## DIARY FOR DECEMBER.

1. Thur. Paper Day, C. P. Clerk of every Municipality except Counties to return number of resident rate-payers to Registrar General. Re-hearing Term in Chancery commences.
2. Frid. New Trial Day, Q.B.
4. SUN. *2nd Sunday in Advent.*
5. Mon. Last day for notice of trial for County Court. Paper Day, Q.B. New Trial Day, C.P.
6. Tues. Paper Day, C.P. New Trial Day, Q.B.
7. Wed. New Trial Day, C.P.
9. Frid. New Trial Day, Q.B.
10. Sat... Michaelmas Term ends.
11. SUN. *3rd Sunday in Advent.*
13. Tues. General Sessions and County Court Sittings in each County.
14. Wed. Grammar and Common School assessment payable. Collector's roll to be returned unless time extended.
18. SUN. *4th Sunday in Advent.*
19. Mon. Nomination of Mayors in towns, Aldermen, Reeves, Councilmen, and Police Trustees.
24. Sat.. Christmas Vacation in Chancery commences.
25. SUN. *Christmas Day.*
26. Mon. *St. Stephen.*
27. Tues. *St. John Evangelist.*
28. Wed. *Innocents Day.*
31. Sat. Last day on which remaining half General Sinking fund payable. School returns to be made. Deputy Registrar in Chancery to make return and pay over fees.


# The Local Courts'
AND
# MUNICIPAL GAZETTE.

**DECEMBER, 1870.**


## CAUSE OF ACTION.

It has been held in several cases that the words "cause of action," as used in the Division Court Act, mean the *whole cause of action*, the contract and the breach; *see* O'Brien's Division Court Act, p. 35: but the recent case of *Jackson* v. *Spittal*, decided in the Court of Common Pleas in England, and which will be found reported in full in the current number of the *Law Journal*, and a note of it on p. 185 of this volume is not altogether in harmony with that view. The section of the English Act which was under consideration read thus:

And it shall be lawful for the Court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of a breach of contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made, &c., to direct from time to time that the plaintiff shall be at liberty to proceed in the action, &c.

The words of the Division Court are "any suit may be entered and tried in the court holden for the division in which the cause of action arose, &c."

There is, certainly, a difference in the interpretation of a statute, where jurisdiction is concerned, between a superior or inferior court, but admitting that this difference is in favor of the jurisdiction of the former, the words of the judgment in this case are very important to be considered. After referring to the statutes and previous decisions, Brett, J., who delivered the judgment of the court said:—

"Then arises the question in dispute, which is,—What is the meaning of the phrase "a cause of the action?" Now, in the drawing of the Act, that phrase is made applicable to two subsidiary phrases. If the section were expanded, it would read thus: "That there is a cause of action which arose within the jurisdiction, or a cause of action in respect of the breach of a contract made within the jurisdiction." In the second collocation the phrase "cause of action" clearly does not mean the whole cause of action as contended for on behalf of the defendant. It means the breach of contract, which breach occurs out of the jurisdiction. But if the phrase "a cause of action," when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? Can the same phrase have two different meanings? Is not the natural reading rather this, that it means the same thing when applied to both? It is that which in popular meaning, and for many purposes in legal meaning, is, "the cause of action," viz., the act on the part of the defendant which gives the plaintiff his cause of complaint. In the first collocation, that is supposed to occur within the jurisdiction, in the second without the jurisdiction."

## OBSTRUCTIONS.

We feel sure many readers of the *Local Courts' Gazette* will share the gratification we experience in noticing a recent decision of the Court of Queen's Bench in the case of *The Queen* v. *Plummer*, argued during last Michaelmas Term.

It was an application to quash a conviction made by the Police Magistrate of London, Ontario, in the case of one Plummer, who was held to have contravened a city by-law in riding a velocipede along the sidewalk. The by-law in question provided—

"That no person shall, by any animal, vehicle, lumber, building, fence, or other material, goods, wares, merchandize, or chattels, in any way encumber, obstruct, injure, or foul any street, square, lane, walk, sidewalk, road, bridge, or sewer now

being or hereafter to be lald out and erected, (except as hereinafter provided with respect to buildings)."

It was urged by counsel for the defendant that the word "obstruction" meant something of a permanent nature, and did not apply at all to a velocipede in motion, which takes up no more room than a single person. But Adam Wilson, J., in discharging the rule remarked—

"A velocipede, I should say, may be an obstruction or encumbrance on a sidewalk. All that has to be done is to give the words a reasonable latitude in interpretation, just as we have to do when we use them. Now, to ordinary comprehension, a horse, or a waggon, or a drove of sheep or oxen, driven along the sidewalk, would be understood to be an obstruction or encumbrance to the legitimate use of it by those desirous of using it.

I understand this language off the Bench, though not the most exact or scientific, and I do not know why I should not understand it as sufficiently precise for the purpose on the Bench; and I understand it to mean, that whoever, by any of the means described in the by-law, prevents foot travellers from the free, safe, and convenient use of side-walk, offends against the enactment."

In support of this view his Lordship cited the words of the Vagrant Act (32–33 Vic. cap 28, Ca.):

"All persons loitering in the streets or highways, and *obstructing* passengers by standing across the footpaths, or *by using insulting language*, or in any other way, shall be deemed vagrants."

We trust this decision may give the *coup de grace* to the velocipede mania, now fast disappearing, but which for a short time made our streets a theatre for the acrobatic displays of aspirants after bycycular notoriety. It only remains for some philanthropist to carry the matter a little farther, and invoke judicial authority for the suppression of those terrible "obstructions," the perambulators which careless nursemaids propel so skillfully against the sensitive tibiæ of unwary pedestrians. We congratulate the London magistrate on the result of the argument, and invite him to "carry the war into Africa," and head a crusade against the "perambulator-propellers" as well as the "velocipedestrians."

## AN AMERICAN JUDGE ON REPUBLICANISM.

We cannot forbear to notice the following very remarkable passage in a speech delivered by Mr. Lawrence, the Chief Justice of the Supreme Court of Illinois, in reply to an address presented to him by the Law Institute at Chicago, on its recent opening. After saying (the *Chicago Legal News* is our authority) that the Bench, if cordially supported by the Bar, could "calmly face any degree of popular passion or partisan clamour, trusting its vindication to the bar, and strong in the conviction that the upright magistrate will certainly be honored in the end by the very community whom his judgments may have offended," he says:

"But a better and deeper reason than this can be given why the bench and bar should keep fully alive the sentiment of brotherhood. It is a fact which cannot be denied that, as a people, we are undergoing rapid deterioration. Our social, political and commercial morals are sinking to a lower and lower grade. We are no longer content with the acquisition of wealth by patient toil, to be when won, as wisely expended as it has been honestly earned. A fevered and insane passion for money has gained possession of the minds of men, and at this moment, is doing more to corrupt our national life than all other causes united. This maddening love of gold, to be expended, not in the modes which shall make American life the highest development of modern civilization, but in coarse and barbaric display, or what is still worse, in the ways that lead to the debasement of public morals, is leading us, as a nation, down the dance of death. Corruption has become a systematic and almost shameless means of power, and contemporary events at times recall the period when the Roman Empire entered upon its swift descent to ruin. Wise men begin to doubt the ultimate success of our institutions, and already proclaim that in the metropolitan city of the continent, republicanism, as an instrument of municipal government, stands a confessed failure; day by day we seem to be drifting further and further from our ancient anchorage toward an unknown coast whose atmosphere is laden with poison and death.

"That it is in the power of the bench and bar of the country, unaided, to arrest the downward tendency of the times, is not to be supposed. Nevertheless we can do something, and, if properly aided by other conservative elements of society, can do much to check it. We can, at least, make a noble struggle, and be the last to fall. Common as it is to utter vapid witticisms in dis-

paragement of the bar, the well-known truth, nevertheless is, that the men who, in better times, have done most to create and mould our political institutions and control the social forces of the country, have belonged to the profession of the law. If you, gentlemen of the bar, can constantly live up to the highest and noblest traditions of professional life; if you can keep ever fresh and bright the sentiment which doubtless now animates you, that the true ambition of the lawyer is not the acquisition of wealth, but of that pure professional fame which is to be won by the exercise of your high vocation in a spirit of the most punctilious honour, and with an ever present consciousness that you, as well as the court, are ministers at the altar of Justice; and if the various judicial tribunals of this state shall so perform their duties as to command the confidence and support of such a bar, shall be so clear in their high office that not even a disappointed litigant can venture to charge them with unholy motives—then the judiciary and the bar standing together, will, in the future, as in the past, furnish a sure protection against wrong, and keep alive in the hearts of all good men the hope that our downward tendencies as a people may be stayed, and that we may get back upon those ancient ways wherein we walked in the better days of the republic."

Now considering that these are the words of an American, they are very remarkable, and bespeak the Chief Justice to be not only manly, independent and free from servility to popular clamour, but as having a high sense of what the bench and the bar owe to their country and themselves. But at the same time, the words show that corrupting influences have gone so far that he feels it to be not merely idle, but wrong and unpatriotic to pretend to gloss over their results.

