that the defendant is entitled to the judgment of the Court. His position as an officer executing the by-law is the same in all respects as it is in this case, and I think the result must be the same.

I have now to consider the liability of his co-defendants, the county council. If the by-law, under which the trespasses here complained of were committed, be one falling within the words of sec. 340 of the Municipal Act of 1883 (which governed these proceedings), then the remedy is barred as it has never been quashed.

"In case a by-law, order, or resolution is illegal in whole or in part, and in case anything has been done under it which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law, order or resolution has been quashed or repealed, nor until one month's notice in writing of the intention to bring such action has been given to the corporation, and every such action shall be

brought against the corporation alone, and not against any person acting under the by-law, order or resolution."

The words used by the Legislature are very comprehensive, and would seem in terms to cover every case of an illegal by-law.

I think the Legislature has wisely provided, as a most important element in the scheme of municipal government, essential to the working of a complex system of local legislation, that, prior to the right to seek damages for any interference with private rights, the judgment of a Court shall be sought and obtained that the local law warranting such interference is illegal and beyond the limited authority given to the enacting body.

Right of the Public to Attend Council Meetings.

TENBY CORPORATION v. MASON.

[1908] 1 Ch. 457; 77 L. J. Ch. 230.

COURT OF APPEAL.

The borough of Tenby was incorporated under the Municipal Corporations Act, 1882. This Act contains no provisions as to the right of burgesses or the public generally to attend meetings of the Borough Council. Tenby, a burgess, claimed the right to attend such meetings. The corporation brought this action against him for a declaration that they had the right to exclude him from Council meetings and for an injunction. Kekewich made the declaration asked for and granted an injunction. The defendant appealed.

BUCKLEY, L.J., said, in part:—I will deal first with the alternative claim which the defendant makes in paragraph 2 of the defence, that the meetings of the council are public meetings, and that he is entitled to be present at them as a member of the public. In the case of proceedings before a Court of justice or a tribunal which has similar attributes, whether it be a Court in the proper sense of the word, or a tribunal which in substance is a Court exercising judicial functions, it is in this country a first principle that all proceedings shall be public. Any member of the public has the

right to come into a Court. But the Court has power to forbid him entrance, and may say: "Notwithstanding that you as a member of the public have that right, the Court has a higher right, the right to take away that which otherwise would be your right." This higher right is exercised by the Court in the interest of the public itself. The Court always sits to advance the public interest. The Court will, for instance, order witnesses to go out of Court if justice requires that they shall not hear the evidence as it is given, or may order women and children out of Court if the evidence is likely to be indecent. The Court in doing that is exercising a right on behalf of the public. There will be found in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (1) some observations as to what is a Court for the purpose of the observations which I have just been making, and it will be found there that, for instance, a meeting of the London County Council for granting music and dancing licenses is not for that purpose a Court. It seems to me that this meeting of the council of the borough was not a public meeting such that any member of the public had a right to go in there. It was not a Court; it was not a public place; the meeting was not a public meeting. No person had, simply as a member of the public, the right to say: "Open that door, I will come in."

The next point is whether the defendant as a burgess—a member of a limited class of the public—had a right to come in. There, it seems to me, I have to investigate the following as matter of principle. Where there is a governing body, a deliberative body, which is to control the interests and affairs of a large body of constituents, is there *prima facie* any right in a constituent to say: "I will be present at the deliberations of the deliberative body"? I think not. Whether it be the House of Commons, deliberating upon the interests of all the subjects of the realm, or whether it be a board such as that of the London and North-Western Railway Co., governing the interests of a large body of shareholders, or whether it be a meeting of the benchers of one of the Inns of Court to determine a question of the management of the property of the Inn or the government of the members, and so forth, it seems to me that *prima facie* the constituent is not entitled to say: "I will be present at the deliberations of the governing body." It may be in the interest of the body governed that the deliberations shall not be held in public. The persons whose duty it is to determine questions of policy and questions of government ought to be placed in such a position that they can express their views freely without

(1) 61 L. J. Q. B. 409; [1892] 1 Q. B. 431.

the risk of their becoming communicated to the public, to the disadvantage perhaps of the body whose affairs they have to govern. *Prima facie* the constituent has no right of access to the meetings of the deliberative body. Here the corporation with which we have to deal is in a sense a public body. It is the municipal corporation of this borough. It is a public body governing the affairs of those members of the public who are burgesses of the borough, but it is not public in the largest sense of the word. It is more analogous to the board of the London and North-Western Railway Co. or the Benchers of an Inn of Court governing domestic affairs. They are governing the affairs of the borough. It does not concern other persons who are not members of the borough. It seems to me that the burgess is not entitled to say: "I will come in and I will hear your deliberations." But all this must be controlled, no doubt, by anything which is found in the statute which governs the corporation. If there is anything in the statute, that must prevail. The Master of the Rolls has dealt with the provisions of this statute and of the Local Government Act, 1894, to which reference may be made as to other like authorities. I fail to find in the Act which creates this corporation anything which says that a burgess is entitled to access to the meetings of the deliberative body. In sec. 233, I do find that he is entitled to copies of the minutes of the proceedings of the council. He is entitled to know what they have done. But the Act contains no provision as to his being entitled to be present at the proceedings themselves. * * *

COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., were of the same opinion.

Municipal Relations with Undertakings under Exclusive Jurisdiction of the Dominion Parliament.

CANADIAN PACIFIC RAILWAY v. BONSECOURS.

[1899] A. C. 367, 68 L. J. P. C. 54.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The facts are given in the judgment.

LORD WATSON delivered the judgment of their Lordships:—

Part of the railway of the appellant company runs through the parish of Notre Dame de Bonsecours in the district of Ottawa and

Province of Quebec; and the respondents are the municipal authority of the parish, under the provisions of the Municipal Code of the Province of Quebec.

Section 92 of the British North America Act, 1867, assigns exclusively to the Legislature of each province the power of making laws in relation to matters coming within the classes of subjects therein enumerated. The class of subjects enumerated in sub-sec. 10 is:—

"Local works and undertakings other than such as are of the following classes:—

"(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

"(*b*) Lines of steamships between the province and any British or foreign country;

"(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces."

On the other hand, by sec. 91, sub-sec. 29, the exclusive legislative authority of the Parliament of Canada is extended to "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces."

It is not matter of dispute that, by virtue of these enactments, the Parliament of Canada had and have the sole right of legislating with reference to the matter of the appellants' railway. As it passes through the parish of Notre Dame de Bonsecours, the railway runs along a piece of ground belonging to one Julien Gervais, from which it is separated by a hedge, which is the boundary of the railway, and the property of the appellant company. Inside the hedge, and between it and the railway track, there is a ditch which has given rise to the present litigation. It is the property of the appellant company, and is part of the railway works.

On June 3rd, 1896, the rural inspector of the parish served the appellant company with a notice, requiring them, within eight days from its date, "à voir à nettoyer, réparer et mettre en bon état le fossé sud de votre voie, à l'endroit où elle traverse la terre portant le numéro huit des plan et livre de renvoi officiels de la dite municipalité, et appartenant à Julien Gervais." The appellant company did not comply with the notice, and the respondents, the corporation of the parish, brought an action against them in the Superior

Court of the Province, setting forth the terms of the notice, the failure of the appellant company to comply with it, and concluding that in respect of such failure they should be ordered to pay a fine of $200. The only defence set up by the company, to which they still adhere, was, that the regulation of matters to which the order of their inspector related, which the corporation were seeking to enforce by penalty, belonged to the Parliament of Canada, and not to the Parliament of the Province of Quebec.

In the Superior Court, Mr. Justice Melhiot gave judgment for the municipal corporation, on the ground that, notwithstanding the terms of the North British America Act, the ditch in question, and the company as its owners, were subject to the Municipal Code of the province. The case was then carried by appeal to the Court of Queen's Bench, when the judgment of the Court below was affirmed by a majority of four Judges to one.

