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LIABILITY OF QUASI AND MUNICIPAL CORPORATIONS, AND THEIR OFFICERS, FOR NEGLIGENT ACTS.

EVER since the case of *Russell et al.* v. *The Men dwelling in the County of Devon*, 2 Term Rep. 667, decided by Lord KENYON in George the Third's time, it has been the settled law, both of England and this country, that political subdivisions of the state, like counties, towns, school-districts and the like, are not liable, at common law, to actions for damages resulting either from the nonfeasance or misfeasance of the public officials of such organizations.

Among the reasons usually assigned why such actions are not maintainable are,

1. That the plaintiff would have the right, as under the Statutes of Hue and Cry, to levy his judgment upon and enforce satisfaction out of the separate property of any inhabitant, whether such inhabitant lived within the boundaries of such political organization or not, at the time the injury occurred; besides giving rise to a multiplicity of actions to enforce contribution from every other inhabitant living in such political organization at the time such actions were begun, to the great annoyance of the public.

2. For want of a fund, belonging to such organization, legally applicable to the payment of any such judgment.

Nor would the fact of the incorporation of such political organizations with the power of bringing and defending actions, which

are usually incident to ordinary aggregate corporations, make the slightest difference in the application of the principle, unless a fund were provided to meet the payment of the judgment recovered; for at common law, conferring such a power would not have the effect of creating such a right of action where none existed before; and besides, where an action of damages is brought against a corporation, such damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: *McKinnon* v. *Penson*, 8 Exch. 319; s. c. 9 Id. 609; *Carr* v. *Northern Liberties*, 35 Penn. St. 324.

And hence, in England, where a right of action has been held to be maintainable against these *quasi* corporations, as counties and hundreds, and in this country, against counties, school-districts and the like, it is by virtue of some statute, as in the case of Hue and Cry, manifesting, on the part of the law-making power, a clear intention in this regard; and at common law, only in those cases where the legislature has expressly created a fund out of which such damages may be satisfied: *Mersey Docks* v. *Gibbs*, Law Rep. 1 H. L. Cas. 93; s. c. 11 H. L. Cas. 686; *Oliver* v. *Worcester*, 102 Mass. 501; *Commissioners for Supply for Renfrewshire*, 6 S. C. 259.

The true reason for the exemption, at common law.

We think, however, that the true reason why, in the absence of any statutory provision, such actions are not maintainable against these *quasi* corporations is, because they are created for political purposes only, and are mere instrumentalities through which the legislature administers the civil policy of the state, such as the administration of justice, of finance, of education, the relief of the poor, the maintenance of a military organization, and other matters pertaining to the state, all of which are minutely regulated by law, and for the support of which, a tallage as minutely circumscribed in its purposes, is imposed, and cannot, in any lawful way be applied to any other purpose, and especially to the payment of damages caused by the wrongful proceedings of the officers of such organizations: *Riddle* v. *Proprietors of the Docks and Canals in Merrimac River*, 7 Mass. 187; *Mower* v. *Leicester*, 9 Id. 247; *Commissioners of Hamilton County* v. *Mighels*, 7 Ohio St. 109; *Coolidge* v. *Brookline*, 114 Mass. 596; Smith on Reparation 29; *Findlater* v. *Duncan*, McL. & Rob. 911; *Commissioners of Supply for Renfrewshire*, *supra*.

The rule of non-liability extends to municipal corporations, sub modo.

And this rule of exemption from liability extends as well to municipal corporations in all matters which are *governmental* and *political* in their character, and where the duties are imposed solely for public purposes, but not to the neglect of those special duties which are imposed on them, with their consent, express or implied, or where a special authority is conferred on them at their request, for their own corporate benefit: *Bigelow* v. *Randolph*, 14 Gray 543; *Sullivan* v. *Boston*, 126 Mass. 540; *Conrad* v. *Ithaca*, 16 N. Y. 158.

Or where, as a condition of receiving some special privilege, they have assumed to discharge some public duty: *Eastman* v. *Meredith*, 36 N. H. 295.