Men, who, like Chief Justice Lawrence, would courageously dare in the face of an excitable nation, whose national self appreciation amounts to a mania, and on a public occasion to state their convictions of the corruptions, social, political and judicial, existing in their country, might well be looked upon as the saviours of their country. The words are also weighty with caution to those who blindly admire the external glitter of that state of things which is above pourtrayed.

We have seen* what such periodicals as the *American Law Review* have said of the gross corruptions in the judiciary, in some of the States. Unless there are sufficient of those who act up to the sentiments of Chief Justice Lawrence, it may well be feared that when he trusts to the judiciary to help to save the country, he leans upon a broken reed.

* Ante Vol. IV, p. 301.

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We are sorry to notice the death, on the 30th ultimo, of Mr. Prince, Judge of the Algoma District, better known to the public as Colonel Prince. We shall refer to the subject again.

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A correspondent of the *Albany Law Journal*, writing from England, gives a flowery description of the proceedings at an assize town, before and at the opening of the court, and describes the old-fashioned ceremonies and curious attire of the judge and officials engaged, and the interest manifested by the public in the proceedings. He concludes thus: "A fellow-traveller said, 'An American judge could not be hired to go through that exhibition.'" Possibly not. But it would appear, if American writers are to be believed, that American judges can be "hired" to do things which would make the ears of the meanest tipstaff in an English court of justice to tingle.

## SELECTIONS.

### MUNICIPAL AID TO RAILWAYS.

The question of the power of towns, counties, and other subordinate municipal corporations to issue bonds, or otherwise pledge their credit in aid of the erection of railroads and other like enterprises, has been much mooted of late years. The tendency of the courts has been generally to sustain the legality and binding obligation of such action, but the late decision of the Supreme Court of Michigan, in *The People ex rel. The Detroit and Howell R. R. Co.* v. *The Township Board of Salem*, published in the August number of the Register, goes to the full extent of holding such subscriptions to be wholly void. The opinion delivered by COOLEY, J., is elaborate, learned, and exhaustive, and is highly approved in editorial notes attached to the opinion as there published.

With the utmost deference and respect for the ability and experience thus arrayed upon that side of the question, we yet are constrained to differ in opinion, and submit the following suggestions upon the other side.

The point of the decision made is that a railroad is not a *public* highway in the same sense as a common road, but is a private enterprise or institution, intended "primarily to benefit a private corporation," though having also the effect to add to the value of lands in adjacent localities; and that, consequently, no tax can

be laid, or corporate liability leading to taxation incurred, in aid of it. We differ entirely upon this point, and deem the arguments used to establish it fallacious.

In order to present our views intelligibly, we propose in the first place to set out certain general propositions which we apprehend will not, at least after due reflection, be denied.

I. This matter of opening roads, canals, and other like improvements, is one which pertains not so much to law as to politics. It is a branch of political economy. The state, or the legislature acting on its behalf, is bound in all proper ways to increase the public annual money income. Wealth is power, in peace and in war.

The legislator, casting his eye, as it were, over the land, perceives a certain tract which, though fertile and productive, is yet of little value, for the simple reason that it has no easy access to a market. The cost of transporting its crops is greater than the price to be obtained. It consequently yields little or no net money income, and can pay little or nothing in annual taxes, for the support of the state. A road or a canal, or, better still, a railroad would *set that land up* close alongside the market. The effect would be that the expense of transporting crops would be reduced to a mere trifle. Every penny thus saved is so much added to the annual income of the land. In view of this saving the land becomes more desirable and rises at once in market value. Value depends upon, and is graduated by, income. The land thus enhanced in value takes rank with lands lying near to the market, and begins to contribute equally to the public burdens; and thus either adds to the public income, or diminishes the burden upon others.

This matter of opening roads, and other means of facilitating intercourse between distant localities, is one of immense interest and importance. The results are wonderful. England, it is said, owes her wealth and power mainly to the fact of her having always had good roads. Massachusetts is to-day wealthy because of her numerous roads. There is a vast field for study and thought in this connection. A road adds to the value (by adding to the net income) not only of the farming lands to which it leads, but of the lots in the market town; to every foot of land along its whole length, and to lands beyond and at its side; in a word, to every business locality which by means of it is brought nearer (so to speak) to other business localities.

II. The state possesses the eminent domain, to wit, the ultimate or superior ownership of all lands lying within its boundaries. Individuals are permitted to acquire lands and thus to own them, exclusive of all other individuals. But the state has an ownership beyond this, and may at its pleasure assume the actual possession. This cannot be done, however, under our republican government, unless the land is to be taken for a *public use*.

This phrase, the public use, is one which, we submit, is often misapprehended. It does not signify the public *user*,—that the land when taken is to be used, occupied, dwelt upon, travelled over, or the like. The word *use* is, as in old English law, synonymous (or nearly so) with benefit, behoof, and the like. The word *public* does not signify the individuals composing the body politic, but the state as a unit. In England the public highway is more often called the king's highway, implying that the king as representing the state is the owner. So here the phrase, public highway, means, we submit, simply that the land embraced within its boundary lines is *public property*, to wit, the property of the state as a unit; the state has asserted its eminent ownership and thrust aside the private proprietor.

Lands are often taken under this right of eminent domain which yet are never "used" or physically occupied by the individuals composing the "public;" as, for example, for forts, penitentiaries, and the like, and yet such lands are confessedly taken for a public use. Personal property, as provisions, has been destroyed by the state authorities to prevent its falling into the hands of the enemy, and yet the taking for that purpose has been held to be a taking for a public use: *Grant* v. *U. S.*, 2 Nott & H. (Court of Claims Reports), 551.

III. The public, meaning the individuals composing it, has a right to travel upon the road, and does; but the public, meaning the state, does not travel or "use" the road in that sense. The phrase the *public use* signifies then, we submit, the profit, the pecuniary gain of the state as a whole—the economical, material advantage, or benefit to the body politic, as such. This profit, or benefit to the state, comes from the increase of the net annual income (and thereby of the market value) of adjoining lands; in a word, an increase of the taxable contributing capital within the bounds of the state, an increase of the fund in the hands of individuals, out of which annual taxes are to be paid.

IV. While the state as a unit, and the citizens and tax-payers generally, are thus benefited, the lands themselves, which are directly affected by the road, are benefited in a much higher degree. They are, as it is often called, specially benefited. The lands so benefited, are those which are, by means of the road, set up nearer, and are by that means enhanced in value. There is a kind, or mode of "benefit," styled "local and peculiar," which is different from this, but need not be defined here. Lands distant from the road, and not made more accessible by it, are not *specially* benefited or affected in value, except, perhaps, by means of a diminution of taxes.

V. Upon taking lands for a public use, the state must make compensation to the private owner. This it may do out of its public treasury, and out of funds raised by general taxation. Lands taken for a street within the bounds of the city, or for a county road, may thus be paid for. On the continent of Europe nearly all the railroads are built by the government, and paid for of course out of the

general fund of the state. The state, instead of paying for the land out of its general fund, may authorise the levy of a special tax for the purpose, and raise it by taxation all over the state. It may, on the other hand, raise this special tax out of the property "specially benefited." This point has often been contested, but is now settled law, aud is clearly just. This mode of taxation is styled the "assessment of benefit," and is practised extensively.

VI. The state, instead of itself exercising its own discretion and right of eminent domain (through its legislatures or otherwise), often deputes those powers to subordinate municipal bodies, as cities, towns and counties. When thus authorized to act, those bodies have all the powers of the state itself. They are vested with a discretion which is unlimited They are to be guided by their own judgment, as to the economical effects to be produced. The will of the majority is to govern, and the minority must submit. They may take the land of an individual, and no power on earth can prevent it. They may raise the funds for compensation by general taxation, or by the "assessment of benefit," as the state law provides.

The town of Salem for example, might, beyond question, if authorized by the legislature, open a road running from one extreme of the town to the other, and might vote a tax for that purpose, and the vote of the majority would bind the whole.

VII. It seems to us perfectly clear that the legislature of Michigan might, in view of the profit to accrue to the state as such, lawfully vote to take land for the Detroit and Howell Railroad, and might order a special tax to be levied upon the lands to be specially benefited, for the purpose of paying for the land taken. It might also, we submit, itself build the road and levy a further tax on the same lands for that purpose. If it could do this, it could, we submit, depute those powers to subordinate municipal bodies. In doing this it would do no more than is done every day in reference to roads and streets.

If the town of Salem were thus authorized to tax the lands situated within its limits, and if its constituted authorities, or better still, its citizens in corporate meeting assembled, were to decide that all those lands would, in their judgment, be "specially benefitted" by the railroad (as doubtless they would be), we can see no reason why the vote of the majority should not bind the whole, as much as a vote of the legislature itself, or as much as a vote of the majority, in reference to a common road. If the majority, when authorized by the legislature, may in their discretion, vote to bring the two ends of the town nearer together, we see no reason why they might not, if so authorized, vote to bring the whole town, as a body, nearer to Detroit. Each of such votes is but the exercise, by the town for the state, of a state political economy.