The British North America Act, whilst it gives the legislative control of the appellants' railway, *qua* railway, to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so-called, applicable to those lines which were placed under its charge, should belong to the Dominion Parliament. It, therefore, appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation, competent to the Legislature of Quebec.

Whether the appellant company ought or ought not to prevail in this appeal depends upon what was the character of the railway ditch in question, and the real nature of the operation which the company were required to perform by the notice of June 3rd, 1896, which is the basis of the present suit. Ten or twleve words of plain unvarnished statement would have been very useful, much more so than the elegant and fanciful language by which the parties have endeavoured to explain, with the result of obscuring the facts. As to the structure of the ditch itself, there is no information; but it does appear from the terms of the respondents' declaration that from some cause or another it had become obstructed, so that the water which it contained escaped, and inundated the land of Julien Gervais. The company were required by the respondents' inspector, "nettoyer, réparer et mettre en bon état le fossé." Their Lordships read these words as simply amounting to a requisition that the company should clean the ditch, by removing the obstruction, and should restore the ditch to the same state in which it was before the obstruction occurred. They do not think that the verb "reparer" suggests that any structural alteration of the ditch was contemplated. The appellant company have persistently maintained that the work directed to be done by the notice would, if carried out, "have the result of affecting the physical condition of the railway, though it is not alleged that such condition would be thereby injuriously affected." These expressions look formidable, but they really mean no more than this—that the removal of the obstruction would affect the physical condition of the ditch, and that the ditch is part of the railway.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from. The appellant company must pay to the respondents their costs of the appeal.

Municipal Relations with Undertakings under the Exclusive Jurisdiction of the Dominion Parliament.

TORONTO v. BELL TELEPHONE.

[1905] A. C. 52, 74 L. J. P. C. 22.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The facts are stated in the judgment.

LORD MACNAGHTEN delivered the judgment of their Lordships:

This is an appeal from a judgment of the Court of Appeal for Ontario on a special case stated by agreement in two separate actions, in each of which the appellants, the corporation of the city of Toronto, claimed an injunction against the Bell Telephone Co. of Canada.

The claim was founded upon the contention that the telephone company was not entitled to enter upon the streets and highways of the city and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways without the consent of the corporation.

The company had been incorporated by a Dominion statute of April 29, 1880 (43 Vict. ch. 67), for the purpose of carrying on the business of a telephone company. The scope of its business was not confined within the limits of any one province. It was authorised to acquire any lines for the transmission of telephone messages "in Canada or elsewhere," and to construct and maintain its lines along, across, or under any public highways, streets, bridges, watercourses, or other such places, or across or under any navigable waters, "either wholly in Canada or dividing Canada from any other country," subject to certain conditions and restrictions mentioned in the Act, which are not material for the present purpose.

The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly accepts from the class of "Local works and undertakings" assigned to provincial legislatures "Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits

of the province"—sec. 92, sub-sec. 10 (*a*). Section 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company, the objects of which as defined by its act of incorporation contemplate extension beyond the limits of one province, is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Co. acquired from the Legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations as authorised by the Parliament of Canada. It appears, however, that shortly after the incorporation of the company doubts arose as to its right to carry on local business. The question was raised in the province of Quebec, and decided adversely to the company in the case of *Reg.* v. *Mohr* [1881] (1). In consequence of this decision, with which their Lordships are unable to agree, the company applied for and obtained from the Legislature of Ontario an Act of March 10, 1882 (45 Vict. ch. 71, Ontario), authorising it to exercise within that province the powers which the Dominion Act had purported to confer upon it. This Act, however, according to the construction placed upon it by the corporation (which, for the present purpose, their Lordships assume to be correct), makes the consent of the municipal council a condition precedent to the exercise of the company's powers in cities, towns, and incorporated villages.

The company was proceeding to construct its lines in the city of Toronto without having obtained the consent of the corporation, when the corporation brought the two actions which resulted in the Special Case the subject of the present appeal.

The case was heard in the first instance by Mr. Justice Street, who decided in favour of the corporation, but his decision was reversed by the Court of Appeal for Ontario, Maclennan, J.A., dissenting.

The view of Mr. Justice Street apparently was that, inasmuch as the Act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done

(1) [1881] 7 Quebec L. R. 183; 2 Cartwright, 257.

under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Chief Justice Moss of Ontario, "the question of the legislative jurisdiction must be judged of by the terms of the enactment and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction." If authority be wanted in support of this proposition it will be found in the case of *Colonial Building and Investment Association* v. *Att.-Gen. of Quebec* [1883] (2), to which the learned Judges of Appeal refer.

Maclennan, J.A., differed from the rest of the Court on one point only. He agreed in thinking that it would not be competent for a provincial legislature of itself to limit or interfere with powers conferred by the Parliament of Canada, but he seems to have thought that the Bell Telephone Co., by reason of its application to the Ontario Legislature, was precluded or estopped from disputing the competency of that legislature, and that the enactment making the consent of the corporation a condition precedent amounted to a legislative bargain between the company and the corporation to the effect that the company would not use the powers conferred upon it by the Dominion Parliament without the consent of the corporation. Their Lordships, however, cannot accept this view. They agree with the Chief Justice in thinking that no trace is to be found of any such bargain, and that nothing has occurred to prevent the company from insisting on the powers which the Dominion Act purports to confer upon it.

Their Lordships therefore are of opinion that the appeal must fail.

Mandamus Requiring Governors of College to Reinstate Professor.

IN RE WILSON.

18 N. S. R. 180.

SUPREME COURT OF NOVA SCOTIA.

The Board of Governors of King's College, Windsor, N.S., dismissed Prof. Wilson without notice. An application was

(2) [1883] 53 L. J. P. C. 27, 30; 9 App. Cas. 157, 165.

made for a mandamus to the Governors to reinstate the professor. The Supreme Court of Nova Scotia made an order for a writ of mandamus to issue requiring the Governors to justify their action.

THOMPSON, J., said in part:—Of the several objections taken to the proceedings of the Governors against Professor Wilson, the only one which, I think, we are called on to entertain, is the objection that those proceedings were entered on, and carried to a conclusion, without notice to the professor. Of the sufficiency of his offence to justify removal, I think the Governors were the judges; and as to the mode in which they received evidence, and deliberated on its effect, I do not think that they were bound to proceed according to the rules which would prevail in a court of law. Notice, however, of those proceedings by which one's property or rights of any kind may be affected, whether the proceedings be those of a Court, or of a private body, authorized to deliberate on such rights, is not merely a matter necessary to regularity,—it is, as Blackburn, J., said in *The Queen* v. *Saddler's Company* (1) at p. 423: "Of the very essence of justice," and the want of notice has been held, in a series of cases, to invalidate all subsequent proceedings, and to make it necessary to restore the party concerned to the status of which he has been deprived, no matter how flagrant or defenceless his conduct may seem to have been. *Dr. Bentley's Case* (2) was the first of these. *Rex* v. *Axbridge* (3) in 1777, appears to be an authority to the contrary (unless it is to be understood as proceeding only on the ground that the Town Clerk, who sought reinstatement, had declared over and over again that he would do no more of the business of the corporation, which his counsel admitted to be sufficient cause of a motion). This case has been claimed as over-ruling Dr. Bentley's case, but the former has been recognized as unshaken authority in more modern decisions. For example: in *Capel* v. *Child* (4), decided in 1832, it appeared that the Bishop of London had required the Vicar of Watford to nominate a curate, on the ground that the duties of the vicarage were being neglected. The Bishop had power to make the requisition, if the neglect appeared to him "upon affidavit, or of his own knowledge." Lord Lyndhurst, C.B., held that if a Bishop, in the exercise of such an authority, proceeded on affidavits, the vicar had a right to meet and answer such affidavits, and that if he proceeded on his own