Instances of non-liability.

As falling within this principle it is held, that no action can be maintained, at common law, against a town for neglecting to provide a system of public instruction, and suitable buildings for such purpose, nor for an injury sustained by a scholar attending a public school by reason of a dangerous excavation in the school-house yard existing through the negligence of the town officers, even though they knew of its existence: *Bigelow* v. *Randolph*, 14 Gray 541. Nor against a board of education for neglecting to fence an open area upon the school grounds, into which a pupil, without fault, fell and was seriously injured: *Finch* v. *Board of Education*, 30 Ohio St. 47. Nor for injuries occasioned to a scholar by reason of obstructions by lumps of ice in the approaches to the school building: *Sullivan* v. *Boston*, *supra*. Nor for injuries sustained from defects existing in a town building by a voter properly in such building for the exercise of a public right: *Eastman* v. *Meredith*, 36 N. H. 284. Nor for damages resulting to individuals from a failure to provide the necessary agencies for extinguishing fires, or from the negligence of officers or other persons connected with the fire department: *Wheeler* v. *City of Cincinnati*, 19 Ohio St. 19; 2 Thompson on Negligence 731. Nor for injuries to the property of a citizen by a riotous assemblage of persons, or for the neglect of the officers in not preserving the peace, and preventing such injury: *Western College, &c.*, v. *City of Cleveland*, 12 Ohio St. 375; *Cincinnati* v. *Cameron*, 33 Id. 368; *Prather* v. *Lexington*, 13 B. Mon. 561; *Ward* v *Louisville*, 16

Id. 193; *Buttrick* v. *City of Lowell*, 1 Allen 172. Nor for failure to maintain a hydrant by which a fire might have been extinguished, and the property of the plaintiff thereby saved from destruction: *Tainter* v. *Worcester*, 123 Mass. 316.

Liable for injuries resulting from negligence with respect to acts done for corporate benefit.

But when they are not exercising governmental functions—those legislative powers which they hold for public purposes solely, and as a part of the sovereign power of the state—but in the exercise of those private franchises which belong to them as creatures of the law, for their corporate benefit, as in the management of property or rights held by them for their own immediate profit, advantage or emolument, although inuring ultimately to the general public, they become liable like private individuals: *Oliver* v. *Worcester*, 102 Mass. 499; *Providence* v. *Clapp*, 17 How. 161; *Hill* v. *Boston*, 122 Mass. 344. It may be difficult, at times, to distinguish between those acts which will be held and regarded as the exercise of legislative functions, solely for public purposes, and characterized as governmental and political, and the exercise of those private franchises and privileges, for the sole benefit of the corporation, and for the abuse of which they will become liable to a civil action for injuries sustained, and many a good lawyer may stumble in his advice to a client simply because the reasons assigned are either shadowy, fallacious or unphilosophical; but still the distinction is well settled, and the illustrations of private liability are too numerous to need citations.

Difference in liability between the neglect to exercise a power, and its negligent exercise.

Here, however, another distinction obtains which must not be overlooked, and that is, between the neglect of duties by municipal corporations, altogether, and their negligent performance.

For instance, a municipal corporation may be authorized to construct sewers, and there is a high moral obligation on their part to do so. The public good imperatively requires a system of sewerage in every city of any magnitude, but they are not bound to build them, and no action will lie for a failure in this regard, however serious the consequences to the public or an individual may be; for the municipal authorities are the sole judges of their necessity.

Adoption of plans for public works fall within the rules of exemption.

Nor will an action lie against a municipal corporation for an injury resulting to individuals for a defect or want of sufficiency in the plan or systems of a public improvement, adopted within the authority conferred, and this exemption from liability is based upon the assumption, that the adoption of a plan for a public improvement, is the exercise of a legislative function, of a *quasi* judicial nature, which is not the subject of review, in any form, by the courts. Hence, no action will lie as for a tort, for an injury resulting to individuals by reason of a defect or want of sufficiency in the plan or system of drainage, adopted within the authority conferred, for the reason that the adoption of such plan involves the exercise of a legislative function, of a *quasi* judicial nature: *Emery* v. *Lowell*, 104 Mass. 15; *Wilson* v. *Mayor of New York*, 1 Denio 595; *Detroit* v. *Beckman*, 34 Mich. 25; *Child* v. *Boston*, 4 Allen 41; *Merrifield* v. *Worcester*, 110 Mass. 216.

