

No. 13463

Supreme Court of Illinois

Roberts, et al.

vs.

City of Chicago.

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 29.

*Roberts
vs
Chicago*

13463

United States of America }

STATE OF ILLINOIS, COUNTY OF COOK, S. S. }

Pleas, before the Honorable George Manierre

Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the

Second Monday, (being the eleventh day) of October in the year of our Lord one thousand eight hundred and fifty eight and of the Independence of the said United States the eighty third

Present, Honorable

George Manierre

Judge of the 7th Judicial
Circuit of the State of Illinois. }

Charles Haven

States Attorney.

John S. Wilson

Sheriff of Cook County.

Attest;

Wm L. Church

Clerk.

Be it remembered, that heretofore, to wit,
on the second day of April, in the year afore-
said, George R. Roberts, by A. W. Windlett, his
attorney, filed in the office of the Clerk of
the Court aforesaid, his certain declaration,
which is in the words and figures following
to wit—

State of Illinois } In the Cook County
Cook County, ss. } Circuit Court. April Term A.D.
1858.

George R. Roberts, who is plaintiff in this
cause, by Arthur W. Windlett, his Attorney,
complains of the city of Chicago, defendant
in this ~~suit~~ cause, who has been summoned
to answer the said plaintiff, of a plea of
respon on the case.

For that whereas, heretofore, to wit, on the
first day of September, in the year of our Lord,
one thousand, eight hundred and fifty seven,
he was the owner in fee simple, of a certain
lot, and the buildings thereon—viz— the prem-
ises described as follows— Bounded by a line
beginning at a point in the South line of
Madison street, one hundred and six feet
from the North East Corner of Lot 1, in
Block Eighteen, in the School Section Addition

Declaration

to Chicago, in the county aforesaid—running thence west, 22 feet, thence south, 90 feet, ~~to an alley~~, thence East 22 feet, thence north 90 feet, to place of beginning— which lot is twenty two feet wide, and ninety feet ~~wide~~ deep, and fronting on the south side of Madison street, a public street and highway in said City— and the said plaintiff saith, that being such owner of said lot, he had before that time, in the year A.D. 1856. at a cost of ten thousand dollars, built and erected on said lot, a store or building of Brick, of four stories in height, upon a basement,

Declaration

for mercantile and business purposes, upon and by, and with express reference to, and reliance upon the public grade of said Madison street as then established by law— said plaintiff avers that said Madison street covers the only means of access or approach to said Building and premises, and that without such access and approach, the said store and building was and would ~~be~~ necessarily be, wholly untenable and useless— said plaintiff avers that on first day of September, A.D. 1857. the rents, issues, and profits of said ~~premises~~ Premises, and building amounted to a large

Declaration

sum viz. fifteen hundred dollars a year, and that he was of right entitled to have the said public street or highway kept and remain open and unobstructed immediately before his said Building and premises - yet the said Plaintiff says, that the said City, by its said officers, agents and servants, on the first day of October, A.D. 1857, maliciously, negligently, wrongfully, intentionally, and without reasonable cause - Caused said public street and sidewalk along and immediately in front of said Premises and building so being built-upon, and with reference to the said grade as aforesaid, to be obstructed raised, and filled up, to wit, four feet above the established grade of the said street, and sidewalks, by and with divers large heaps and piles of earth, sand, and timbers, and other materials, and caused the said public street and sidewalk and highway as aforesaid to be so raised, to wit four feet above said grade, so as completely to block up, obstruct and hinder all access and approach to said Premises - thereby making the same wholly untenable, and use less to said plaintiff -

And the said plaintiff in fact, saith that in order to render and make his said

Premises tenantable and fit to be occupied, he was necessarily compelled to expend, and did expend, to wit, three thousand dollars, in causing said store Building to be raised to a level with the said ^{street} block and sidewalk, that said Premises were rendered tenantless, untenable and profitless to said plaintiff, for viz- seven months by the premises - whereby said plaintiff lost divers great gains and profits thence accruing and issuing, to wit, one thousand dollars - and said plaintiff further says that said building was greatly and inevitably injured by the process and strain of raising the same, to a large amount to wit, five hundred dollars - and that solely by and in consequence of the Premises, and of the wrongful conduct of the defendants, we have sustained damages in all amounting to five thousand dollars - to wit, at the County aforesaid

And that also for that whereas the said plaintiff, heretofore, viz- on the first day of September A.D. 1857 was the owner in fee simple of a certain other lot situate and fronting upon the south line of said Madison street, to wit, in the County aforesaid, and adjoining the lot mentioned in said first count, west, on the west side thereof, being

Declaration

twenty feet wide, and ninety feet deep, said Madison street then and there being a public street and highway in said city, he had before that time, to wit, in 1855. caused to be built and erected upon a level with, and with direct reference to the established public level and grade of said street, a certain other store or building of Brick, four stories high, on a basement even with said grade of said street or highway, as then established by law. Said building was built by said plaintiff, and fitted for mercantile and general business purposes, on said land and grade, at great cost, viz. ten thousand dollars— and yielded plaintiff great gains, issues and profits, viz. one thousand dollars a year— Said plaintiff avers that the sole means of approach to said Building or store, was by said Madison street, on the front thereof, and that without such approach, the same was, and would be wholly untenable, unfit for occupation, or business, and useless and said plaintiff avers that he was of right entitled to have the said public street, or highway immediately in front of, and before his said store or building, kept and remain open and unobstructed— yet the said plaintiff in fact saith, that the said city by its officers, agents and servants, on or about the

Declaration

first day of October, A. D. 1857. through negli-
 gence, unskilfulness, malice, and without
 any reasonable cause, caused the said pub-
 lic street or highway, along and in front of
 said lot and store, said store having been
 as aforesaid, built upon, and with reference
 to the established grade and level of said
 street, to be filled up, and raised by earth
 and other materials, to the height of six feet,
 above such said level and grade, thereby
 blocking up, obstructing, and cutting off, all
 entrance and approach to said store and
 Premises— and thereby blocking and render-
 ing the same untenable, and wholly
 useless to said plaintiff, for a long space of
 time, to wit, for seven months thence next
 ensuing— and the said plaintiff in fact
 saith that he was necessarily compelled
 in order to render his said premises tenanta-
 ble and fit for occupation, to expend, and
 did expend, divers large sums of money,
 to wit, three thousand dollars, in raising
 said store to a level with said street and
 sidewalk— that in consequence of the
 Premises above stated, the said Building
 was, and remained for a long space of time,
 to wit, seven months, tenantless, untenant-
 able and unfit for any use, purpose or bu-

Reclamation

since - whereby he lost, viz, five hundred dollars, and that through and by process of raising said building, the same was necessarily and ^{materially} indubitably greatly injured and damaged - and thereby rendered, less valuable by one thousand dollars than it would otherwise have been - and said plaintiff avers that by reason and in consequence of the wrongful and unlawful conduct of said city in the premises as aforesaid, he has been greatly damaged, injured and oppressed, and has sustained damages to a large sum or amount, to wit, ten thousand dollars -

And also for that whereas the said plaintiff heretofore to wit, on the first day of October, A.D. 1857. to wit, at the city of Chicago, in the county aforesaid, being the owner and proprietor of certain other premises viz, to wit, a lot fronting north on Madison street, a public street or highway in the said city of Chicago, being a part of Lot one, in Block ^{forty} ~~eighty~~ two, in the School Section addition to Chicago, in the county of Cook aforesaid - said lot being bounded by a line beginning at a point in the south line of Madison street, one hundred and six feet distant from the South East

Rec'd. L. S. T. W.

corner of said ^{lot} one, and running thence west, along the said south line of said street forty two feet ~~thence~~ north, ninety feet to the place of beginning—and the said plaintiff in fact saith, that before that time, to wit, in the year 1835. he had. built, erected and made great and valuable Buildings, stores and other improvements, for the purpose of the same being used in and for mercantile, and other general business, on and upon said last described land, fronting on said Madison street, and upon a level with, and in conformity to, and with a view to the grade and level of said street and highway, and the sidewalk opposite to said lot, as then previously regulated and established by law—said stores and buildings being, and built of Brick, upon Basement walls of stone on a level with, and even with said grade and four stories high—at a cost to said plaintiff of twenty thousand dollars—and the said plaintiff says that said Buildings and stores were, at the time of the Commission of said defendant of the wrongs and grievances hereinafter mentioned, and for a long time before then, had been, rented for, and were and then

Declaration

thence south, ninety feet to an alley—thence East forty-two feet,

had been yielding and paying to said plaintiff, divers large profits, and sums of money - viz. three thousand dollars a year, yearly - Said plaintiff avers that the sole means of approach to said stores and Premises, were by and along Madison street, on the front of said Premises - and that without ~~such~~ approach, said stores and premises were wholly untenable, unfit for any business purposes, or use - and profitless - Said plaintiff avers that at the time last aforesaid, and ever since, he has been of right entitled to have the approach to his said stores and premises along said street or highway, along, to and upon the public and established lawful grade and level of said street, kept and remain open, free, clear of obstruction, and accessible - and that it was the duty of said city to keep the same so open, free and clear of obstruction, along, and in front of said plaintiff's said lot and stores. yet the said plaintiff saith, that the said defendants, the said city of Chicago, by its officers, agents and servants, disregarding their duty in the Premises, and designing maliciously to wrong, injure and oppress said plaintiff, without any au-

Declaration

thorty or right- without reasonable cause
 negligently unskilfully caused the said
 street and public highway in front of, and
 along said lot, to be filled up and raised
 divers, viz six feet, above the level and grade
 of said street, as established by law- and
 upon and in reference thereto, the said
 plaintiff's buildings had been expressly
 built, and all his Improvements made
 as aforesaid- by means whereof, said the
 level of said street, was filled and raised
 above the whole first story of said stores,
 and buildings, and the said stores and
 buildings were then and thereby rendered
 wholly untenable, and unfit for busi-
 ness and occupation- inaccessible and prof-
 itless to said plaintiff- and that the same
 necessarily remained so, for, viz. the space
 of seven months thereafter- whereby plain-
 tiff lost viz. rents and profits amounting
 to two thousand dollars- and the said
 plaintiff says, that in order to render said
 buildings tenable, and fit for occupa-
 tion, he was necessarily put to, and did
 incur great cost and expenses in having
 said Buildings raised to a level with
 the new level of Madison street- viz- the
 sum of five thousand dollars- and in

Declaration

making repairs rendered necessary by the
process of raising the same, he further ex-
pended viz- one thousand dollars- that said
Buildings were inevitably and necessarily
damaged by raising the same, beyond what
could be repaired- viz- one thousand dol-
lars- and said plaintiff says that by means
of the wrongful and improper conduct
of defendant, by its agents, servants and
officers, in the Premises above set forth, he
has sustained damages in all amount-
ing to, at least the sum of ten thousand
dollars- and therefore he brings his suit
8c.