Such a power entrusted to a town may be liable to abuse. But such abuse must consist only in an error of judgment as to the economical effect to be produced by the road. Such errors do not, at least now-a-days, often occur. A railroad is sure to enhance the value of lands to an amount far beyond the tax, and even the whole cost of the road. And besides, a town is quite as little likely to err in judgment as is the legislature. But even if liable to abuse, that matter is one for the consideration of the legislature, and affords no ground for the interference of the courts.

VIII. The state, instead of itself opening and building a railroad, may authorize a private corporation to do so; and in such cases it vests the latter with its power of eminent domain, though not necessarily with its power of taxation. It also grants to the company the exclusive right to carry passengers and freight upon the road, and to charge a toll or compensation therefor. This right to take toll is a franchise, to wit, a right which the state itself can alone exercise, or authorize others to exercise.

The franchise is granted by the state for *a consideration;* which is the outlay of money by the company in opening, building and preparing to operate (*Ang aise*, work) the road, in its risk of loss of the money so invested; and in its obligation assumed to carry all passengers and freight that offer. In England the right to charge toll upon a turnpike (the king's highway) or upon a ferry over a public stream, was granted only upon a similar consideration.

This deputing the power of eminent domain, and the grant of right to carry for a toll, is a matter of convenience and economy to the state. The business can all be done to much better advantage by individuals than by the state; by private citizens whose private pecuniary interests are involved, than by public officers working upon a salary and liable to a removal at stated periods.

The fact that the private corporation is sure to make money by operating the road, has, we submit, nothing to do with the question at issue. In the first place, the company invests beyond recall, and risks its capital—often a very large amount,—it incurs heavy obligations; for these it should be paid. In the second place, this is a matter for the consideration of the legislature. If in view of the benefit to accrue to the state finances, it sees fit liberally to reward the projectors of the enterprise, its decision is final. It is a matter of simple bargain and contract. In the third place, as a general rule, no public improvements are ever undertaken except at the instance of individuals who expect to profit specially thereby. Citizens, generally, do not feel sufficient interest. They are to be benefited, but only in a slight degree. The motive of self interest is a most important one in public affairs. It is the spur to vast public improvements, and the wise legislator will not ignore or discountenance it, or decline to avail himself of it.

Secondly, we approach particular points made in the opinion under consideration.

I. We agree entirely with the point that the three requisites set out are necessary to the validity of any tax, to wit, that the purpose must be public, the tax must be duly apportioned, and if laid upon a limited district such district must be "specially benefitted." But we insist that these requisites are all fully complied with in the case in question.

II. The learned judge compares this railroad to an hotel, and cites a Wisconsin case as deciding that a tax could not be raised to build the latter. This is, perhaps, not exactly a fair comparison, but yet something is to be said even as to such a case.

When individuals consent to reside in (say) a city, they agree to be bound by the will of the majority in respect to certain things. Those things are the matters which properly come within the scope and purpose of a city government. To increase the taxable value of the lands lying within the city is certainly within that scope and purpose. The opening of a public square, the introduction of pure water, the draining of a marsh and the like, all have that effect, and are legitimate objects for taxation. The erection of an hotel is very often likely to do the same, and each and every house and lot in the town is to yield and be worth the more for it.

An hotel attracts and detains visitors from abroad. Such visitors become customers to the merchant, the mechanic and others. The hotel keeper must buy meats and other supplies for them. All this makes the town lots used for business more productive of return to human labor, and thus more able to contribute to the public burdens. Lots for dwellings come into demand and yield a higher rent. As a matter of equity, it certainly is not fair that one obstinate lot owner should get this benefit and yet not share a burden which the rest are willing to assume. And as a matter of law we submit that he is bound by the will of the majority.

There is of course a limit beyond which the power of the majority cannot go. The rule is the same here as in every other association. The avowed object and purpose of the association is always to be kept in view. That is what gives it its distinctive character. To any attempt to go beyond that purpose, the individual may say, *non in hoc fœdera veni.* A temperance society could not compel its members to contribute money to build a bowling alley, nor a bank apply its capital to manufacturing purposes. But a city government may, we submit, put in exercise a political economy, and have a discretion for that purpose not to be controlled by the courts. Such a power is, we submit, inherent in every body politic and is implied if not expressed.

The judge also compares the railroad to a grist mill. As to that we desire merely to say, that in many of the states laws exist by which lands may be taken for the purpose of flowage, in order to raise a water power to carry the mill. This is done under the power of eminent domain, and upon the ground that the land is taken for the public use. Such use (meaning always benefit, profit,) consists only in the diminution of distance and expense, and the consequent increase of net income to adjoining lands; thus creating additional taxable capital. This is pure and genuine political economy. These laws have been stoutly contested, but we believe their validity is now established. See *Todd* v. *Austin*, 8 Am. Law Reg., N. S., 9.

The learned judge likens the hackmen of Detroit to a railroad corporation, as carriers for hire. Those hackmen have not, by the investment and risk of private capital, added a hundred, or a thousand fold to the pecuniary resources of the state. They have not built the streets upon which they run; they have not brought distant localities together, nor in any manner benefitted the state as a state.

III. The following passage occurs in the opinion: "If the township of Salem can be required to tax itself in aid of the Detroit and Howell Railroad Company, it must be either:—*first*, on the ground of incidental local benefit, in the enhancement of values; or *secondly* in consideration of the facilities which the road is to afford to the township for travel and business. The first ground is wholly inadmissible. The incidental benefit which any enterprise may bring to the public, has never been recognized as sufficient of itself to bring the object within the sphere of taxation. In the case of streets and similar public improvements, the benefits received by individuals have sometimes been accepted as a proper basis on which to apportion the burden; but in all such cases the power to tax is unquestionable, irrespective of the benefits. The question in such cases has not been of the right to tax, but of the proper basis of apportionment, when the right was conceded.

The second ground is more plausible. To state the case in the form of a contract, it would stand thus: The township is to give or loan to the company five per cent. of its assessed valuation. In consideration whereof, the railroad company agree to construct and operate its road, and to hold itself ready at all times to give to the people of the township the facilities of travel and trade upon it, provided they will pay for such facilities the same rates which are charged to all other persons. In other words, the company agree on being secured the sum mentioned, to take upon themselves the business of common carriers within the limits of the township. If this consideration is sufficient in the case of common carriers, it must be sufficient also in the case of any other employment."

This paragraph, we submit, is fallacious in many respects.

1. The judge makes a distinction, where there is, in fact, no difference. The enhancement of values caused by the road is exactly the same thing as the facilities to be afforded for travel and business. Or rather the one is

merely the measure of the other. The increase of value is simply the estimate expressed in dollars and cents, which men put upon the facilities of communication.

Value is a thing not inherent in or attached to the land, like shape, color, or the like. It exists in men's minds. In putting a value upon the land, men take into view surrounding facts precisely as does a jury in estimating value or damage. Those facts lend a hue to the thing in question. Men *look through* them as at a landscape through stained glass.

The road is a fact, present or prospective. A right of way or travel over it exists in favor of the lands or their occupants. The road is an appurtenance to the lands, made so by the act of the legislature. In view of this fact and of the prospective savings of time and expense of travel and transportation, men begin to consider the land desirable as a location for business or residence, and will pay the more for it. The facility of communication is, therefore, the physical, material effect produced by the road; the increase of value the moral mental effect produced by the same means and at the same instant. One is the benefit, the other what that benefit is decided to be worth. A little reflection will, we think, convince any one that the increase of values in that locality caused by a railroad is traceable directly and exclusively to the fact that the lands are set up (*Anglice* brought) nearer to some other business locality, and that such increase of value represents or measures all the value to all the world, of the facility of communication—that the benefit of the road to an individual travelling it, say the farmer, is that it saves his time, which time saved, is to be devoted to labor on his farm, making the latter more productive; and that the increase of value thus caused to the farm, is exactly the measure of the value of the saving of time to the individual, the farmer. There is a philosophy in this matter, which may not at first sight appear, but will do so fully on reflection. A farm is enhanced in value by the road, say five thousand dollars. This is but saying that the facility of communication is worth to it that sum. The expression, five thousand dollars worth of facility, is but another term for the facility itself; precisely as five thousand dollars worth of wheat is the same thing as the wheat.

If we are correct in our view, then a taxing based upon these facilities or their value is precisely the same thing as one based upon the increased values of the lands.

2. The incidental benefit to accrue to lands from a public improvement, to wit, the increase of value or the material benefit which is represented or measured by such increase of value, has, we submit, always and everywhere been recognized as sufficient of itself to bring the object within the sphere of taxation or assessment. This is, indeed, the only legal or just rule or object, for burden should be assessed upon and proportioned to benefit. We deny that the power of taxation—meaning special taxation or assessment to pay for a particular improvement—does exist irrespective of the benefit to be conferred by it. All lands in the state may be taxed for general purposes, as to pay state salaries and the like on the ground of benefit, to wit, protection, received by each and every tract; but no tax upon a limited district could lawfully be laid for such a general purpose, or for any purpose except to pay for "special benefit" accruing to that district.