(1) 10 H. L. Cases, 404.
(2) 1 Strange, 557.
(3) 2 Cowp. 523, in 1777.
(4) 2 Cr. & J., 578.

knowledge the vicar had a right to be heard, for the purpose of explaining his conduct; "he has a right to call witnesses for the purpose of removing the impression made on the mind of the Bishop; he has a right to be heard in his own defence." . . . "It is against every principle of justice that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce judgment." Bayley, B., concurred and said:—"When the Bishop proceeds on his own knowledge, I am of opinion, also, that it cannot possibly, and within the meaning of this act, appeal to the satisfaction of the Bishop, and of his own knowledge, unless he gives the party an opportunity of being heard, in answer to that which the Bishop states on his own knowledge, to be the foundation on which he proceeds. . . . If you remove a corporator, and it turns out that he was not summoned, however gross and flagrant his conduct may have been, he is entitled to be restored; and I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property, without his having an opportunity of being heard." This case is an answer to the argument that notice was not necessary, and that evidence was not necessary, because the Governors might proceed without what is called evidence, and on their own information and belief. I think they were not bound by the ordinary rules of evidence; but, even if they could act on their own knowledge or belief that Professor Wilson had published the letter complained of, as I suppose they could, and as the Bishop of London was empowered to do in reference to the neglect of the vicar, the obligation still existed to give notice,—at least the "notice of the intention to proceed to pronounce judgment." The observations of Bayley, B., in reference to a corporator, showed that the case did not turn on the point that the Bishop's decision was a judicial decision, in any technical sense of the word "judicial,"—it was a judicial decision only in so far as it affected the right of property of him who was subject to its operation, and was pronounced by one who had authority to decide on the facts which seemed to call for the sentence. The same may be said of the decision of the Governors of the College.

The case of *Cooper* v. *Wandsworth Board of Works* (5) removes all doubt on this branch of the subject. The defendant Board had the right to order the demolition of houses built in

(5) 14 C. B., N. S., 180.

violation of a building act. Erle, C.J., said:—"I cannot conceive any harm that could happen from hearing the party, before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss. . . . It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding, and that a district board, ordering a house to be pulled down, cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court, exercising judicial discretion upon the point; but the law, I think, has been applied to many exercises of power which, in common understanding, would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down." Willes, J., in the same case, said:—"I apprehend that a tribunal, which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice." Byles, J., concurred, and said:—"It seems to me that the board are wrong, whether they acted judicially or ministerially. . . . A long course of decisions, beginning with Dr. Bentley's case, and ending with some very recent cases, establish that although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature."

The cases cited by Parke, B., *In re Hammersmith Rent Charge* (6) and those of *Reg.* v. *Cheshire Lines Committee* (7) and *Reg.* v. *College of Physicians and Surgeons* (8), need only be mentioned to show how abundant and various the illustrations of the rule are in modern times.

The affidavits lead me to the conclusion that Professor Wilson had no notice that the Governors would deliberate on the offence charged and consider the propriety of removing him from his office on account of it. The letter, which he is charged with publishing, appeared on the 20th of October; he was removed on

(6) 4 Ex. 96.

(7) L. R. 8 Q. B. 344.

(8) 44 U. C. Q. B. 146.

December 5th; he swears that he had no notice whatever of the meeting which took place on the latter date. It is true that the deliberations of the Governor had commenced before that day, but when we know that some of those who then voted had not been present at the previous meeting, and must have decided on what they then heard, and when the affidavits in reply do not allege that notice was given of any previous meeting, I think I am justified in believing that no notice was given: at any rate, I would so hold at the present stage, when we are merely enquiring whether a further investigation of this case seems necessary or not.

We are met, however, at the outset of this discussion, by the objection that all enquiry into complaints in connection with the affairs of this corporation are beyond the cognizance of the courts of law, because they are subject to a private jurisdiction—viz., that of the Visitor of the College, who can remove an officer, or restore him, and to whom an appeal lies on behalf of any officer who is aggrieved. I think there are plain features which distinguish this college from those institutions in which the Visitor has the wide range of authority which the common law generally attaches to the office. * * *

The objection was made by counsel for the Governors that Professor Wilson's office was not one of those in respect of which such a remedy as mandamus should be granted, but it seems to me to be such an office as those offices in respect of which the remedy has been given in some of the cases which I have cited; and, in addition to what appears in those cases, I may quote the Lord Chancellor's (Hatherly's) expression in *Osgood* v. *Nelson* (9): "I apprehend, . . . as has been stated by the learned baron who has delivered in the name of the judges, their unanimous opinion, the Court of Queen's Bench has always considered that it has been open to that Court, as in this case it appears to have been considered, to correct any court, or tribunal, or body of men who may have a power of this description, a power of removing from office, if it should be found that such persons have disregarded any of the essentials of justice in the course of their inquiry." The expression of Baron Martin, delivered in the name of all the judges, and which was thus approved, was in these words:—"There can be no doubt, my lords, that the courts of law in this country would take care that any proceeding of this kind should be conducted in a proper manner; that the person it was proposed to remove should have every opportunity of cross-examining the witnesses brought forward against him, or of

(9) L. R. 5 E. & I., App. 649.

otherwise opposing the case set up against him; that he should have the power of calling witnesses to prove his own case; and that he should have every possible opportunity which a person can have, according to the law and constitution of the country, of defending himself and of establishing that he is not liable to amotion."

Then it was said that the applicant had another remedy,—that he could sue for damages for wrongful dismissal;—a remedy of that kind does not seem to have been considered so adequate, certain and specific as to induce the court to refuse reinstatement in the cases which I have cited. * * *

For the reasons which I have thus set forth, I think that the rule *nisi* should be made absolute for the writ of mandamus to go to the Governors. This will not be the peremptory writ, but the writ which will bring before us, by the return, all the justifications which the Governors choose to present.

Powers of Boards of Education as to Dismissal of Teachers.

DUNN v. BOARD OF EDUCATION.

7 O. L. R. 451; 3 O. W. R. 393.

CHANCERY DIVISION ONTARIO.

BOYD, C.:—An *ex parte* injunction has been obtained to restrain the defendants from adopting, acting on, receiving, or dealing with a resolution of the school management committee of the Board of Education for Toronto, and upon this foundation two motions come before me for decision: first, to commit some of the trustees composing the defendants' board for contempt in disregarding the order of the Court; and second, to continue and make absolute till the hearing the said preliminary injunction.

The second matter is of more general importance, and I first deal with it. The writ of summons claims by indorsement damages, and also *quia timet*, that the defendants be restrained from taking action on the recommendation of the said committee favouring the dismissal of the plaintiff as a school teacher.

The chief matters of complaint set forth in the affidavits are, that there was investigation touching the plaintiff's position as teacher before the committee, when she and other teachers were examined privately: whereas her submission is, that she should have been present throughout and have been assisted by legal counsel, with power to examine and cross-examine witnesses, and also to be allowed to be present and substantiate counter charges made by her against the principal.

The report of the committee was based upon a so-called private report of the public inspector, sent upon request to the principal (wherein was corrected an error in his public report), and the further submission is, that this report could not be regarded, and that the whole action of the committee was irregular, improper and unjust. *Prima facie*, this seems to present a case of hardship, yet the course contemplated by the plaintiff would be fraught with detriment and disaster to the best interests of the school. The power of dismissal if deemed needful without parley or investigation would appear to be essential to proper discipline. But apart from consequences the question is, whether any method of redress by way of injunction is open to the plaintiff. The solving of this question depends upon the relative situation of the two parties to this litigation.

The defendants are a statutory body with corporate powers, and its members are selected by vote of the ratepayers of the city. Their powers and duties and responsibilities are defined and measured by the Ontario Public Statutes in that behalf. The funds they administer are derived from legal taxation, out of which they receive no compensation. They are honorary trustees of the property held for the purpose of public education, but their relation towards the staff of teachers is not in any legal or equitable sense fiduciary.