Arthur W. Windett
Atty for Plff.

And afterwards to wit, at the April Term
of said Court, for the year last aforesaid, there
to wit, on the 14th day of April, of said year,
the following proceedings, among others, were
had and entered of Record therein, to wit-

12771 George R. Roberts }
vs } Case.
City of Chicago }

This day comes the said
Plaintiff, by his attorney, and due personal

Order of the Court

service of Process of Summons issued herein, being had on the said defendant, and it having been three times solemnly called in open Court, comes not, nor does any person for it, but herein it makes default, which is ordered to be taken, and entered of record—wherefore said Plaintiff ought to have and recover of the said Defendant, his damages herein sustained by occasion of the premises, but because those damages are not certainly known to the Court, it is Ordered that a Jury come hereafter to enquire of said Plaintiff damages herein—

And afterwards, to wit, at the Term of said Court last aforesaid, to wit—on the 24th day of May, of said year, the following proceedings, among others, were had and entered of Record therein, to wit—

George R. Roberts }
 12771 } Case
 The City of Chicago }

This day again comes the said plaintiff, by A. W. Windett, his Attorney, and the said Defendant, by E. Anthony, its Attorney, also comes, and the said Defendant, by its said Attorney, now moves the Court to

Order vacating default

set aside the default of the said Defendant heretofore taken and entered of Record in this cause, and the Court ~~having~~^{being} fully advised in the premises, now sustains said motion and orders that the default of the said Defendant heretofore taken and entered of record in this Cause, to wit—on the 14th day of April, last past, be, and the same hereby is set aside, and held for naught—And thereupon, on motion of said Defendant's Counsel, it is ordered that said Defendant have leave to plead, or demur to said Plaintiff's declaration, herein, by tomorrow morning—

And afterwards to wit, on the 23rd day of May, in the year last aforesaid, the said defendant, by E. Anthony, City Attorney, filed in said Court, its certain demurrer to the said plaintiff's declaration, which is in the words and figures following, to wit—

Cook County Circuit Court.

April Term. A.D. 1858.

George B. Roberts

The City of Chicago

And the said Defendant, in this suit by Elliott Anthony, its Attorney,

W. Windett, of Counsel for said Plaintiff,
it is ordered that he have leave to amend
his declaration herein, by adding an addi-
tional Count thereto—

November 6th A.D. 1858.

George B. Roberts }
12771. vs } Case
City of Chicago }

This day again come
the parties, by their Attorneys, and the Court
having heard argument of Counsel, and
being fully advised in the premises, doth
find that said plaintiff's declaration here-
in, is ⁱⁿ sufficient in law for him to have
and maintain his said action in this be-
half, ^{Therefore the said demurrer of the said defendant} against the said defendant, to said
plaintiff's declaration herein is sustained,
to the sustaining of which said demurrer,
the plaintiff, by his counsel, excepts, And
the said plaintiff failing to amend his
said declaration herein— Therefore it is
considered that said defendant do have and
recover of the said plaintiff its costs and
charges, by it about its defense in this behalf
expended— And have execution therefore—

Therefore the said demurrer of the said defendant
is sustained.

State of Illinois, }
COUNTY OF COOK. } S. S.

I, WILLIAM L. CHURCH, Clerk of the Circuit
Court of Cook County, in the State aforesaid, do hereby
certify the above and foregoing, to be a true, perfect and complete
copy of ~~the Declaration, Answer, & Proceedings~~
~~that and entry of Record~~
in a certain cause lately pending in said Court on the
~~Common law~~ side thereof, wherein ~~George R~~
~~Roberts~~ was Plaintiff and
~~City of Chicago~~ was defendant

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of our
said Court at Chicago, this 22nd day of January A. D. 1859

W. L. Church
Clerk.

In the Supreme Court of the State of Illinois
Third Grand Division. April
Term A.D. 1837.

George R. Roberts
vs Plaintiff in Error

The City of Chicago deft. in Error
had now covered the said Plaintiff in Error
by Attorney W. Widdett his Attorney and
alleges that in the record of judgment
in this case there is manifest error.
In this trial that the Court held error in
maintaining the depositions to be taken
and in giving judgment in favor of deft.
and against said Plaintiff

Attorney W. Widdett.
Atty for App in Error.

Order

of April, last-past, be, and the same heretofore
is set aside, and held for naught — And
thereupon, on motion of said Defendant's
Counsel, it is ordered that said Defendant
have leave to plead, or demur to said Plain-
tiff's declaration, herein, by tomorrow morning.

And afterwards to wit, on the 23rd day
of May, in the year last-aforsaid, the said
defendant, by E. Anthony, City Attorney, filed
in said Court, its certain demurrer to the
said plaintiff's declaration, which is in the
words and figures following, to wit —

Cook County Circuit Court.

April Term. C & D. 1858.

George R. Roberts }
vs }
The City of Chicago }

And the said Defendant

Deceases

comes and defends the wrong and injury, when &c. and says that the said declaration and the matter therein contained, in manner and form as the same as above stated, and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof, against the said defendant, and that the said defendant is not bound by law to answer the same. And this the said defendant is ready to verify.

Wherefore for want of a sufficient declaration in this behalf, the said Defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof, against the said defendant.

E. Anthony
City Atty

And afterwards, to wit, at the same term of said Court, last aforesaid, to wit, on the 3rd day of June, in said year, the following proceedings among others, were had and entered of Record therein, to wit—

12771. vs }
Geo. R. Roberts }
City of Chicago } Case

On motion of A.

In the Supreme Court of
the State of Illinois Third
Grand Division - April Term
A.D. 1859.

George R Roberts
Plaintiff in Error

vs

The City of Chicago
Defendant in Error.

And hereupon
afterwards to wit at the April Term
of the said Supreme Court in the
year of Our Lord One thousand
Eight Hundred & Fifty Nine the
said City of Chicago by Elliott
Anthony, comes here into court
and says that there is no error
either in the record & proceedings
aforesaid, or in the rendition of
the judgment aforesaid; and prays
that the justices of the said Supreme
Court now, here may proceed to
examine, as well the record &
proceedings aforesaid, as the
matter aforesaid above assigned
for error, and that the judgment
aforesaid in form aforesaid given
may be in all things affirmed.
E. Anthony
for Deft in Error.

Supreme Court
George R. Roberts
vs
City of Chicago

Found in Error

E. Anthony
Found in Error

29 23
Circuit Court of Cook County

George R Roberts

vs

City of Chicago

Record

Filed March 5, 1860

L. Leland

Clerk

77
11
77
27
84720
16940
43
2

44.15

4.15

For Deft in Error

May it please your Honors.

The judgment in which we submit there is error, was given sustaining a general demurrer to our declaration. That demurrer admits the truth of the declaration. It confesses that every word in the declaration is true. Not merely in a technical sense, but fully and substantially. So that excluding all questions of formal sufficiency and accuracy, and assuming as true, all questions of fact, it raises the bare question, whether in point of substance in law, upon the case so stated, and admitted and confessed by them to be true; upon this case in all its amplitude and extent, without any restriction, diminution, or qualification of any sort, the plaintiff in error has a right to maintain his action; whether the plaintiff in error can have redress at the hands of the law for the damages which he has suffered; whether the defendants for the damages which they caused him, are liable in law.

May it please your Honors, I submit, and respectfully insist, that the case now before the Court is admitted by the defendants to be true in this sense and to this extent. That our case is the same case, and as strong in point of law, as if upon this declaration, the plaintiff had gone to trial before a jury, upon the general issue, and upon that trial had given competent and sufficient evidence in support of each and all of its sub-

(stantia

allegations of fact, to satisfy the jury, and to justify them in rendering, and to request them to render, a verdict for the plaintiff upon each count, and upon that evidence and trial, the jury had found a verdict for the plaintiff upon each count of the declaration, and assessed damages corresponding to the proof, and commensurate with the damage claimed; and upon that verdict, judgment had been entered for the plaintiff; And then, that upon that judgment the whole case had been brought by appeal or writ of error before this Court, for its judgment and review.

May it please your Honors, less than this will not satisfy the the common principle, never questioned, and always observed; that a demurrer confesses the whole truth of the pleading demurred to. By interposing a general demurrer, the defendants arrests the development of the proof upon which the plaintiff relies, and which, *ex hypothesi* it is within his power to produce; he thus renders a trial unnecessary, and so prevents it from taking place. We well know the nature of a jury trial, and of the proof, and other elements which influence the trial, and verdict; the arguments of counsel, the charge of the judge, and that minute and particular detail of circumstances, which in the course of evidence, come to the knowledge of the jury, and tell powerfully on the final result.