3. The term "incidental" is not properly applicable to this increase of value, for it is the primary, direct and immediate end and object sought by the legislature, and the effect directly and immediately produced; such increase of value being, as we have said, but the representative in money of the facility of communication. What benefits may be styled incidental we shall not stop to inquire, but surely this increase of value is not one.

IV. The learned judge says further: "There is nothing in the business of carrying goods and passengers which gives the person who conducts it a claim upon the public different in its nature from that of the manufacturer or the merchant."

To this proposition we assent. But the operating of the railroad when once built, is a thing entirely distinct and different from that of the opening and building. It is the latter, not the former, which is the consideration rendered to the state. It is the investment, in perpetuity and upon risk, of a large amount of private capital in such manner as to add to the wealth and power of the state as a state. Such an investment is the actual burying of so much money in the ground and is beyond recall. The carrying of passengers and goods for hire is a different matter: such businesss is unquestionably a private business, but the right to carry it on is the very thing which the state guaranteed or granted in consideration of the permanent investment made for its benefit.

V. The learned judge says: "When the state itself is to receive the benefit of the taxation in the increase of its public fund, or the improvement of its property, there can be no doubt of the public character of the enterprise."

This is doubtless the true doctrine. The question then comes to this: Does the opening of a railroad increase the public fund? That it does so in almost if not quite every instance there can be no sort of doubt It developes lands otherwise wholly unproductive and valueless. Many a railroad has turned out profitless to the stockholders, and the money capital contributed has been wholly sunk. But yet the road has benefitted the state as such, and added to its taxable capital ten fold its cost. For example, the railroads in Vermont, have, we believe, not paid the stockholders; but the state as a state is to-day far in advance of her former position in wealth and resources, simply by the building of those roads. Her farms, her marble quarries and other industries are all paying well. The owners of such properties could well have afforded to build the roads at their own expense. If they have, in fact, contributed to the capiital

and have lost, yet their loss is far more than made up in the increase of net annual income and consequent enhancement of market values to their property. The state as a unit, thrives, as every state does, just in proportion to the thrift and prosperity of its owners of land and other fixed property.

Undoubtedly distress has been caused to individuals in some of the States by the issue of town or county bonds, and the levy of taxes to pay them. For example, a farmer is called upon to pay his tax who has little or no ready money. His lands, to be sure, are valuable—made so by the very railroad. He could, if he chose, sell it for twice as much as before, but he desires not to sell. To raise the money is to him a serious burden. But such a case of individual hardship must not stand in the way of great public improvements. Every individual who settles in a community and invests in real estate, assumes the risk of just such hardships. In the case put, the hardship comes from the very fact that the farmer is actually possessed of property, and is rich. It is one of the incidents of wealth, an instance of *embarras des richesses.* Many a man would gladly assume the hardship, if the wealth also accompanied it.

In opening streets in cities, it often happens that a lot is enhanced greatly in value, but is owned by one who has no ready money or other available property. The assessment for benefit is in such a case a grievons burden, but it must be borne.

Finally, it will not be denied that as a general rule the legislature of a State has an unlimited discretion to decide whether a proposed improvement will or will not increase the wealth of the State, and thus be for a public use, or that the legislature of Michigan has in the present case decided, tacitly it may be, that the railroad in question will have that effect. It would not otherwise have permitted the majority in the towns named to have voted a tax.

We may admit that if a legislature should be so wicked as to authorize such a tax in a case where the effect must be not to increase the wealth of the State as such, but merely of a private individual (though it is hard to conceive such a case, for the wealth of the individual citizens is the wealth of the State), the courts might interfere. But they should be very cautious in so doing. Unless the case is entirely clear, their interference would be usurpation.

In the present case there can be no question that the legislature decided wisely and well. This railroad will unquestionably develop lands now comparatively valueless, and add millions to the taxable capital of the State. A legislature can hardly go amiss on this point.

If, indeed, private corporations are to become unduly rich by running these roads; if the success of such companies in that business is so assured as that all risk of loss is gone; then it may be the duty of the State to limit their profits or otherwise curtail the privileges granted. But this is a matter for the legislature, not the courts. Unwise legislation is one thing, unconstitutional legislation is another. —*American Law Register.*

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[There are some home truths in the above, but they are expressed in a very "homely" manner, and not in the most correct or elegant English. EDS. L. J.]

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## DURATION OF A CARRIER'S RESPONSIBILITY.

*Shepherd* v. *The Bristol and Exeter Railway Company*, 16 W. R. 982.

This case involved the important question —How long does a carrier's liability *as carrier* continue? A common carrier is, as such, under a peculiar liability differing from that of any other kind of bailee. He is said to be an insurer, and is liable for all injuries to the property committed to his care, unless the injury be caused by the act of God, or by the king's enemies. A carrier may at common law exempt himself from this liability, and may enter into a special contract for the carriage of goods upon any terms that may be agreed upon. In the absence of any special contract he is liable as an insurer. In *Shepherd* v. *The Bristol, &c., Railway Company* injury was done to some cattle carried by the defendants. The cattle had been carried safely, but were injured in a pen on the defendants' premises after the actual carriage was completed. The first question was one purely of fact, viz., whether the cattle had in fact been delivered to the plaintiff? The second question was whether, if the cattle had not been delivered, the defendants were liable for the injury *as carriers?* If the defendants were responsible as carriers for the cattle during the whole time they remained in their possession, the defendants were, under the circumstances, liable to compensate the plaintiff for the damages done, as the injury had not resulted from the act of God or of the king's enemies. If the defendants were not responsible as carriers, the plaintiff could not recover without proof of negligence, of which as a fact the defendants had not been guilty. The defendants liability, therefore, assuming that the cattle had not been delivered to the plaintiff, depended solely on the question whether they were liable as carriers.

The Court were divided in opinion on the second question, which is the only one we need notice here. Bramwell and Channell, BB., held that it was not material to consider whether or not the cattle had in fact been delivered to the plaintiff, because even if they had not been delivered the defendants were not liable as carriers, as nothing remained to be done in and about the carriage of the cattle at the time the injury occurred. Martin, B., dissented from this view, and held that the liability of the defendants as carriers continued

until delivery, and that there had been no delivery. The opinion, therefore, of Martin, B., differs entirely from that of the other two learned judges The question is of great importance to railway companies and to all who are in the habit of sending goods by railways. The common law liability of carriers often works very inconveniently, and it would probably be a great improvement if this liability were altogether removed, and the rights of the carrier and of the goods owner were left to be ascertained either by a special contract between them or by an application of the ordinary rules which govern all other classes of bailments. As, however, this special liability of carriers still exists, its logical consequences should be admitted, and it seems more consistent with general principle to hold with Martin, B., that a carrier is liable as carrier so long as he holds goods under the original bailment for the purposes of carriage than to decide with Bramwell and Channell, BB., that a carrier's liability is divided into two parts, although there is but one contract, and that the carrier is liable as an insurer while the goods are actually been carried, but is only liable as an ordinary bailee after the carriage is over; especially as it may be that a deposit of the goods after the transit is over is as necessary an incident of their carriage as the placing them in a truck upon the railway. As the case stands at present, however, the opinion of the majority of the learned judges constitutes an authority in favor of their view of this question.—*Solicitors' Journal.*

## SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

### NOTES OF NEW DECISIONS AND LEADING CASES.

Customs Duties.—*Held*, that under Con. Stat. Can. cap 17. sec 33, the only recourse against the first appraisement of the collector was an appraisement by two merchents as therein prescribed. An importer who preferred to pay the duties exacted by the collector had no action to recover them back.—*Rooney* v. *Lewis ès quel*, 14 L. C. J. 145.

Delegates to Synod.—*Held*, 1. That when the certificate of election, granced to a lay delegate to "the Synod of the Diocese of Montreal" by the chairman of the Vestry meeting held for the election of lay delegates, is in form, and found to be satisfactory by the committee appointed to examine the certificates of such lay delegates, it is not competent to the Synod to enquire into the validity of the proceedings at the Vestry meeting, or in any way to try the validity of the election certified to in the certificate. 2. That the second clause of the constitution of said Synod was and is legal.—*Davidson*, Petitioner, and *Baker*, Respondent, 14 L.C.J. 165.

Practice—Cause of Action.—The plaintiff sued a British subject, living in the Isle of Man, on a contract made there, the breach taking place within the jurisdiction of the court. The plaintiff, under the Common Law Procedure Act, 1852, served the writ in the Isle of Man. The defendant, without waiting for the plaintiff to obtain an order to proceed, obtained an order to stay proceedings, on the ground that the whole cause of action did not arise within the jurisdiction.

*Held*, that the defendant was not bound to wait for the plaintiff to make an application to proceed before obtaining such an order.