Their power and their duty is to employ "teachers, officers, and servants" (such is the collocation of the statute) and to make provision for their compensation. The pertinent clause is that which enables the board "to appoint and remove such teachers, officers, and servants, as they may deem expedient:" 1 Edw. VII., ch. 40, sec. 16 (7) (O.), 1901.

This language dates back to 1891, when it appears as 54 Vict. ch. 57, sec. 14 (8) (O.). Its earlier form appears in R. S. O. 1887, ch. 226, sec. 25, in two portions: (9) "*To remove, if they see fit*, and in case of vacancies, appoint a legally qualified master and assistants in the high school, and to fix their salaries and pre-

scribe their duties," and (10) "To appoint such other officers and servants in the high school as they may judge expedient, and fix their remuneration."

Hence the legislature has itself interpreted the words, "as they may judge expedient," to be synonymous with the "if they see fit."

These words thus used, go back in the statute as far as 1853, 16 Vict. ch. 186, sec. 11 (secondly). I have traced them no further.

The power to remove given to the Board of Education is one to be exercised by them in their discretion when they deem it expedient or fitting to act in view of the interests of the school.

It appears to me plain that the members of the board are the judges of what they deem expedient, in each particular case. In the matter of removal or dismissal of a teacher, they may institute an investigation, or they may dispense with it, and proceed on their own conviction of what is right, from a general knowledge of the situation. I see no reason why they may not validly act on the information contained in a report of the provincial inspector, even though it be irregularly obtained—if they are satisfied with it. The board may remit the matter to a committee and act on its report, and that is the course of action which is here deprecated by the plaintiff, and to restrain which the injunction has been obtained.

If there be a wrongful dismissal in point of law, which is contrary to the terms of the contract, that is a subject for compensation in damages, in course of ordinary litigation: or a matter to be exploited before the electorate upon any subsequent election to fill vacancies in the board.

Now, the authorities relied upon to sustain the injunction are of very different character from the present case. They afford examples of charitable endowments, in which the property is clothed with a trust for the maintenance of a schoolmaster or other officer. The jurisdiction arises in respect of trustees over charitable subjects, whose conduct is under the control and supervision of the Court of Chancery. The distinction between the two classes of cases is made plain by two decisions of Lord Langdale, one of which was cited as in favour of the plaintiff. In *Willis* v. *Childe* (1) jurisdiction by injunction was exercised because it was a case of existing charitable trust, which, by the very terms of its constitution, was made subject to the control of the

(1) 13 Beav. 117.

Court (see pp. 129, 130). With this contrast *Attorney-General* v. *Magdalen College, Oxford* (2), where the duty involved was not the execution of a trust as understood by the Court, and relief was refused. On the same line and to the same effect is *Whiston* v. *The Dean and Chapter of the Cathedral Church of Rochester* (3).

It is difficult to distinguish the position of this board of education from that of the trustees commented on in *The Queen* v. *The Governors of Darlington Free Grammar School* (4). There it was said, where the trustees may appoint and may dismiss a schoolmaster in their discretion, the office in its legal qualities and consequences was *ad libitum* only.

A notable case greatly discussed by the most eminent counsel and elaborated with unusual care by the V.-C. Malins, is *Hayman* v. *Governors of Rugby School* (5), where nearly all the authorities were considered. Lord Denman's language, cited by the Vice-Chancellor, may be repeated as generally appropriate to this class of case: "The governing body 'were formed to remove any master whom according to their sound discretion they think unfit and improper for the office; and as that discretion may possibly be well exercised for defects of various kinds, not amounting to misconduct, so there may be misconduct incapable of proof by witnesses, but fully known to the governors themselves, etc. * * * They might be reasonably satisfied of the truth of the charges, without possessing any means of proving them by evidence, and even if they had no charge before them, they might still in the exercise of their discretion remove him for reasonable cause. * * * There may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof:'" *ib.*, pp. 72, 73.

And the Vice-Chancellor himself uses language very pertinent to this particular contest: "A man's scholarship may be perfect, his character admirable, and yet, for want of the power to control subordinates and govern boys, he may be wholly unfit for a schoolmaster:" p. 85.

Another case much in point is *Marquis of Abergavenny* v. *The Bishop of Llandaff* (6), in which by statute the bishop had power to license if he shall think fit after due examination and inquiry. It was held that the bishop had an absolute discretion

(2) (1847), 10 Beav. 402 at p. 409.
(3) 7 Ha. 552 at p. 557.
(4) (1844), 6 Q. B. 682, at p. 715.
(5) (1874), L. R. 18 Eq. 28.
(6) (1888), 20 Q. B. D. 460.

as to ascertaining the requirements of the parish, and that he was not bound to institute a formal inquiry of a judicial nature for that purpose, calling in and hearing the party interested. And the Court decided that the bishop might get his information from any source he thought reliable.

No power of dismissal is given in terms by the Public School Act of Ontario, yet it was held that inherently such power exists in the case of employer and person employed, and the Court is not concerned with the reasons on which such power of dismissal is exercised: *Raymond* v. *School Trustees of the Village of Cardinal* (7).

I fail to see any grounds alleged or suggested on the materials which would attract the equitable jurisdiction of the Court. No irreparable damage can result to the plaintiff if she loses the situation, for there is no impeachment of her character or her capacity for teaching, but only of unsuitability for her present position. The board should be allowed to decide whether she is to be retained or removed in the interests of the institute. They may choose to act or decline to act on the recommendation of the committee, but in my best judgment they should not be interfered with by the Court in any action they may be advised to take. As I view the action, it is premature, and the injunction should not be longer continued. The costs will be dealt with as in the cause.

Upon the motion to commit, one is influenced by the fact that the injunction was improvidently or erroneously granted. Lord Eldon said: "On an application against persons guilty of a breach of the order, the Court would forget its duty if it did not give to them the benefit of the fact that the order ought not to have been made:" *Drewry* v. *Thacker* (8).

The case of *McLeod* v. *Noble* (9) has been misread as if it applied to every case where the order could not stand. That was a highly exceptional case, in which a conflict arose between the Dominion authorities and the Provincial Court, and it was held that the attitude of the Court was *ultra vires*. So that the order made was a nullity and void. But where, as here, the order is only voidable, and would be good if not moved against, the general rule is, that while it stands unavoided or not appealed from, it must not be lightly regarded by those who are enjoined. What was done in this case was not a violation of the terms of the order, but it was in contravention of its reasonable import.

(7) 14 A. R. 562.

(8) (1819), 3 Swanst. 529 at p. 546.

(9) 28 O. R. 528.

The order contemplated the retention of the *status quo* of the plaintiff as teacher till the matter complained of was further considered by the Court. The board proceeded to suspend the teacher, which was to deprive her of the main part of her functions in a manner not contemplated by the statute, and possibly with a view to turn the edge of the injunction. But I give credit to the disclaimer of the active members inculpated, and accept their statements under oath that no disrespect was intended to the Court, and will only mark my sense of what was done by directing the costs of the motion to go in any event to the plaintiff in the cause.

Relations Between Municipal Councils and School Boards.

TORONTO PUBLIC SCHOOL BOARD v. TORONTO.

4 O. L. R. 468; 1 O. W. R. 443.

COURT OF APPEAL FOR ONTARIO.

Application by the School Board for a mandamus to the corporation of the city of Toronto to levy certain sums of money alleged by the School Board to be required for school purposes. The City Council had received the estimate of the School Board and had struck off certain items and reduced others.

Street, J., allowed certain reductions and disallowed others.

Both parties appealed to the Divisional Court, which allowed the appeal of the School Board. The city appealed to the Court of Appeal.