2

A demurrer casts off all this. It cannot be allowed, that by an act of his own, a defendant should rob a plaintiff's case of any one element of its strength, and thereby weaken a remedy by the very act which admits his own wrong, whatever its enormity may be.

But this result can only be got rid of, by the rule which I contend for, and by its faithful application to the case in hand. Justice in its primary necessities, demands this rule, and sustains me in the position I have taken.

Then what are the facts in this case, which the defendants admit? And by what rules of law are these facts to be governed?

Mr. Roberts, the plaintiff in this case, was in 1855, the owner of a valuable lot, bounded by a public street in Chicago, which was regularly graded by the city; upon this lot, and in conformity with the grade, he erected buildings in reference to the grade as then established: the buildings were made with express reference to the grade, and upon faith of its permanency. The plaintiff conformed to the regulations then in force, and made his improvements accordingly. Subsequently, the grade was changed. He then made further improvements, and put up other buildings upon the same premises, in conformity to the new grade.

The premises in question are situated near a

public bridge across the South branch of the Chicago river. That bridge was torn down, and upon the site of that bridge, a new one was constructed, and leading to it, a raised causeway was made, along and in front of the plaintiff's lots and stores, several feet - from four to six feet, - thick or deep, upon and above the established grade and level of the street as last established; which completely blocked up the entrance of the store, and all access to them, filling up the street to near a level with the windows of the second story, rendering them wholly untenable, and useless.

These buildings were erected at a great expense, and were yielding large rents at the time of the act complained of. The plaintiff lost his tenants, and his rents; was put to an outlay of several thousand dollars in accommodating his buildings to the changes in the street, and obviating the obstructions made to their approach, and in making them again fit for use and enjoyment.

All these acts on the part of the defendant were done without warrant of law, or authority; and were ^{executed} ~~extended~~ with a degree of negligence, and carelessness, which if the acts had been lawful of themselves, would have made the defendants responsible on that ground alone.

This is the case which the defendants admit by their demurrer; these are the facts which they confess exist; they admit, we should have proved them all directly and completely.

and that a jury would have found a verdict in our favor; yet, they deny our right of action, our right to recover, and affirm, that in law we have no redress.

No excuse or authority is shown or pleaded; and they contend, that while they acted without authority, without law, and without right, and wronged us heavily, we are to be turned away from this Court without remedy and without redress.

The city of Chicago denies her liability in the premises. We contend that in point of fact, and in point of law, she is liable. She claims immunity upon the maxim of *Damnnum sine injuria*.

They say, that whatever the nature and extent of the plaintiff's damage, the acts which caused it, were rightful acts, done by the city in its public or Legislative capacity, in the exercise of its powers of eminent Domain, and therefore not actionable.

I admit that as to the streets of the city, the city government has full power over them. The regulation and establishment of grades was within the competence of the defendants. This power and jurisdiction was conferred by the charter. It is highly important if not absolutely necessary, that this power which must reside somewhere, be vested in the city of Chicago, as a corporate body. We do not question the bare physical power of the city under its charter to do the acts complained of.

But we affirm, that resulting from this power, and its possession, and exercise, in a case like this, the obligation of making indemnity for damage done in its exercise, follows it; and in this case fastens upon the city. We contend for this proposition upon the ground of principle, and we contend for it as a necessary deduction of natural justice, and elementary law; and we also, contend for it, on the ground of precedent, and authority of Judicial Tribunals of the highest ^{character} authority and of last resort in Great Britain and in numerous States of this Union.

We admit the existence of exceptional precedents, and cases which, so far as they go, contain many dicta inconsistent with the doctrine which is ^{opposed} to us, but while some of these cases and dicta, may appear to be in conflict with us, we contend that the judgment of every court in every case of this kind that has come before it, has been consistent with our right to recover in this case; while the express decisions of the highest Courts in our favor.

The first case I shall cite as a direct authority conclusively in our favor, is *Leaden vs Moxon & Will's*, 461. The case, is ^{closely} ~~very~~ similar to this. The plea general issue, verdict special, stating that the act was done under the authority of parliament, raising the question whether the action lay. The defence relied upon the public authority, and contended that private interests must yield to public good.

4

Blackstone said The Seignior had no jurisdiction to give satisfaction in damages: shall the party be precluded from bringing his action in this Court, and laying his case before a jury to have satisfaction in damages. I am of opinion he shall not be precluded. Gould Justice, was of opinion that the action well lay. Every man of common sense must understand, that this act of parliament ought to be carried into execution without doing such enormous injury to individuals. If in the execution of a public trust, Commissioners mismanage themselves, they are answerable on Indictment. If they aggrieve the subject, they are answerable civiliter in damages. After stating the common law right of action in such a case is recognized by the act of parliament; he says; It would be very grievous to the subject if the Courts of Westminster were not open for them to obtain justice by the verdict of a jury in such a case as this.

Blackstone added. The commissioners were authorized to repair and alter the street, and to apportion the property holders for the expense ^{of the} ~~of the~~ it is consistent with common sense that the plaintiff must be rated to have her horses buried? The damages are too small, Justice Nares agreed.

The case at bar is like the case cited in all important particulars. The declaration although not copied from that is very similar.

The very questions raised here by the city, were raised and discussed at the bar, and determined by the court in that case, in our favor. It is impossible to deny the plaintiff's right, without disregarding the authority of that case, and it is impossible to uphold that case, unless our right is conceded.

There the act was authorized by act of parliament it was the repairing and grading of a public street, it was done by commissioners appointed by the act, in their public capacity, and not as individuals; their new grade blocked up the entrance to the plaintiff's premises; the case is parallel with the case at bar; the elements of both are the same.

The act of parliament did not confer an immunity; the discretionary powers of the commissioners did not mitigate the wrong. The case assumes the principle, that an act of parliament conferring authority of this sort, confers it on the express condition, that it be exercised so as to cause no loss or damage to private persons that if such loss or damage is caused, liability ensues, and the right of action rests not on the wrongfulness of the act, but on the fact of damage.

That for an act in itself illegal, the commissioners are indictable; but that for consequential damage arising from a rightful act, a private

action lay. If this principle be applied to the present case, the plaintiff must recover.

If the city did an unlawful act on the public street, it was subject to an indictment; conceding that it acted legally, or did acts within the scope of its powers, but which destroyed the plaintiff's property, it is subject to this action for damages.

The case which I have cited is so high an authority, that as a question of law, it settles the principle of this case.

It was decided by the Court of Common Pleas, in one of the highest periods of its renown, in the age of Mansfield, with Blackstone adding the authority of his opinion, and name, to the judgment of the Court. The reason and rule of the case, are drawn from the prime sources of the common law, they are just; and especially valuable, inasmuch as they subject the acts of local corporations to the wise control of the Courts of Justice, and of the rules of law.

The authority of the case is supported by the authority of the act of parliament itself, under which the commissioners acted. This implies the right of action at the common law. The act does not confer the right of suing, but limits the time within a certain period.

And this is the case with all acts of

5

~~action~~ ~~law~~. Parliament in similar cases.
In all cases where commissioners are authorized to ~~construct~~ sewers, sea walls; incorporated companies exercising powers under parliament, are all left subject to actions within certain times, for damages caused by them in the construction of their works. In all the English acts of parliament providing for the execution of public works, whether by cities, boards of commissioners, or private incorporations, such as rail roads, dock companies, turnpike, gaslight, or mining companies, there is a provision and clause, that all persons, whose property is injuriously affected by acts done, under the charter, or corporate powers, shall be at liberty to bring their actions for damages, within a time appointed by the act.

Innumerable acts of parliament might be cited in support of this assertion. And I submit and earnestly contend, that this clause does not create, or confer the right; it regulates, and limits a right which already exists at common law ^{of action} upon the case. But the clause in question is introduced in favour for the defendants; that they shall not be held liable for acts done under the act of parliament, unless such ^{action} be brought within the certain time.

It is a Statute of limitations of actions;

2 . . . 1

avowedly made for the protection of the officers, the commissioners, the corporate body; and can in no just sense be held to give origin to the right of action any more than that the Statute of Limitations is the sole authority for bringing suits, instead of being the prohibition after the time stated. Then in support of my argument, I have the whole perpetual consent of parliament as an organ of the Common Law; and reflecting upon the constitution of that body; the large prevalence of the legal character among its members of both Houses; the deference paid to the judges of Westminster Hall, so often consulted upon acts of Parliament, and the long period of time, considerably more than a hundred years for which parliament has published this its emphatic recognition of the principle; the weight of argument and authority derived in this way from the acts of Parliament, would be overwhelming and conclusive, in the absence of all else; if this were a new case, at least to this extent, that in the judgment of parliament, an action lies for damages sustained by individuals consequential upon the execution of works done under the authority of its laws and Statutes, at common law. If this were a

new case, and if there were no decision upon the subject in our favor, the argument as to the principle of the Common law, and its power to afford relief in such a case, would be of the greatest weight and consideration. It would be conclusive evidence of the Common law.

13 But we are not left to speculate. The Courts of many States of this country, have affirmed the doctrine contended for, in a large number of cases presenting the question under discussion under a variety of aspects; but all concurring in direct affirmance of the rule of law as we contend for it.

The first American cases which I shall cite, are a series of decisions from the Supreme Court of Ohio.