*Held* also, that the phrase, "cause of action," in the Common Law Procedure Act, 1852, s. 18, means the act on the part of the defendant, which gives the plaintiff his cause of complaint.

*Held* also, that section 19 is to be construed in the same way.—*Jackson* v. *Spittall*, 18 W. R. 1162, C. P.

Mortgage.—In a foreclosure suit by the second of several incumbrancers, in which a sale was prayed, a decree was made and the estate sold, and the money paid into court:

*Held*, that the costs of the sale were not to be included in the costs of the suit, but each incumbrancer was to add his costs of the sale to his debt, and be paid his principal, interest and costs, according to priority.—*Wanham* v. *Machin*, 18 W. R. 1098.

Liability for Mistake in Telegram.—The defendant, by letter, desired plaintiffs to send him a sample Snider rifle, and added that he could probably fix an order for fifty. A few days afterwards he telegraphed to plaintiffs to send him "three" rifles, but the telegraph clerk, by mistake, telegraphed for "the" instead of "three" rifle, add the plaintiffs sent fifty rifles to the defendant, who refused to accept more than three of them.

In an action to recover the price of the forty-seven rifles from the defendant,

*Held*, that the defendant was not responsible for the mistake of the telegraph clerk, and was not liable.—*Henkel and another* v. *Pape*, Ex., 19 W. R. 106.

Father and son.—Void sale.—A son who had purchased property for his father, and had taken the conveyance in his own name, afterwards induced his father while in a state of mental depression to enter into a contract that the son should retain the property on certain terms which were hard and unfavorable to the father:

*Held*, that the contract was not valid in equity, and that the father was entitled to a conveyance, on payment of the sum which the son had paid on the contract.—*Johnston* v. *Johnston*, 17 Chan. R. 493.

TRUST FUND—MISAPPLICATION BY ONE TRUSTEE.—Trust funds which stood in the name of two trustees (A. and B.) were paid out on the cheques of the two: got into the hands of one (A.) who was the acting trustee, and were misapplied by him without the knowledge of the other trustee (B.) The primary *cestui que* trust was a married woman; the trust deed contained a clause in restraint of anticipation; there was a trust over with a limited power of appointment. B. insisted that he was not liable, as he had become trustee at the request of the lady and her husband, and it had been represented to him that his name only was wanted; that his co trustee (A.) was to do the business part of the trust, and that he (B.) was to have no trouble about it:

*Held*, that these representations did not exempt B. from the duty of seeing that the trust money was properly applied.—*Mickleburgh* v. *Parker*, 17 Chan. R. 503.

PATENT, SALE OF BY PATENTEE—INFRINGEMENT.—During the existence of a license the licensee cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another.—*Whiting* v. *Tuttle*, 17 Chan. R. 454.

INJUNCTION—BREACH.—Injunctions must be obeyed accordiug to the spirit as well as letter.

Where defendants were enjoined against removing from their premises certain iron rails to which the plaintiff claimed to be entitled, and they allowed another claimant to take them away without objection or obstruction on their part, and to remove them to the United States:

*Held*, that they had committed a breach of the injunction.—*Bickford* v. *The Welland Railway Company*, 17 Chan. R. 484.

## MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

### NOTES OF NEW DECISIONS AND LEADING CASES.

SUIT FOR TAXES.—In a suit to impeach a sale of land for taxes, it appeared that about 20 acres of the lot were cleared and a barn was erected thereon, into which hay made on those 20 acres by a person occupying the adjoining lot was stored in winter, no one residing on the 20 acres the owner being resident out of the country and never having given notice to the assessor of the township to have his name inserted on the roll of the township.

*Held*, that this was not such an occupancy of the 20 acres as exempted the lot from being assessed as the land of a non-resident.—*Bank of Toronto* v. *Fanning*, 17 Chan. R. 514.

INSOLVENCY — MORTGAGE FOR ANTECEDENT DEBT.—A mortgage was obtained by pressure from an insolvent person (a miller) three months before he executed an assigument in insolvency; the mortgage was for an antecedent debt, and was not enforceable for two years; it comprised the mortgagor's mill only, and left untouched about one-third of his assets; it was not executed with intent to give the mortgagees a preference; and at the time of obtaining it they were not aware of the mortgagor's insolvency. In a suit by the assignee in insolvency, impeaching the transaction, the mortgage was held to be valid.

The mortgagees, shortly after obtaining this mortgage, became aware of their debtor's desperate circumstances, and obtained from him, by pressure, a mortgage on his chattels used in his business: this mortgage was held void against the assignee in insolvency.—*Mc Whirter* v. *The Royal Canadian Bank*, 17 Chan. R. 480.

PRINCIPAL AND SURETY—COUNTY TREASURER.—County money should be deposited to a separate account, and should not be unnecessarily mixed up with the treasurer's private money.

To invalidate a bond given by sureties on the ground of material facts having been concealed from them until after they had executed the bond, it must appear that the concealment was fraudulent.

A county treasurer had, through a misapprehension of what was the proper course, been allowed for many years to mix all county money with his own, and had used for his private purposes a large sum received in that way; in this state of things he had occasion to give to the corporation a new bond with two new sureties. Shortly after giving this, it was ascertained that he was unable to pay his balance to the corporation; and the sureties filed a bill to be relieved from their bond on the ground of the treasurer's misconduct, and of the uncommunicated knowledge of that misconduct by the representatives of the corporation at the time the bond was given. But the Court, being of opinion that most of the facts relied on as proving misconduct were known to the sureties, and that no information had been withheld from them fraudulently, *held* the bond to be valid. (See *Corporation of East Zorra* v. *Douglas*, reported on p. 2.)—*Peers* v. *Oxford*, 17 Chan. R. 472.

# ONTARIO REPORTS.

## CHANCERY.

(*Reported by* ALEX. GRANT, ESQ., *Barrister-at-Law, Reporter to the Court.*)

### COOK v. JONES.

*Sale for taxes—Amendment at hearing.*

The warrant for the sale of land for taxes described the lands as "all deeded:"

*Held*, sufficient.

The statutory provision requiring certain rates to be kept separate on the collector's roll is directory only; and where the direction had not been observed, a sale for non-payment of the taxes was held valid notwithstanding.

Leave to amend is, at the hearing, granted in furtherance of justice and not otherwise, and is not proper when the object is to enable the plaintiff in a speculative suit to take advantage of a technical defect in the defendant's title.

[17 Chan. Rep. 488.]

Examination of witnesses and hearing at Whitby.

Mr. *Crooks*, Q.C., and Mr. *McCarthy*, for the plaintiffs.

Mr. *S. H. Blake* and Mr. *Moss* for the defendants.

SPRAGGE, C.—The plaintiffs have no *locus standi* in court unless they can successfully impeach the sale for taxes, at which the defendant Edward Jones was a purchaser. They claim under McFarlane, and McFarlane's title was divested by the tax sale, if the sale and the purchase by Edward Jones thereat can stand. If they cannot stand, the *prima facie* case of the plaintiffs is made out, for they shew title in McFarlane, and they derive title from him; and as to Thompson under whom, apart from the tax sale, the defendants derive their title, the plaintiffs shew that McFarlane had, as against him, an undoubted equity to obtain from him a reconveyance of the land in question. The first question therefore is, whether the tax sale is impeachable.

Before discussing the several grounds of objection, I will premise that the case of *Connor* v. *Douglas*, 15 Grant, 456, before the late Chancellor, and afterwards in the Court of Appeal, seems to settle it as a principle that the statutes for the sale of lands for taxes are not to be construed as statutes creating a forfeiture. The language of Chief Justice Draper in a previous case, *Payne* v. *Goodyear*, 26 U. C. Q B. 451, states accurately, as I think, the purpose and character of these statutes. "The primary, it may be said, the sole object of the Legislature in authorizing the sale of land for arrears of taxes was the collection of the tax. The statutes were not passed to take away lands from their legal owners, but to compel those owners who neglected to pay their taxes, and from whom payment could not be enforced by the other methods authorized, to pay by a sale of a sufficient portion of their lands." This is the language of a learned judge less disposed than some other judges of the courts, and less disposed than the majority of the court in *Conner* v. *Douglas*, to hold tax sales not vitiated by irregularities I think that Mr. Justice Wilson, in *Cotter* v. *Sutherland*, 4 VanK., 384, takes a just view of the objects and nature of these statutes.

One of the objections taken in this case is, that the rates, or some of them, imposed by the municipality are excessive. I feel clear that there is nothing in this objection. The statutes create a machinery for the raising of money by taxation for local purposes. They vest power for the purpose in bodies elected by the tax payers themselves. If they err in matters where they have a discretion, I do not see how their action can be reviewed by the courts. If they transcend their powers, the remedy, I apprehend, would be in applying to quash the by-law, by which they do so. But here is a subsisting by-law by which a tax is imposed and under which proceedings to levy it are taken. Assuming for a moment that it is open to objection, still while it stands it must be an authority for what is done under it. It would, in my judgment, be against principle, as well as in the highest degree mischievous, if a sale for taxes could be impeached on such a ground as this.