The judgment of the Court was delivered by OSLER, J.A.:—The facts of the case are so fully set forth, and the questions involved so fully, and to my mind so satisfactorily dealt with in the judgment of the Divisional Court, that I feel it to be unnecessary to enter upon them at length, and would content myself with simply recording my assent to the judgment, were it not that counsel for the defendants have so ably and earnestly argued for a construction of the statute which would enable them to place some check or limitation upon what is complained of as the extravagant expenditure of the School Board.

The main question is whether the defendant corporation has the right to any, and if so, to what extent, to control, modify, cut down or diminish the estimates submitted by the plaintiffs of the expenses for the current year of the schools under their charge.

When the status of the parties is considered, and their respective duties and obligations properly appreciated, the question is solved and appears to be a very simple one.

Each of the parties is a municipal corporation—the defendants the corporation of the municipality, of which the council is the governing body; and the plaintiffs the public school board of the same municipality. The council and the school board are elected by different classes of ratepayers, though many of them are electors in both classes, and to their own constituents each is responsible. Each corporation is bound to the performance of certain statutory duties within the range of which, except in so far as they are reciprocal, neither is subject to be controlled by the other.

Section 56 and sec. 65 and its sub-sections of the Public Schools Act, 1 Edw. VII., ch. 39, contain the principal provisions relating to the powers and duties of the school board. It is sufficient for the purpose of illustration to mention these, but there are other sections also, their powers under which are not less clear. Section 65 enacts that "it shall be the duty of the trustees of all public schools, and they shall have power," to do the several things specified in the subsequent sub-sections. These powers and duties are in many respects described in general language, and some of them arise by implication, as is pointed out in the judgment below. The exercise of some powers is discretionary, and where that is the case it is at the discretion of the trustees only, except where specially provided, as for example in secs. 76 and 78.

The due execution of these powers by the trustees involves, it is needless to say, the expenditure of money; and in the case of a municipality like Toronto, with a registered city school population of nearly 35,000, for whose accommodation it is the duty of the trustees to provide, and with forty-five school houses under their charge, that expenditure is necessarily very large. How is it to be provided for? With the exception of the Government grant, the means for it must be obtained in some way from the ratepayers of the municipality, and it is evident that it would not only be inconvenient, but it would in more than one respect cast an additional burden upon the ratepayers, if the trustees had to provide a separate staff of officials to strike and levy the necessary

rate. Every motive of convenience and economy points to the council of the municipality as the most suitable body to provide, and through their own officials to collect with the ordinary municipal taxes of the year whatever is required for the purposes of school expenditure; and that, accordingly, has been for many years the policy of the Legislature indicated in the various School Acts passed from 1850 to the present time. This, however, having regard to the constitution of the school corporation and their independent powers of action, by no means suggests that the council has, or should have, a controlling hand over their expenditure. They are in no sense the agents of the council as they may be said to have been under the School Act of 1847, 10-11 Vict. ch. 19 (C.). Rather is the contrary the case. It is well put in the respondents' reasons against the appeal, that school trustees are the representatives of the people as to school expenditure; just as aldermen—members of the council—are their representatives as to street improvements and municipal government, etc. The method prescribed by the Act by which the trustees are to procure the funds they require is an extremely simple one. They are "to submit to the municipal council on or before the first day of August, or at such time as may be required by the council, an estimate of the expenses of the schools under their charge for the current year:" sec. 65 (9). This being done, sec. 71 (1) enacts that "the council shall levy and collect upon the taxable property of the municipality in the manner provided by this Act and in the Municipal and Assessment Acts such sums as may be required by the trustees for school purposes, and shall pay the same to the treasurer of the public school board from time to time as may be required by the board for teachers' salaries and other expenses."

Now, as there is not a word in the Act which indicates that the council has any voice in the control or management of the affairs which are committed by law to the school board, it might be thought that these two sections made it tolerably clear that, the trustees on their side submitting to the council an estimate of what they required to meet their contemplated expense for lawful school purposes, the council's duty simply was to levy and collect and pay out, from time to time as required, the moneys shewn by the estimate to be necessary for such purposes.

The argument for the defendants seems to rest wholly upon the meaning they attribbute to the words "submit" and "estimate" in sec. 65 (9), the latter, it is said, implying something proposed or deliberative and not final, and the former a submission of their proposed or tentative estimate to the better judg-

ment and final decision of the council. With this contention I entirely disagree. Within the range of the subjects in respect of which the school board must, or may, exercise their powers or duties, they are the judges of what expenditure is necessary and proper; the estimate of that is their estimate, and, when they have sent it in to the council, their final estimate, just as the estimates of the council under sec. 404 of the Municipal Act, R. S. O. 1897, ch. 223, for the lawful purposes of the municipality, are their final estimates of the sum to be raised therefor by by-law under section 405. It can hardly be necessary to say that in both cases the word is used as descriptive of its subject-matter. An estimate is still an estimate even when it represents the final judgment of the body whose right and duty it is to prepare it, of what is required; and when that body "submits" it to the council the estimate is merely laid before it or brought under its notice to be dealt with as required by sec. 71 (1).

To summarize: the right of the school board in preparing their estimate is to include therein everything that, in their best judgment, may be needed to meet legitimate expenditure—that is to say, expenditure upon objects or for purposes within their lawful authority; and their duty to the council is to prepare it in such a manner as to shew generally what these purposes are and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* the school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this, in my opinion, the council cannot go.

I refer to *Canadian Pacific R.W. Co.* v. *City of Winnipeg* (1), and to *Public School Trustees of Nottawasaga* v. *Corporation of Township of Nottawasaga* (2). The following passage from the judgment of Burton, J.A., in that case is apposite: "The trustees are the parties entrusted by law with the management of the school section and the parties to determine on the amount required to be levied for the purpose; and when the Legislature enacted as a matter of convenience that the rates should be collected in the manner provided for the collection of the taxes, I should have supposed that no further change was intended than the substitution of one collector for another."

The provisions of the Municipal Act respecting the duties of the board of control in cities, particularly secs. 277 (*a*) (8),

(1) (1900), 30 S. C. R. 558. (2) (1888), 15 A. R. 310.

to which we have been referred since the argument, do not affect the question. There is nothing in any of them to suggest that the board of control are authorized to deal with the estimate of the school board in any other manner than I have already pointed out. Indeed, sub-section 8 rather aids that view, as it merely requires the various public bodies mentioned therein, including the school board, to "furnish" to the board of control their several and respective annual estimates.

It is unnecessary to scrutinize in detail the various items of the estimate. They seem to me quite sufficient, supplemented as some of them have been from time to time, especially the item for repairs and alterations to school property, by further information while under the consideration of the council, to shew the subject of the proposed expenditure, and whether such subject is within the powers of the board. As regards the item over which the main battle has been fought, and which, indeed, seems to have provoked the council into litigation, viz., for school teachers' salaries, I have been unable to feel any doubt. I can see nothing illegal in the agreement under which the teachers were re-engaged at the end of the year 1900, looking to, or providing contingently for, an increase of the salaries of the same teachers by the new board of the following year. The council is not entitled to call for or to inspect the contracts which the board make with the teachers; nor is it necessary, in order to entitle the board to place the item of salaries in their estimate, that contracts should then have been actually entered into. If the sum required is what the board, in good faith, think necessary, having regard to the number of teachers and the arrangements they contemplate making with them, the council must be satisfied.

For these reasons, I think the appeal should be dismissed.

Ballots.

WOODWARD v. SARSONS.

L. R. 10 C. P. 733, 44 L. J. C. P. 293.

COURT OF COMMON PLEAS.

A petition was presented against the election of Sarsons. The deputy returning officer at one poll marked on each ballot the number of the voter appearing on the roll. The number so marked

was 294. At another poll the deputy marked 20 ballots by the direction of electors who were unable to read and each was separately wrapped up in the declaration of inability to read and put in the ballot box.