Goodloe } The action was on the case; the plaintiff had
vs } built and furnished his house with an express
Vincinatti } view to the level and grade of the street as pri-
4. Ohio. 1850. } marily established by the defendants; and the
Narr. stated the defendants maliciously, and without
cause dug up, and destroyed said street. Demurrer.
The Court said. That by the demurrer, the defend-
ants admitted the previous grade as established by
themselves; that plaintiff had built to it; and
that they maliciously, and without cause changed
the grade to his injury. The act is charged
to have been malicious and illegal.

When a corporation acts illegally and maliciously, it ought to be made directly responsible.

Smith
vs
Cincinnati

4 Ohio. 514.

This case was like the last. The plaintiff had built and finished his house with an express view to the grade and level of Water street; as previously established by the defendants; and that the defendants maliciously and without cause, dug up and destroyed the street. Demurrer. The previous grade, the building to it, the change of grade without cause, were the grounds on which the plaintiff relied and recovered. These cases last cited, were exactly like the case at bar, but less strong than this case is. If those cases are entitled to any consideration or regard, they are decisions of the case at bar. They conclude this case.

Rhodes
vs
Cleveland,
10 Ohio. 157.

In this case the Court said, we held the city of Cincinnati liable in the above ^{Cases} for injuries done by grading either illegally or maliciously.

In this case the Court of holding the city of Cleveland liable for its acts, and the consequences in like manner as an individual. And in that case, upon full discussion the Court held the city of Cleveland liable for its acts, and the consequences to others following from its acts, in the same manner and to the same extent, precisely, and upon the

same grounds, that individuals are held liable.

And they made their decision, upon the plain and obvious moral duty, that aggregations of men, like individual men, should not wrong others with impunity. But that when for their own purposes and advantages, they do acts which injure or destroy the rights or property of other men, they should be held bound to make compensation.

Barron
vs
Baltimore

2 Am. Jur. 203.
cited and
approved in
14 Rich 147 et seq.

In the Baltimore case the plaintiff owned a wharf in the port of Baltimore: the city diverted the natural channels of certain streams to a point near the plaintiff's wharf: and thereby caused a deposit of sand and earth to be made, and so to lessen the depth of water at the plaintiff's wharf per quod, &c. The opinion of Archer, Ch. J. is founded on the immutable principles of justice and Constitutional law. "If," he said, "the exercise of the power of the city was wanton or careless, and improvident, every one admits their responsibility. It was contended by the defendants that they were a public corporation acting within the scope of their powers, upon advice, and with due care, and circumspection. The opinion of Archer proceeds, upon the ground, that it was a necessary measure beneficial and necessary to the city; but it was held that they should not carry it into effect, without compensating the individuals whose property was sacrificed."

" The plaintiffs had a right ~~a right~~ of which
" they were deprived by the defendants act.
" Their right to wharfage was greatly impaired
" and for that special injury, they were entitled
" to maintain their action. The defendants are
" trustees of public interests, and ought to answer
" as an individual to the person at whose ex-
" pense they are benefited".

McCombs }
Akron } In this case, the town Council of Akron, Ohio,
15 Ohio. 474 was sued for damages for cutting down a street
before the plaintiffs lot and premises. The
defence was, that the cutting down the street, had
been done in a careful, and judicious manner
under the powers of the charter, and the town
ordinances.

X By the Court. The sole question in the case is
whether a municipal corporation can be made
liable for an injury resulting to the property
of an other, by an act of such corporation, strictly
within the scope of its corporate authority, and
not attended by any circumstances of negligence, or
malice.

The case of Rhodes vs. Cleveland, 10 Ohio. 107
with admirable good sense, and strength of
reason, answers this question, by asserting that
corporations are liable like individuals for
injuries, although the act was not beyond their

lawful powers. A sort of transcendentalism, like a mist about the mode of corporate liability, enabled corporations, like the Pestilence that works at noon-day, to do their mischief, and escape responsibility. It is refreshing to the jurist, and important to the rights of individuals, that these confused notions are yielding to more light, and more solid reason.

V The late Chief Justice in the same case, manfully asserts the freedom of judicial action, when for ages the judicial mind has been hampered, by the declaration, that in cases like the present, he did not look so much for precedents, as for the following out of incontestible principles. In pursuance of this declaration, he asserts with unanswerable force, upon the most solid foundations of reason and morality, and law: That the rights of one should be so used as not to impair the rights of another, is a principle of morals that from remote ages has been recognized as a maxim of law. If an individual exercising his lawful powers ^mcommit an injury, the action on the case is the familiar remedy. If a corporation acting within the scope of its authority, should work wrong to another, the same principle of ethics demands of them to repair it; and no reason occurs to the Court, why the same remedy should not be applied to compel justice from them.

We recognize that case as founded on the most solid reason, right, and morals; and a majority of of the Court, have not the slightest disposition to impair its obligations but by the light of such example, we hope, that the whole subject-matter of corporations will in the end be reduced to the control of incontestable principles.

There is another reason; If a municipal corporation for the good of all within its limits, see proper to cut down a street, it is nothing more than right that an injury then done to a single individual should be shared by all.

The same case came again before the Court, ^{when} 18, Ohio 229. *Avory, Ch. J. said.* The plaintiff was the owner of a lot in Akron, on which he had built a brick house for merchandizing, with an express view to the level and grade of the street on which the building stood. After he had built, the town caused the street in front to be dug out, and sunk several feet, by which the value of his lot was lessened. The defence was made under the gen. issue, that the acts were done under corporate powers, and town ordinance. The judge on the application of the defendants, allowed a writ of error in order to give an examination of the case. The doctrine of the Court in its former decision of this cause, is, that a corporation is liable for an injury resulting to the property of individuals, by acts strictly within

17
its corporate powers, and without negligence or
notice In *Scoville vs Giddings*, 7 Ohio, 474, the
Court held, that if the town had power to cause
the act to be done, and the agents perform it in
strict accordance with a legal order, they cannot of
course be personally liable. But that determination
left the injured party without remedy, unless he can
have his action directly against the corporation
and by its name.

The case of *Scoville vs Giddings* 10, Ohio, 157,
supplied the remedy. In that case, the court de-
clared the corporation was liable to answer in dam-
ages, for a consequential injury; though not acting
beyond its lawful power. This case is not
the only one to be found in support of the principle
involved.

The Court here referred to the cases of *Thayer*
vs Boston, or *Stetson vs Foxon*, and *Burton vs*
Baltimore, in support of the above views and
reasonings.

That a city should be clothed with power
to accomplish all its objects may be necessary.
It is indispensable that it should have the
power to regulate its streets; and in the
exercise of that power, injury to property
of individuals may be unavoidable. But when
the public interests require the sacrifice of
such property, a very clear principle of justice

requires compensation for the injury. The judgment we are reviewing, sanctions that principle and gives the compensation.

It is not without support from that section of the constitution of the State, which holds private property inviolate, but subservient to the public ^{necessities} requirements, provided, compensation be made to the owner. The above section has come under the consideration of the Court upon various occasions, in its bearings upon public improvements of the State, upon private companies, authorized to construct public works; and upon city and town corporations; and in reference to them all, it is now understood; that powers may be conferred upon them necessary to carry out the objects for which they were created, but when in the lawful exercise of such powers, individual property must be taken, sacrificed, or injured, they will be held liable to the party injured, to make good his loss. If the act conferring the authority provides the mode of satisfaction, that must be followed; if not, the injured ^{party} may still appeal to this Court, and find redress. This principle is just, in accordance with the spirit of the Constitution, upon the point in controversy; and in accordance with the decisions of this Court, and other courts upon the same subject.

These decisions of the Ohio Courts determine

1 That in the case at bar, the city officers who executed the public works under the authority of the city, are not liable on the ground that they were compelled to act, and acted under a lawful public authority.

7 Ohio, 474. Scoville vs Giddings.

Thayer vs Boston 19 Pick. 511.

Lougher vs Pointer.

2 That the local corporation, the principal in interest and in counsel, and power, is liable for consequential damages resulting from public improvements, or works, done by it in its corporate capacity, and under its corporate powers, without negligence actual, or constructive on the parts of its executive or ministerial agents, on the ground that the principal shall answer civilly for the acts of its agents, for which the agents themselves may claim immunity,

3 This liability arises upon the fact of injury, loss, damage, harm, or destruction of property, or interruption in its lawful use, or enjoyment.

4 This doctrine is based upon the same grounds that whoever by his voluntary act causes directly or indirectly, loss or damage to another, shall make it good. The right of action exists of common right; and independent of any statutory provision.

5 This doctrine is supported by the spirit, if not within the letter of the constitutional

provision relating to private property. While the constitution forbids the taking of private property for public use without compensation, its spirit and reason require that property shall not be wholly or partially destroyed or ruined, if not taken, with impunity.

21

After repeated calls to ~~review~~ this whole doctrine, and to recede from the grounds before taken by the Ohio courts, the Supreme Court of that State, lately on repeated occasions, presenting the question in its strongest aspects, and after a very full and exhausting argument ^{in each case}, reaffirmed its former views,

Crawford
Village of

7 Ohio State Rep.

458-471.

See case at
length -

The owner of a lot in a city, who erects a building upon the established grade, and who has put up his building, and made his improvements in reference to that grade, has an action at law, for damages, against the corporation for changing the grade. The Court base their decision upon a proprietary right of the lot owner to an easement in the highway. What highway? The highway as established. He has an easement upon that level; If the highway is materially changed, he may acquire an other easement, in the new highway; but he is entitled to compensation for the loss of his old easement.

The new easement may be more or less

valuable, than the old one, This affects
the quantum of damages, not the ^{substantive} ~~substantive~~
right to an action.

see also 4 Ohio 50- 84.

