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No. _____

Supreme Court of Illinois

Wheeler

vs.

City of Chicago

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STATE OF ILLINOIS.
SUPREME COURT.
Third Grand Division.

No. 223.

Wheeler
vs

Thompson

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93-154

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THIRD GRAND DIVISION.

[No. 91.]

WILLIAM WHEELER, Plaintiff in Error,

vs.

CITY OF CHICAGO, Def't in Error.

} APRIL TERM,
1860.

[223.]

ROSALIA A. BONNER vs. CITY OF CHICAGO.

Defendant
Argument for ~~Plaintiffs~~ in Error.

ELLIOTT ANTHONY, Counsel for Plaintiffs in Error.

Filed May 11, 1860
A. Selmer.
Clk

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This was an action of *Assumpsit*, brought by the plaintiff in error against the defendant in error, in the Cook County Court of Common Pleas, (now the Superior Court of Chicago,) on the 2d day of March, 1859, to recover of the defendant the sum of fifteen thousand five hundred and forty-five dollars, which the plaintiff claims that the city owes him for damages which commissioners appointed by the city of Chicago to estimate the benefits and damages to the owners of property by the opening and extending of south Lasalle street, from its present termination at Madison street to Jackson street, awarded him.

Declaration.—The declaration sets out that on the 15th day of October, 1855, and until the time of the appropriation for street purposes, the plaintiff was the owner and seized in fee of the west thirty feet of sub-lot 8, and all of sub-lot 7 in lots 1 and 2, in block 118 in the school section addition to Chicago.

On 15th October, 1855, the Common Council ordered a survey to be made for the extension of south Lasalle street from its terminus on Madison street to Jackson street.

On 20th October, 1855, notice was given of the intention of the city to take and appropriate the land necessary for the extension of said street. This notice was published ten days.

Jan. 10, 1856, the Common Council appointed F. A. Bragg, Thomas Church and W. W. Saltonstall commissioners to ascertain and assess the damages and recompense due the owners of land, which might be taken *on the real estate* of the persons *benefited* in proportion as nearly as may be to the benefits resulting to each.

Jan. 16, 1856, the commissioners were duly sworn to execute their duties according to the best of their ability, &c. That before entering on their duties they gave ten days notice to all persons interested, of the time and place of their meeting, for the purpose of viewing the premises and making their assessment, which notice was published ten days in the corporation newspaper. The declaration then sets out that they proceeded to make the assessment, and "did determine and appraise to the owner and owners the value of the real estate appropriated, after making due allowance for benefits, &c.— That the commissioners did in all things comply with the law and charter, and ordinances of said city in regard to said assessment, and the opening of said street, and did *describe* the real estate upon which *their assessments were made.*" And after having completed and signed said assessment, did within the extended time allowed them by the said Common Council, in which to complete and return their said assessment, did on the 5th day of April, 1856, return their said assessment to the Common Council.

Ten days notice was then given by the Clerk of the return of the assessment roll, commencing on the 8th day of April, 1856.

June 10th, 1856, the assessment roll was confirmed, in and by which the plaintiff claims that he is entitled to have and receive from the City of Chicago the sum of \$15,545 as damages which the commissioners had awarded him. The plaintiff then avers "that it thereupon then and there became and was the duty of the said defendants to proceed immediately, and with diligence to collect money by the means provided by their charter, sufficient to pay the aforesaid assessment and award, as aforesaid assessed and awarded to said plaintiff, and confirmed as aforesaid, and to pay the same to said plaintiff within a reasonable time; and the said defendant, in consideration thereof, then and there undertook and faithfully promised the said plaintiff to faithfully and diligently perform their said duty in all respects in this behalf. Yet the said defendants, disregarding their said undertaking and promise in the premises, did not within a reasonable time pay to the said plaintiff the said award and assessment, &c., but have for an unreasonable time, to-wit: for the space of two years and eight months, wholly failed and neglected to pay the said plaintiff the said sum of money so appraised, awarded and allowed to him. &c."

These constitute the main allegations of the plaintiff's declaration.

To this declaration, the defendant in the Court below filed a general demurrer, which was sustained by the Court. The plaintiff stood by his demurrer, and the case is now brought to this Court by a writ of error.

I.

The plaintiff in this case brings an action of assumpsit against the defendant, and claims to recover a certain sum of money, which he says had been awarded to him for damages in opening a street over his land, by certain commissioners, appointed by the Common Council of the city of Chicago, and which the city of Chicago ought to have collected of the property holders upon whom the assessment was levied, and who were personally liable to pay it; yet the city having *neglected* to collect it of said property holders, must now pay it itself out of the public treasury.

The whole cause of action is contained in this syllogism, and the first thing to be looked at is the premises:—

1. The origin of the action is certain proceedings instituted on the part of Common Council to take and condemn the plaintiff's land for the purpose of opening a street in the city of Chicago. The power which the city exercised is derived from chapter 6 of the municipal laws of the city of Chicago, commencing at page 32 and extending to page 37, inclusive.
2. Were these proceedings regular and valid, or were they absolutely void, and of no account whatever?
3. The plaintiff relies upon a right derived from a statute, and not a right existing at common law. Has he brought himself within all the requirements of the statute, as prescribed by the established rules of pleading? And does that appear upon the face of his declaration?
4. Is the city liable in its corporate capacity, under the circumstances as set forth in the plaintiff's declaration, to any action whatever?
5. And if so, has he chosen the proper remedy, and is the form of action in which he has declared, correct?

To answer these suggestions and inquiries, a resort to the city charter, to the rules of pleading, and to the different forms of action, must be had.

Now the Court will observe that the declaration in this case recites the proceedings in the Common Council, and shows that the assessment was confirmed, and then says that the city has neglected to collect the assessment, &c. The manner of collecting assessments

is prescribed in chapter 8, on pages 43, 44 and 45 of the city charter, and in order to collect an assessment, the City Clerk must issue a warrant to the City Collector, and the City Collector collects "all taxes and assessments in the same manner, and with the same power and authority, as are given by law to collectors of county and state taxes."

The City Clerk is an officer appointed by the Common Council, page 6, city charter, sec. 1. The Collector is *elected* by the people, page 6, sec. 8 of city charter.

To issue a warrant for the collection of an assessment, is a ministerial duty incumbent upon the Clerk, and required by the city charter, and if he neglected his duty in this respect, which is required by law, the plaintiff should have compelled him by mandamus to do so. If the warrant had been issued to the Collector, and he refused to collect the assessment, then the plaintiff could have compelled *him* to do so by mandamus, or held him civilly responsible.

II.

The city is not liable in this case, because the whole proceedings were absolutely void.

1. The declaration shows that the commissioners who pretended to levy the assessment, never valued the land upon which they levied the assessment.

2. It does not appear that the commissioners ever viewed the premises at all, as required by sec. 4, chap. 7, page 33. The rule being that where an act requires a thing to be done in a particular way, that way alone can be pursued.

3 Brevard R., 15 Mass, 205; 9 Pick, 496: 13 *ibid*, 284.

3. The declaration shows that the commissioners were appointed on the 10th *day of January*, 1856, and that they did not make their return to the Common Council until *April 5*, 1856, more than forty days after their appointment, which was a direct violation of the city charter, and therefore rendered all the proceedings void.

2 Mich. (Gibbs) 486.

4 Hill, 76, 92.

Devaris on Statutes, 750.

It is well settled that in proceedings to take private property for public use, where a corporation or individual seek to exercise power in derogation of the common law, every requisite of the statute must

be complied with, and if any material link in the chain be wanting, the whole proceeding will be void.

Sharp v. Spier, and

Sharp v. Johnstone, 4 Hill, 86.

Doughty v. Hope, 3 Denio, 599,

2 Duer., 1. 4 Peters, 359. 3 John's, cases p. 108. Note A.
and authorities there cited.

Angel on Highways, p. 107. Now in this case the *statute* under which these proceedings were had, *requires* the commissioners when they have ascertained the damages and expenses of the improvement, and completed their assessment, to sign and return the same to the common council *within forty days* of their appointment; the language is: "When completed, (that is, their assessment) the commissioners shall sign and return the same to the common council within forty days of their appointment." See Municipal Laws, page 35, sec. 10. Now this provision of the statute cannot in any sense be regarded as directory, its terms are *absolute* and *peremptory*; it limits and contracts the commissioners, and sets bounds to the time within which they can act; and every act of theirs after the period of forty days, is null and void; after that time their acts are *functi officio*; and this provision of the statute when properly understood, is indeed a most salutary one, and is a protection to the property-holder where property is sought to be taken. Within the period of forty days the property holder may look after his interests, and should be vigilant; after that time he can go about his business, and is not to be kept standing on guard for an indefinite period to suit the whim of dilatory commissioners. This same view has been taken of a similar statute by this Court, which must be regarded as perfectly conclusive upon this point and of this case. See

Marsh v. Chestnut, 14 Ill., 223.

Billings v. Detten, 15 Ill., 218.

Kealing v. Sharp, 15 Ill., 220.

Thames Manufacturing Co. v. Lathrop, 7 Conn., 550.

The case of Billings v. Detten, 15 Ill., 218, and Kealing v. Sharp, are exactly in point; as also the case in the 7 Conn., 550, and they show conclusively that these statutory provisions must be strictly complied with, or else the proceedings will be void.

Now if this construction be correct, then the city of Chicago is not in fault, because a void act is no act, and cannot be ratified and rendered legal at will.

In the case of Billings v. Detten, 15 Ill., p. 219, the Court say; "The 21st section of the Act of March 3, 1845, under which the premises were assessed, required the assessor to complete the assess-

"ment, and return the same to the clerk of the county commissioners court, by the 1st Monday of August; and the 26th section authorized the owners of property assessed to apply to that court at the September term, but not afterwards, for a reduction of the assessment. A month was given them in which to inspect the assessors books, and prepare their objections to the assessment. In this case they were deprived of the right of appeal altogether, as the assessment was not returned until after the close of the September term."

"*The failure of the assessor to make his return within the time designated, clearly vitiated the assessment.*"

"*This requirement of the statute was designed for the benefit of the owners of the property assessed. It should be strictly complied with in order to divest them of their title. On this point the case of Marsh v. Chestnut, 14 Ill., 223, is perfectly conclusive.*"

The case of *Merchants v. Longworth*, 6 Hill, 646, quoted by plaintiff, is not such a case at all as the one at bar, and has no analogy to it whatever. Neither has the case of *Ex parte v. Heath*, 3 Hill, 42. This was an election case and was for a public purpose, and rests upon the same *principle* as the case of *The People v. Allen*, 6 Wend, 486, in which it is decided that "a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory merely, unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered as a limitation of the power of the officer; and it was accordingly held that a brigade order constituting a court martial, issued in July, when the militia law under which the proceeding was held, it was made the duty of the commandant of the brigade to issue such order on or before the 1st day of June, in every year, was valid." The principle here enunciated, the Court will perceive belongs to an entirely different class of cases from the one at bar, and can have no influence in the settlement of the case.

The case of *Pond v. Negus*, 3 Mass., 231, which was for levying a school tax, and which rested upon the peculiar statute of that State, is the only case strictly analogous to the one under consideration, and it is a sufficient answer to that case to say that our Court has taken an entirely different view of the matter, and hold the statute to be imperative and not directory.

III.

But if the Court should be of the opinion that the proceedings in levying the assessment were not void, for the reasons above specified,

then I say, that by the plaintiff's own showing, he cannot maintain this action, because his declaration does not show that the city have taken and appropriated his land. Sec. 15, p. 35, providing expressly that "the land required to be taken for the making, opening, or "widening any street, alley, lane or other highway, shall not be appropriated until the damages awarded therefor to any owner thereof, under this act, shall be paid, or tendered to such owner or his "agent."

And 2dly—the allegation, "that it thereupon, then and there, became and was the duty of the said defendants to proceed immediately and with diligence to collect money by the means provided by their charter, sufficient to pay the aforesaid assessment, and award "so as aforesaid assessed, and awarded to said plaintiff and confirmed," being a *very special* and particular plea, or to use a classic expression, a stump speech inserted into the belly of the plaintiff's declaration, in favor of the remedy by mandamus, and nothing else.

IV.

But if the Court should be of the opinion that any action would lie against the city for not performing its duty in the premises, then we say it must be some other action than that of assumpsit, and that assumpsit will not lie.

The action of assumpsit is based upon a contract, either express or implied, and there must also exist a *privity* of contract between the parties, plaintiff and defendant.

In the present case there exists *no contract* between the parties; there is no *privity* of relation between them; the action proceeds upon the statute, which simply confers upon the Common Council power to open the streets, condemn property for that purpose, determine what persons will be benefitted by such improvement, and assess the damages and expenses thereof *on the real estate of persons benefitted*, in proportion, as nearly as may be to *the benefits* resulting to each. It is out of this *particular fund*, and from this particular assessment, that the party claiming compensation must be paid. The statute does not either in express terms or by implication, charge this compensation upon the city corporation; it simply confers upon the city the right and power of making, apportioning and collecting the assessment.

The only breach which the plaintiff alleges, is that the defendant neglected to collect it. The defendant then had been guilty of a neg-

lect of duty according to the plaintiff's own showing, to-wit: in *not collecting* the assessment. The damages the plaintiff may have sustained, do not arise from the violation of a contract, either express or implied, that the *city* shall pay for the land condemned, but result from, and are consequent upon, the neglect to collect the assessment from those particular individuals upon whom it has been imposed, and who are bound by the statute to pay it.

The liability of *the city* to the defendant in an action of assumpsit for the value of the property condemned, arises only when the assessment has been collected and is in their hands. And should the city fail to collect the assessment, the remedy against them would properly be by *mandamus*, to compel them to do so.

V.

In assessment cases the city acts merely as an agent over the land owners.

Under the charter, the expenses of opening streets are not made a charge upon the whole city, but only upon the owner's and occupant's of the houses and lots to be benefitted by the improvement. The corporation is the *agent* or *instrument* of the *land holders* having an interest in the matter, to ascertain how much one man ought to pay and another ought to receive, to collect the money from those who are benefitted, and see that it is properly applied to the particular object.

Lake vs. Trustees of Williamsbury, 4 Denio. 523.

McCullough vs. Mayor of Brooklyn, 23 Wend. 458—12 id. 165—6 Hill, 244—2 Denio. 110—2 Hill, 466—4 id. 88, 76, 92.

See upon this subject the case of *Brady v. The Mayor*, 2 Bosworth, 184. This case was an action brought upon a contract which had been entered into contrary to the provisions of the charter, and which was held void. Woodruff, J., in deciding the case said "that the corporation of the city in the matter of contracts of this description, (for improving streets,) are acting not simply as an individual acts in respect to his private interests, nor as a private corporation acts in relation to its property or concerns. They derive no property, and gain no corporate benefit from the improvement of streets or other public works; and whatever they may pay or contribute toward the expense (by reason of the great cost of the improvement assessed upon the city at large); they pay out of the public treasury from moneys raised by taxation for public purposes; they

“act as a public corporation in discharge of duties, and in the exercise of powers which they hold, as *trusts*, for the benefit, not of the corporation as such, but for the citizens at large, and for the public.— Not only so, they are *trustees and agents* in another sense; the exercise of their powers in matters such as are included in this contract, proceeds upon the assumption of *benefits to contiguous landowners*, to be received through the *agency* of the *corporation* not at their own cost, but at the *landowners expense*. And the *agency* involves, further the *creation of a lien* upon the lands, and the enforcement of the rights of the landowners bound to contribute, as between themselves, so that the defendants as a private corporation may be said to leave no interest in the subject, but to act throughout as *trustees and agents* of the public and the landowners, and to be clothed with the requisite powers only, for the benefit of such owners and the public.”