Appendices A and B contain exact illustrations of thirty-two ballot papers.

BRETT, J., said in part:—In this case, therefore, where the objections to the particular votes have been determined, the effect of the mistakes on the result of the election will be exactly known. If so, there is no room for speculation or doubt as to whether a majority *may or may not have* been prevented from voting with effect. Those who did not vote were not prevented by the errors which occurred; it will be seen how the majority of those who did vote was affected by such errors. In this case, therefore, it becomes necessary, not by way of scrutiny, but in order to determine whether the majority has been prevented from voting with effect, to determine upon the validity or invalidity of the votes which were given, and to which objection has been taken. In order to determine this part of the case, it is necessary to consider and determine the construction of the Ballot Act. Now, first, the Act is divided into the principal part which contains certain sections, and two schedules which contain certain rules and forms; and by section 28, "The schedules and the notes thereto and directions therein shall be construed and have effect as part of this Act." The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing "directions." Comparing the sections and the rules, it will be seen that, for the most part, if not invariably, the rules point out the mode or manner of doing what the sections enact shall be done. And in schedule 2, the first note states: "The forms contained in this schedule or *forms as nearly resembling the same as circumstances will admit* shall be used." And in the ballot paper, as given in the schedule, is: "*Directions* as to printing ballot paper," and, "Form of *directions for the guidance* of voters in voting," &c. These observations lead us to the conclusion that the enactments, as to the rules in the first schedule, and the forms in the second, are directory enactments as distinguished from the absolute enactments in the sections in the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act, and which must be determined before determining what effect such breach has upon a vote on the election, the general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. The

2nd section enacts, as to what the voter shall do, that: "The voter having secretly marked his vote on the paper and folded it up so as to conceal his vote, shall place it in an enclosed box." This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is that the voter shall mark his paper *secretly*. How he shall mark it, is in the directory part of the statute. By rule 25, "The elector on receiving the ballot paper shall forthwith proceed into one of the compartments in the polling station, and *there mark his paper*, and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot-box." This rule, it will be observed, does not yet say how the paper is to be marked. But in schedule 2 is given the "form of ballot paper," and appended to this form is a note, which, by the 28th section, is to be construed and have effect as part of the Act. This note contains the form of directions for the guidance of the voter in voting: "The voter will go into one of the compartments and with the pencil provided in the compartment place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X." This is the only enactment throughout the statute as to the manner and form in which the voter is to mark the ballot paper. And therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly, but it would be sufficient that the manner of marking the paper should be obeyed substantially. If these two enactments be so obeyed, there is no material breach of the Act. The extent of error, which is to vitiate so as to annul the ballot paper, is further to be gathered from the statute itself. By sec. 2: "Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is *written or marked by which the voter can be identified*, shall be void, and not counted." It is not every writing or every mark, besides the number on the back, which is to make the ppaer void, but only such a writing or mark as is one by which the voter can be identified. So in rule 36: "The returning officer shall report, &c., the number of ballot papers rejected, and not counted by him under the several heads of, first, want of official mark; secondly, voting for more candidates than entitled to; thirdly, *writing or mark by which voter could be identified;* fourthly, *unmarked or void for uncertainty.*" And then in schedule 2 in the note to the form before referred to, we have this warning:

"If the voter votes for more than candidates, or places *any mark* on the paper *by which he may be afterwards identified*, his ballot paper will be void, and will not be counted." The result seems to be, as to writing or mark on the ballot paper, that if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all, or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted. Or, to put the matter affirmatively, the paper must be marked so as to shew that the voter intended to vote for some one, and so as to shew for which of the candidates he intended to vote. It must not be marked so as to shew that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all, or for which candidate he intended to vote, nor so as to make it possible, by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted.

If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void, though the other directions in the statute are not strictly obeyed. If these requirements are not substantially fulfilled, the ballot paper is void, and should not be counted; and if it is counted, it should be struck out on a scrutiny. The decision in each case is upon a point of fact to be decided, first, by the returning officer, and, afterwards, by the election tribunal on petition.

Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station No. 130 were void, and ought not to be counted. There was a mark on them by which, on reference to the burgess roll, the way in which the voter had voted could be identified.

As to the twenty ballot papers at the polling station No. 125, there was a breach by the presiding officer of the directions in rule 26, but there was no breach for which by any enactment the ballot papers can be rejected. The votes were given in the way prescribed, but the presiding officer dealt with the declarations erroneously. We are of opinion that those votes were properly counted. As to the ballot papers in Appendix A, No. 638 is clearly void, and must be disallowed. We, with some hesitation, disallow Nos. 844 and 889. There is no cross at all, and we yield

to the suggested rule that the writing by the voter of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter. But we cannot think that the mere fact of two crosses being placed, as in 433 or as in 928, ought to vitiate the ballot paper. There can be no doubt as to the intention to vote, and no doubt as to the intention to vote emphatically for the one candidate. If there were evidence of an arrangement that the voter to indicate that it was he that voted, who had used the ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the paper, upon such proof being made, should be rejected. But the mere fact of there being two such crosses, is not, in our judgment, a substantial breach of the statute. Neither is the mere fact of an additional mark such as is found in 926, nor the mere fact of the peculiar form of cross in 1,364 and 641, nor the marks on 1,726, 2,140, 3,562 or 911, though in these cases also extrinsic evidence of arrangement might make such peculiarities indications of identity. We think that, inasmuch as the ballot paper was handed in by the voter as a vote, the mark on 875 substantially indicated that the voter intended to vote for the candidate against whose name it is placed, and that the paper ought to be allowed. And we think the same reasoning applies to 117, 155, 190, 505, 174, 183, 842, 1,413, in which the cross is placed on the left hand side of the candidate's name, instead of on the right hand side. The substance of the direction in the note in schedule 2 is fulfilled, which is, in our opinion, that the voter should clearly indicate the candidate for whom he intends to vote. If this be done substantially and the absolute enactment as to secrecy be observed fully, we think the statute is satisfied. For the same reasons we, in Appendix B, disallow No. 410, but allow all the rest.

APPENDIX A.

844.

1	SARSONS.	Sanen.
2	WOODWARD.	

889.

1	SARSONS.	Sarsons.
2	WOODWARD.	

433.

1	SARSONS.	× ×
2	WOODWARD.	

926.

1	SARSONS.	×
2	WOODWARD.	

On 926 a × in pencil had evidently been rubbed with a damp finger as shewn.

928.

1	SARSONS.	×
2	WOODWARD.	

928 Had evidently been marked with a × in ink and folded up, thereby making a corresponding mark on the other part of the paper.

1364.

1	SARSONS. ×	×
2	WOODWARD.	

1364 Had evidently been marked with a × in ink and folded up, thereby making a corresponding mark on the other part of the paper.

1426.

1	SARSONS.	× ×
2	WOODWARD.	

1726.

1	× SARSONS. ×	×
2	WOODWARD.	

2140.

1	SARSONS.	× |
2	WOODWARD.	

3562.

1	SARSONS.	× ¶
2	WOODWARD.	

875.

1	SARSONS.	/
2	WOODWARD.	

641.

1	SARSONS.	*
2	WOODWARD.	

911.

1	SARSONS.	×
2	~~WOODWARD.~~	

The name "Woodward" has a pencil line through it, diagonally across the paper.

638.

1	SARSONS.	×
2	WOODWARD.	

E. Prews.

This ballot paper bears the name of the voter, E. Prews, which is to be found on the burgess roll.

117.

× 1	SARSONS.	
2	WOODWARD.	

175.

1 ×	SARSONS.	
2	WOODWARD.	

190.

1 ×	SARSONS.	
2	WOODWARD.	

505.

× 1	SARSONS.	
2	WOODWARD.	

174.

1	×SARSONS.	
2	WOODWARD.	

183.

1	×SARSONS.	
2	WOODWARD.	

842.