I next cite the Court to a case decided by the
Supreme Court of Wisconsin, arising in the city
of Milwaukee, which develops the question
very fully. Before proceeding to state the case,
I may be permitted to remark; that the
application and assertion of the doctrine for
which I contend, was made by the Wisconsin
Court in the face of infinitely greater difficul-
ties arising upon ~~circumstances~~ considerations
of local public necessity for making the works, and
of expediency for denying the redress sought, than
can be pretended to exist in the present case.

Milwaukee is built upon the sides, and
summits of steep and rugged hills; and on
low levels at their feet. How ^{inferior} ~~unpleasant~~ and
evident to all in advance, the necessity of
grades, and changes of grades; of deep cut-
tings, of embankments, and modifications there-
of, as the settlement and building up of the
city should advance. The buyer of lots
in Milwaukee, bought with his eyes open to
what was ^{by its exposure} ~~inevitable~~, both for the welfare
of the community, ^{in its own} ~~and~~ also in many cases,
the benefit of
for his own lands; while in some instances,

it is true, that early sites and erections
would be destroyed and rendered useless, by
the necessary ~~public~~^{public} changes and ~~and~~
improvements that would have to be
made. On the other hand, in direct
ratio to the necessity and magnitude of the
changes, would be the burden, if beside the
costs, the consequential damages should be
thrown upon the corporate treasury. If
in any case, surely in that, it might have
been said, that private interests must yield to
the exigencies of the public welfare. And
24 that if private proprietors were aggrieved
by measures necessary for the welfare of the
community, they must look for compensation, in the
attendant improvement of their property, in
part made necessary by the public works,
and for the rest, look to their own exertions,
and to their participation in the common
^{and prosperity} advantages. But these specious arguments
were overruled by the Court in its decision.

X

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would be destroyed and rendered useless, by
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and for the rest, look to their own exertions,
and to their participation in the common
^{and prosperity} advantages. But these specious arguments
were overruled by the court in its decision.

X

Goodall }
Milwaukee }
S. Wis. Rep.
32-50.

In 1847 the city of Milwaukee passed an ordinance permanently establishing the grades of certain streets; and provided, that to any person building by the grade on said streets, the faith of the city was pledged, that the grade should not be altered, to the injury of such person; without the ward in which &c. making ^{compensation for} the accruing damages. Held, that the city should be held liable for damages caused by a change of the grade under an ordinance of the city, by which the buildings erected in reference to the grade, were rendered valueless.

Writ of Error on judgment of the Circuit Court rendering judgment of non suit, and in favor of defendants for costs.

Per Curiam, A.D. Smith J.

After admitting to the Constitutional guarantee, that property shall not be taken for public use, without compensation made, he asks, "Is the constitutional inhibition restricted to the actual, manual taking and appropriation of the constituent material of the property to the public use? or does it extend to all the ~~material~~ ^{material} rights, incidents and uses of the property as nature disposes, fixed, and adapted them?"

4 Page 167. In Lusala vs Halbrook, Chancellor Walworth

501. I have a natural right to the use of
" my ground in the situation in which
" it was placed by nature surrounded and
" protected by the soil of the adjacent lots.

" and the owners of those lots will not be
" permitted to remove this natural support and
" barrier."

" But is not the right of access to any lot in
" the situation in which it was placed by
" nature, over adjacent soils, much my right to
" the enjoyment of any lot, as is the right of ^{pro-}tection and support. Am I bound when I purchase
" any lots, to take into view all the whims and
" caprices, the suggestions of speculation, or malice
" that may seize upon or ^{influence} ~~pervert~~ disturb the judgment
" of municipal functionaries; or to measure the
" wants of other owners to be promoted by ar-
27 " tificial means? Or may I rely upon their
" natural form, situation, and advantages,
" leaving to others to do the same, under the shield
" of the Constitution? In other words, may I
" purchase property with all its natural advan-
" tages of form, location, and surroundings, and
" rest sure that these advantages, opportuniti-
" es and incidents, shall not be taken from
" me unless the public necessity shall so
" require, and then only upon compensation?
" Nor is it deemed necessary now to discuss the

" question whether a municipal corporation may
 " be liable to an action for an abuse or excess
 " of its powers.

The Court then states the distinction between adjoining lot-owners, and between an owner as in this case, and a municipal Corporation having control of streets. The former has full dominion and ownership; the latter, has dominion as an owner only for public purposes, as a street, and can use the ground laid out as a street, for that purpose and no other, and the power and dominion of the latter, are much more restricted, and must be exercised solely with a view to the objects and purposes of the trust.

28 " But it is claimed, that the city of Milwaukee
 " has other powers in relation to the regulation
 " and grading of the streets, than those conferred
 " ~~as by the title~~ derived from title, conferred by
 " the act of incorporation. These latter powers
 " must not be confounded with those derived from
 " title merely. The latter is an incident of ownership, the former is a delegation of power by the
 " State. The one is the dominion of the proprietor,
 " the other is the dominion of the Sovereign. To
 " the one the maxim Sic utere tuo ut alienum non laedas
 " is applicable; to the other, Constitutional inhibition
 " for the protection of private property, is the
 " only restraint within the scope of the charter,

And here the question recurs on which the
 whole ^{cure hinges} ~~disposition~~ is the power derived from the
 title merely, or a full and complete defence to
 every complaint for the use made of the lands,
 or whether such use is authorized by the charter.

In addition to the Mass. and Ohio cases,
 the Court cites ^{the case} of *Barnes v. Baltimore* 2 Am. L.J.
 307. *Cum v. Pittsburgh* 18 Penn. Rep. 187.

It may well be asked, in view of the
 principles sustained by the authorities, and reasoning
 before cited, what is the difference, in principle, and
in equity, or in the rules of construction, between
the case where the property of an individual is
taken for public use, and the case where the
sacrificed or rendered worthless as the direct
consequence of contiguous operations, designed and
constructed for the benefit of the public?

It was said in the argument, and it was
 repeated in the reasoning of the authorities cited,
 that the public good is the paramount good or, and
so it is with certain qualifications. It is necessary,
 that the city should have the right to regu-
 late streets, and devise and execute public
 improvements. But in the language of Chief
 Justice Shaw, let compensation go hand in
hand with the public benefit. Is it right,
 or just, that in order to accomplish a great
 public good, or to carry on a great public
 improvement, the several individuals whose

* Property of an individual

15
" property may be destroyed ^{thereof} ~~thereby~~, not literally
" taken and appropriated, should be compelled
" to sustain the whole loss occasioned thereby?
" If the public good or convenience requires
" that the grade of a street, should be lowered
" to such a plane, as to destroy the use of the
" lots of one or two men; whether is it more in
" accordance with natural justice, or sound public
" morality, that the public for whose benefit the
" improvement is made, should bear an equitable
" apportionment of the partial injury resulting
" therefrom; or that one or two citizens, whose
" property is thus destroyed or injured for the
" public convenience and benefit, should sustain
" or suffer the whole loss? The spontaneous
" suggestion of every enlightened conscience answers
" the question. It is at once suggested to every
" mind, as remarked by Chancellor Walworth, "that
" every person has a natural right to the use of his
31 " own land, in the situation in which it was
" placed by nature, surrounded and protected by
" the soil of the adjoining lots: And if the right
" is infringed for the public benefit, is not the
" owner, ^{as much} entitled to compensation, as if the
" soil itself were appropriated?
" In 12 Mass. ^{220. (Cotter v. Marsh)} which has been ably questioned
" by other Courts of learning, especially 19 Barb S.C.
" 380. there was no taking, appropriating, sacrificing ^{ic.}

" or destroying, or even injuring of property for
 " public use or benefit; very different is the case
 " where the convenience of the public requires the
 " sacrifice or destruction of one man's property;
 " where the public derive all the benefit, and
 " demand it at the unrequited expense of those
 " who may suffer by the operation.

" It is cheerfully admitted, that private tastes,
 " notions, and interests must and ought to yield
 " to the public welfare; but it is insisted, that the
 " public who demand the sacrifice; ought in eq-
 " uitable & ratable proportions, to share the expense
 " of procuring the victim. If the public interest
 " requires a grade to be made which changes ~~the~~
 " ~~situation~~ the situation of lands, as they were
 " placed by nature, ^{is} it not just, that the pub-
 " lic for whose benefit the lands of individuals
 " may be seriously damaged thereby, should in ratable
 " proportions, contribute in compensation for the dam-
 " age thus sustained? Is there any substantial
 " difference, whether the same ground in ~~any~~
 " elevated land is taken to construct an em-
 " bankment, or fill up a depression below, or
 " whether, the sand or gravel in the streets
 " around my lot, are taken to fill ~~up~~ the same,
 " or another, street below; and thereby render my
 " lot wholly inaccessible and worthless. In both
 " cases, the public interest is subserved, and in

both cases ~~either~~ individual property is either
 taken or sacrificed, as the direct consequence of the
 operation. The policy of the law in permitting
 it, is based upon the subserviency of private to
 public interests. But the policy of the law is
 equally designed to protect private property
 from uncompensated appropriation or destruction;
 when the public welfare seems to demand
 its destruction, On the part of the defendant in
 Error, it is contended, that their power to grade
 the streets is a continuing power, not exhaust-
 ed by one exercise of it, but is vested in the
 legislative authority of the corporation, to be exer-
 cised and used from time to time, as occasion
 should seem to require to promote the public
 good, or convenience; And that the city ordinances
 so far as they assume to abridge this authority
 are void. In *Gozler vs. Guyot* 6 Wheat. 593.
 the Court very properly held, that the power
 could not be abjured. There was no question
 of damages or compensation in case; the power
 was exercised, it was by no means held, that
 compensation could not be recovered for an
 injury resulting from such an alteration.
 We have most carefully examined all the cases
 cited by counsel for defendants in Error, and
 we have been satisfied with an examination
 of those authorities, which have been cited upon

34 " argument; but have searched for all the light
 " which elementary treatises, monographs, and re-
 " peated decisions within our reach, could furnish.
 " and in the main, we find ourselves thrown
 " back upon the principles of law and justice.
 " long established and approved by the universal
 " conscience of mankind.