13 Barb., 567;

16 “ 392;

4 Sandford, 221;

Cole v. Trustees of Indiana, 27 Barb. 220.

By the very terms of the statute upon which this action is based, no obligation whatever is *imposed upon the city corporation to pay the damages sustained by individuals whose property has been condemned*. There exists no legal duty so to do. And since it is not made a charge upon the city, and no legal duty to that effect is imposed upon them, there exists no express contract to pay such damages. An implied contract to pay those damages could only arise from a legal duty or obligation to do so, and since no such legal duty or obligation exists, no such implication can arise. The duty or obligation to pay is charged upon the particular individuals benefitted, and upon them alone.

Brady agst. The Mayor of New York, &c., 16 How., Pr. R. 444.

VI.

The plaintiff in error assumes, that it was the duty of the defendant to pay the plaintiff “*A liquidated sum in cash*.” No such duty, as we have already seen, existed either by statute or by implication, and could not exist until after the amount of the assessment had been collected.

The case cited by the plaintiff in error, in support of his positions, appear to have been subjected to a certain *Procrustean* process in their statement, and will be found upon examination entirely destitute of the vast and sweeping powers which is so vauntingly claimed for them.

1. *Higgins vs. The City of Chicago*, 18 Ill. 276, is an action of mandamus. Now if that case was decided correctly, no action to recover the amount or suit in damages whatever will lie, because a mandamus is never allowed where there is any other remedy.

2. *Hawkins vs. Trustees of Rochester*, 1 Wend, 53, was a case brought expressly upon the statute pertaining to Rochester, which, was passed in 1826, and which provided that "if the Board of Trustees neglect, on demand, to pay the sum assessed as damages to any individual, caused by laying out or widening any street, the party thus entitled to the sum assessed may sue the Board of Trustees and recover the same in an action of debt on mutatus with interest and costs." Such a remedy is expressly given by the statute. See *Cuyler vs. Trustees of the village of Rochester*, 12 Wend, 167.

3. *People vs. Trustees of Brooklyn*, 1 Wend, 318, was an application for mandamus, and which was to compel payment of a sum of money for opening a street, and which depended upon the provisions of the charter of that city, and which provides that the party who is damaged shall be paid by the City, and the city assumes the payment.

4. The matter of Anthony street of the City of New York, 20 Wend. 618, arose upon a petition for leave to discontinue the proceedings which had been commenced upon the part of the corporation, and depended entirely upon the charter of New York.

5. *Buell vs. Trustees of Lockport*, 11 Barb., 602, was an action of debt brought under the 46th section of the charter of the village of Lockport, which provides "that in case of non-payment, on demand, with interest, or in case where the parties shall be known and named in the precept of the said Board of Trustees shall refuse to pay the sum or sums so assessed, with interest from the time of judgment rendered upon said assessment, to the said parties or owners or either of them entitled to the same, said owner or parties may sue for and recover the same from said Board of Trustees together with interest, and the proceedings under the precept, and proceedings antecedent thereto, shall be presumptive evidence against the defendants."

Here it will be observed the liability for the sum assessed, and the right of action to recover it, are expressly created by the statute.

6. *Rann vs. Green*, 2 Cowper, 474. "This was an action of assumpsit brought by the plaintiff against the defendant, to recover the sum of 40s. and 6d. due to the plaintiff as vicar of the parish of Trinity, in the City of Coventry, pursuant to an order made by the Lord Chancellor, the Lord Chief Justice of the Common Pleas and myself, agreeable to the directions of a private act of parliament, concerning tythes in the parish of St. Michael and Holy Trinity, in Coventry, passed in the fourth and fifth years of Philip and Mary."

"The declaration stated the *act to be the 4th of Philip and Mary*, whereas the *record* when produced in evidence appeared to be the 4th and 5th of Philip and Mary."

This is a *verbatim* statement of the case as taken from the report itself, and the only question was whether the act under and by virtue of which the Lord Chancellor, Lord Chief Justice of the Common Pleas, had made the *order* granting the 40s. and 6d., had been misdescribed, etc., and the Court said that there was a *variance*, and the plaintiff was non-suited. The Court, however, in remarking upon the case, do use the language which is quoted by the plaintiff in his brief, and say, "here the action, which is an action of assumpsit, is brought in consequence of a right liquidated by means of a statute, etc., etc.," and then adds the words, "*when the order was made the law raised an assumpsit.*" In other words, the law gave power to the Chancellor, Chief Justice, etc., to create a debt by certifying to the Vicar of the parish of Trinity his dues, and after he had obtained a certificate or order—specifying the amount—then it is very plain that the law would raise an assumpsit that he should be paid. But how different that case is from the one at bar. In the case at bar under the statute, by which the plaintiff in this case claims that he is entitled to the amount of damages assessed, and under which he says the statute or law *raises an assumpsit*, the *assumpsit* to carry out the analogy suggested by the case of *Rann v. Green*, does not arise and cannot arise *until* those who are *benefitted* by the opening of the street pay, because section 2, chapter 6, page 32-3, especially provides that the commissioners shall ascertain the "*damages and recompense* due the owners of such lands respectively, at the same time to determine what persons will be benefitted by such improvement, and assess the *damages and expenses on the real estate of persons benefitted*, in proportion as nearly as may be to the benefits resulting to each." Here it will be seen that the damages to the lots and lands taken or injured by the improvement is to be assessed upon the lots and lands of those who are *deemed benefitted*, and of course it follows, that until those *who are benefitted pay*, no man who is damaged can ever get the amount of his damages, and there can be no implied assumpsit which can arise until the money is paid. This disposes of all the analogy suggested in the case of *Rann v. Green*.

See Angel on Highways, pages 148-9.

Livingston v. The Mayor of New York, 8 Wend, 85. 2 Duer, 1. It was decided in the case of Livingston, v. Mayor of New York, 8 Wend, 85, that "the benefit accruing to a person whose land is taken for a street, by the increased value of adjacent property belonging to him, may be set off against the loss or damage sustained by him by the taking of his property for a street, and if equal to the loss or damage is a just compensation for property so taken."

Now, here again, it will appear in accordance with the 4 Denio, 523, and 23 Wend, 458, that the city being a mere agent to collect the money of those who are benefitted, and pay it over to those who are damaged, that no assumpsit can arise until it be shown that the city has *received the money* which should belong to the party suing—just like any other agent.

7. The case of "The town of Pawlet v. the town of Langate, 19 Vermont, 621, cited by plaintiff, was brought under the pauper act of the State of Vermont, which provides that where a pauper resident domiciled in one town, strays into another town, shall be removed, &c., but that "if such stranger, so ordered to remove, be sick or disabled, and cannot be removed without endangering life, the overseer shall provide for his maintenance or cure, at the charge of such town, and after the recovery of such stranger, shall cause him to be removed under said order; and the town in which he was last legally settled, shall repay all charges occasioned by the sickness, maintenance or cure of such stranger, and for his removal, and shall also repay all charges and expenses incurred, if he shall die before removal; and if the town in which such stranger was last legally settled, shall not pay and satisfy all the charges and expenses, as aforesaid, within fifteen days after notice shall be given in writing, the same may be recovered from such town by an action to be brought in the name of the town making the disbursements."

Now this case bears no analogy whatever to the case at bar. The provisions of the statute are plain and positive, and give an action by one town against another to recover for *necessaries* of life, which it bestowed upon the sick and feeble members of the family of an adjoining town, just the same as one may recover of a parent for the necessities of life bestowed upon a child which he was bound to support. And how any lawyer of any experience could question the form of action to be adopted, is a matter of surprise. It was simply a suit to recover for "money paid, and work, labor," &c., and which could be recovered under the statute without any difficulty, and is entirely unlike the case at bar.

8. The case of *Gray v. The President, Directors, &c., of the Portland Bank*, 3 Mass, 364, quoted by plaintiff in his brief, may be put down as a legal curiosity. If Socrates had never reasoned with more subtlety than this case displays, he would never have been subjected to hemlock. The plaintiff was a stockholder in a bank with a capital stock of \$100,000. A law is passed by which the bank is authorised to increase its capital to \$200,000, and that the *original stockholders* should have the preference in taking the stock on payment of the instalments down which were fixed, and the other instalments which should become due from time to time. The plaintiff in his declaration averred that he was an original stockholder—that he offered to subscribe to the stock, and offered to comply with the provisions of the law, but that the directors decided not to allow him to subscribe, &c. He then brings an action, which the reporter in his statement of the case calls case, and says that “the declaration in this action was *in case*,” and it really is case, and ought to be case, but the counts of the declaration are *indebitatus assumpsit*, and special assumpsit, &c. Now if this case be examined carefully, it will be found that the Court rest their entire decision upon these points and propositions.

1. “Viewing a corporation of *this kind* as a *co-partnership*, a “power of increasing their stock reserved in their original agreement, is a beneficial interest *vested in each partner*, to which no “stranger can be made a party but by the consent of each subsisting “partner, and it is a power which the subsisting partners must exercise proportionably and according to their interest in the original “stock.” Page 377.

2. “A vote to increase the capital stock, if it was not the creating “of a new and disjointed capital, was in its nature an *agreement* “among the stockholders to enlarge their capital in amount or number, to the extent required to effect that increase.” Page 379.

3. “At the time of the vote to augment the capital of the bank, “all the stockholders were *partners*. The *augmentation* was supposed to be, and intended for the profit of the *joint* interest; and it “could only be done by the will of the majority, and that in pursuance of their original association. The law by which the partnership existed, and by which the united interest was regulated, was “that alone by which the organization could be made. Whenever “a *partnership adopts a project within the principles of their agreement* for the purpose of profit, it must be for the benefit of all partners in proportion to the respective interests in the concern.”

4. That “the plaintiff having done every thing incumbent on him “to become a proprietor in the new stock, *is in fact* interested in it,

"and consequently that he is entitled to his proportion of the dividends upon that stock." Page 385.

Now the whole reasoning of this case bases its action upon the fact that the parties were partners, and that the project of increasing the stock, was a project for the benefit of all the parties, and they view the plaintiff the same as if he owned the *amount of stock* he sued for; and that the amount of his interest was fixed and liquidated;—and that he could secure the same as if a balance had been struck. Now this is all there is in this case, and it has no analogy to the case at bar at all.

10. The case of Sargent et. al. v. The Franklin Insurance Co., 8 Pick., 90, was a case of just this character. The plaintiff brought an action against defendants to recover the value of stock under the following circumstances. Adams & Armony owned a certificate of 25 shares of stock in the Insurance Co., which certificate dated Feb. 10, 1824. On the 24th of May, 1826, Adams & Armony assigned the certificate to the plaintiff. On the next day, May 25th, during business hours, and before 12 o'clock, the certificate was presented at the office, and a demand made to transfer it on the books of the company, but the president not being in, the secretary refused to make the transfer. At 12 o'clock on the same day, May 25th, the defendant caused the stock to be *attached* at their own suit against Adams & Armony. On the 9th June and 19th October, the defendants levied other attachments upon the shares of stock, and the shares were subsequently sold to pay the debts of Adams & Armony, which they owed the Insurance Co. The Court in deciding the case decided that a by-law requiring shares of stock like those in question to be transferred only on the books of the company, was a restraint contrary to the law of that commonwealth, and that the shares could be sold just like any other personal property; and they declared further that "where an insurance company being bound to enter on its books a transfer of shares in pursuance of an assignment of the same made by the former holder, *refused* to enter such transfer, and caused the shares to be *attached and sold as the property of the former holder*, it was held to be liable in damages to the assignees of the shares, and the amount of damages in such case is the value of the shares at the time of the refusal, with interest from that time."

And to sum up all that is contained in the case, it may be added that it is nothing more or less than an ingenious *case of trover*, and the reasoning of the Court, and all the facts would in this State be a fit action for trespass in the case, and nothing else.

11. The case of Kartright v. Buffalo Commercial Bank, 20 Wend. 91, and the same case in 22 Wend. 349, were decided upon similar

grounds to the above case, and the Court say—"The counsel for the defendants contend that the plaintiff should recover only damages actually sustained, and which they insist to be no more than the excess of price in the market over the par value which might have been realized upon a sale and transfer. This assumes the plaintiff to be the *owner* of the stock. But the defendants have *denied this ownership altogether, and all right and title to control it, or the profits arising from the same.*"

"They possess the means of preventing its use or enjoyment, and if the plaintiff should now recover only the loss occasioned by his inability to sell in the market, the remedy would obviously be incomplete. He might still be nominally in possession of the stock, but the enjoyment of it denied to him, unless we are to assume in the absence of any change of intention on the part of the bank, that a second application for a transfer will be more successful than the first. Upon this limited measure of damages the plaintiff might be kept in continual litigation at the volition of the defendant, or be driven to abandon his property." See 20th Wend, page 95.

12. The case of the Bank of Columbia v. Patterson's Administrator, 7 Cranch, 299, quoted by plaintiff, was upon a stated agreement which had been made between Patterson and a duly *authorized committee of the directors of the Bank*; the committee were the duly authorized agents of the Bank; and after discussing the particular points in that case, the Court say, "accordingly it would seem to be a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all *parol contracts* made by its authorized agents, are express promises of the corporation, and all duties imposed on them by law, and benefits conferred by their request, raise implied promises for the enforcement of which an action may lie."

The law in that case, as applied to the facts and circumstances, I do not dispute, but there is a great distinction between *moneyed corporations* and public municipal corporations, where all of the agents and officers act under and by virtue of the laws by which they are elected and appointed, and can do nothing outside of their laws, on their own motion and responsibility. This distinction is clearly made in the case in 20th Wend, 91, and the syllabus of that case is thus: "An action of assumpsit lies against a *moneyed corporation* for refusing to permit a transfer of its stock, etc."

13. Lloyd v. The Mayor, etc. of New York, 1 Selden, 369, was an action on the case for killing a horse which was driven by the plaintiff into a hole in the street. This case discusses and makes a

distinction between the *government and public powers* of a municipal corporation, and the *private powers* of the corporation in which it acts like an individual. The court in that case, say, "The corporation of the city of New York, possesses *two* kinds of powers, one *governmental* and *public*, and to the extent they are held and exercised "is clothed with sovereignty; the other *private*, and to that extent they "are held and exercised as a legal individual. The former are given "and used for public purposes, the latter for private purposes. "While in the exercise of the former the corporation is a municipal "government, and while in the exercise of the latter is a corporate "legal individual."

The same distinction is made in the case of *Hutson v. City of New York*, 5 Sandford, 403.

13 Wend, 337.

1 Denio, 595.

3 Hill, 531.

2 Denio, 450.

3 Comstock, 463.

EMINENT DOMAIN.

Now the power which a municipal corporation exercises in the taking of private property for public use, is a sovereign power which is delegated to it by the Legislature of the State, and is emphatically the power of eminent domain, it is a *governmental* power, and not a private power in any sense whatever.

Alexander v. Mayor of Baltimore, 5 Gill, 393.

Burgess v. Pue, 2 Gill, 11.

Livingston v. Mayor of New York, 8 Wend, 101.

Wiggins v. Mayor of New York, 9 Paige, 23.

Heywood v. Mayor of New York, 3 Selden, 214.

State v. Jersey City, 1 Dutch, 310.

5 Selden, 106.

15 Ky., 642.

18 Ill. 303.

2 Denio, 488.

14. The case in the 1st of Selden, and the case of *Weet v. The Trustees of the Village of Brockport*, 16 N. Y., 161, and the case of *Browning v. the City of Springfield*, and in all this class which can be found in the books in suits for *negligence*, the grounds of liability are entirely different from the case at bar; because if the distinction between the different powers of a city is recognized, then a munici-

pal corporation when it exercises the power of *eminent domain*, does not act like a private corporation, but would be entitled to all the immunities incident to a public employment or public agent.