And if such plan, when adopted, be executed in a reasonably proper and skilful manner, and an injury results to individual property, the owner is remediless at common law, and must seek compensation under the statute; for where such improvements are authorized by public authority for public use in the exercise of eminent domain, they cannot be unlawful: *Perry* v. *The City of Worcester*, 6 Gray 546; *Sprague* v. *The City of Worcester*, 13 Gray 194. If, however, it is apparent that the adoption of the plan, and its execution, however skilfully done, is, when completed, necessarily and inevitably to cause an injury to contiguous private property, the execution of such a plan would be regarded as an act of negligence, and the municipality would be liable in tort for the damages sustained: *Indianapolis* v. *Huffer*, 30 Ind. 235; *Rochester White Lead Co.* v. *Rochester*, 3 Comst. 463; *Perry* v. *Worcester*, 6 Gray 544; *Mersey Docks* v. *Gibbs*, 1 L. Rep., H. L. Cas. 93; *Haskell* v. *New Bedford*, 108 Mass. 208; *Jones* v. *Bird*, 5 B. & Ald. 837; *Proprietors of Locks* v. *Lowell*, 7 Gray 223; *Ashley* v. *Port Huron*, 35 Mich. 296; *Montgomery* v. *Gilmer*, 33 Ala. 116; 2 Thomp. on Neg. 742.

And where likewise, the adoption of a plan, and its most skilful execution, would necessarily and inevitably expose to danger an unsuspecting public, having a lawful right to share in the benefits

and privileges of such public improvement, there would seem to be no doubt of the liability of the municipality for a personal injury sustained by reason thereof, for it would then fall within the analogy of a well-settled rule of law announced in a class of cases which hold, that if the owner of real property permit a dangerous excavation to remain unprotected, and which is closely contiguous to a highway along or over which the public have the right, or are accustomed to travel, he would be liable for injuries received by one proceeding along such way with due care: *Pitts., F. W. & C. Railway Co. et al.* v. *Bingham, Adm'x.*, 29 Ohio St. 368; *Barnes* v. *Ward*, 9 C. B. 393; *Hargreaves* v. *Deacon*, 25 Mich. 5; *Corby* v. *Hill*, 4 C. B. N. S. 556; Roscoe's Ev. at N. P., 14th ed., 685.

Or where an individual enters upon the premises of another upon lawful business, by invitation, either express or implied, and is injured by reason of their unsafe condition, the owner of such premises would be liable, for he owes a duty to those having a lawful right to be upon such premises, to see that they are secure against accident and injury: *Sweeny* v. *Old Colony and Newport Railroad Co.*, 10 Allen 373; *Carleton et al.* v. *Franconia Iron & Steel Co.*, 99 Mass. 216; *Severy* v. *Nickerson*, 120 Id. 307.

But if such plan, when adopted with reasonable skill and care, and executed without negligence, would not have the effect of exposing the public necessarily and inevitably to danger, although insufficient to afford complete immunity therefrom, the municipality, at common law, would not be liable to damages for injuries sustained: *Detroit* v. *Beckman*, 34 Mich. 25; *Lansing* v. *Toolan*, 37 Id. 152; *Vanpelt* v. *Davenport*, 42 Iowa 308.

Thus, for instance, if a municipal corporation wanted to construct a ditch across a public way, it has the exclusive right to determine whether such ditch shall be covered the full width of the way or not, and the action of the corporation in this regard is not the subject of review by the courts, for they cannot interfere with the judicial functions of the corporation: *Carr* v. *Northern Liberties*, 35 Penn. St. 324.