" The Court then cites the section of the
 " Statute giving the power to grade and
 " level streets &c. under the provisions of
 " these several acts of the legislature, we are
 " unable to find any such limit or restriction
 " of authority as that contended for by the
 " defendants in error; To admit this doctrine
 " would be to admit, that while the city
 " authorities have ample, nay almost plenary power
 " over the streets, they may by solemn ordinances
 " and compact fix permanently the grade of
 " any street, and thereby declare, that who so-
 " ever will grade his lots, and erect his build-
 " ings in reference thereto, shall not be dis-
 " turbed or injured by a change of the grade
 " of the streets, without full compensation being
 " made to him, yet after the citizen shall
 " have expended hundreds and thousands
 " of dollars, relying upon the faith of the
 " city thus pledged, the common council
 " may with impunity violate its most

" solemn enactments, change however capriciously
 " or disastrously the grade of the streets so improved,
 " even to the utter ruin of the citizen who has relied upon
 " their faith. It is difficult to conceive of a rule of action
 " more destructive of private property, more utterly
 " incompatible with sound morality, and public
 " faith pledged in all the forms from which it
 " derives respect, confidence, and sanction.
 " We admit even as all the cases cited tend to
 " establish, that power of the city to change the
 " grade of the streets. But we are not here con-
 " sidering the question of power. The plaintiff in
 " error, does not seek to restrain the defendant
 " from the exercise of power. But he has acted
 " upon the ordinance of the city by which its
 " faith was pledged. The city did not engage
 " that they would never exercise the power
 36 " which they have of altering the grade of Sycamore
 " street; but they declared that if they did so
 " again, so as to injure any one, they would make
 " good all damages sustained in consequence thereof.
 " and solemnly pledged the faith of the city to that
 " end, Let that faith be preserved inviolate, if
 " they would challenge credence, If it be not,
 " let the sanction of the law put spur to the
 " public conscience.

" It will be borne in mind that neither in the
 " ordinance of 1846, nor 1847, was there any

" by a person, who with a view to accommodate
 " his surface to the established grade of the street,
 " has laid his foundation some ten feet below the natural
 " surface, and yet it is deemed necessary to excavate the
 " street some twenty feet deeper, and it is so done for
 " the benefit of the public, but to the ruin of the property
 " of such person; and all this after the most solemn
 " guaranty, which the city authorities could give of
 " permanency in reference to the former grade, and of
 " security in making the improvements upon the faith
 " of such guaranty, after making these compacts on the
 " part of the city, and having been acted upon by
 " the citizens, does not sound law as well as
 " public morals, and political economy, demand the
 " observance of the faith so pledged? We think so.
 " We also think it was competent for the common
 " council to pass the ordinance of 1846, and 1847,
 " and having been executed and acted upon, they
 " must be held obligatory upon the city. The
 " judgment of the Circuit Court is reversed.
 29 " But it will be said, "We admit the directness,
 " and pertinency of the cases you have cited,
 " we contest their authority. They are in opposition
 " to all received notions and ideas, and to the cur-
 " rent decisions of the older states of this Union
 " as well as of Great Britain in modern
 " times." It will be said by the other side,
 " that the Ohio decisions have been condemned

judicially in New York. overruled in Massachu-
setts, and New York, and are not worthy to
be regarded as authority anywhere, or by any
Court, and in point of fact are not regarded
as of authority. And they will cite the
opinion of Bronson in the case of Radcliff vs
Mayor of Brooklyn, & Camstock.

The gentleman whose disapprobation of the
Ohio Court, is there relied upon to rob the
opinions and decisions of that Court of respect,
was for a time upon the Bench. He has
also since then, been a Custom house officer
under the General Government. He was dis-
missed from that office by the power which
appointed him.

He is now, like the Gentleman who shelters
himself under his authority, a city attorney.

It will become any private person to
speak in contemptuous, and arrogant terms of
the Supreme Courts of the State of Ohio ^{of Justice} and
and it will become the salaried officer
of a local corporate body in this State,
to appeal from argument, and reason, and
undeniable justice, fortified by the highest
judicial authority explicitly declared of two
States of this Union, in twelve cases or more
occurring through a tract of twenty or thirty
years, to the private opinion of any gentleman.

individual; last of all to a man who occupies the same official position with himself, in this case.

But the Courts of Ohio and Wisconsin are not alone; they are supported by the highest Courts of England, by the authority of Parliament declaratory of the common law, and by the Imperial Civil law of Rome. The doctrines of those Courts are sustained by the repeated decisions of the Supreme Court of Massachusetts; by the ^{principles} judgments and decisions of the Courts of the State of New York itself; by the authority of the Text writers, Kent and Story, and Sedgewick. And the doctrines of those Courts have received already the implied approval of this Court, as intimated in a cause of very great importance, which was decided a few years ago. I mean the case of *Browning vs. Springfield*. In this latter case, the Ohio cases were pointedly brought before the Court, and the case which gave the fullest development to the doctrine in question; which presented, and was decided upon no other ground, ^{it is} the Akron case, was recognized by this Court ^{as its authority and as supplying a gap in its authority} for its guidance.

But the Akron case is valueless, and of no authority at all, unless the doctrine which I contend for, is allowed. For the very

Constitutional litis presented no other question, than the
are² of Corporate liability for consequential
damages; and called for no other decision,
than that municipal corporate bodies are liable
for consequential damages. That case, that
doctrine was recognized by this Court.

And I may add, if the Court permit, with-
out impropriety, that the then Chief Justice of
the State, Scates, does fully and without re-
serve, adopt the doctrine of the Ohio Courts;
and recognizes, as I contend and submit, to
this Court, in those decisions, a noble and
benign advancement and enlargement of
the Common Law, in keeping with its spirit,
kindred to the Constitution itself, and a proof,
that in these Western States^{the European Law}, the fruit and
wisdom of ages, is as reverently studied, as
carefully ~~guarded~~ ^{guarded}, and as faithfully served,
as in older societies, with all the pomp
of their Courts, and rigor of their institutions

I will next cite two cases, one from
the 4 Ohio (Warden) 74, and the other from
Gabriels New Jersey Reports.

In the first case, Ramsey, Justice, who
delivered the opinion of the Court said,

" In each of three cases, (alluding
to the former Ohio decisions,) the liability of a

4 municipal corporation, acting through sub-
4 ordinate agents, within the scope of its author-
1 ity, and without malice or negligence, was
7 enforced, where the acts of such agents
1 resulted in injury to the property of pri-
4 rate individuals. The propriety of investing,
6 such corporations with the power to improve
1 their streets, resulting often in direct injury
1 to private property, is conceded; but ^{the cases result} upon
4 the clear principle of right and justice,
1 which requires compensation to go hand
1 in hand with the public benefit.

44 4 And when in the the lawful exercise
1 of these powers, private property must be
1 injured for the common benefit of all, all
1 should be held liable to make reparation;
1 and in the view of the judges who concurred
1 in these decisions, the principle was not with-
1 out support from that section of the con-
1 stitution of the State, which secures the
1 inviolability of private property.

1 The Court remarked, that notwithstanding
1 the emphatic condemnation of those cases by
1 Judge Bronson in 4 Com. 204. they think
1 the obligation to make compensation in such
1 cases, cannot be seriously doubted; the only
1 question appearing to be whether compensation
1 should be provided by the legislature, or
1 by the common law ~~in~~ action.

Further on the Court observes, "However
 " lawful a business may be, whether pursued
 " by any individual or corporation, the law
 " exerts a careful regard for the rights of others.
 " It must not only be lawful in itself, but also
 " lawful in its consequences, to shield from responsibility.

45 " It cannot be accomplished with safety to
 " others without the exercise of a proper degree of
 " care and skill; which simply means, such care
 " and skill, as prudent men exercise in their
 " own affairs, when the loss if any happens to be
 " borne by themselves. The reasons upon which
 " this doctrine rests, are not in the least dim-
 " inished, when applied to injuries inflicted by
 " operations of men, endowed with corporate
 " capacities; either for individual emolument or
 " social convenience. They are still but individ-
 " uals pursuing their own interests or common ad-
 " vantage; and it would be altogether inad-
 " missible to permit them to use their acts of
 " incorporation, granted at their own instance,
 " and designed to offer them extraordinary facilities
 " in the accomplishment of their purposes, to
 " deprive others of acknowledged rights.
 " ~~Whether~~
 " ~~Whether~~ they act individually, or collectively, or
 " whether, they pursue mere private gain, or social
 " conveniences or governmental security, they are
 " equally bound by the great law of social duty.

to so conduct themselves as not to injure
others by their malice or negligence; and when
they do, the highest considerations of right and
justice, require them to be held responsible,
whoever may be injured, or by whosoever it
may be inflicted. Even the State is not ab-
solved from the moral obligation of making
of ~~making~~ reparation in such cases; and it
is only because her policy requires an appeal
to her justice, rather than amenability in her
Courts, that a remedy is denied.

Judge Ranney remarks, "These cases
sufficiently indicate the line that divides
the exercise of public, or merely judicial or
legislative powers, conferred upon a corporation
from those ministerial or executive, and munici-
pal in their ^{Nature} ~~Scope~~ and character."