The whole drift of the *plaintiff's argument*, it will be observed, is to show that in suits which are brought for negligence, the city acts like private corporations, like a turnpike company or individual, and liable because there is an imperative duty devolving upon them. I do not suppose that the counsel on the other side will contend for a moment that a city when it exercises the power of eminent domain, acts like a private corporation, and yet he quotes indiscriminately actions of assumpsit and actions of trespass on the case, and lays all kinds, classes and conditions of cases under contribution to establish the great point that assumpsit will lie.

The cases in which actions have been sustained against municipal corporations for *negligence* in not keeping their streets in repair, rests just upon this point—cities have exclusive power over streets—streets are for the public accommodation—cities by their acts invite the public to travel over them; the fee of the streets is vested in the cities; and they alone have the power as well as the means of repair; therefore the *duty becomes absolute* to repair and keep the streets in good order. *Browning v. City of Springfield*, 17 Ill., 143.

But it does not follow from this doctrine, that the same duty and obligation rests upon a municipal corporation when it undertakes to exercise a discretionary power. That duty is not absolute, and to be performed under all circumstances, like that of keeping streets in repair; but is an imperfect duty, dependent upon the facts; and the liability is like that of commissioners of highways, who when they have the funds, "necessary means to discharge their duty will be held liable, if not they will not be; and this is the very point decided in *Browning v. City of Springfield*, 17 Ill., 143.

Bartlett v. Crozier, 17 Johns, 439.

People v. Commissioners of Highways of Hudson, 7 Wend, 474.

Now, in entire accordance with the idea here suggested, is this case at bar, so far as the action of assumpsit is concerned. If the property holders, whose duty it was to pay, had paid, and if the city had the funds which the property holders should pay for opening the street, then in that case the plaintiff might perhaps sustain his action of assumpsit, if not, he could not.

15. The case of *Seagraves v. The City of Alton*, 13 Ill. 370, when carefully examined, will be found to present no analogy with

the case at bar—because there the statute *created a direct and positive obligation and liability*. The Court, referring to the 9th section of the act of incorporation, say: “This provision imposes on the city the duty of supporting the paupers within its limits, and grants it in return an ample equivalent. The *obligation is legal* and may be enforced against the corporation. It is *enjoined by positive law* and its observance does not rest in the discretion of the corporate authorities.

Again the Court says: “*Paupers* are not to be turned over to the uncertain charities of individuals. The law makes them a charge on the corporation, and it is bound to provide for them a comfortable support. If she will not do this in the first instance, individuals may provide for their necessities, and look to the corporation for remuneration.

Here the Court placed their decisions substantially upon the same grounds of the decision in Vermont, to-wit: a sort of *parental* duty on the one side,—a neglect to fill that duty—and the furnishing of necessities on the other side. The same thing is suggested in the case of the trustees of Cincinnati v. Ogden, 5 Hammond, 23, and it would seem that it needs no great powers of discrimination to see how unlike those cases are to the one under consideration.

“The nature and extent of the duty and obligation devolved upon the city in the opening of streets,” is, it is urged by the plaintiff in error, “precisely the same as in the case of improving and repairing.” No greater mistake could well be made. The duties and obligations of the city in the *opening* of streets are especially defined and conferred by the statute; but the duty and obligation of a municipal corporation to keep its streets and highways in repair, is a *common law obligation*, and results from its general duty to the public so to protect its streets and highways that the right of passage over them may be safely enjoyed.

Whatever remedy, therefore, the statute may confer, for a breach of this duty to keep the streets in repair, is cumulative. Actions against municipal corporations for damages, resulting to individuals from defects in the highways, are uniformly based upon the common law obligation, already stated, and are always in case. “Browning v. The City of Springfield,” 17 Ill., 143, and “The City of Chicago v. Mayor,” 18 Ill., 349, cited by the plaintiff in error, are both actions on the case. The injury complained of in those cases resulted from

the neglect to discharge the common law obligation, to which we have already alluded. In the present case no such obligation exists, and the duty to collect the assessments imposed upon those particular individuals whose property is to be benefitted by the opening of streets, is one imposed by the *statute alone*, and if any other remedy can be found for its non-performance than mandamus, it must be by action on the case.

The action of assumpsit, against a person, or a corporation acting in a particular character, for a breach of duty, can be sustained only in that class of cases, where the duty is of common law origin.

I Saund. Pl. and Ev., page 166.

In support of the proposition that an action of assumpsit is not the proper form of remedy in the present case, we submit the following authorities :

"Where the commissioners, under a local act, have power to appoint officers at a salary to be paid out of the rates raised, the appointment does not create a contract on the part of the commissioners to pay the salary. Therefore, an *indebitatus* action will not lie against them for salary; but a mandamus, or an action on the case is the proper remedy."

Bogg v. Pearce, 3 Eng. Law and Eq., 508.

"Assumpsit will not lie against a collector of taxes for a neglect to levy, collect and pay over the taxes."

Charleston v. Stacey, 10 Vt., 563.

"Assumpsit is never the proper remedy against a public officer, for neglect in executing the duties of his office."

McMillan v. Eastman, 4 Mass., 378.

6 Greenleaf, 471, 472.

Earley v. Butterfield, 2 Shep., 112.

See also—

Toram v. Howard Beneficial Association, 4 Barr., 519.

Bisquay v. Jeunelot, 10 Ala. 235.

Force v. Haines, 2 Harr., 385.

Knowlton v. Plantation No. 4, 2 Shep. 20.

Turnpike Co. v. Smith, 12 Verm. 212.

Paris v. Paris, Hardin 456.

Selectmen, &c. v. Johnson, Brayt. 24.

Burnett v. Lynch, 5 B. & C. 609 (per Littledale, J.)

16: The case of *Keaney v. City of Covington*, 1 Metcalf (Ky.) 339, was simply an action brought under the "Code practice of Kentucky," which has long since abolished all distinctions in actions to recover of the City of Covington a certain sum of money "for work" and labor done on the streets of the city at the instance of the "latter." See page 341.

There was no provision in the charter of the city of Covington restricting it as to any *mode* of paying those whom it employed; and if it chose to *make a contract* that a certain person whom it employed should be paid in a *particular manner* and upon certain conditions, and then did not see fit to regard those conditions, of course it was not the contractor's fault, and he could recover at any and all hazards; and the case in that respect is just like a man giving his note for a certain amount payable in cattle; if he does not produce the cattle at the time specified, the other party could sue and recover the full amount in *money*.

Hence it was that the Court say, using the same *identical* reasoning, that "The plaintiff *was employed* by the City Council to do the "work *for the city*, under an agreement that he should be paid for it "when completed by a tax on the lot owners. If the city has failed to adopt such measures as the charter requires to render the lot "holders responsible, it was not the fault of the contractor, and the "city is liable for the violation of her implied undertaking, that the "work should be paid for by the owners of the lots."

The city was *primarily* liable for the work done, and the contractor could have recovered of the city under the circumstances at any and all hazard.

This is all there is in that case, and with the greatest respect for the legal acumen of the counsel who cites it, I cannot conceive that because a party may maintain the action of assumpsit for work and labor done and performed at the special instance of a party, that it therefore follows as a sequence that for a tort originating in "*inexcusable neglect*," the same action may be sustained. To do this would subvert all distinctions in actions, and overthrow all reason and common sense.

VII.

But, without pursuing this subject further, I respectfully submit in conclusion, the following points and suggestions:

1. The assessment in this case, by virtue of which the plaintiff claims to recover the sum of \$15,545, was not levied according to law, and is *void*, and the plaintiff never acquired any rights under it at all. [Municipal Laws, sec. 10, chapter 6, page 35.]

2. This is an action brought against the city in its *corporate capacity*, and as all corporations are creatures of statutory law, a resort must be had to the charter to determine its *powers* and liabilities,—and I claim that the plaintiff in this case has not *shown* that the city of Chicago has been guilty of any neglect of duty, because he merely shows that the assessment in question was *confirmed* by the Common Council of the city; and does not show that any warrant was issued by the clerk to collect the assessment. The *charter*, sec. 4 and 6, chapter 8, page 43, Municipal Laws, expressly providing that the *clerk* shall issue the warrant, and that if he did not, then the plaintiff should have resorted to a mandamus, and compelled him to do it. The *city of Chicago*, through its *Common Council*, did all that was *required of it as a body corporate*, when it *confirmed* the assessment, (assuming the assessment to be valid) and if the City Clerk did not issue a warrant for its collection, and the City Collector did not proceed to collect it, as *required* by the *charter*, that was a personal matter for which the city is not liable; but the plaintiff should have compelled them to do this duty by mandamus.

3. The action of assumpsit will not lie in this case, because plaintiff does not show any contract either express or implied, existing between the city and himself.

4. If there was a duty resting upon the city to collect money, by means provided by its charter, and pay to the plaintiff the amount of damages, which commissioners may have awarded him for land condemned for a street, then *mandamus* is the only remedy the party has to *compel* the city to do its duty.

Commonwealth v. City of Pittsburgh, American Law Register, March, 1860.

5. If the action of assumpsit can be maintained in any case against the city of Chicago to recover damages which commissioners may have awarded a party for condemning his land for a street, that action cannot lie until the assessment has been collected of the parties who are bound to pay it, and the city has *got it in its treasury*,—because, by the charter, the city is *not* bound to pay it out of the general fund at all, and *no assumpsit* arises, or can arise, *until it is shown that the assessment has actually been collected*. Then the city would hold the money for the use of those interested, and

6. The cases of *Lake v. Trustees of Williamsburgh*, 4 Denio, 523. *McCullough v. Mayor of Brooklyn*, 23 Wend, 458, are perfectly decisive and conclusive upon this point.

7. In all the cases quoted by the plaintiff from the New York reports upon this subject, the Court will find that by the Charters of the towns, cities and villages, they were required to *pay* the amounts assessed for opening streets out of the public treasury, and in case they did not, the *remedy* was expressly provided by the *statute*.

8. The plaintiff does not show that the city has ever taken and appropriated his land at all. (See Sec. 14, page 36 of the Municipal Laws.) And as a matter of fact, the street in question is yet a *myth*, *has never been opened*, and the plaintiff is in as full and complete possession of his property as he ever was, and this action is nothing more or less than a *compulsory process* to make the city purchase the plaintiff's land, at the most enormous and outrageous price that ever was put upon property since the *speculating explosion* of 1836.

9. The judgment of the Court below was correct and should be affirmed.

United States of America
State of Illinois
Cook County, S.D.

Shew before the Honorable the Judges
of the Superior Court of Chicago within & for the County
of Cook and State of Illinois at a regular
term of said Superior Court of Chicago begun
and holden at the Court House in the City of
Chicago in said County and State on the
first Monday being the sixth day of Feb-
ruary in the year of our Lord Eighteen
Hundred and sixty and of the Indepen-
dence of the United States of America the
eighty fourth

Present the Hon John M Wilson
Chief Justice of the Superior Court of Chicago
Van H Higgins and Grant Goodrich Judges
Caplan Keaven Pro Attorney
John Gray Sheriff

Attest

Walter Kimball clerk

Be it Remembered that here-
before to wit on the twenty fourth day
of May A.D. Eighteen Hundred and fifty

nine Rosalia A. Banner & others by Annabel
Lay and Gregory their attorneys filed in
the office of the Clerk of the Superior Court
of Chicago their Declaration in a
plea of Absumpt against the City of Chicago
Defendant, which said Declaration is in
Words & figures as follows to wit

Impaired
Superior Court of Chicago
of the May Term A.D. 1859.

State of Illinois }
Cook County } ss.

Before
Rosalia A. Bonner in her
own name and behalf, and Percy William
Bonner, an infant, who sues by his next friend
John Jones, all of the City of Chicago in the
County and State aforesaid, who are the
sole surviving heirs at law of one James D.
Bonner deceased, plaintiffs in this suit, by
their attorneys Arnold, Lay & Gregory, complain
of the City of Chicago, defendant in this
suit, which has been summoned &c; in a
plea of trespass on the case on promises;

For that whereas the said Rosalia A. Bonner
and Percy William Bonner, plaintiffs,

Together with one E. Virginia Bonner, since
deceased, were on the fifteenth day of October
in the year eighteen hundred and fifty-
five, and long before that time, and have
been ever since until and at the time
of the appropriation of the same for street
purposes by said defendant as herein-
after stated, seized in fee of the following
described premises, to wit, All that part
of lot four in block ninety six, of school
section addition to the City of Chicago

omit
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bounded as follows; Beginning at northeast corner of said lot four, running thence westerly along the line of said lot fifty-six (56) feet and three inches; thence southerly on a line parallel with the side line of said lot four to the south end of said lot; thence easterly along the line of said lot, fifty six feet and three inches, to the southeast corner of said lot; thence along the line of said lot to the place of beginning together with all the buildings and appurtenances thereto belonging; a portion of which said land and premises have been subjected to the proceedings hereinafter named, to condemn the same for the purpose of opening over the same a highway or street being an extension South of LaSalle street, to wit; at the said County of Cook. And the said plaintiffs aver and say that the said G. Virginia Bounce, on or about the seventeenth day of April A. D. Eighteen Hundred and fifty seven, died, leaving them the said plaintiffs her sole and only heirs at law. And the said plaintiffs further say that on, to wit; the said fifteenth day of October A. D. Eighteen Hundred and fifty-five, at, to wit, the court aforesaid; the said City of Chicago, defendant.

did through its Common Council, in pursu-
ance of the powers conferred upon said defen-
dant by its Charter, order a survey for an
extension of said La Salle street from its
then present terminus at Madison street
in said City of Chicago south to Jackson street
survey was made accordingly; and afterwards the said
in said city, which said defendants, through
its said Common Council, gave the notice
required by its Charter, of its intention to take
and appropriate the land necessary for the
extension of said La Salle street south
from said Madison street to said Jackson
street, to the owners of said lands, by publish-
ing said notice ten days as required by said
Charter, in said defendants corporation
newspaper, the first publication of which
notice being on the Twentieth day of October
in the year Eighteen Hundred and fifty-
five aforesaid and the same being pub-
lished ten days consecutively thereafter:

And the said plaintiffs
further say that afterwards, and after the
expiration of said notice, to wit, on the tenth
day of January in the year Eighteen Hun-
dred ^{and} fifty six, to wit, at the said the County
of Cook aforesaid, the said defendants
through the said Common Council and in
pursuance of the requirements of their said

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Schacter, did choose three disinterested free-
holders residing in the said City of Chicago,
to wit, F. A. Bragg, Thomas Church and W.
M. Saltonstall, as Commissioners to ascertain
and assess the damages and recompense
due the owners of such lands respectively;
and at the same time to determine what
persons would be benefitted by such
improvements and assess the damages
and expenses thereof on the real estate
benefitted, in proportion, as nearly as
might be, the benefits resulting to each;
which said Commissioners were then
and there elected and chosen by a
majority of all the Aldermen authorized
by law to be elected; which said Commis-
sioners were afterwards, to wit, on the
Sixteenth day of said month of January
in the year last aforesaid, duly sworn
as required by law faithfully to execute
their duties according to the best of their
ability, and before entering upon their duties
the said Commissioners did give notice
to the persons interested of the time and
place of their meeting, for the purpose of
viewing the premises and making their
assessment, by publishing said notice
two days before the time of such meeting

in the said defendants corporation newspaper, to wit at the County of Cook aforesaid.