Another objection is, that the warrant for sale does not sufficiently distinguish between lands patented and unpatented lands. It has been held that the words "all patented" are sufficient, *Brooke* v. *Campbell*, 12 Grant, 526; *Bell* v. *McLean*, 4 VanK., 416. The words here are "all deeded." What the statute requires in the warrant is to "distinguish lands which have been granted in fee, from those which are under a lease or license of occupation, and of which the fee still remains in the Crown." It is contended that the word "deeded" may apply to a patent in fee or to a lease, to one as well as the other. But so may the word patent, or the word grant. "Deeded" is indeed a more colloquial expression, but still has an understood meaning, viz., conveyed in fee; and the words *all* deeded, or *all* patented could have no other meaning, as it is implied that all were upon the same footing; that where a distinction, if any existed, was to be noted, and the bulk of the lands enumerated were certainly granted in fee, the proper construction would be that all were so, and that there were none to distinguish. I am not disposed to be more strict than the judges who have held the word "patented" to be sufficient. Still, I cannot help remarking that this is only another instance of the inaccurate and careless way in which many municipal officials discharge their duties.

It is objected that the rates are not kept separate in the collector's roll. I think that though there are very good reasons for the provision in the statute that they should be kept separate, still the provision is only directory, and under *Connor* v. *Douglas*, the omission to keep them separate would not invalidate a sale for taxes. I say this, assuming that the facts in this case are in favor of the objection. I am not satisfied, however, that this is the case, for the aggregate of the different columns which are set out separately agree with the sums set down in the column headed "total taxes." This was not the case in *Colman* v. *Kerr*, 27 U. C. Q. B. 5, to which I am referred. It is true that other lots are charged with rates not set down against these lots, but they appear to be special rates which may have been chargeable for local reasons against those lots and not chargeable against the lots in question; but, however that may be, I should hold the omission to keep the rates separate no ground for setting aside the sale.

A fourth objection is, that for some of the rates inserted in the collector's roll there was no by-law of the township to warrant them; as put in paragraph fifteen, "the township clerk in making up said rolls inserted rates, and more especially the rates called the 'Township rate,' without any rate or tax having been imposed or levied by by-law of the corporation of the said township, which the plaintiff submits was the only manner in which such corporation could impose a rate or tax." The objection upon this is, that by-law No. 14, passed in 1856, which was a by-law for the imposition of taxes, and 1856, being one of the years for arrears of taxes in which the lands in question were sold, was not regularly passed; that in short there was no valid by-law, the document called by-law No. 14, not being authenticated by the seal of the corporation. I do not think, upon the evidence, that I can find this objection to be founded on fact. It is true that in the book produced by the township clerk containing copies of by-laws passed by the township council, no seal of the municipality is appended to the copy of the by-law in question, as it is to the copies of by-laws entered in 1857, and in subsequent years; but the explanation is, that 1857 is the first year in which this was done, and the clerk swears that the seal was appended to the original by-law. I should not assume that it was not so, although not appearing in the entry in the book, because the entry purports to be a copy only, made probably at first only for convenience of reference, and the presumption would be that the by-law itself was passed and duly authenticated.

There is indeed evidence in respect of other by-laws passed in the same year by the county council, which is much stronger against their authenticity, but these are not impeached by the bill. The bill impeaches no county by-law, but only a by-law or by-laws passed by the township council; the plaintiffs did not ask leave to amend by inserting allegations impeaching the validity of any county by-laws, and if leave had been asked I should have refused it, as not in furtherance of justice. The plaintiffs are purchasers, for the sum of $50, of the interest of McFarlane in the lots sold for taxes, and they say in argument that the sum of $1200 paid by the trustee of Mrs. Jones for the same land was an inadequate consideration. It is manifest that what they really purchased was the chance of finding some flaw in the proceedings connected with the tax sale that would enable them to set it aside, and thus obtain the land for less than one-twentieth of its value. If there are objections to a sale to which the court must give effect, the court will decree against the sale: but it will do so only where the plaintiff is entitled *strictissimi juris*. It certainly will not aid him by granting any indulgence. Mr. Justice Wilson, in *Cotter v. Sutherland*, 4 VanK. 388, describes those in the like position with these plaintiffs as "speculating on some defect discovered, or which they hope may be discovered in the course of litigation, and who have paid but little, if any, more for the chance of the suit, than the persons whose titles they dispute have paid in taxes." In this case the sums paid in taxes were more than three times the amount paid by these plaintiffs for the chance of setting aside the tax sale. Mr. Justice Wilson goes on to say, "the former statutes of maintenance and champerty might properly be re-enacted and enforced against such persons, for they are in no sense entitled to legal favor." In all this I entirely agree.

The plaintiffs are not entitled, in my opinion, to succeed upon any of the grounds upon which they have impeached the tax sale, and their bill must be dismissed with costs. I should observe that some of the grounds taken by the bill were abandoned in argument: upon them I make now no observation.

Taking the view of the case that I do, I have not thought it necessary to express any opinion as to whether the defendant Mrs. Jones and her trustee are entitled to the protection afforded by the law to purchasers for value without notice, and having registered titles.

## DIVISION COURT CASE.

(*Reported by* B. F. FITCH, ESQ., *Barrister-at-Law.*)

### FAIR v. JAMES.

### GRAND TRUNK RAILWAY, *Garnishees.*

*Division Court Act, 32 Vic. ch. 23 (Ont.)—Jurisdiction of Division Court under garnishee clauses—Foreign railway —Place of business.*

Section 7, sub-sec. 1, of the Ontario Division Court Act, 32 Vic. ch. 23, provides that the garnishee summons shall issue "out of the Division Court of the division in which the garnishee lives or carries on business."

*Held*, in case of a foreign railway doing business within this Province, to mean that proceedings may be taken in the division in which the principal offices for the Province are located.

By 29 & 30 Vic. ch. 92, the Grand Trunk Railway Co., whose head office is at Montreal, leased the Buffalo and Lake Huron Railway, whose principal offices were at Brantford.

*Held*, that garnishee proceedings against the Company were properly taken at Brantford.

[Brantford, 1870—*Jones, Co. J.*]

In this case the primary creditor took garnishee proceedings under 32 Vic. ch 23, against the Grand Trunk Railway Company at Brantford, it being the principal station on the Brantford line known as the Buffalo and Lake Huron Railway, and which had been leased by the former company. The debt was for wages due the primary debtor for services on this branch line, and the cause of action arose at Brantford. It was objected by the garnishees that the Division Court of the County of Brant has no jurisdiction over the Grand Trunk Railway Company under the garnishee clause of the above act, inasmuch as the company do not reside, live, or carry on business within the meaning of the act anywhere or in any place in the County of Brant, and that they do not so reside, live or carry on business anywhere than in the City of Montreal, in the Province of Quebec.

JONES, Co. J.—Where the garnishee proceeding are taken on a judgment already recovered against the primary debtor by the 6th section of our last Division Courts' Act, sub-section 4, the summons must issue from the court of the division in which the garnishee resides or carries on business. Although the phraseology of the two sections is slightly different, the provisions are, I think, substantially the same.

The debt owing by the garnishees in this case to the primary debtor was for wages earned and payable at the Brantford station, within this

division. Had the primary debtor sued the garnishees for these wages the suit could have been entered and tried in this court, as the whole cause of action arose in this division. I mention this, as in the argument before me a good deal of stress was laid by the counsel for the garnishees, upon the hardship they would be subjected to could they be called upon to answer such suits as these at every Division Court along the line. I think there is nothing in this argument, for these garnishees may now be sued as defendants in any such court, provided the cause of action arose there; and, as a rule, it is more convenient to both parties that a case should be tried in the division where the cause of action arose, and where the witnesses, if any, would probably reside, than it would be to try it at Montreal or any other place where the garnishees might carry on business.

In the English authorities cited by the garnishees the same argument of inconvenience was raised, and it had a considerable weight with the court, but there a defendant can only be sued in the district where he resides or carries on business, except the special leave of the judge is obtained to sue him where the cause of action arose; but by our Division Courts Act, as already remarked, it is optional with the plaintiff to bring his action either in the division where the defendant resides or where the cause of action arose.

The main question, however, is whether the garnishees carry on business within the meaning of the Act, at Brantford. The evidence shewed that the debt owing by the garnishees to the primary debtor was for wages due the primary debtor for services on the branch line of the railway from Buffalo to Goderich, and that the cause of action arose at Brantford, which is the principal station on that line. This branch line was originally built and owned by the Buffalo, Brantford and Goderich Railway Company as an independent line. Brantford was the principal station, and the head offices of the company were situate at that place. The manufacturing and repairing shops for the whole road were also located there. That company becoming involved sold their road to the Buffalo and Lake Huron Railway Company, who continued and extended the same business that the old company had carried on at Brantford, at which place the head offices of the company, and the machine works and manfacturing and repairing shops for the road were still continued.