47 In the exercise of the first class, the
corporation cannot be made responsible for
misconduct of those intrusted with their
execution. It embraces all that description of
duties involving judgment and discretion in
their exercise, and resulting in prescribing
the rules by which the conduct of individuals
is to be regulated in works either municipal
or public to be accomplished. And the
immunity from responsibility to individuals,
is ~~grounded~~ ^{grounded} upon the same public policy

" that protects the judge or legislature in the
 " exercise of his duty, and is designed to remove
 " every obstruction to the free exercise of his
 " judgment and discretion.

" It also includes, so far as liability of the
 " Corporation is concerned, the accomplishment
 " of purposes merely public, devolved upon the
 " corporations as a public officer, or agent of
 " the State, with no power to decline their
 " performance,

46 " In such cases, the immunity of the State is trans-
 " ferred to its officer or agent; and he only is liable
 " for his own, ^{direct} misconduct. The power of prescribing
 " rules and regulations, is sometimes called judicial
 " and sometimes legislative. It would perhaps be
 " more accurate to say, that it partakes of the
 " nature of these powers; and therefore is attended with
 " the same protection to those who exercise it; since it
 " is perfectly clear, that the legislature is incompetent
 " to bestow any ^{portion} ~~protection~~ of its legislative power upon
 " a corporation, or take from the judicial tribunals
 " any part of the judicial power of the State,
 " where the Constitution has lodged it. In such
 " cases, the corporation exercises a wholly subor-
 " dinate function, and rather gives detailed appli-
 " cation to legislation, than originates new rules;
 " while its by laws are to be deemed in the nature of
 " contracts between the corporation, rather than
 " acts of legislation.

117 " But when a municipal corporation assumes to
" execute its own prescribed regulations, by construct-
" ing improvements for the especial interest and
" advantage of its own inhabitants, the authorities are
" all agreed that it is to be treated as a legal individual,
" and as such owing all the duties to private persons,
" and subject to the liabilities that pertain to private
" corporations, or individual citizens. To this class most
" clearly belongs the construction, repair, and mainte-
" nance of its streets.

" Now does this conclusion give the least
" countenance to the supposition, that the corpora-
" tion is liable for the misconduct of the officers
" it selects when performing duties for or between
" private individuals. In such cases the absolute
" duty of the corporation is performed, when the
" selection is made, and having no interest in, or
" control over, the performance of such services, no
" liability attaches.

Delaware &

Canal Co. vs Lee } Action on the case, The declaration charged
2 Zabriske. 243. a misdemeanor in the obstruction of a flow of
water in a water which flowed through the plain-
tiffs' close, and thereby damaged the water in the
plaintiffs' close and injured it. Plea. gen. issue
The injury complained of is a nuisance created
by the obstruction of a water course, turning
the water in the plaintiffs' land

The injury is in its nature, actionable.
It is insisted that the Canal Company are not liable for any nuisance necessarily resulting from the construction of the canal, that a nuisance necessarily implies a violation of law, that the act complained of was done under authority of law act of the legislature, was done by sanction of law, and that the company are not liable, civilly or criminally for the consequences of such an act. It is true that a party is not liable criminally for an act done by authority of law.

Not as it seems is he liable civilly for such injuries as are not the natural, direct or necessary consequences of such act. 2 Barr. N. 314.

51 But it is by no means true, that an act constituting a nuisance must necessarily be in itself unlawful, or the contrary acts which in themselves are perfectly lawful, may, and frequently so, in their consequences, actionable injuries to others. To construct a mill-dam upon his own property is a perfectly lawful act; but if by means of such dam the natural course of the water is obstructed and thrown back upon the lands of another it becomes actionable as a nuisance. Sic utere tuo ut no alicui laedas. is a sound maxim in law as well as morals. In the present case the construction

of the canal by the defendants, was a lawful act, but the consequence of that act, the throwing back of the water upon the plaintiff's land, was an infringement of his rights, for which he is entitled to remuneration in damages. It is well settled that an injury of private property resulting from an act authorized by law, and done in pursuance of the statute, cannot be justified, unless the act was done by one acting as an agent, or in behalf of the government. And the Statute, (authorizing the work,) is no bar to an action for damages resulting from such act, unless it provides a different mode of compensation, 5: Bowen. 166. 20 Johns. 733; 2 Green Rep. 417; 2 Harr 129.

This doctrine has been recognized as applicable to this Company, in the case 3 Har. 200. The present case is directly within the principle of that decision, and must be controlled by it;

It is said, that the damages of which the plaintiff complains result directly from the construction of the Canal, and that a mode of compensation for these damages being provided by the charter no action will lie, and the opinion of Waring (Spencer) is relied upon.

I am confident in the opinion, that no such inferences were designed to be drawn from that opinion. Because the learned judge, in that opinion said, The whole scope of their charter indicates

clearly that the legislature did not mean to interfere with private and vested rights, without providing a recompense to be paid by the Company and not by the State. And if injury or damage has accrued to the private property or rights of others which could not be foreseen, and therefore not provided for in the charter of the company, this constitutes no reason why the party thus injured, should not be compensated.
3 Harr. 200.

Corporations have not a divine right
2 Comstock 159. to do just as they please; in *Hay vs Babner &c.*, the defendant was held liable without any imputation or proof of negligence; but simply because their acts caused consequential damages. And in the North Carolina Case, there was in the declaration neither averment of negligence nor was there proof of negligence offered to the jury, yet the verdict was sustained, and the judgment on the verdict and record was upheld.

Hay vs Babner &c. Case against defendants for throwing rocks &c upon plaintiff's premises per quod they broke his windows &c.
2 Comstock 159.

Tannin vs Same No allegation was made or proof offered, that defendants were guilty of negligence or want of skill, or that the injury was wilful;
in page 165; The action was sustained on the ground

that although defendants were a public company and authorized to construct the Canal and although it was impossible to do so by other means, than by blasting the rock and thereby injuring the plaintiff they were liable to him for the injury which they caused, irrespective of the question of skill or negligence.

" How the defendants performed this act was of no consequence. what they did to the plaintiff's injury was the sole question"; Per G. J. Linn.

Mearns
vs
Wilmington

7

73

This was an action on the case, for cutting down the grade of the street, in front of plaintiff's lot, and damages sustained thereby.

The defence was that the act was done by public authority.

505

There was no allegation of negligence or want of skill, nor was any proof of either offered or given at the trial. The jury found a verdict for the plaintiff \$500, and the Supreme Court sustained the verdict, and the judgment upon it.

The Court in deciding the case at great length, after reviewing the England and New York cases, condemning *Wilson vs Morgan* 1 Denio 395, and distinguishing *Meredith vs Plate Glass Co.* 4 T. 796 pointing out in this latter case, that two of the judges, Buller & Grose put their decision on the ground, that Parliament

had provided a special compensation, decided that the jury having found the city of Wellington guilty of negligence which caused the damage, put their decision on this ground.

The principle of this case, is, that while private corporations are instituted for, and pursue private gain as their object, and public municipal corporations are established for public purpose, they are both subject to the same rule and law of liability for their acts, and the consequences.

86 But the doctrine which I contend for, is neither new nor peculiar to the Courts of Ohio. I will refer to the case of Roberts vs Read. In an action on the case the plaintiff sought to recover damages against the defendants for a wrong done by them in their capacity of surveyors of the highways in undermining their wall. The act which caused the damage was done by their order for the purpose of making some improvements in the street. The defendants objected that the action was not brought in proper time; it being provided by act of Parliament 13. Geo. III c. 78. Sec. 81. that any action brought for anything done or acted in pursuance of this act, shall be commenced 3 months after the fact committed, and not afterwards.

It was contended by the defence that the legislature limited the time so narrowly in order that the officers of this description,

sued for what they did ~~ex~~ officio. might have the means of indemnifying themselves, if sued while they were in office, or at Court, before they passed their final accounts.

57 Lord Eldenbrough, Ch. J. said, it is sufficient that the action is brought, ~~that~~ ~~the action is brought~~, within three months after the wall fell, for that is the grievance; the consequential damage is the cause of action in this case. If this had been trespass, the action must have been brought within three months after the act of trespass complained of; but being an action on the case for consequential damage, it could not have been brought till the specific wrong had been suffered; and that only happened within three months before the action brought.

In this case the defendants, although acting under Parliamentary authority, and guilty of no negligence or malice, are held liable for damages purely consequential.

The act which caused them was not trespass, it was authorized and did not transcend the authority, it was legal, and rightful; it was not done negligently, nothing is said of negligence in the doing of the act, and this act of Parliament recognizes the right of bringing an action for things done and acted under the act itself, but it limits the period of limitation.

it fixes three months, Now it cannot be denied that the Common Law right of action, which the Parliament recognized but regulated, only reached cases where injury resulted from the negligent manner in which the work was done, this appears from the reason alleged in the defence, that the officers might reimburse themselves in their official accounts for their personal negligence, that would give them no right of indemnity by the public, Nor could it be pretended that such negligence was done or acted in pursuance of this act, or any act of Parliament. The act of Parliament contemplated cases of harm or injury, partial or total destruction of property, consequential upon the execution of the work which it authorized to be done.

59
Now upon the grounds urged by the other side no such liability could exist in any case all cases would be shielded by the maxim dominus sive servus sive inquilinus and if the damages were sustained by negligence on the part of the agents, there was, and could be, no occasion for Parliamentary interference.

But I have contended in the early stages of this argument an action at common law lay for consequential damages, this was shown by the case of *Maxon vs Leader*,

irrespective of negligence; aggravated and strengthened by negligence if in fact it existed, but independent of negligence as a condition of the right itself. This Common law right I said was recognized explicitly by Parliament throughout all its legislation upon subjects of this description it has been recognized and limited by Parliament. Witness the act cited in this case, and all acts of Parliament of a similar kind that have ever come to my knowledge recognize and limit the Common law right which I assert. Am I to say to this Court what is the weight and force of the argument drawn from this Parliamentary recognition and sanction in all the immense number which must have arisen in the domestic economy of the British Empire for the last three hundred years?