And the said plaintiffs further say that the said Commissioners did thereupon after the expiration of said last named notice proceed to make their said assessment, and did determine and appraise to the owner or owners the value of the real estate appropriated for said improvements and the injury arising to them respectively, as damages, after making due allowance therefrom for any benefit which such owner or owners might respectively derive from such improvements, to wit, at the County of Cook aforesaid;

And the said plaintiffs further say that the said Commissioners did in all things comply with the law, and the Charter and the ordinances of said City, in regard to said assessment and the opening of said street; and having ascertained the damages and expenses of such improvement, as aforesaid, the said Commissioners did thereupon apportion and assess the same, together with the costs of the proceedings upon the real estate by them claimed

benefitted, in proportion to the benefit resulting thereunto from the aforesaid improvement, and did describe the real estate upon which their assessments were made, and after having completed and signed said assessment the said commissioners did, within the extended time allowed them by the said Common Council in which to complete and return and sign the said assessment, to wit: on the fifth day of April in the year last aforesaid, return their said assessment to the said Common Council of the said City of Chicago as required by law; and the Clerk of the said City of Chicago did thereupon, after the return of said assessment, give ten days notice commencing on, to wit, the eighth day of April in said year last aforesaid, in the said defendants corporation newspaper, that said assessment had been returned and that on a day specified in said notice said assessment would be confirmed by said Common Council, unless objections were made to the same by some person interested; and the said plaintiffs further say that after the

expiration of said last mentioned notice, to wit; on the ninth day of June in the year last aforesaid, at, to wit, the County of Cook aforesaid, (no objections having been made) the said assessment of the said Commissioners, so as aforesaid by them returned, was in all things confirmed by the said Common Council of the said City of Chicago, in due form of law:

And the said plaintiffs further say that there was appraised, allowed and awarded to the said estate of said James D. Bonner in and by said assessment so as aforesaid returned by said Commissioners, and confirmed by said Common Council, for the taking and appropriating of the portion of said land hereinbefore described which was included in such survey and appropriated to said street, the sum of ten thousand dollars, and for the buildings thereon the sum of sixteen hundred dollars; and said Commissioners did then and there estimate the benefit to the balance of said lot not appropriated, at the sum of fourteen hundred and seventy-five dollars; and then and

deducted the amount of said last named sum from the aggregated of said damages leaving the sum of ten thousand and one hundred and twenty-five dollars which said commissioners then and there by said assessment appraised, awarded and allowed to said plaintiffs as net damages over and above benefits. And said plffs aver that thereafter, to wit, on the 17th day of June A.D. 1856 a collector's warrant was duly issued for the collection of said assessment duly signed and sealed ~~was issued~~, to wit at said Cook County aforesaid.

And the said plaintiffs further aver that they are the sole and only heirs at law of the said James D. Bonner, and that as such heirs they are entitled to the said sum of money so awarded to the said estate of said James D. Bonner as aforesaid, as such damages as aforesaid.

And the said plaintiffs aver that the said defendant for a long time after the said confirmation of said assessment as aforesaid, to wit, for the space of two years and nine months and

upwards has wholly neglected and failed to pay to said plaintiffs or either of them, or to any other person for the use of said plaintiffs, the said sum of ten thousand and one hundred and twenty five (\$10,125-) dollars appraised, awarded and allowed, to the estate of said James D. Bonner, now it, to said plaintiffs as such net damages as aforesaid, or any part thereof, though often requested so to do.

By means of the premises the said defendant became liable to pay to the said plaintiffs said sum of ten thousand one hundred and twenty five dollars appraised, awarded and allowed to the said plaintiffs as aforesaid, and being so liable in consideration thereof, then and there undertook and promised to pay the same to the said plaintiffs when it, the said defendant, should be thereunto afterwards requested, to wit at Cook County aforesaid.

Second
Count.

For that whereas the said Rosalia
A. Bounce and Percy William Bounce,
Plaintiffs, together with one E. Virginia
Bounce, since deceased, were on the
fifteenth day of October in the year
Eighteen hundred and fifty five and
long before that time, and have been
ever since until at the time of the
appropriation of the same for street
purposes by said defendants as herein
after stated, seized in fee of the
premises above described in the said
first count in this declaration set
out, a portion of which said land and
premises have been subjected to the
proceedings hereinafter named, to
condemn the same for the purpose of
opening over the same a highway or
street being an extension of LaPalle
street, to wit, at the said County of Cook.

And the said plaintiffs
aver and say that the said E. Virginia
Bounce on or about the seventeenth
day of April in the year Eighteen
hundred and fifty seven, died leaving
them the said plaintiffs her sole and
only heirs at law. And the said

plaintiffs aver further, that they are the sole and only heirs at law of the said James D. Bonner, and that as such heirs they are entitled to the said sum of money awarded to the said Estate of said James D. Bonner as hereinafter mentioned.

And the said plaintiffs aver and say that heretofore, to wit, prior to the ninth day of June in the year Eighteen Hundred and fifty-six the said defendant determined to take certain proceedings to extend La Salle street in said City from its then present terminus at Madison street south to Jackson street in said City, and did through their Common Council give the legal notice of their intention to appropriate and take the land necessary for the laying out said extension of said street; and therefore did choose certain commissioners, as in the manner required by the Charter of said City, to assess the damages and expenses of such improvement. And said plaintiffs further say that the Commissioners so chosen as afore-

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said, did proceed to discharge their duties and did in all things comply with the law and the Charter and the ordinances of said City, in the making of the assessment for the opening of the extension of said street, and did apportion and assess the damages and expenses &c of said improvement and did sign and return their said assessment to the said Common Council within the time required by law, and thereafter, to wit on the ninth day of June A.D. 1856 such proceedings were taken as that the said defendant by its Common Council did confirm and enter an order of confirmation of the said assessment of said Commissioners.

And the said plaintiffs aver that in and by the said assessment there was appraised, allowed and awarded to the said estate of said James D. Bourne the sum of ten thousand one hundred and twenty five dollars as net damages over and above benefits, for a piece of land of the estate of ^{said} James D. Bourne

so taken and appropriated for the purposes of said street.

And the said plaintiffs aver that, thereupon, to wit, after the proceedings so had and taken as aforesaid by the said defendant and after the confirmation of said assessment as aforesaid, it became and was the duty of the said defendant to proceed with all convenient dispatch and within a reasonable time to collect and pay over the said sum of money so awarded to the estate of said James D. Bunker, to wit, to said plaintiffs:

And the said plaintiffs aver that the said defendant did not proceed with all convenient dispatch in within a reasonable time to collect and pay over, nor to collect the said sum of money so awarded as aforesaid, though often requested so to do, but has unreasonably and without cause, and carelessly and negligently, and in disregard of its duty in that regard, neglected, failed and refused so to do for a long space of time, to wit,

and long before that time, and have been ever since until and at the time of the appropriation of the same for street purposes by said defendant as hereinafter stated, seized in fee of the premises above described in the said first Count in this declaration set out; a portion of which said land and premises have been subjected to the proceeding hereinafter named, to condemn the same for the purpose of opening over the same a highway or street being an extension of La Salle Street, situate at the said County of Cook

And the said plaintiffs aver and say that the said E. Virginia Bonner, on or about the seventeenth day of April in the year eighteen hundred and fifty seven, died leaving them, the said plaintiffs her sole and only heirs at law. And the said plaintiffs aver further that they are the sole and only heirs at law of the said James D. Bonner, and that as such heirs they are entitled to the said sum of money awarded to the said estate of said James D. Bonner as hereinafter mentioned.

And the said plaintiffs aver

and say that heretofore, to wit, prior to the ninth day of June in the year Eighteen hundred and fifty six, the said defendant determined to take certain proceedings to extend La Salle Street in said city from its then present terminus at Madison Street south to Jackson Street in said City, and did through their Common Council give the legal notice of their intention to appropriate and take the land necessary for the laying out said extension of said street; and thereafter did choose certain Commissioners, as and in the manner required by the Charter of said City, to assess the damages and expenses &c of such improvement. And said plaintiff further says that the Commissioners, so chosen as aforesaid, did proceed to discharge their duties, and did in all things comply with the law and the Charter and the ordinances of said City, in the making of the assessment for the opening of the extension of said street, and did apportion and assess the damages and expenses &c of said improvement and did sign and return their said assess-

ment to the said Common Council within the time required by law, and thereafter, to wit, on the Ninth day of June A.D. 1856. such proceedings were taken as that the said defendants by said Common Council did confirm and enter an order of confirmation of the said assessment of said Commissioners.

And the said plaintiffs aver that in and by the said assessment there was appraised, allowed and awarded to the said estate of said James D. Bonner the sum of ten thousand one hundred and twenty five dollars as net damages over and above benefits, for a piece of land of the the Estate of said James D. Bonner taken and appropriated for the purposes of said Street.

And the said plaintiffs further aver and say, that in consideration of the powers conferred upon said defendant in and by the said City Charter and in further consideration of the franchise and the right to the use of said pieces of land for the said street, he had and taken of the said Estate of said James D. Bonner, to wit of said plaintiffs as aforesaid, of the said defendant, from

ised and undertook to indemnify, or to cause to be indemnified unto the said plaintiff, therefore, by the collecting and payment of the said sum of Ten Thousand, one hundred and twenty five dollars so appraised, awarded and allowed as aforesaid; and to raise and obtain the money to indemnify the said plaintiffs did promise and undertake to proceed to collect and pay over said sum of money in the manner required by the said Charter with all convenient dispatch and within a reasonable time.

And the said plaintiffs aver that the said defendant did not proceed with all convenient dispatch or within a reasonable time, to collect and pay over, nor to collect the said sum of money so awarded as aforesaid, though often requested so to do, but has unreasonably and without cause, and carelessly and negligently, and in disregard to its said promise and undertaking neglected, failed, and refused so to do. for a long space of time, to wit, from thence hitherto, to wit, for the space of two years and nine

months and upwards to the great damage and injury of the said plaintiffs

By the means of which said premises the said defendant became liable to pay to the said plaintiffs said sum of Ten thousand, one hundred and twenty five dollars, appraised, awarded and allowed to wit to the said plaintiffs as aforesaid and being so liable, in consideration thereof then and there undertook and promised to pay the same to the said plaintiffs, when it, the said defendant should be thereunto requested, to wit at Cook County, aforesaid.

4th Count.

And whereas, also, the said defendant, afterwards, to wit, on the first day of March in the year of our Lord one thousand eight hundred and fifty nine at the place aforesaid, was indebted to the said plaintiffs in

the sum of twenty thousand dollars, lawful money of the United States of America for money before that time lent and advanced by the said plaintiffs to the said defendants, and at the special instance and request and request of the said defendant.

And for other money by the said plaintiffs, before that time, paid, laid out and expended for the said defendant and at the like request of the said defendant.

And for other money by the said defendant, before that time had and received to and for the use of the said plaintiffs.

And for other sum of twenty thousand dollars appraised, awarded and allowed by said defendants to said plaintiffs for the taking of and damages to land and buildings of the said plaintiffs by the said defendants And also in like sum there and there found due and owing said plaintiff on an account stated between them and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the same day and

year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when it, the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested so to do) has not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, ^{to the said plaintiffs} ~~to pay the same or any part thereof to the said plaintiffs~~, the said defendant has hitherto altogether refused and still does refuse. To the damage of the said plaintiffs of twenty thousand dollars and therefore the said plaintiffs bring their suit &c

Arnold, Gray & Gregory.

attys for plffs.

Copy of the account used in.

City of Chicago

March 1st 1859

To Rosalia A Bonner

and Percy W. Bonner

Dr.

To money lent and advanced \$20,000.

To money paid, laid out & expended for debt \$20,000.

To money had & received for use of &c \$20,000

To money appraised, allowed and
awarded for lands and buildings \$20,000.

To balance on account stated \$20,000.

And afterwards to wit on the day of
May 1st 1859 the said City of Chicago by
Cyprian Perry and Anthony attorneys in filed
in said cause a Verdict to said plain-
tiffs declaration which said Verdict
is as follows to wit,

The Superior Court of Chicago
of the May Term A.D. 1859.
The City of Chicago } Deft
acts

Rosalie A. Bonner &
Percy William Bonner } Plffs.

And the said Defendant by
Harvey & Anthony its attorneys comes and
defends the wrong and injury when & said
says that the said first, ^{second third & fourth} counts, of the said
declaration, and the matters therein con-
tained in manner and form as the same are
above stated and set forth, are not sufficient
in law for the said Plaintiffs to have or maintain
their aforesaid action thereof against the
said Defendant and it the said Defendant
is not bound by law to answer the same.

And this it is ready to verify, wherefore
by reason of the insufficiency of the said first
^{second third & fourth} counts of the said declaration, in this
behalf, the said Defendant prays judgment, and
that the said Plaintiffs may be barred
from having or maintaining their afore-
said action thereof against it &c.

Crocker, Harvey & Anthony
Attys for Deft.

And afterwards to wit on the Seventh day of October in the year aforesaid the said Plaintiffs filed in said Court their Pleading on said Defendants Answer which said Pleading is as follows to wit:

Superior Court of Chicago
 Bonner et. al }
 vs }
 City of Chicago.)

And the said Plaintiffs say that the said 1st, 2nd & 3rd & 4th counts of the said declaration and each and every of them and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law, for them, the said Plaintiffs to have and maintain their aforesaid action thereof against said Defendant and the said Plaintiffs are ready to verify and prove the same as the court here shall direct and award wherefore -

inasmuch as the said deft, has not answered the said Counts or either of them of said declaration, nor hitherto in any manner denied the same the said plaintiffs pray Judgment and his damages by reason of the not performing of the said promise and undertaking in said declaration mentioned. To be adjudged to them &c

Arnold, Lay & Gregory;
Plffs Attys.

And afterwards to wit on the Twenty Fifth day of February Eighteen Hundred & Sixty, Said day being one of the days of the February term of Said Court the following proceedings were had in said cause and entered of Record in said Court to wit.

Rosalia A. Bonner and
Percy William Bonner by his
Attorneys John Jones

City of Chicago

Appear

This day comes said plaintiffs

by Annaed Lay and Gregory their attorney
 and said defendant by Anthony Crocker
 its attorneys also come, And counsel being
 heard on said Defendants Demurrer to
 Plaintiffs Declaration in this cause, and
 due deliberation being thereupon had, and
 the premises being fully understood, it ap-
 pears to the Court that the Demurrer of said
 Defendant herein pleaded in bar to plaintiffs
 Declaration in this cause is sufficient
 in law to bar said Plaintiff from having
 and maintaining their action against
 said Defendant, the Demurrer is there-
 sustained, and plaintiffs elect to stand
 by their said Declaration

Therefore it is considered that said
 Defendant do have and recover of said
 Plaintiffs its costs and charges on Demurrer
 expended and have execution therefor

State of Illinois }
County of Cook } J. J. Waller Kimball
Clerk of the Superior Court of Chicago in
said County and State do hereby Certify
that the foregoing is a full true and
correct transcript of the Declaration
Demurer Joinder on Demurer, and
also of the Order and Judgment of the
Court entered of Record in the case
of Rosalia A. Bunker et al vs City of Chicago
On testimony whereof I hereunto
set my hand and the Seal of said
Court at Chicago in said County
this 9th day of March A.D. 1860
Waller Kimball
Clerk

Bonner et al
vs.
City of Chicago.



\$7.50.

State of Illinois }
Supreme Court } ss.

April Term in
the year Eighteen hundred
and sixty.

Rosalie A Bommer ^{and}
Percy William Bommer,
an infant by his next friend
John Jones,
vs.
City of Chicago

In Error

Afterwards, to wit, on the day
of A.D. 1866, at this same term of
the Court, before the justices thereof, came
the said parties plaintiff by their attorneys
Arnold, Lay & Gregory, and say that in the
record and proceedings, aforesaid, and
also in the rendition of the judgment,
aforesaid, there is manifest error
in this, to wit; that the declaration
aforesaid, and the matters therein
contained, are ~~not~~ sufficient in
law, for the said plaintiffs to have
and maintain his aforesaid action
thereof, against ~~him~~ the said
City of Chicago, defendant.