The Buffalo and Lake Huron Railway Company leased their road to the garnishees. See 29 & 30 Vic. ch. 92.

The garnishees have still continued the workshops at Brantford, where they have a superintendent of those works, Mr. Jones, who employed the primary debtor. They have also there a local superintendent of the line, Mr. Larmour, who acts under instructions received by him from Montreal, at which latter place the chief offices of the company in Canada are situate. The general manager again receives his instructions from the Board of Directors in London, England, where the head office of the company is situate.

I think from the above consideration that Brantford stands in a different position from that of a principal station. It appears to be the place where the business of the line is centred and carried on.

The case of *In re Brown & The London and North Western Railway Co.*, 4 B. & S. 326, is cited by the garnishees to shew that a railway corporation only carries on business within the meaning of the English County Court Act, at the place where their head office is situate and the general business of the company is transacted. But in the above case the defendants had their head office and general place of business in England, where they might be sued. Suppose their head office was in France and the business in England was carried on through instruction from such head office, would it be held that the company did not carry on business in England, and therefore that they could not be sued there?

The case I have supposed is very much like the position of the Grand Trunk Railway Co. as respects this Province. The City of Montreal, where the garnishees have their chief offices in Canada, is not in this Province, and our courts have no jurisdiction there. It is unto us a foreign country. To compel the plaintiff to go there to prosecute this matter would be to deny him any relief, for the Act under which these proceedings are taken does not apply to that Province.

When therefore the Legislature enacts that these proceedings may be taken against a garnishee at the place where he carries on his business, it must mean, I think, where the business is carried on in this Province. To put any other construction on the act would be to render its provisions nugatory.

Now the Buffalo and Goderich line of railway is a distinct branch not owned by the garnishees, like their main line, but leased by them and worked under a special arrangement with the Buffalo and Lake Huron Railway Company.* If the question is as to what place in this Province the garnishees carry on their business as regards this line, I think the answer would be Brantford, for the reasons I have already stated, and as I think it my duty to put such a construction on the act as will give effect to its provisions, I hold that the proceedings have in this case been properly instituted in this court, and that I have jurisdiction in the matter.

If it should be held that the garnishees could not be proceeded against at Brantford on the ground, that although their principal business as regards this line is carried on here, yet that it is so carried on under instructions from Montreal, would it not in effect be saying that neither could they be proceeded against at Montreal, because the business there is carried on under instructions from the head office in England.

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RICHARD A. DAWSON, the colored graduate of the Law Department of the University of Chicago, was lately awarded a certificate of good moral character by the Superior Court of Chicago, with a view to his future admission to the bar, upon the motion of B. W. Ellis, of the Chicago bar, who was formerly a slaveholder in the State of Arkansas. Verily the world moves.

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* Since giving this judgment the Grand Trunk Railway have purchased the Buffalo and Lake Huron line, and the purchase was ratified by an Act of last Session, 33 Vic. cap. 29 (Can.).—EDS. L. J.

## UNITED STATES REPORTS.

### SUPREME COURT OF MICHIGAN.

CITY OF DETROIT v. BLAKEBY AND WIFE.

(*Continued from page* 176.)

In order to get at the true ground of liability, the opinion goes on to determine, first, whether townships and other public bodies, not being incorporated cities or villages, are liable, and shows conclusively that they are not, and the court arrives at this conclusion not on the basis of an absence of duty or an absence of means, but because their duties are duties to the public and not to individuals. Full citations are made from the English cases which were cited before us, and also from the American cases. The case of *Young* v. *Commissioners of Roads*, 2 N. and McC., 537, is cited approvingly, and the following language is quoted as expressing the correct idea: "When an officer has been appointed to act, not for the public in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered him, he may be responsible in a private action for a neglect of duty, but when the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution." In another part of the opinion, sheriffs are given as examples of the former and highway commissioners of the latter class of officers. The cases cited do not all require the consideration for the services to come from individuals, but they all require the services to be due to individuals and not to the public, and to spring from contract. The English cases are reviewed in the *Mersey Dock Cases*, 1 H. of L Cases, N. S., 93; 1 H. & N. 493; 3 Id. 164, and exemplify this. Thus the liability to repair a sea wall is in favor of those who own the property adjacent; the liability to keep docks safe of access in favor of those who have occasion to require their use upon the customary terms; the liability to keep toll bridges safe in favor of those who use them. But there is no instance of liability where the public is interested directly, and in those cases where the obligation rests upon the consideration of corporate franchises, the duty has always been towards individuals, although the consideration moved from the state. The decisions upon this sustain the views of Judge Selden concerning his premises, but there is some difficulty in reaching his conclusions through them. It is admitted everywhere, except in a single case in Maryland, that there is no common law liabaility against ordinary municipal corporations, such as towns or counties, and that they cannot be sued except by statute. It has also been uniformly held in New York as well as elsewhere, that public officers whose offices are created by act of the legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it unless it is authorized or ratified expressly or by implication. This doctrine has been applied to cities as well as to all other corporations. *Barney* v. *Lowell*, 98 Mass 570; *White* v. *Philipston*, 10 Metc., 108; *Mower* v. *Leicester*, 9 Mass., 247; *Bigelow* v. *Randolph*, 14 Gray, 541; *Wolcott* v. *Swanscott*, 1 Allen, 101; *Young* v. *Com'r of Roads*, 2 Nott. & McCord, 537; *Pack* v. *Mayor*, 4 Seld., 222; *Martin* v. *Mayor of Brooklyn*, 1 Hill, 545; *Bartlett* v. *Crozier*, 17 J. R., 438; *Morey* v. *Newfane*, 8 Barb., 605; *Eastman* v. *Meredith*, 36 N. Y. 284; *Hyde* v. *Jamaica*, 27 Vt. 443; *Lorillard* v. *Town of Monroe*, 11 N. Y. 392; *Mitchell* v. *Rockland*, 52 Maine, 168—and the numerous cases which exonerate cities from liabilities for not enforcing their police laws so as to prevent damage, rest upon a very similar basis.—*Howell* v. *Alexandria*, 3 Peters. 398; *Levy* v. *Mayor*, 1 Sandf, S. C. 465; *Proctor* v *Lexington*, 13 B. Monroe, 509; *Howe* v. *New Orleans*, 12 La. Ann., 481; *Western Reserve College* v. *Cleveland*, 12 Ohio St., 375; *Brinkmeyer* v. *Evansville*, 29 Ind, 187; *Griffin* v. *Mayor*, 9 N. Y. 456. In *Eastman* v. *Meredith*, 36 N. H, 284, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature, which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies. They may own private property and transact business not strictly municipal, if allowed by law to do so, just as private parties may, and with the same liability; but their public functions are all held at sufferance, and their duties may be multiplied and enforced at the pleasure of the legislature. They have no choice in the matter; they have no privileges which cannot be taken away, and they derive no profit from their care of the public ways and the execution of their public functions. They differ from towns only in the extent of their powers and duties bestowed for public purposes, and their improvements are made by taxation, just as they are made on a smaller scale in towns and counties. In the case of *Bailey* v. *Mayor*, 3 Hill, 538, it was intimated by Judge Nelson that the state could not compel the city to accept its charter, and in *Child* v. *Boston*, the fact that the sewerage system had been left to vote and been accepted, was held to make it a private and not a public matter. The sewer cases have, in several instances, gone upon this latter notion. It is not necessary to discuss that question here, because streets are not private and because in this state at least, no municipality can exercise any powers except by state permission, and every municipal charter is liable to be amended at pleasure. The charter of Detroit has undergone most radical changes. It is impossible to sustain the proposition that those charters rest on contract, and it is impossible as Judge Selden demonstrates, to find any legal warrant for any other ground for distinguishing the liability of one municipal body from that of another. There is no basis or authority for any such distinction concerning the consideration on which their powers are granted, and it rests upon simple assertion; and yet the decision stands in New York as authority for all that is claimed here, because although in the case in which the opinion was given in the Supreme Court, it was not called for, yet in the case of *Hickox* v. *Trustees of Plattsburg*, 16 N. Y., 161, in which it was adopted as the opinion of the Court of Appeals, the mischief was a mere neglect to repair, when the street had been obstructed by an individual excavation for a short time.

It is impossible to harmonize the decision with the previous decisions exempting corporations from responsibility, because public officers were not their agents. It is no easier to sustain it in the face of the uniform decisions denying liability for failure to enforce their police regulations. The authorities which make corporations liable on the ground of conditions attached to their franchises, go very far towards compelling them to respond as absolutely bound to prevent mischief, and the general reasoning on which most of the opinions rest, and the criticisms made upon former decisions—which it is asserted, went altogether too far in creating liability—all are designed to show, and do show very forcibly, that simply as municipal corporations apart from any contract theory, no public bodies can be made responsible for official neglect, involving no active misfeasance.