1	×SARSONS.	
2	WOODWARD.	

1413.

1	×SARSONS	
2	WOODWARD.	

APPENDIX B.

1290.

1	SARSONS.	
2	WOODWARD.	×

×

3672.

1	SARSONS.	
2	WOODWARD.	×

×

1632.

1	SARSONS.	
2	WOODWARD.	×

On 1632 a × in pencil had evidently been rubbed with a damp finger as shewn.

410.

1	SARSONS.	
2	WOODWARD.	CW ×

1374.

1	SARSONS.	
2	WOODWARD.	×

This paper was torn through the middle where indicated by the dotted line.

1391.

1	SARSONS.	
2	× WOODWARD.	

2592.

1	SARSONS.	
× 2	WOODWARD.	

2619.

1	SARSONS.	
× 2	WOODWARD.	

3641.

1	SARSONS.	
2	× WOODWARD.	

3642.

1	SARSONS.	
2	× WOODWARD.	

NOTE.—The principles laid down in *Woodward* v. *Sarsons* have been frequently applied by Canadian Courts. It must be remembered that the statutory requirements under Dominion and Provincial Acts differ materially from those of the Ballot Act in England. This particularly applies to the requirement that a cross shall be made.

Unseating Reeve Not Properly Elected.

TOD v. MAGER.

20 W. L. R. 537, 21 W. L. R. 203.

COURT OF KING'S BENCH AND COURT OF APPEAL FOR MANITOBA.

Application by Tod for leave to file an information in the nature of *quo warranto* calling on the respondent Mager to shew by what authority he held office of Reeve of the Municipality of St. Vital.

COURT OF KING'S BENCH.

ROBSON, J.:—From the material adduced it appears that the applicant is a qualified elector of the municipality.

The applicant and respondent were candidates for election as Reeve of the municipality for the present year. They were both duly nominated on the 5th December last. The voting would have taken place on the 19th day of that month.

After the nomination, objection was taken before the Returning Officer that the applicant, being a Noxious Weed Inspector of the Municipality, was a paid officer and disqualified under sec. 53 of the Act. The Returning Officer gave effect to this objection, and put an end to the contest by declaring the respondent elected. That the Returning Officer so acted without authority is clear: see *Pritchard* v. *Mayor of Bangor* (1).

But it is said that *quo warranto* will not lie, and that the remedy was by petition. Sections 217 and 218 of the Municipal Act are referred to. They are:—

217. A municipal election may be questioned by an election petition on the grounds—

(a) (Corrupt practices, not in question here).

(b) That the person whose election is questioned was at the time of the election disqualified; or

(c) That he was not duly elected by a majority of lawful votes.

218. A municipal election shall not be questioned on any of the above grounds, except by an election petition.

The question here in brief is: might the return have been questioned under sec. 217, clause (c)?

Sections 217 and 218 are almost identical with sections 87 and 88 of the English Municipal Corporations Act, 1882. Section 225 of the English Act says: "225 (1). An application for an information in the nature of a *quo warranto* against any person claiming to hold a corporate office shall not be made after the expiration of twelve months from the time when he became disqualified after election."

My attention has not been called to any such provision in the Manitoba Act.

I am referred, on behalf of the respondent, to *The Queen* v. *Morton* (2), where, at p. 41, A. L. Smith, J., said: "It was said that these two sections, of themselves, did away with proceedings by way of *quo warranto* excepting in cases of disqualification arising after election, and a passage in the judgment

(1) 13 App. Cas. 241, 250, 253. (2) [1892] 1 Q. B. 39, 41.

of Lord Halsbury in *Pritchard* v. *Mayor of Bangor* (1) was read in that behalf. * * * It is not necessary to hold, and I do not hold, that in no case will proceedings by way of *quo warranto* lie excepting in the case of disqualifications arising after election. It is, however, clear that proceedings by way of *quo warranto* are abolished by the 87th section of the Act of 1882 in cases which come within that section; or, in other words, where a petition will lie, *quo warranto* will not. The question is, does the present case fall within either sub-sec. (c) or (d)? for, if it does, the rule must be discharged."

It is evident from *The Queen* v. *Beer* (3) that, even in the face of the English sec. 225, the remedy by *quo warranto* is taken away only where an election petition will lie.

In *The Queen* v. *Morton* (2) the facts were, that at an election of an alderman for a borough there were two candidates, one of whom was the Mayor. The Mayor presided and voted for himself, which caused an equality of votes. He then gave the casting vote in his own favour, and declared himself elected. The rule for *quo warranto* was discharged, because the complaint was either disqualification or that the defendant was not duly elected by a majority of lawful votes, either of which grounds might have been the subject of petition.

Is the real complaint here that the respondent was not duly elected by a majority of lawful votes? If it is, the leave cannot be granted.

I think clause (c) of sec. 217 was intended to extend to cases where there had actually been a vote. The evils to be rectified under Part III. of the Act are corrupt practices or the exercise of the privileges of the Act by those to whom they are not accorded, whether as candidates or voters. The legislature would contemplate the carrying out of the election law by the named officers. The usurpation of office in disregard of the methods authorized was left to common law remedies.

I think an objection to a petition that the case was not within sec. 217 would have been much stronger than is the objection to *quo warranto*.

Tod's alleged disqualification for election cannot be regarded now, that being a matter to be dealt with in the manner prescribed by the Act. He was a candidate and had a right to go

(3) [1902] 2 K. B. 693.

to a vote—all questions of qualification being left to petition proceedings: *Pritchard* v. *Bangor, supra.*

I do not find anything in the other matter raised to justify discussion of them.

The order for leave will go as asked.

Mager appealed to the Court of Appeal.

COURT OF APPEAL.

HOWELL, C.J.M.:—Section 71 of the Municipal Act provides that the electors shall annually on the third Tuesday in December elect the members of the council, "except such members as have been elected at the nomination." Section 84 requires that "a meeting of electors shall be held in each year for the nomination of candidates." Section 86 declares that "the clerk of the municipality shall be the returning officer to preside at such meeting." By sec. 87, "the time for receiving nominations shall be between the hours of twelve o'clock noon and one o'clock in the afternoon;" and by sec. 88, it is provided that, "if only one candidate for the office of mayor or reeve has been nominated within the time limited, the returning officer or chairman shall declare such candidate duly elected." Section 89 provides that, if more candidates are nominated, "the returning officer or chairman shall announce the same and make known to the electors present the time and place" when and where the polls will be opened; and by sub-sec. (a) of that section it is provided that if more candidates than the required number are nominated, "any one of them may, before two o'clock on the day following the nomination day, tender his resignation, which will be accepted by the returning officer when a sufficient number of them remain for election."

It seems, then, that the statute requires a meeting of electors over which there shall be a presiding officer; and that at the meeting and between noon and one o'clock the nomination shall take place; that, if there is but one person nominated, the presiding officer shall declare him elected; and this person is, by sec. 71, called a person "elected at the nomination;" and the presiding officer at the meeting shall—if there are more than one candidate —"announce the same and make known to the electors present" the time and place of voting. Plainly this shall all take place at the meeting of electors, or, in other words, at the nomination meeting.

Sub-section (a) of sec. 89 makes one exception to this, and allows the returning officer apparently to act otherwise in the single

case where, within 25 hours, a rival candidate tenders his resignation to that officer.

In this case there were two candidates nominated, and the returning officer duly made the announcements required by sec. 89. The next day, and, of course, after the meeting was over, that officer, believing that one of the candidates was disqualified, declared the other one, the defendant, duly elected; and the latter has taken the office and is acting as if elected.

The action of the returning officer was clearly illegal: *Pritchard* v. *Mayor of Bangor* (1). He had no power whatever to decide this question and no power to arrest the election proceedings commenced by him.

The defendant was not elected either at the nomination or at the polls.