There is also error in this, to wit,
that

that by the record aforesaid, it appears,
that the judgment aforesaid, in form aforesaid
given, was given for the said Defendant
City of Chicago against the said Rosalia
A. Bonner and Percy William Bonner
whereas by the laws of the land, the said
judgment ought to have been given for
the said Bonner and Bonner against
the said City of Chicago -

There is also Error in

this, to-wit:

1. The court below erred in sustaining the demurrer to said first
count of said declaration, and in rendering judgment in favor of said
defendant, upon the issue of law formed by said demurrer and joinder.

2. The court erred in sustaining the said demurrer to said second
count of said declaration, and in rendering judgment in favor of said defend-
ant upon the issue of law formed by said demurrer and joinder.

3. The court erred in sustaining the said demurrer to said third count
of said declaration, and in rendering judgment in favor of said defend-
ant upon the issue of law formed by said demurrer and joinder.

4. The judgment rendered in said cause is erroneous, and contrary
to law.

And the said plaintiffs pray
that the judgment aforesaid, for
the errors aforesaid, and for other
Errors apparent in the record and
proceedings aforesaid, may be reversed
annulled, and altogether held for
nothing, and that they may be
restored to all things which they have lost by
occasion of the said judgment, &c.

Armed Lay & Gregory
attorneys for plaintiffs

City of Chicago
ads.

Rosalie A. Horner
Etal

} Supreme Court &c

And hereupon afterwards, to wit; at
the said April Term of said Supreme
Court, in the year of our Lord one thousand
Eight hundred and sixty, the said City
of Chicago by Elliott Anthony its
attorney, comes here into Court, and
says that there is ^{not} manifest error
either in the record and 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 and
proceedings aforesaid, as the matters
aforesaid above assigned for error, and
that the judgment aforesaid in form
aforesaid may be in all things affirmed &c

Elliott Anthony
atly for City.

Supreme Court of the State of
Illinois.

Third Grand Division.

Rosalie A. Bonner, ^{and}
Percy William Bonner
an infant, by his
next friend, John Jones
vs:
City of Chicago

It is hereby stipulated by the
attorneys for plaintiffs and defendant
in the above entitled cause that the
issuing and the service of a Scire
facias is hereby waived, and appearance
in said cause is hereby entered by
the said defendant, and the usual
notice to either party is hereby waived.

And it is hereby further
stipulated in said cause that the fourth
count in the said plaintiffs declaration
has been heretofore withdrawn and shall
not be considered as a part of the record in
said cause.

Chicago, April 9, 1860.

Amos Day & Gregory
attys for plffs.
Elliott Anthony
Atty for city.

Supreme Court

Bonner

vs

d.

City of Chicago.

Stipulation.

223
Supreme Court of Illinois.
Third Grand Division.

Rosalie A. Bonner
vs.
City of Chicago.
Etal

Record - 4
Stipulation

Filed April 18 1860
L. Leland
Clerk

Supreme Court of Illinois
Third Grand Division

Rosalie A. Bommer
et al

vs.

The City of Chicago

April Term A.D. 1880.

It is hereby stipulated that the briefs prepared for and filed in the case of William Wheeler vs The City of Chicago on the part of the plaintiff in Error, shall be considered as filed in the said case of Bommer et al. v. The City of Chicago on the part of the said plaintiffs in Error; and in case the said Bommer case is submitted on printed brief, without argument, the brief in said Wheeler case shall be considered as submitted in said Bommer case also. on the part of plaintiffs in Error.

Arnold Lay & Hegarty
attorneys for plff.

Chicago. April 28. 1880.

Elliott Anthony
Atty for Defendant
in Error

Superior 223. - 184
~~Superior~~
Supreme Court of
Illinois

Bonner et al.
vs.
The City of Chicago.

Stipulation.

Filed May 3 1860
L. Deland
Clerk

SUPREME COURT.

THIRD GRAND DIVISION.

ROSALIA A. BONNER, AND PERCY WILLIAM BONNER, AN INFANT, BY HIS NEXT FRIEND, JOHN JONES, VS CITY OF CHICAGO.	}
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ABSTRACT OF RECORD.

This was a special assumpsit, brought in the Superior Court of Chicago, by the plaintiffs, in this Court, who were the plaintiffs in the court below, against the city of Chicago, defendant.

The said defendant filed a general demurrer to each of the counts of the plaintiffs' declaration. The plaintiffs joined in demurrer.

The court below sustained the demurrer to each of the counts of the declaration.

The plaintiffs stood by their declaration, and final judgment was rendered against them, with costs, and they bring the case to this court by writ of error.

The said first, second and third counts of said declaration are as follows:

SUPERIOR COURT OF CHICAGO.

Of the May Term, A. D., 1859.

STATE OF ILLINOIS, }
COOK COUNTY. } ss.

See Rec. p. 3. Rosalia A. Bonner, in her own name and behalf, and Percy William Bonner, an infant, who sues by his next friend, John Jones, all of the City of Chicago, in the county and State aforesaid, who are the sole surviving heirs at law, of one Jas. D. Bonner, deceased, plaintiffs in this suit, by their attorneys, Arnold, Lay & Gregory, complain of the City of Chicago, defendant in this suit, which has been summoned, &c., in a plea of trespass on the case on promises.

For that, whereas, the said Rosalia A. Bonner and Percy William Bonner, plaintiffs, together with one G. Virginia Bonner, since deceased, were on the fifteenth day of October, in the year 1855, and long before that time, and have been ever since until and at the time of the appropriation of the same for street purposes by said defendant, as hereinafter stated, seized in fee of the following described premises (describing it): a portion of which said land and premises have been subjected to the proceedings hereinafter named, to condemn the same for the purpose of opening over the same a highway or street, being an extension south of La Salle street, to wit, at the said County of Cook. And the said plaintiffs aver and say that the said G. Virginia Bonner, on or about the seventeenth day of April, A. D., 1857, died, leaving them, the said plaintiffs, her sole and only heirs at law.

And the said plaintiffs further say that on, to wit, the said fifteenth day of October, A. D., 1855, at, to wit, the county aforesaid, the said City of Chicago, defendant, did, through its common council, in pursuance of the powers conferred upon said defendant by its charter, order a survey for an extension of said La Salle street, from its then present terminus, at Madison street, in said city of Chicago, south to Jackson street in said city, which said survey was made accordingly: and afterwards,

the said defendant, through its said common council, gave the notice required by its charter, of its intention to take and appropriate the land necessary for the extension of said La Salle street, south from said Madison street to said Jackson street, to the owners of said lands, by publishing said notice ten days, as required by said charter, in said defendant's corporation newspaper, the first publication of which notice being on the twentieth day of October, A. D. 1855, aforesaid, and the same being published ten days consecutively thereafter.

And the said plaintiffs further say that afterwards, and after the expiration of said notice, to wit, on the 10th day of January, A. D., 1856, to wit, at the said the county of Cook, aforesaid, the said defendant, through the said Common Council, and in pursuance of the requirements of their
 REC. 6 said charter, did choose three disinterested free holders residing in the said city of Chicago, to wit, F. A. Bragg, Thomas Church and W. W. Saltonsall, as Commissioners, to ascertain and assess the damages and recompense due the owners of such lands respectively: and at the same time to determine what persons would be benefitted by such improvement, and assess the damages and expenses thereof on the real estate benefitted, in proportion as nearly as might be the benefits resulting from each: which said commissioners were then and there elected and chosen by a majority of all the aldermen authorized by law to be elected: which said commissioners were afterwards, to wit, on the sixteenth day of said month of January, in the year last aforesaid, duly sworn as required by law faithfully to execute their duties, according to the best of their ability, and before entering upon their duties the said commissioners did give notice to the persons interested, of the time and place of their meeting, for the purpose of viewing the premises and making their assessment, by publishing said notice ten days before the time of such meeting in the said defendant's corporation newspaper, to wit, at the County of Cook, aforesaid.

REC. 7 And the said plaintiffs further say that the said Commissioners did thereupon after the expiration of said last named notice proceed to make their said assessment and did determine and appraise to the owner or owners, the value of the real estate appropriated for said improvements, and the injury arising to them respectively, as damages, after making due allowance therefrom for any benefit which such owner or owners might respectively derive from such improvements, to wit, at the County of Cook aforesaid.

And the said plaintiffs further say that the said Commissioners did in all things comply with the law, and the charter and the ordinances of said city in regard to said assessment and the opening of said street, and having ascertained the damages and expenses of such improvement, as aforesaid, the said Commissioners did thereupon apportion and assess the same, together with the costs of the proceedings upon the real estate by them deemed benefitted, in proportion to the benefit resulting thereto from the aforesaid improvements, and did describe the real estate upon which their assessment were made, and after having completed and signed said assessment, the said Commissioners did within the extended time allowed them by the said Common Council in which to complete and return and sign the said assessment, to wit, on the fifth day of April in the year last aforesaid, return their said assessment to the said Common Council of the said city of Chicago, as required by law, and the clerk of the said city of Chicago did thereupon, after the return of said assessment, give ten days notice, commencing on, to wit, the eighth day of April, in said year last aforesaid, in the said defendant's corporation newspaper, that said assessment had been returned, and that on a day specified in said notice, said assessment would be confirmed by said Common Council, unless objections were made to the same, by some person interested, and the said plaintiffs further say that after the expiration of said last mentioned notice, to wit, on the ninth day of June, in the year last aforesaid, at, to wit, the County of Cook aforesaid, (no objection having been made) the said assessment of the said Commissioners, so as aforesaid by them returned was in all things confirmed by the said Common Council, of the said City of Chicago, in due form of law.

And the said plaintiffs further say that there was appraised, allowed and awarded to the said estate of said James D. Bonner, in and by said assessment so as aforesaid returned by said Commissioners, and confirmed by said Common Council, for the taking and appropriating of the portion of said land hereinbefore described, which was included in such survey and appropriated to said street, the sum of ten thousand dollars, and for the buildings thereon the sum of sixteen hundred dollars, and said commissioners did then and there estimate the benefit to the balance of said lot not appropriated, at the sum of fourteen hundred and seventy-five dollars; and then and there deducted the amount of said last

named sum from the aggregate of said damages, leaving the sum of ten thousand and one hundred and twenty-five dollars, which said commissioners then and there, by said assessment appraised, awarded and allowed to said plaintiffs as net damages over and above benefits.

And said plaintiffs aver that thereafter, to wit, on the 17th day of June, A. D., 1856, a collector's warrant was duly issued for the collection of said assessment duly signed and sealed, to wit, at said Cook County, aforesaid.

And the said plaintiffs further aver that they are the sole and only heirs at law of the said James D. Bonner, and that as such heirs they are entitled to the said sum of money, so awarded to the said estate of said James D. Bonner, as aforesaid, as such damages, as aforesaid.

And the said plaintiffs aver that the said defendant for a long time after the said confirmation of said assessment, as aforesaid, to wit, for the space of two years and nine months, and upwards, has wholly neglected and failed to pay to said plaintiffs, or either of them, or to any other person, for the use of said plaintiffs, the said sum of ten thousand and one hundred and twenty-five dollars, (\$10,125.00) appraised, awarded and allowed to the estate of said James D. Bonner, to wit, to said plaintiffs, as such net damages, as aforesaid, or any part thereof, though often requested so to do.

By means of the premises, the said defendant became liable to pay to the said plaintiffs said sum of ten thousand and one hundred and twenty-five dollars appraised, awarded and allowed to the said plaintiffs, as aforesaid; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiffs when it, the said defendant, should be thereunto afterwards requested, to wit, at Cook County, aforesaid.

SECOND COUNT.

Rec. 12 For that whereas the said Rosalia A. Bonner and Percy William Bonner, plaintiffs, together with one G. Virginia Bonner, since deceased,

were on the 15th day of October, A. D., 1855, and long before that time, and have been ever since until and at the time of the appropriation of the same for street purposes by said defendant, as hereinafter stated, seized in fee of the premises above described in the said first count in this declaration set out, a portion of which said land and premises have been subjected to the proceedings hereinafter named, to condemn the same for the purpose of opening over the same a highway or street, being an extension of La Salle street, to wit, at the said county of Cook.

And the said plaintiffs aver and say that the said G. Virginia Bonner on or about the seventeenth day of April, A. D., 1857, died, leaving them the said plaintiffs, her sole and only heirs at law. And the said plaintiffs
 REC. 13 aver further that they are the sole and only heirs at law of the said James D. Bonner, and that as such heirs they are entitled to the said sum of money awarded to the said estate of said James D. Bonner, as hereinafter mentioned. And the said plaintiffs aver and say that heretofore, to wit, prior to the 9th day of June, A. D., 1856, the said defendant determined to take certain proceedings to extend La Salle street, in said city, from its then present terminus at Madison street, south to Jackson street, in said city, and did, through their common council, give the legal notice of their intention to appropriate and take the land necessary for the laying out said extension of said street: and therefore did choose certain commissioners as and in the manner required by the charter of said city, to assess the damages and expenses of such improvement: and said plaintiffs further say that the commissioners so chosen, as aforesaid, did proceed to
 REC. 14 discharge their duties, and did in all things comply with the law and the charter, and the ordinances of said city, in the making of the assessment for the opening of the extension of said street, and did apportion and assess the damages and expenses, etc., of said improvement, and did sign and return their said assessment to said common council within the time required by law, and thereafter, to wit, on the 9th day of June, A. D., 1856, such proceedings were taken as that the said defendant, by its common council, did confirm and enter an order of confirmation of the said assessment of said commissioners.

And the said plaintiffs aver that in and by the said assessment there was appraised, allowed and awarded to the said estates of said James D. Bonner the sum of ten thousand one hundred and twenty five dollars, as

net damages over and above benefits, for a piece of land of the estate of said James D. Bonner, so taken and appropriated for the purposes of said street.

And the said plaintiffs aver that, thereupon, to wit, after the proceedings so had and taken, as aforesaid, by the said defendant, and after the confirmation of said assessment, as aforesaid, it became and was the duty of the said defendant to proceed with all convenient dispatch, or within a reasonable time to collect and pay over the said sum of money so awarded to the estate of said James D. Bonner, to wit, to said plaintiffs.

And the said plaintiffs aver that the said defendant did not proceed with all convenient dispatch or within a reasonable time to collect and pay over, nor to collect the said sum of money, so awarded, as aforesaid, though often requested so to do, but has unreasonably, and without cause, and carelessly and negligently, and in disregard of its duty in that regard, neglected, failed and refused so to do for a long space of time, from thence hitherto, to wit, for a space of two years and nine months, and upwards, to the great damage and injury of said plaintiffs.

Rec. 16 By means of which said premises, &c.. (as on page 5 of this abstract.)

THIRD COUNT.

The said third count is the same as the second count down to page 6 and mark * of this abstract, where the language of the said third count is as follows:

Rec. 19 And the said plaintiffs aver and say in consideration of the powers conferred upon said defendant in and by the said city charter, and in further consideration of the franchise and the right to the use of said pieces of land for said street, so had and taken of the said estate of said James D. Bonner, to wit, of said plaintiffs, as aforesaid, it, the said defendant promised and undertook to indemnify, or caused to be indemnified unto the
 Rec. 20 said plaintiffs therefor, by the collecting and payment of the said sum of ten thousand one hundred and twenty-five dollars, so appraised, awarded

and allowed, as aforesaid, and to raise and obtain the money to indemnify the said plaintiff, did promise and undertake to proceed to collect and pay over said sum of money in the manner required by the said charter, with all convenient dispatch, and within a reasonable time.

And the said plaintiffs aver that the said defendant did not proceed with all convenient dispatch, or within a reasonable time to collect and pay over, nor to collect the said sum of money, so awarded, as aforesaid, though often requested so to do, but has unreasonably and without cause, and carelessly and negligently, and in disregard of its promise and undertaking, neglected, failed and refused so to do, for a long space of time, to wit, from thence hitherto, to wit, for the space of two years and nine months and upwards, to the great damage and injury of the said plaintiffs,

REC. 21 By means, etc., (as at the end of the first count on page 5 of this abstract.)