There is no such distinction recognized in the law elsewhere. In *City of Providence* v. *Clapp*, 17 Howard, 161, the United States Supreme Court, through Judge Nelson, held that cities and towns were alike in their responsibility and in their immunity. In *County officers of Anne Arundel* v. *Duckett*, 20 Md., 468, a county was held responsible to the fullest extent. In New Jersey in *Freeholders of Sussex* v. *Strader*, 3 Harrison, 108; *County Freeholders of Essex*, 27 N. J., 415; *Livermore* v. *Freeholders of Camden*, 29 N. J., 245, and 2 Vroom, 507, *Pray* v. *Mayor of Jersey City*, 32 N. J., 394, the cases were all rested on the same principles, and cities were exonerated because towns and counties were. The suggestion of Judge Selden has been caught at by some courts since the decision, and has been carried to its legitimate results, as in *Jones* v. *New Haven*, 34 Conn., 1, where the damage was caused by a falling limb of a tree. But so far as we have seen, even the cases which are decided on this ground, do not hold that towns do not receive their powers upon a consideration as well as cities. That question still remains to be handled n those courts.

It is utterly impossible to draw any rational distinction on any such ground. It is competent for the legislature to give towns and counties powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this, because the good government of the people is supposed to require it. It would be contrary to every principle of fairness, to give special privileges to any part of the people and then deny to others, and such is not the purpose of city charters. In England the burgesses of boroughs and cities have very important and valuable privileges of an exclusive nature and not common to all the people of the realm. Their charters are grants of privilege and not mere government agencies. Their free customs and liberties were put by the great charter under the same immunity with private freeholds. But in this state and in this country generally they are not placed beyond legislative control. The Dartmouth College case which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere which holds that either offices or municipal charters generally involve any rights of property whatever. They are all created for public uses and subject to public control.

We think that it will require legislative action to create any liability to private suit for non-repairs of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions of importance and some nicety. They cannot be solved by courts.

*Judgment reversed.*

COOLEY, J., dissented.

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(Note by Editor of *American Law Review*.)

[The foregoing case is one that cannot fail to be of interest to the profession, inasmuch as it concerns an important question affecting a great number of our municipalities to a very large extent, and is, at the same time, a departure from the doctrines, which have been supposed to have been adopted by the English courts and those of some of the American States. The question is by no means free from difficulty; and we cannot fairly say that we have been able to devote sufficient time to an examination and analysis of the cases bearing upon the point, to enable us to speak confidently of the exact weight of authority against the decision here made. There seems to be no question, whatever, that the New York Courts have adopted a rule more in conformity with the dissenting opinion in this case than with that of the majority. In *Davenport* v. *Ruckman*, 37 N. Y., 568, the rule is thus stated: When the streets or sidewalks of the city of New York are out of repair through the neglect of the corporation, it is liable to an action for such neglect, at the suit of the person injured, whether the injury arises from some act done by the corporation, or from an omission of duty on their part. And the same doctrine is found in numerous earlier decisions in that state, most of which are referred to in the opinion in the case under review. The rule is thus stated in a late case in the Supreme Court of New York: "Whatever may be the case in regard to commissioners of highways in towns, a different and more stringent rule appears to have been applied to corporations and the trustees of a village:" *Hyatt* v. *The Trustees of the Village of Rondout*, 44 Barb., 385.

And in *Wendell* v. *The City of Troy*, 4 Keyes, N. Y. Court of Appeal, 261, the city was held responsible for an injury to the plaintiff, by means of the defective construction of a drain under the street, whereby it caved in, although built by a private person for his own convenience by permission of the city authorities. The New York cases seem to go the full length of making cities and villages responsible for all damage caused by any failure to perform the duties imposed by their charters, on the ground that having sought special acts of incorporation they are bound, as corporations, to the performance of all the duties imposed by such charters, as conditions voluntarily assumed by the corporations, impliedly at least, by reason of the acceptance of the charters containing such conditions. And the case of *Jones* v. *The City of New Haven*, 34 Conn. 1, seems to go much upon the same ground, except that there the matter came specially under one of their own by-laws, in regard to which there might seem to be less question than if the duty had been imposed by the legislature as a public duty or burden.

The general doctrine that a public officer is not responsible for the misconduct of his subor-

dinates, although his appointees, has been recognized from an early day: *Lane* v. *Cotton*, 1 Ld. Ray. 646, where the action was against the postmaster general for the default of his deputies. The case of the *Mayor of Lime Regis* v. *Henley*, 3 B. & Ad. 77; S. C. 2 Cl. & Fin. 331, was an action for injury to the defendant's land by reason of the plaintiffs failing to repair certain sea walls appertaining to their municipality, and which the condition of their charter obliged them to maintain and keep in repair. The case was first decided by the Common Pleas, in favor of the present defendant, 5 Bing., 91, and came for hearing on writ of error in the King's Bench. Lord Tenterden, Ch. J., gave judgment for the defendant, upon the ground that the corporation by accepting its charter became bound to perform all its conditions, and whoever suffered damage through any default in that respect, may have an action and the public may have redress for such defaults by indictment.

The subject has been more or less considered by the English courts since that time; but the case of the *Mersey Docks* v. *Gibbs*, and the same v. *Penhallow*, 1 H. Lds. Cases, N. S. 93—128; S. C., 1 H & N. 439; 3 id. 164, seems to have put the question at rest there, so far as the points involved in the latter case are concerned. The injury complained of here occurred by reason of the docks being out of repair. The plaintiffs are a public corporation, created for the purpose of maintaining the harbor of Liverpool, and are required to maintain and keep in repair suitable docks and other harbor accommodations, for the use of which they are authorized to demand certain dues, which are intended to maintain the works, and are to be lessened whenever they produce more than is required for that purpose. The Court of Exchequer gave judgment in favor of the corporation, on the authority of *Metcalfe* v. *Hetherington*, 11 Exch. 258; but this judgment was reversed in the Exchequer Chamber; 3 H. & N. 164, and the judgment of the Exchequer Chamber affirmed in the House of Lords. The case of Gibbs was heard on demurrer to the declaration which contained the averment that the company knowing that the dock and its entrance was, by reason of accumulation of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damages arose in consequence.

The case in the Exchequer Chamber seems to have been decided upon the general ground that a corporation created for the purpose of maintaining public works, and receiving tolls or dues for the use of the same, is bound to see that such works are kept in a safe and fit condition for public use. This decision went upon the authority of *The Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & El. 223, 242. And it was here considered that it made no difference whether the tolls were reserved for the benefit of the shareholders, as in the last case cited, or in a fiduciary capacity, as in the present case. And the House of Lords seem to have decided the case upon this view. Lord Chanworth, Chancellor, said the destruction was one that could be held to affect the rights of those using the docks. Lord Wensleydale said, if the question were *res integra*, and not settled by authority, he would be inclined to hold that it came within the principle of the cases where public officers have been held not liable to a private action for neglect of duty by servants appointed by them. But upon the former decisions he held the judgment below must be affirmed. And Lord Westbury fully concurred with the Lord Chancellor.

And it seems to us that this case is in itself no sufficient authority for holding cities and villages any more responsible for their streets and sidewalks being out of repair than are towns ro counties, upon whom the duty of keeping highways in repair is imposed, where it has been long settled there is no responsibility for injuries occurring by want of repairs, unless imposed by statute. But the earlier English cases held a more stringent rule of responsibility in regard to cities and villages having special acts of incorporation, and chiefly upon the ground that they had accepted them voluntarily, and thus assumed the duties imposed by the charters thus accepted. How far this distinction is well-founded, it will not be altogether decisive of the question to inquire. For, since it has been long settled that such corporations are so responsible, it might not be entirely just to the public to now declare their irresponsibility, when, but for the rule of responsibility already established, the legislature might have provided for such responsibility by special enactments, as in the case of towns. For while it may be reasoned with great plausibility that there is no good reason, aside from the former decisions, to hold cities and villages to any higher degree of responsibility in regard to damages occurring by reason of their highways being out of repair, than towns are held; it may at the same time be urged with great propriety that they should be held to the same responsibility. But under the decision here made they could not be so held in most of the States. Since the legislatures have omitted in most cases it is fair to presume, to impose the same duty by statutes upon cities and villages, which they do upon towns, on the ground that it is not required by reason of the general principles of the law having already imposed that duty upon them, this consideration will tend to show that the restoration of the law to symmetry in this particular will more conveniently come from the legislature than from the courts. Beyond this it does not occur to us that any very convincing argument can fairly be urged against the decision of the court in this case. It cannot, we think, as a general rule, be justly held that towns are any less responsible for the consequences of leaving the highway in an unsafe condition than cities and villages are. If it requires a special statutory enactment to impose any such responsibility upon towns, we do not, upon general principles, very well comprehend why it should not require the same in the case of cities and villages. Our only doubt would be whether the symmetry of the law upon this point might not better be restored by the legislature. I. F. R

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COUNTY OF YORK WINTER ASSIZES will commence on the 9th January, 1871.

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PRINTED BY COPP, CLARK & CO., COLCORNE ST. TORONTO.

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