Surely, this is more than a sufficient offset to the opinion of city attorney Bronson of New York or city attorney Eliot Anthony of Chicago. But I go much further than this.

The courts of the State of New York have laid down the rule which I ask this Court now to declare. I will cite the cases in which the law has been laid down.

25 Wendell In *Fletcher vs Syracuse Rail Road Co.* the plaintiff alleged in his declaration of a messuage and garden in Gordon Street in Syracuse

61
that defendants caused to be constructed an embankment four feet high, across the said street, near his messuage and garden, whereby he was ^{deprived} ~~obstructed~~ of his free and unobstructed passage into and upon the street, from his house and garden, was deprived of the use, benefit, and advantage of the street, and whereby his cellar and garden were frequently inundated and his property depreciated.

The defence pleaded the gen. issue and that they had acted under authority of law.

Nelson Chief Justice, for the Court, said, it is quite obvious that the power conferred upon the Company by the charter to enter upon and occupy the public highway, relates only to the public property in the road, to the public use, and enjoyment of it, without intending to interfere with any private interest concerned. Hence the legislature guard only against any obstruction of the common use. the road is to be restored to its former state, or in a manner not to impair its usefulness.

62
The Statute effectually protect the Company, if they comply with the conditions, from an indictment or against any interference with their works, as a public nuisance, on account of their occupation of the public highway; but not against claims for private damages, arising from consequential

injuries to adjacent owners. Provision for such injuries was not made, because no authority was conferred to commit them, the company may occupy the road, but they must occupy it at their perils in a way not prejudicial to private rights. Even upon a fair construction of the grant, the power conferred is broad enough to protect the company against all consequential injuries to private interests, and is so intended by the legislature, it would be impossible to uphold it to that extent, where no provision has been made for compensation. It would be in violation of the fundamental law of the land, or repeatedly declared in this Court, and in the Court for the Correction of Errors, 18 Wendell, 1.

63 As the pleas constitute no defence to the cause of action, set forth in the declaration, the plaintiff is entitled to judgment.

In this case in its doctrine and ^{in the} principles upon which it rests, we find the same law, the same arguments, the same ideas that we find in the old case of Leader vs Maxon, we find the same reference to the spirit and meaning of the constitutional protection to private property, and its use and enjoyment that we find in the Ohio cases, and the Wisconsin case, except that in the New York case last cited, more explicitly founds himself upon the consti-

not borrowing its sanction from brute force or despotic power.

The case last cited is not an isolated case in the courts of the State of New York.

18 Barlow

377 (11)

In *Bruce vs the Delaware and Hudson Canal Company*, decided by Harris, upon a motion to dissolve an injunction, it appeared, that a bill had been filed, to restrain the company from enlarging their canal. Harris J. said, The defendants had authority to make ^{their} enlargements. They had the legal right to build the dam, and raise the water so as to make the canal navigable for boats of any enlarged size. The only remedy left to the plaintiff, would be an action to recover damages for the injury sustained, or by proceeding under the charter to assess damages. This admits the mere power to do the act; therefore it could not be enjoined; yet damages were sustained by a legal act; and for those damages an action would lie.

66

There can be no rational account given of the case before Harris, but by recognizing the doctrine of the law as ~~we~~ contend for it. The same principles of Common law, crops out in this case, and in that cited from Wendell, that is so elaborately reasoned, and enforced in Ohio, and Wisconsin. In Massachusetts we find authority the most satisfactory and explicit.

19 Pick. 58. In *Thayer vs Boston*, the plaintiff owned,

and occupied stores fronting upon Dock Square a public highway by prescription. The opinion of the Court as pronounced by Chief Justice Shaw, who said: The action is case against the city in its corporate capacity for special damages done the plaintiff's Estate by the city through its officers, by acts which they professed to do for the use of the city over its Streets and highways, and whether the action can be maintained against the city is the main question in the case.

" The argument pressed strongly by the defendant, is that if the officers act lawfully in the scope of their authority, their acts must be deemed justifiable, and if an individual suffers damage, it is damnum absque injuria.

" But the Court are of the opinion, that this argument if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results.

" There is a large class of cases in which the rights of both public and private individuals are involved, in which it cannot be known at the time of the act done, whether it is lawful or not.

" The event of legal inquiry may show that it is unlawful. Still if not thus known and understood at the time the act is done, by the officers having authority, by the express vote of the city government, or by the nature or functions of their officers, to act upon the

subject-matter reason and justice obviously require that the city in its corporate capacity should be liable to make good the damage sustained by the individual in consequence of the acts thus done.

The Court gave judgment for the plaintiff and held the city of Boston liable for the acts done by its officers acting by its authority, upon a subject matter within its jurisdiction and control.

The Supreme Court of Massachusetts denied the validity of the Maxim, damnum sine injuria in that case. They held the city of Boston liable for the acts of its officers, acting under full authority, in relation to the streets, when their acts, although legal, and ~~un~~authorized, and regular in every respect, caused consequential damage to a property holder.

By the authority of that case for the same reasons that prevailed there, Mr Roberts is entitled to recover against the defendant in error, and the judgment should be reversed.

19 Pick. 147 In *Hutton vs Faxon* the plaintiff averred title to a warehouse and real estate, that defendants acting by the authority of the city, had obstructed the highway in front, blocked up approach to his stores, per quod he had sustained damages. The Court sustained the action, and said, "Upon the authority of the

90

adjudged cases, we are all of the opinion, that there are sufficient special injuries, peculiar to the plaintiff, for which he may have his action.

And the long established rule which we enforce, is not we trust to check the progress of public improvements.

Let the city take from individuals all that is necessary, convenient and becoming this great and flourishing Capitol, but let compensation go hand in hand with the public benefit."

70 The great argument pressed here, is, private interest must yield to the demands of the public. That public improvements are necessary; that to subject the city to consequential damages would make it bankrupt. If this be so, how enormous the losses sustained by private persons! If the majority of the city, for its own gain, advantage or pleasure, will execute works, or do acts which cause or are attended with heavy loss and injury to others, is it not better, more just, that they who do the wrong, freely for their own gain or advantage should bear the burden, even if it be oppressive should be made good the loss, even if it should oppress the treasury, than that the offending, the innocent and helpless should be ruined and their homes, and property destroyed.

made a burden to repair and keep; and then
the doors of the Courts shut against them.

71

If any body is to be ruined who should be
ruined, the innocent and helpless, or the wrong
doers?

And why are the helpless owners of a property,
in which they have put their all; the sole de-
pendants for widowhood, and orphans, and old age,
to be denied redress? Not because they have
not been ruined, Not because their wrongs are
slight; but because the wrong is so enormous,
the injury so great, that to make compensation
would weigh heavy upon the treasury.

It is high time then, that the Courts interpose, to
stop these extravagant and monstrous ~~schemes~~
schemes, and to make moderation a duty, and
justice a right. That men shall not be
exposed to a loss of every thing, to ruinous losses,
and to destruction of property, to suit the caprice of
a faction, or to gratify the appetites of an acciden-
tal majority, regardless of their rights and
reckless of consequences, if only themselves are
saved from them; and the means are thereby
provided of satiating themselves out of the
public plunder.

We submit to the Court, that we have
shown error in the judgment of the Court
below, in either of two alternatives.

It hardly matters of present, in which of the two; so far as the present argument goes. But which ever horn of the dilemma, the other side choose, will be fatal to them. By an unbroken array of cases, from all the Courts of England. New York itself. Massachusetts, Ohio, and Wisconsin. I have demonstrated.

That a municipal Corporation acting under authority of law, is liable for damages sustained by private persons consequential upon negligence in the execution of the work, that for any abuse or appropriation

and misuse of Chartered powers, a municipal body corporate is liable like an individual. That the law makes no exception in its favor. I particularly allude now, to the ^{great case} ~~question~~ of Bailey vs the Mayor of New York, 3 Hill 531-544. S. C. in Court of Errors 2 Denio, 433-460. Whitehead vs Rochester & Comstock: 463-469. Mears vs Wellington & Treadell

It is believed that no case has ever been decided conflicting with this proposition; nor can a contrary ~~decision~~ ^{decision before} be found by any single Judge, or by any text writer. But in the present case, it is admitted upon the record, that in executing a work under the charter, the defendant was guilty of negligence. If on the other hand, this be denied, or held otherwise, we insist that the city is liable for the consequential damage caused by its works. And for this proposition I rely upon the decisions in England, upon the authority of Parliament as to the Com-

mon law right, I rely upon the authority of the Ohio Courts, those of Massachusetts, Wisconsin and New York; New Jersey, and North Carolina, Besides the authority of precedent.

I appeal to this court as a high tribunal of justice, to accept as authority the great principles of justice, and natural right. Let private property be secured not only from direct attack, but also from insidious violation.

Let the spirit of the Constitution give vigor to a remedy known to the Common Law, although not created by the letter of the Constitution. I ask that under the forms of lawful authority, justice and private right shall not be trampled down. That corporate bodies, as well as private persons, shall be taught to obey, as well as to exercise, the authority of the law.

I ask that the remedies of the law shall not be ~~wounded~~^{narrowed} in their administration by the Courts. I ask that this Court shall administer justice to this man,

Arthur W. Windett

April 18. 1860.

of counsel with Phineas A. Fox.

93 29
Superior Court
of Illinois
3rd Gr. Div'n

April 7, 1860

Robert }
4
The City }

Written argument
of Arthur W. Hindert

Filed April 19, 1860
L. Leland
Clerk