REC. 23 Nevertheless the said defendant (although often requested so to do,) has not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same or any part thereof, to the said plaintiffs, the said defendant has hitherto altogether refused, and still does refuse:

To the damage of the said plaintiffs of twenty thousand dollars, and therefore the said plaintiffs bring their suit, etc.

ARNOLD, LAY & GREGORY,

Attorneys for Plaintiffs.

ASSIGNMENT OF ERRORS.

The plaintiffs assign the following ground of error appearing upon the record, in this cause.

1. The court below erred in sustaining the demurrer to said first count of said declaration, and in rendering judgment in favor of said defendant, upon the issue of law formed by said demurrer and joinder.
2. The court erred in sustaining the said demurrer to said second count of said declaration, and in rendering judgment in favor of said defendant upon the issue of law formed by said demurrer and joinder.
3. The court erred in sustaining the said demurrer to said third count of said declaration, and in rendering judgment in favor of said defendant upon the issue of law formed by said demurrer and joinder.
4. The judgment rendered in said cause is erroneous, and contrary to law.

ARNOLD, LAY & GREGORY,

Attorneys for said Plaintiffs.

223-184

Supreme Court

Bourner et al

vs.

The City of Chicago

Abstract

Filed Apr-18. 1860

L. Leland
clerk

SUPREME COURT.

THIRD GRAND DIVISION.

ROSALIA A. BONNER, AND
PERCY WILLIAM BONNER,
AN INFANT, BY HIS NEXT FRIEND,
JOHN JONES,
VS
CITY OF CHICAGO.

ABSTRACT OF RECORD.

This was a special assumpsit, brought in the Superior Court of Chicago, by the plaintiffs, in this Court, who were the plaintiffs in the court below, against the city of Chicago, defendant.

The said defendant filed a general demurrer to each of the counts of the plaintiffs' declaration. The plaintiffs joined in demurrer.

The court below sustained the demurrer to each of the counts of the declaration.

The plaintiffs stood by their declaration, and final judgment was rendered against them, with costs, and they bring the case to this court by writ of error.

The said first, second and third counts of said declaration are as follows :

SUPERIOR COURT OF CHICAGO.

Of the May Term, A. D., 1859.

STATE OF ILLINOIS, } ss.
COOK COUNTY.

See Rec. p. 3.

Rosalia A. Bonner, in her own name and behalf, and Percy William Bonner, an infant, who sues by his next friend, John Jones, all of the City of Chicago, in the county and State aforesaid, who are the sole surviving heirs at law, of one Jas. D. Bonner, deceased, plaintiffs in this suit, by their attorneys, Arnold, Lay & Gregory, complain of the City of Chicago, defendant in this suit, which has been summoned, &c., in a plea of trespass on the case on promises.

For that, whereas, the said Rosalia A. Bonner and Percy William Bonner, plaintiffs, together with one G. Virginia Bonner, since deceased, were on the fifteenth day of October, in the year 1855, and long before that time, and have been ever since until and at the time of the appropriation of the same for street purposes by said defendant, as hereinafter stated, seized in fee of the following described premises (describing it): a portion of which said land and premises have been subjected to the proceedings hereinafter named, to condemn the same for the purpose of opening over the same a highway or street, being an extension south of La Salle street, to wit, at the said County of Cook. And the said plaintiffs aver and say that the said G. Virginia Bonner, on or about the seventeenth day of April, A. D., 1857, died, leaving them, the said plaintiffs, her sole and only heirs at law.

And the said plaintiffs further say that on, to wit, the said fifteenth day of October, A. D., 1855, at, to wit, the county aforesaid, the said City of Chicago, defendant, did, through its common council, in pursuance of the powers conferred upon said defendant by its charter, order a survey for an extension of said La Salle street, from its then present terminus, at Madison street, in said city of Chicago, south to Jackson street in said city, which said survey was made accordingly: and afterwards,

the said defendant, through its said common council, gave the notice required by its charter, of its intention to take and appropriate the land necessary for the extension of said La Salle street, south from said Madison street to said Jackson street, to the owners of said lands, by publishing said notice ten days, as required by said charter, in said defendant's corporation newspaper, the first publication of which notice being on the twentieth day of October, A. D. 1855, aforesaid, and the same being published ten days consecutively thereafter.

And the said plaintiffs further say that afterwards, and after the expiration of said notice, to wit, on the 10th day of January, A. D., 1856, to wit, at the said the county of Cook, aforesaid, the said defendant, through the said Common Council, and in pursuance of the requirements of their
 REC. 6 said charter, did choose three disinterested free holders residing in the said city of Chicago, to wit, F. A. Bragg, Thomas Church and W. W. Saltonsall, as Commissioners, to ascertain and assess the damages and recompense due the owners of such lands respectively: and at the same time to determine what persons would be benefitted by such improvement, and assess the damages and expenses thereof on the real estate benefitted, in proportion as nearly as might be the benefits resulting from each: which said commissioners were then and there elected and chosen by a majority of all the aldermen authorized by law to be elected: which said commissioners were afterwards, to wit, on the sixteenth day of said month of January, in the year last aforesaid, duly sworn as required by law faithfully to execute their duties, according to the best of their ability, and before entering upon their duties the said commissioners did give notice to the persons interested, of the time and place of their meeting, for the purpose of viewing the premises and making their assessment, by publishing said notice ten days before the time of such meeting in the said defendant's corporation newspaper, to wit, at the County of Cook, aforesaid.

And the said plaintiffs further say that the said Commissioners did
 REC. 7 thereupon after the expiration of said last named notice proceed to make their said assessment and did determine and appraise to the owner or owners, the value of the real estate appropriated for said improvements, and the injury arising to them respectively, as damages, after making due allowance therefrom for any benefit which such owner or owners might respectively derive from such improvements, to wit, at the County of Cook aforesaid.

And the said plaintiffs further say that the said Commissioners did in all things comply with the law, and the charter and the ordinances of said city in regard to said assessment and the opening of said street, and having ascertained the damages and expenses of such improvement, as aforesaid, the said Commissioners did thereupon apportion and assess the same, together with the costs of the proceedings upon the real estate by them deemed benefitted, in proportion to the benefit resulting thereto from the aforesaid improvements, and did describe the real estate upon which their assessment were made, and after having completed and signed said assessment, the said Commissioners did within the extended time allowed them by the said Common Council in which to complete and return and sign the said assessment, to wit, on the fifth day of April in the year last aforesaid, return their said assessment to the said Common Council of the said city of Chicago, as required by law, and the clerk of the said city of Chicago did thereupon, after the return of said assessment, give ten days notice, commencing on, to wit, the eighth day of April, in said year last aforesaid, in the said defendant's corporation newspaper, that said assessment had been returned, and that on a day specified in said notice, said assessment would be confirmed by said Common Council, unless objections were made to the same, by some person interested, and the said plaintiffs further say that after the expiration of said last mentioned notice, to wit, on the ninth day of June, in the year last aforesaid, at, to wit, the County of Cook aforesaid, (no objection having been made) the said assessment of the said Commissioners, so as aforesaid by them returned was in all things confirmed by the said Common Council, of the said City of Chicago, in due form of law.

And the said plaintiffs further say that there was appraised, allowed and awarded to the said estate of said James D. Bonner, in and by said assessment so as aforesaid returned by said Commissioners, and confirmed by said Common Council, for the taking and appropriating of the portion of said land hereinbefore described, which was included in such survey and appropriated to said street, the sum of ten thousand dollars, and for the buildings thereon the sum of sixteen hundred dollars, and said commissioners did then and there estimate the benefit to the balance of said lot not appropriated, at the sum of fourteen hundred and seventy-five dollars; and then and there deducted the amount of said last

named sum from the aggregate of said damages, leaving the sum of ten thousand and one hundred and twenty-five dollars, which said commissioners then and there, by said assessment appraised, awarded and allowed to said plaintiffs as net damages over and above benefits.

And said plaintiffs aver that thereafter, to wit, on the 17th day of June, A. D., 1856, a collector's warrant was duly issued for the collection of said assessment duly signed and sealed, to wit, at said Cook County, aforesaid.

And the said plaintiffs further aver that they are the sole and only heirs at law of the said James D. Bonner, and that as such heirs they are entitled to the said sum of money, so awarded to the said estate of said James D. Bonner, as aforesaid, as such damages, as aforesaid.

And the said plaintiffs aver that the said defendant for a long time after the said confirmation of said assessment, as aforesaid, to wit, for the space of two years and nine months, and upwards, has wholly neglected and failed to pay to said plaintiffs, or either of them, or to any other person, for the use of said plaintiffs, the said sum of ten thousand and one hundred and twenty-five dollars, (\$10,125.00) appraised, awarded and allowed to the estate of said James D. Bonner, to wit, to said plaintiffs, as such net damages, as aforesaid, or any part thereof, though often requested so to do.

By means of the premises, the said defendant became liable to pay to the said plaintiffs said sum of ten thousand and one hundred and twenty-five dollars appraised, awarded and allowed to the said plaintiffs, as aforesaid; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiffs when it, the said defendant, should be thereunto afterwards requested, to wit, at Cook County, aforesaid.

SECOND COUNT.

Rec. 12 For that whereas the said Rosalia A. Bonner and Percy William Bonner, plaintiffs, together with one G. Virginia Bonner, since deceased,

were on the 15th day of October, A. D., 1855, and long before that time, and have been ever since until and at the time of the appropriation of the same for street purposes by said defendant, as hereinafter stated, seized in fee of the premises above described in the said first count in this declaration set out, a portion of which said land and premises have been subjected to the proceedings hereinafter named, to condemn the same for the purpose of opening over the same a highway or street, being an extension of La Salle street, to wit, at the said county of Cook.

And the said plaintiffs aver and say that the said G. Virginia Bonner on or about the seventeenth day of April, A. D., 1857, died, leaving them the said plaintiffs, her sole and only heirs at law. And the said plaintiffs
 REC. 13 aver further that they are the sole and only heirs at law of the said James D. Bonner, and that as such heirs they are entitled to the said sum of money awarded to the said estate of said James D. Bonner, as hereinafter mentioned. And the said plaintiffs aver and say that heretofore, to wit, prior to the 9th day of June, A. D., 1856, the said defendant determined to take certain proceedings to extend La Salle street, in said city, from its then present terminus at Madison street, south to Jackson street, in said city, and did, through their common council, give the legal notice of their intention to appropriate and take the land necessary for the laying out said extension of said street: and therefore did choose certain commissioners as and in the manner required by the charter of said city, to assess the damages and expenses of such improvement: and said plaintiffs further say that the commissioners so chosen, as aforesaid, did proceed to
 REC. 14 discharge their duties, and did in all things comply with the law and the charter, and the ordinances of said city, in the making of the assessment for the opening of the extension of said street, and did apportion and assess the damages and expenses, etc., of said improvement, and did sign and return their said assessment to said common council within the time required by law, and thereafter, to wit, on the 9th day of June, A. D., 1856, such proceedings were taken as that the said defendant, by its common council, did confirm and enter an order of confirmation of the said assessment of said commissioners.

And the said plaintiffs aver that in and by the said assessment there was appraised, allowed and awarded to the said estates of said James D. Bonner the sum of ten thousand one hundred and twenty five dollars, as

net damages over and above benefits, for a piece of land of the estate of said James D. Bonner, so taken and appropriated for the purposes of said street.

And the said plaintiffs aver that, thereupon, to wit, after the proceedings so had and taken, as aforesaid, by the said defendant, and after the confirmation of said assessment, as aforesaid, it became and was the duty of the said defendant to proceed with all convenient dispatch, or within a reasonable time to collect and pay over the said sum of money so awarded to the estate of said James D. Bonner, to wit, to said plaintiffs.

And the said plaintiffs aver that the said defendant did not proceed with all convenient dispatch or within a reasonable time to collect and pay over, nor to collect the said sum of money, so awarded, as aforesaid, though often requested so to do, but has unreasonably, and without cause, and carelessly and negligently, and in disregard of its duty in that regard, neglected, failed and refused so to do for a long space of time, from thence hitherto, to wit, for a space of two years and nine months, and upwards, to the great damage and injury of said plaintiffs.

Rec. 16 By means of which said premises, &c., (as on page 5 of this abstract.)

THIRD COUNT.

The said third count is the same as the second count down to page 6 and mark * of this abstract, where the language of the said third count is as follows:

Rec. 19 And the said plaintiffs aver and say in consideration of the powers conferred upon said defendant in and by the said city charter, and in further consideration of the franchise and the right to the use of said pieces of land for said street, so had and taken of the said estate of said James D. Bonner, to wit, of said plaintiffs, as aforesaid, it, the said defendant promised and undertook to indemnify, or caused to be indemnified unto the
 Rec. 20 said plaintiffs therefor, by the collecting and payment of the said sum of ten thousand one hundred and twenty-five dollars, so appraised, awarded

and allowed, as aforesaid, and to raise and obtain the money to indemnify the said plaintiff, did promise and undertake to proceed to collect and pay over said sum of money in the manner required by the said charter, with all convenient dispatch, and within a reasonable time.

And the said plaintiffs aver that the said defendant did not proceed with all convenient dispatch, or within a reasonable time to collect and pay over, nor to collect the said sum of money, so awarded, as aforesaid, though often requested so to do, but has unreasonably and without cause, and carelessly and negligently, and in disregard of its promise and undertaking, neglected, failed and refused so to do, for a long space of time, to wit, from thence hitherto, to wit, for the space of two years and nine months and npwards, to the great damage and injury of the said plaintiffs,

REC. 21 By means, etc., (as at the end of the first count on page 5 of this abstract.)

REC. 23 Nevertheless the said defendant (although often requested so to do,) has not as yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same or any part thereof, to the said plaintiffs, the said defendant has hitherto altogether refused, and still does refuse:

To the damage of the said plaintiffs of twenty thousand dollars, and therefore the said plaintiffs bring their suit, etc.

ARNOLD, LAY & GREGORY,

Attorneys for Plaintiffs.

ASSIGNMENT OF ERRORS.

The plaintiffs assign the following ground of error appearing upon the record, in this cause.

1. The court below erred in sustaining the demurrer to said first count of said declaration, and in rendering judgment in favor of said defendant, upon the issue of law formed by said demurrer and joinder.

2. The court erred in sustaining the said demurrer to said second count of said declaration, and in rendering judgment in favor of said defendant upon the issue of law formed by said demurrer and joinder.

3. The court erred in sustaining the said demurrer to said third count of said declaration, and in rendering judgment in favor of said defendant upon the issue of law formed by said demurrer and joinder.

4. The judgment rendered in said cause is erroneous, and contrary to law.

ARNOLD, LAY & GREGORY,

Attorneys for said Plaintiffs.

223-184
Supreme Court

Rosalie A Bonner
et al

vs

The City of Chicago

Attest by Record

Filed April 18. 1860

L. Leland
Clerk

\$10 per line
Arnold & Co

SUPREME COURT OF ILLINOIS.

Third Grand Division, }

APRIL TERM, A. D. 1860. }

WILLIAM WHEELER,	}	ERROR FROM SUPERIOR COURT OF CHICAGO.
v s.		
THE CITY OF CHICAGO.		

POINTS OF PLAINTIFF IN ERROR.

I.

The action in this case is upon a special assumpsit arising upon an implied promise by the defendants to discharge their duty, in the premises, to the plaintiff. The declaration sets forth

1st. The premises upon which it is claimed the duty arises, viz: The proceedings, at length, of the defendants, under chap. 6 of city charter, for the condemnation of plaintiff's land for the opening of a street, including confirmation by the Common Council, of the assessment.