If the returning officer had, at the nomniation, treated the defendant as the only candidate, and had declared him elected, then he would have been elected at the nomination; and, although the action of the returning officer would have been illegal, the remedy would be by petition under sec. 217 and following sections: *Harford* v. *Linsky* (4). It seems clear that, if there is a remedy by petition, then there is no remedy by *quo warranto*: *The Queen* v. *Morton* (2), *The King* v. *Beer* (3).

It is not pretended that the defendant was elected at the nomination, nor was there an election at the polls. It is not a case of the defendant having been unlawfully elected at the nomination, for, as above mentioned, the returning officer took the opposite position at the nomination and gave notice of the polls.

If there is jurisdiction for a petition, it arises under subsec. (c), "that he was not duly elected by a majority of lawful votes." To again repeat: he was not elected by the voters—even if unlawfully—at the electors' meeting for nomination; and there was no other election. While the election matters were proceeding, and before any election was held, he obtruded himself into the office and pretends still to hold it. I think the case of *The King* v. *Beer* (3) is an authority for holding that in this case a writ of *quo warranto* will lie.

The appeal must be dismissed, with costs.

NOTE.—This is one of the few Canadian cases in which the old procedure to unseat by *quo warranto* was resorted to.

(4) [1899] 1 Q. B. 852.

Powers of County Court Judge on a Scrutiny.

THE WEST LORNE SCRUTINY.

47 S. C. R. 451.

SUPREME COURT OF CANADA.

Middleton, J., made an order which was reversed by the Divisional Court, Ontario, but restored by the Court of Appeal. The following statement of facts is taken from the judgment of Britton, J., in the Divisional Court:—

On the 2nd January, 1911, the electors of West Lorne voted upon a local option by-law, duly submitted, and the apparent result was: for the by-law, 141; against it, 92. Had this result not been effected, the by-law would have been carried by 1 1/5 votes over the required three-fifths: total vote 233; 3/5 of 233 =139 4/5.

One Mehring, an elector of West Lorne, applied for a recount or scrutiny; and on the 31st January, 1911, the recount was had before the Judge of the County Court of the County of Elgin; and, as a result of the mere recount, on inspection, one of the rejected ballots was held good. It was marked for the by-law, thus making 142 for, and 92 against—making a majority over the requisite three-fifths of the total votes of 2 3/5 votes. The learned County Court Judge then proceeded with the scrutiny as to residence of persons whose names were on the voters' list as tenants, and who had assumed to vote, and he found that five persons, whose names are given, had not the right to vote. Deducting 5 from the total vote of 234, leaves 229. Deducting these 5 from the 142 counted for the by-law, leaves 137; 3/5 of 229=137 2/5; so the vote for the by-law was 2/5 of one vote less than required to carry it. If this result stands, the by-law is lost by 2/5 of one vote, and the Judge, unless prohibited, must so certify.

No proceeding, by way of appeal or otherwise, has been taken against the result of the scrutiny, or as to the ruling of the County Court Judge upon the qualification or right to vote of any one of the five disqualified persons; but Dugald McPherson, another elector of West Lorne, accepting entirely the decision of the County Court Judge, as far as His Honour had gone, applied

to Mr. Justice Middleton for an order prohibiting the County Court Judge from so certifying until he had first inquired and ascertained how these five persons—not voters—had marked their so-called ballots. Mr. Justice Middleton made the order and directed the inquiry to proceed.

From that order this appeal has been taken by Mr. Mehring, the elector who applied for and obtained the recount and scrutiny. Mr. Mehring got all he applied for; and he now objects to these five persons, whom he unearthed and whose names were struck off the vote, being called upon to disclose how they marked their ballots.

McPherson appealed to the Supreme Court of Canada.

The Chief Justice, Sir Charles Fitzpatrick, said in part:—The broad question to be decided on this appeal is: What is the nature and extent of the County Judge's powers under the ballot scrutiny sections (367-372) of the Ontario Municipal Act (Statutes of 1903, ch. 19)? In my view, it will, in addition, be necessary to consider: How far in the case of a tenant the voters' list is conclusive, not only as to his qualification when it is certified, but also as to his right to vote at the time of the election; and the powers of the Judge to inquire into the way any of the votes were cast. The decisions in the provincial Courts are numerous and have not been consistent.

Those sections (367-372) in substance provide that, upon reasonable grounds, the County Judge may direct a "scrutiny of the ballot papers" (369) and, upon their inspection, and the hearing of such evidence as he may deem necessary, he shall in a summary manner determine "whether the majority of the votes given is for or against the by-law and forthwith certify the result to the council" (371). With respect of all matters arising upon the scrutiny, the Judge possesses the like powers and authority as are possessed by him upon a trial of the validity of the election of a member of a municipal council (372).

The ultimate object of the proceedings authorized by those sections is, in the concluding words of section 371, to enable the Judge "to determine in a summary manner whether the *majority of the votes given* is for or against the by-law and to forthwith certify the result to council," and to that end he is required not only to "inspect the ballot papers" for the purpose of counting the votes recorded on those ballot papers as in the case of a recount, but he is in addition "to hear such evidence as he may deem neces-

sary" to enable him to give his certificate to the council. It would not be necessary to hear evidence if his duty was merely to recount the good ballots in the box, but he is directed to ascertain and report whether the will of the majority of those qualified to speak—*i.e.*, the electors (sec. 338)—as signified by their ballots, is for or against the by-law, and for that purpose it may be necessary to hear evidence on matters connected with the *right* to vote, although external to the ballot which is merely the paper record of the *fact* that a person voted. Section 372 vests the Judge with the like powers and authority as to all matters arising upon the *scrutiny* as are possessed by him upon a trial of the validity of the election of a member of a municipal council. These are powers which one would not expect to find given to a Judge to enable him to recount the ballot papers. This further observation is suggested by the use of the word scrutiny in this section. A scrutiny is an entirely distinct proceeding from a recount; it is an inquiry into the validity of the votes.

"The object of a scrutiny is to ascertain who has had the majority of the legal votes," Halsbury, vol. 12, p. 454, No. 883, and that being the accepted meaning of the word in England, from which country our whole system of elections by ballot is very largely borrowed, it is binding upon us. * * *

The next question has reference to the qualification of leaseholders entitled to vote. In other words: How is their right to vote determined? I have much difficulty in reaching a conclusion on this point. As a general rule, the voters' list is conclusive as to the right to vote, but par. 2 of sec. 24 of the Voters' List Act, read with sec. 86 of the Consolidated Municipal Act, makes an exception in that continuous residence in the municipality up to the time the poll is held is made a condition of the exercise of that right by a tenant. This fair construction of the language of that section is confirmed by reference to sec. 357 of the Act, which provides for the form of oath the leaseholder must take, if required. That form may, I think, be fairly taken as the construction put by the legislature upon sec. 24. Those only are qualified to vote who can take that oath, and one of the qualifications required is residence within the municipality for one month next before the vote.

Finally, I am of opinion that the Judge has not got the right to inquire into the way any of the votes were cast. If the number of votes improperly cast is found to be greater than the majority in favour of the by-law and it is not possible to ascertain, without violating the secrecy of the ballot as admitted by all the Judges, except Middleton, J., whether or not those illegal votes constitute

that majority, how can the Judge report that the by-law was adopted or defeated by the required three-fifths of the legal votes cast? The result is, I admit, most unsatisfactory, inasmuch as it enables one who has no right to vote to cast his ballot against the by-law as pointed out by Mr. Justice Middleton. But if that incongruous result follows on the application of settled legal principles to the construction of the statute, the remedy is with the legislature that has attempted to apply a procedure devised for the contestation of municipal elections to a case in which the question at issue is whether or not the requisite majority of the legal votes is for or against a by-law. As the learned Chief Justice in appeal very properly observes, this case vividly illustrates the dangers attendant upon legislation by reference.

In the result the Supreme Court upheld the decision of the Count of Appeal.

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