2nd. The duty of the defendants, thereupon arising, to proceed immediately and with diligence to collect money, by means provided by their charter, with which to pay, and to pay the assessment to the plaintiff within a reasonable time.

3d. The promise of the defendants, in consideration of the premises, to faithfully and diligently perform said duty to the plaintiff.

4th. By way of breach that the defendants, for an unreasonable and long space of time; to-wit: two years and eight months after such confirmation wholly failed and neglected to pay said assessment, or any part thereof, and thereby became liable to the plaintiff therefor, and in consideration thereof promised to pay him the same, but wholly failed so to do, and the question is, do these allegations sustain the action? The Court below held that they did not, and in this, as we submit, erred.

II.

That, upon the confirmation of the assessment, the plaintiff's right thereto became fixed and vested, and a corresponding duty became fixed upon the defendants to proceed to collect and pay over the same to the plaintiff, is unquestionable. The authorities in support of this are uniform, clear and conclusive.

Higgins vs. The City of Chicago, 18 Ill. 276.

Hawkins vs. Trustees of Roch. 1 Wend. 53,

People vs. Pres. and Trustees of Brooklyn, ib. 318, 20 Wend. 618—11 Barbour (N. Y.) 602.

The language of the cases is, that upon the confirmation of the assessment, the plaintiff's "right thereto becomes a vested right which it is not in the power of the defendants to defeat," and that "they cannot refuse with impunity to proceed" to collect and pay over the same, nor has this position been seriously controverted in this case; but it is said that it is not such a duty as renders the city liable to the plaintiff in an action for damages for inexcusable neglect and failure in its performance. But we insist that such action will lie, and that an examination of the city charter and the authorities should dispel all doubt upon this point.

The power and jurisdiction of the city over this subject of *opening* streets is conferred by the same clause of the same section and chapter of the charter, as the power and jurisdiction to control, regulate, repair and clear streets after they are opened. This general power and jurisdiction is conferred by subdivision 54 of sec. 4, of chap. 4 of charter of 1851, which provides that the city shall have power within the chartered limits "to *exclusively* control, regulate, *repair* amend and clear the streets and alleys, bridges, side and cross walks, and *open*, widen, straighten and vacate streets and alleys, and put drains and sewers therein, and prevent

the incumbering of the streets in any manner, and protect the same from any incroachments and injury." See municipal laws of 1856, page 26.

The means provided by the chapter, with which to raise the money, to defray the expenses for opening, are precisely analogous to those provided for payment of the expenses for improving and repairing, namely, special assessments upon the real estate benefited, except that the means in case of opening are more full and ample than in the case of improving and repairing ~~them~~ ^{there} being a restriction to three per cent. per annum upon the property assessed in the latter, and no such restriction in the former. (See chap. 6 and 7 of charter of 1851, pages 32 and 38 of municipal laws of 1856.

The nature and extent, therefore, of the duty and obligation devolved upon the city, in the opening of streets, is precisely the same as in the case of improving and repairing, and if an action will lie against the city for neglect of duty in the one case, so under like circumstances will it lie in the other, whether an action for damages will lie against the city for breach of duty in merely neglecting to repair a street is no longer an open question in this state.

The precise point was decided in the case of *Browning vs. The City of Springfield*, 17 Ill. 143. In that case the plaintiff brought his action for damages, "alleging that it was the duty of the city to keep a certain street in repair, which duty had been neglected, in consequence thereof he had fallen and broken his leg." The city interposed a general demurrer which was sustained by the Court below and judgment rendered for the defendant. This Court, on error, reversed the judgment, and after a full review of the authorities and the provisions of the defendant's charter, (of which judicial notice was taken, and which is like the charter of Chicago) held that where there is a clear duty with means for its discharge, provided, an action will lie, saying "here is a specific, full and complete duty imposed, with powers adequate to its discharge, and means that appear ample to its accomplishment," and that "under the strictest rule laid down in this class of cases, this seems clearly to fall within them and fix the liability of the defendant for the injury occasioned by its neglect." So in the *The City of Chicago vs. Major*, 18 Ill. 349, an action against the city for breach of duty in negligently permitting a water tank in the street to be and remain insecurely covered by means whereof a child fell in and was drowned, was sustained.

So also in the case at bar; the city, under the powers granted by their charter,

proceeded to condemn and did condemn the land of the plaintiff for the opening of La Salle street, and assessed and awarded to him the measure of compensation, for the land so condemned and confirmed such assessment and award, immediately upon such confirmation, all leases, covenants, contracts or engagements respecting the land condemned, which may have existed between the plaintiff and any third parties, ceased and became absolutely discharged by the express provisions of the charter, (see sec. 15 and 16 of chap. 6 of charter,) and the land for all practical purposes was taken from the plaintiff by a proceeding which was to vest in the city the absolute title in fee, with exclusive control over the same. See 21 Ill. 516, ib. 605. The right of the plaintiff to the assessment from that time became vested and indefeasible, and the duty immediately devolved upon the city to proceed with diligence to collect and pay over the same to the plaintiff. Yet, having proceeded thus far, the city, for the space of nearly three years after such confirmation, without any excuse whatever, wholly failed and neglected to proceed further with their duty to collect and pay over such assessment, thus suffering even their powers to enforce collection of special assessments to expire by limitation. 22 Ill. 580.

Such is the case made by the allegations in the declaration, and which stands admitted upon the record by the demurrer; and it would seem, upon the plainest reason and analogy, that upon this inexcusable neglect of this plain and explicit duty to the plaintiff, thus devolved upon the city by their own voluntary acts, an action for damages should be sustained.

III.

But it is objected that an action in the form of a special assumpsit, based upon an implied promise to discharge the duty imposed, ^{will not lie,} and that if any action can be maintained a special action on the case, ~~something~~ ^{something} in tort, is the proper and only form of remedy applicable to this case. This is an objection purely technical and should not prevail unless founded upon some inflexible rule of law, clearly applicable. Since, an objection, coming from the defendants, that the plaintiff has chosen a less stringent form of remedy than might have been adopted, has little to commend itself to the conscience of a Court. It will be found, however, that a special assumpsit will lie in such a case. What will be offered upon this point will also mostly apply with equal force to the general question whether an action for damages in any form can be maintained.

Let it be remembered that this was a duty to pay *to the plaintiff* a liquidated

sum in cash within a reasonable time, as a compensation for his land condemned ; and the position of the plaintiff is that the law raises an assumpsit—an implied promise to discharge the duty by paying the money.

Saunders says, that “assumpsit may be maintained for the recovery of a simple contract debt, and for the breach of any duty which the defendant has been legally liable to perform in favor of the plaintiff, the law implying in the one case a promise to pay, and in the other a promise to perform the particular act.”—1 Saunders Pl. & Ev. 5, in Amer. Ed. title assumpsit, page 162.

Stephens, in speaking of the promises upon which assumpsit will lie, says “such promises may be either express or implied ; and the law always implies a promise to do that which a party is legally liable to perform ; this remedy is consequently of very large and extensive application.”—Stephens’ Pl. 16 and 17.

Chitty lays it down that “*assumpsit may* be supported for money, &c. accruing due to the plaintiff under the provisions of a statute, there being no express restriction in the statute to any particular form of remedy.”—1 Chit. Pl. 6 Amer. Ed. marg. page 120.

In *Ran vs. Green*, Cowper’s Reps. 474, which was an action of assumpsit to recover forty shillings and six pence for tithes ordered by the Lord Chancellor and two Judges under an act of Parliament, to be paid by the defendant to the plaintiff as vicar of a parish, Lord Mansfield said : “here the action, which is an action of assumpsit, is brought in consequence of a right liquidated by means of a statute. The statute, therefore, is the only ground of the action ; without it we had no right to make the order we did, but when the order was made the law raised an assumpsit.”

In *The Town of Pawlet vs. The Town of Langate*, 19 Vermont 621, which was an action of assumpsit to recover of the town of Langate for the support of a sick pauper whose legal settlement was in Langate, the statute providing that the town wherein his settlement was should pay the expenses of his support while sick, and if not paid after notice the same might be recovered by action, but providing no form of action. It was objected that an action on the case was the proper form of remedy, and that assumpsit would not lie ; but the Court held that the action would lie upon the ground, (to use the language of the Court) that “the law raises an assumpsit where money accrues due under the provisions of a statute.”

So may it be said of the case at bar; the action should be sustained because it is for a "breach of duty which the defendants were legally liable to perform *in favor of the plaintiff*," and "the law always *implies a promise* to do that which a party is legally liable to perform," because it is a case of "money accruing due to the plaintiff under the provisions of a statute"—the city charter—and therefore "the law *raises an assumpsit*." But further. Though it was formerly held in England that corporations could not be charged in assumpsit upon mere implied promises, such is not now the law in this country; but that they may be so charged is the well settled American doctrine, and it has been repeatedly adjudged in cases analogous to the case at bar, that both ordinary private corporations and municipal corporations, like Chicago, may be charged in assumpsit upon an implied promise to discharge duties devolved upon them by their charters.

In *The Bank of Columbia vs. Patterson's Administrator*, 7 Cranch 299, in which assumpsit against the bank was sustained. Mr. Justice Story, who delivered the opinion of the Court, after an elaborate discussion of the whole subject, states the doctrine as follows: "Accordingly it would seem to be a sound rule of law that whenever a corporation is acting within the scope of the legitimate purposes of its institution all parol contracts, made by its authorized agents, are express promises of the corporation, and *all duties imposed on them by law*, and benefits conferred by their request, *raise implied promises* for the enforcement of which an action may well lie."

In *Gray vs. The Bank of Portland*, 3 Mass. Rep. 364, the plaintiff, one of the original stock holders, sued in assumpsit to recover damages for a refusal by the bank to allow him to subscribe for new stock, in proportion to his ownership in the old. The old stock was fixed at \$100,000, and the charter allowed it to be increased \$200,000, which was done. The Court sustained the action upon the ground that the plaintiff, as one of the original stockholders, was entitled to subscribe in proportion for the new; and, therefore, it *was the duty of the Bank* to permit him to do so, and the new stock being above par, he could recover the difference between the par value and the market value upon the shares for which he was entitled to subscribe.

Sargent, et. al. vs. The Franklin Insurance Co. 8 Pick. 90, was an action of assumpsit to recover damages for a refusal, by the company, upon demand made, to transfer upon their books stock standing in the name of Adams and Armony,

and which had been by them assigned to the plaintiffs, and to issue to the plaintiffs certificates therefor. The legal title to the stock was transferable only at the office and upon the books of the company. It was held that the action would lie upon the ground that it was the duty of the company to make the transfer and issue the certificates, and that "the law (in the language of the Court) supposes that the corporation *promises or undertakes to do its duty and subjects it to answer in a proper action for its defaults whether of non-feasance or misfeasance,*" and that the measure of damages was the value of the shares at the time of demand and refusal to transfer.

To the same effect, also, is the case of *Kortwright vs. Buffalo Commercial Bank*, 20 Wend. 91, affirmed by the Court of Errors, 22 Wend. 348. This too was an action of assumpsit to recover damages for a refusal by the bank to permit a transfer of stock upon the books, such transfer being necessary to the validity of the transaction under the act of incorporation. Chief Justice Nelson, in delivering the opinion of the Court, said: "It is contended that the action should have been case instead of assumpsit. The former remedy, no doubt, would have been appropriate, perhaps the most appropriate, but the latter appears to be warranted by sufficient authority." Citing among others the authorities above quoted, and holding that the action would lie upon the ground "that the action may be maintained against a corporation aggregate for a fault, of the kind in question, upon the ground that all duties imposed on them by law *raise an implied promise of performance,*" and holding, also, that the plaintiff was entitled to recover the full value of the stock.

Thus, in cases against ordinary private corporations, does the principle for which we are contending appear to be most amply sustained by the authorities; indeed, the case at bar is much stronger than most of the cases cited since in the former the duty imposed is for the payment of a sum certain in money, thus creating a cash obligation, an additional feature rendering assumpsit a most appropriate form of remedy: and so far, at least, as the form of the remedy is concerned these authorities are to all intents in point and to the purpose, for it being conceded that an action for damages in any form can be sustained, no plausible reason can be urged why assumpsit is not as appropriate in the case of a municipal corporation as in the case of any other kind or description of corporation. But whenever this question has arisen in suits against municipal corporations, like the City of Chicago, the same rule has been applied.

In the case of *The Frankfort Bridge Co. vs. The City of Frankfort*, 18 B. Monroe 41, a suit was brought to recover pay for the use of the plaintiff's bridge

over the Kentucky river in extending the defendant's water pipes and conveying the water from the northern to the southern side of the river within the city limits. No express contract for compensation was shown. But the city authorities did make use of the bridge, and the city was held liable upon the ground as stated by the Court "that the modern doctrine, that promises by corporations may be implied from their acts, and the acts of their agents was applicable," and "that the plaintiffs might recover upon *such implied promise*, at least what the use of the bridge was reasonably worth."

The case of *Seagraves vs. The City of Alton*, 13 Ill. 366, is, as we submit, completely analogous and is an authority decisive, establishing both that an action for damages will lie and that assumpsit is an appropriate form of remedy. It was an action of assumpsit brought to recover pay for the support of one Reeves, a pauper, residing in the City of Alton. The plaintiff notified the Common Council that Reeves was a pauper and requested them to provide the necessary means for his support, which they neglected and refused to do, and the plaintiff thereupon furnished such support himself and brought this suit to recover over of the city the expenses which he had thus incurred. The charter of the City of Alton imposed the duty upon the Common Council to "provide for and take charge of all paupers within the limits of said city," and "to *accomplish this object*," conferred upon them "the exclusive right, power and authority to license and tax all taverns, merchants, auctioneers, peddlers, &c. within the limits of said city."

Here, then, was a duty imposed with a specific mode or means for its accomplishment, provided, the Common Council neglected and refused to discharge this duty, and an action of assumpsit was sustained on the ground that the law implied a promise on the part of the city to discharge this duty. Chief Justice Treat, in delivering the opinion of the Court, said that by the charter "it became the duty of the Common Council *to make competent provision for the support of paupers within the city*. But a *failure on their part to perform this duty will not absolve the corporation from responsibility*, where the law imposes an obligation on a corporation, which it *refuses to discharge*, it may be held liable civilly at the suit of the party who sustains damages in consequence of its refusal. In legal contemplation a corporation *assumes to perform* what its charter enjoins upon it, and it is subject to answer in a proper action for its default. And the law is now well settled; however, it may have been formerly, that an action of assumpsit may be maintained against a corporation upon an *implied contract*." Citing among other authorities 7 Cranch. 299, above quoted.

So in the case at bar, upon the confirmation of the ~~assumpsit~~ ^{assessments}, the City of Chicago became as positively charged with the duty to collect and pay over, as the City of Alton with the duty to provide means for the support and to support paupers, and the means, with which to accomplish the duty, were even more ample and certain in the former than in the latter case; besides, in the case at bar, the duty was one which the City of Chicago voluntarily assumed in the particular case by proceeding to condemn the plaintiff's land, whereas in the Alton case the duty was a general one, imposed by the act of incorporation, and if upon this general duty the law raised an implied promise of performance *a fortiori*, will such promise be implied where a corporation voluntarily assumes a duty directly to the plaintiff in the suit.

It appears, therefore, that no distinction is made between this class of municipal corporations and ordinary private corporations with reference to this question. Indeed, these municipal corporations are treated as mere private corporations, and as such are held liable as to their powers and duties pertaining to streets.

In *Floyd vs. The Mayor, &c. of New York*, 1 Selden 369, which was an action for injuries, caused by negligence in the repairing of a sewer in a street, Mr. Justice Foot, in delivering the opinion of the Court, says "the corporation of the City of New York possesses two kinds of powers, one *governmental and public*, and to the extent they are held and exercised, is clothed with sovereignty; the other *private*, and to the extent they are held and exercised, is a *legal individual*. The former ~~one~~ ^{are} given and used for public purposes the latter for *private purposes*, while in the exercise of the former the corporation is a municipal government, while in the exercise of the latter is a *corporate legal individual*." And it was as a private corporate legal individual that the city was held liable in that case.

The same doctrine is re-affirmed in the very elaborately considered case of *West vs. The Trustees of the village of Brockport*, 16 New York Rep. (2 Smith) 161, which opinion was adopted and followed by the Court of Appeals in *Hickok vs. Village of Plattsburgh* and *Conrad vs. Village of Ithaca*, found at page 158 of same volume. By an examination of the opinion in that case it will be seen that actions are sustained against this class of municipal corporations for negligence, consisting of mere omission of duties pertaining to streets, because in respect to such duties they are treated as mere private corporations, the Court at the same time holding that corporations purely municipal, public or governmental, as towns and counties, would not be liable to civil actions for mere omissions of duties by its officers or agents,

and the liability in these cases seems to be placed upon the ground that by the charter the government grants to the municipality a portion of its sovereign power with valuable privileges and franchises, and that, in consideration thereof, there is an implied promise on the part of the corporation to discharge the duties and obligations imposed by such charter. Justice Selden, in delivering the opinion of the Court, concludes by the following : " It follows from the preceding reasoning that, if we regard the injury to the plaintiff as the result of mere neglect to keep the highways of the village in repair, the defendants would be responsible in an action for such neglect, upon the ground that their acceptance of the franchise, granted by their charter, *raised an implied undertaking or contract* on their part to perform that duty, which, upon the principles referred to, inures to the benefit of every individual interested in such performance."

IV.

But in relation to maintaining this action in the form of a special assumpsit it may be asked : " is this form of remedy admissible in the ordinary case of an injury caused by neglect of duty in the non-repair of a street ? " And if the city is liable in this case, in analogy to their liability for injuries for non-repairs, why is not assumpsit also an appropriate form of remedy in the latter class of cases ? We answer that in the ordinary case of an injury by reason of non-repairs the action is based upon the breach of a general duty, which the defendants owe to the public at large and not to the plaintiff in particular, and the plaintiff sues for a special injury, which is consequential merely upon the non-performance by the defendants of this general duty, and it may well be doubted whether in such a case the law will "raise an assumpsit," in the language of the books, in favor of the plaintiff. Surely the form usually, if not uniformly adopted, has been case and not assumpsit. But the case at bar presents the instance of a specific duty, voluntarily assumed by the defendants, to do an affirmative act for the immediate benefit of the plaintiff by the payment to him of a liquidated sum in cash, and it is sufficient to say that whenever the duty has been thus specific, and due from the defendants directly to the plaintiff in the suit, a special assumpsit has been uniformly sustained, and to say the least has been the form of remedy most usually adopted.

V.

It may well be that trespass on the case also could be maintained. But it by no means follows, that, therefore, assumpsit will not lie. Case and assumpsit, are

often concurrent remedies, as in the case of common carriers, warehouse-men, wharfingers, and other bailees. So, also, though assumpsit will lie for a refusal by corporations to permit transfers of stock upon their books, case, too, seems ~~regarded~~ ^{recorded} as an appropriate remedy.—10 Johns. (N. Y.) Rep. 484. See also upon this point 15 Ill. 366.—27 Maine 106.—9 Mass. 510.—9 Wend. 611-618. By these cases it appears that either case or assumpsit will lie against the grantee in a deed poll for failure to perform a condition in the deed upon the ground that by accepting the deed, and acting under it, a *duty* devolves upon the grantee to perform such condition.

The case in the 15 Ill. 366, above quoted, was a suit against a railroad corporation and affords another illustration of the principles contended for under the second and third points above. In delivering the opinion of the Court in that case, Mr. Justice Caton says: "By accepting and acting under the deed, a *duty* arose in the company to perform the conditions upon which the grant was made, and the violation of this duty was such a wrongful act as entitles the plaintiff to maintain this action. It may be that assumpsit might be maintained upon the implied promise to make the fence, but it by no means follows that the plaintiff may not treat the violation of duty, which arose in the company to make the fence, as tortious and recover in this form of action."

V I.

It was urged as one objection by the defendants, in the Court below, that the city charter contemplates that the burdens and expenses of opening streets shall be borne by special assessment upon the property deemed benefited; that a recovery in this suit would result in a judgment to be satisfied out of the treasury from monies raised by general taxation, and inasmuch as a recovery would result in imposing a burden to be discharged by general tax, which the charter contemplates shall be discharged by special assessment; therefore, this action should not be sustained. This objection, if true, proves too much. This reasoning would defeat all suits for damages against the city for delinquency and neglect of duty. It is an objection to the recovery of a judgment, because such recovery would result in an unexpected and inconvenient burden, in taxation to raise money with which to discharge such judgment. This would be a very cheap and convenient way to absolve the city from liability to civil actions for damages in all cases whatsoever. This is a suit to recover damages against the city for delinquency in the

discharge of duty, and it always happens that when the city is mulcted in damages by reason of the delinquencies of their officials a corresponding burden upon the people in taxation results, and suffice it to say that the charter and the law contemplate that if the city discharge their duties and obligations, much unnecessary burdens in taxation may be thus averted. But, if delinquent in duty, the charter and the law contemplate, that for such delinquency, the city shall be held to a just accountability in an action for damages in favor of the party whose rights have been neglected and disregarded, even though increased burdens in taxation upon the people shall result.

But, we are not without authority, upon this point. The case of *Kearney vs. The City of Covington*, 1 Metcalf (Kentucky) Reports, 339, was a suit brought to recover pay for improving streets. The charter provided that the expenses of such improvements should be assessed upon the adjoining lots, and the work was done under an express agreement with the city that it should be paid for "by a special assessment upon the adjoining lot owners." It was alleged that the city had failed to adopt such measures as the charter required to render the lot owners liable and that the city were therefore liable upon an implied promise to pay for the work. It was objected that the city by their charter were restricted to this mode of special assessment for means with which to pay, and that this was virtually a suit to compel them to pay out of the general revenue of the city. The Court, after discussing the question whether the city were so restricted, concludes as follows: "But it is immaterial in a case like this whether it was designed to operate as a limitation on the power of city authorities to have the work done at the public expense or not. The plaintiff was employed by the Council to do the work for the city, under an agreement that he should be paid for it when completed, by a tax on the lot owners. If the city has failed to adopt such measures as the charter requires, to render the lot holders responsible, it was not the fault of the contractor, and the city is liable for the violation of her implied undertaking that the work should be paid for by the owners of the lots." It is impossible to conceive a case more precisely in point than this.

In the case at bar, the obligation of the city "to adopt such measures as the charter requires to render the lot holders responsible," was just as perfect and positive as in the case cited; and it, therefore, follows, that there existed the same "implied undertaking" to discharge such obligation.

VII.

It was sought to liken this case to a class of cases where the legislature creates institutions or corporations of a public nature, with public officers to be appointed by such corporations upon salaries to be paid out of a specific fund at the same time, provided by the legislature for the purpose; in which cases the Courts hold that the mere appointment of the officer does not create a contract or raise a promise on the part of the corporation to pay the salary for which *indebitatus* assumpsit will lie, to be collected out of the general property or funds of the corporation, in other words that it does not create a debt against the corporation, payable out of its general revenue, but that the officer in accepting such appointment does so upon the credit of the specific fund and is restricted in his remedy to a direct proceeding to reach such fund, by mandamus or other proceeding, to compel the parties ~~interested~~ ^{interested} with it to pay over.

But there is no analogy between that class of cases and the case at bar. In the first place it is gratuitous to say that a specific fund is provided, out of which the plaintiff is to receive his pay, to be sure the city are to raise means with which to pay; not by general tax but by special assessment "on the real estate of persons benefited in proportion as nearly as may be to the benefit resulting to each;" so that, after all, the tax is general or special in proportion as the benefit is general to the whole city or special to particular localities. The assessment is collected by the city collector, the agent and officer of the city and the same officer who collects the general tax; and, when collected, he pays it, together with the general tax, into the general treasury of the city (sec. 7, chap. 8 of charter.) Sec. 13 of same chapter provides that "if at the sale of real or personal estate for taxes or assessments no bid shall be made for any parcel of land, or any goods and chattels, the same shall be struck off to the city," and that the city shall thereupon be "vested with the same rights as other purchasers at such sales." The sum awarded is to be paid by the city to the owner of the land condemned, or if he cannot be found in the city, "deposited to his credit in same place of deposit *other than the hands of the city treasurer,*" (sec. 14 of chap. 6 of charter.) All these provisions show that the assessment, when confirmed, becomes a debt due from the city, and that the plaintiff may look to the city, and is not restricted to any supposed fund for his pay; indeed, any other construction might enable the city to retain real or personal property struck off to them on a sale, and still deprive the plaintiff of the award to pay which the sale was made.

But suppose it were payable out of a particular fund, surely it was the duty of the city to proceed and collect and pay over from that fund, and this not being a

mere action of debt or indebtedness assumpsit, but a special assumpsit based upon a breach of the implied promise to discharge this duty, still it may be maintained, and the case of *Kearney vs. the City of Covington*, above cited, is the point.

VIII.

It makes no difference that the city has not actually opened a street over the plaintiff's land, or that they are prohibited from doing so till they shall have actually paid the damages awarded. (sec. 14, chap. 6 of charter,) the action for the amount awarded is still maintainable, and when recovered the city may open the street.

This precise point was so adjudged in *Stafford vs. the city of Albany*, 7 Johns. (N. Y.) Rep. 541-545. See also 1 Wend. 53. Though the city could not actually open the street till the award was paid, still from the moment of the confirmation of the assessment, as has been seen (sec. 15 and 16, chap. 6 of charter,) the land was completely tied up and the plaintiff virtually cut off from all practical ownership. Nor are these sections of the charter unconstitutional, because by them the plaintiff's rights in the property are abridged before actual compensation made. The compensation need not precede the actual taking; provided, ample provision is made in the statute for ultimate pay—14 Wend. 51-18 id. 9-6 Hill 361-7 Barb. (N. Y.) 426. The case, therefore, may be likened to the case of a bargain struck for the sale of goods, though the vendee cannot take possession of the goods till payment made, still the vendee may hold the goods in readiness and sue for the purchase price. Such is the view taken in some of the cases, this being regarded as a sort of forced sale, the city, by its proceedings to open the streets, compelling the plaintiff to sell to them his land upon just compensation.—4 Barb. (N. Y.) 64-79.

IX.

The case of *McColough vs. Mayor, &c. of New York* is not an authority against us. The declaration in that case was not framed upon a breach of duty, as in this, but simply alleged the proceedings to the confirmation, and then alleged the liability and promise immediately upon this. It did not allege any neglect of duty in failing to proceed and collect, as in this case, and Bronson Justice says "on that case I do not see how the action of assumpsit can be maintained; but if it will lie

in any form it must be on a different assumpsit from that laid in the declaration. The conclusion which the plaintiff has drawn does not follow from the inducement or premises which he has alleged." So say we; for surely this action does not lie nor does the money become due immediately upon the confirmation of the assessment. But when the city shall, without excuse, have neglected to proceed and pay over until the lien upon the land assessed shall have been lost by lapse of time then the action will lie within the principles before discussed. Again, he says, "if the Common Council has neglected that duty, (the duty to proceed and collect,) or has been wanting in diligence, an action on the case would perhaps lie in favor of the one who, like the plaintiff, would be entitled to the money when collected." So say we; and we have shown that a special assumpsit is also an appropriate remedy for this breach of duty.

What the learned Justice says in that case about the city, as a corporation having "no direct interest" in the business of opening public streets or highways within their chartered limits, and about the city, being a mere go-between or arbitrator to "adjust the matter between the persons interested" who "would not be likely to agree as to how much one should pay and another receive," &c., even if reconcilable with the whole current of authority in New York, and especially the cases in the 16 of N. Y. Rep. before quoted, and correct, as applicable to the peculiar charter of Brooklyn, certainly it cannot be sound law as applicable to the city of Chicago and the decisions in this State

It will not do for the defendants in this suit, after having voluntarily instituted proceedings to take from the defendant his land and vest the absolute title in fee thereto in themselves as a public street with exclusive and absolute control over the same, and proceeding to a point where the plaintiff's right to compensation has become absolutely vested and indefeasible, to reply, when called to an account for inexcusable breach of duty in the premises, that the city as a corporation have no part nor lot in the matter save to act as a mere umpire between neighbors and private citizens who are interested, and thus absolve themselves from all duty and responsibility in the matter.

X.

It will be observed that it appears by the declaration that the commissioners of assessment were appointed on the 10th day of January, 1856, but did not return

their assessment roll until the 5th day of April thereafter, more than forty days from their appointment; the declaration, however, alleges that the commissioners returned the same "within the extended time allowed them by the Common Council in which to complete and return their said assessment." This failure, to return within the forty days, does not vitiate the assessment; the provision in sec. 10, chap. 6 of charter, requiring it to be returned within forty days, is not peremptory but merely directory to the officer; there are no negative words restraining the commissioners from making and returning their assessment after the forty days, nor would a subsequent return in any wise abridge the rights or effect the interests of the property owners, the time of the return is not made the essence of the transaction, it is not necessary in order to carry out harmoniously the objects of the statute; the parties interested would have the same time and length of notice in which to examine the roll and prepare objections. By sec. 11 of same chapter the clerk is to give ten days notice of time of confirmation after the return is made; the naming of the time, therefore, for making the return, must be regarded as directory to the commissioners and not a limitation of their authority.

Pond vs. Negus, 3 Mass. 231-232.

People vs. Allen, 6 Wend. 486.—Ex. parte Heath, 3 Hill (N. Y.) 42.

Merchants vs. Longworth, 6 Hill, 646—affirmed on error, 3 Denio, 526—7 Hill 9—9 Page, 16—12 Conn. 243.

Smith Com. on statute law, sec. 670 *et. sequa.*

The case of *Marsh vs. Chestnut*, 14 Ill. 223, is not at all in conflict with this view. In that case the statute required the assessor to return his assessment on or before the first day of May, and provided that the parties interested might apply at the next June term of the Court and not afterwards. To have the valuation of their property reduced; and the return of the assessor was not in fact made until the June term of the Court had commenced, so that the parties interested had no opportunity to inspect the return and prepare for the application to reduce the assessment, whereas by the statute they were entitled to a whole month. Hence the time of return was matter of substance affecting the substantial rights of parties, and upon this ground, and this ground only was the statute in that case held peremptory, upon the same ground also were the cases in 15 Ill. 218 and 220 decided; the same is true of the case of *Thames Manufacturing Co. vs. Lathrop*, 7 Conn. 550. In that case the statute required the return on or before the first day of December, and provided for the hearing of an appeal or review of the proceedings of the assessor on the first Monday of January thereafter. The return was not made until the 20th of December. Besides the city having allowed the extension

2 Mon 9th 486
4 Hill 76-92
Swanson 161-750

(17)

and subsequently confirmed the assessment are now concluded from raising this objection.—18 Ill. 276.

Upon the whole, therefore, we respectfully submit that the declaration is clearly sufficient, and that the action should have been sustained, and that to hold otherwise would be to permit the City of Chicago to trample upon private rights with impunity and to license the city officials in the grossest dereliction of duty, placing them above and beyond the law.

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223-

Supreme Court

William Wheeler

vs

The City of Chicago

Points for plff in Error

Filed April 23. 1860

L. Leland

Clerk

~~This brief is to~~

This brief is to be used
in Bonner vs City
of Chicago

Harrell Smith

& Thomas

Attorneys