But if, in constructing such ditch, the corporation should see proper not to cover it the full width of the way, including footways along the sides of such way, and should fail to erect sufficient appliances and guard-rails to protect the public against injury, it would unquestionably, and upon principle should be liable for any

injury occurring by reason of such omission of duty: *Chicago* v. *Gallagher*, 44 Ill. 295; *Chicago* v. *Langlass*, 66 Id. 361. For this would be regarded as an act of negligence in the execution of the plan, which is a ministerial act, and for which a corporation is liable in all cases, no matter how efficient the general plan of the contemplated improvement may be: *Child* v. *City of Boston*, 4 Allen 41; *Emery* v. *Lowell*, 104 Mass. 16; *Merrifield* v. *Worcester*, 110 Id. 216.

Waterworks.

And the same thing may be said with respect to the power on the part of a municipal corporation to construct and maintain a system of waterworks. Now, no action will lie against the corporation for a neglect of this duty however necessary for the public good; nor, if the corporation sees fit to do so, can the discretion of the corporation as to the plan or extent of the system, or its efficiency be controlled by the courts in any respect, but if the corporation proceeds to construct them, and does so negligently, to the injury of person or property, it will be liable for the damages sustained, to the same extent precisely, as an individual, under like circumstances, would be liable: *Southcote* v. *Stanley*, 1 Hurlst. & N. 247; *Hardcastle* v. *The South Yorkshire Railway Co.*, 4 Id 67; *Scott* v. *Manchester*, 2 Id. 204; *Gibson* v. *Preston*, Law Rep., 5 Q. B. 219; *Oliver* v. *Worcester*, 102 Mass. 489; *Hill* v. *Boston*, 122 Id. 344; *Murphy* v. *Lowell*, 124 Id. 564; *City of Dayton* v. *Pease*, 4 Ohio St. 80.

Obstructions to natural watercourses.

Distinctly traceable to this principle with its attending qualification, is the right of municipal corporations to construct bridges and culverts over natural watercourses which cross public ways. They may adopt any plan they please, and no objection can be urged on this account, but they must be sufficient to permit the flow of the water to the same extent as before, and if they are not, but cause the water to flow back to the injury of the property of another, the corporation is liable to the same extent as any other corporation or individual for similar acts: *Wheeler* v. *City of Worcester*, 10 Allen 591; *Hill* v. *Boston*, 122 Mass. 358; *Parker* v. *Lowell*, 11 Gray 353; *Conrad* v. *Village of Ithaca*, 16 N. Y. 158.

And the same thing may be said with respect to the pollution of natural watercourses by the discharge of sewerage into them to

the injury of riparian proprietors, not attributable to the plan of sewerage adopted by the municipality, but to the improper construction, unreasonable use, or negligent care and management of the sewers, such municipality is liable, precisely to the same extent that riparian proprietors, *inter se*, would be liable for any unreasonable use of the stream: *Merrifield* v. *Worcester*, 110 Mass. 216; *Child* v. *Boston*, 4 Allen 41; *Goldsmid* v. *Tunbridge Wells Imp. Co.*, Law Rep., 1 Ch. App. Cas. 349; s. c. Law Rep., 1 Eq. 161; Higgins on Watercourses 96; Wood on Nuisances, section 688; *Hazeltine* v. *Case*, 46 Wis. 391.

And the same principle, it is conceded, would apply to the discharge of sewerage, or other noxious substances upon an open area, so as to pollute the surface water, and artificial channels, to the injury of individual rights, precisely to the same extent, as between conterminous or riparian proprietors: Goddard on Easements 63; Gale on Easements 308; *Johnson* v. *Jordan*, 2 Met. 234; *Holsman* v. *Boiling Spring Co.*, 1 McCarter 335; *Merrifield* v. *Lombard*, 13 Allen 16; *Dayton* v. *Pease*, 4 Ohio St. 80, 87; Washburn on Easements.

If, however, the injured party be not a riparian or conterminous proprietor, or one sustaining some private injury distinguishable from that which results to the general public, by reason of the acts of the municipality, then no action of a private character is maintainable, at common law: Smith on Reparation 388.

Distinction with respect to obstructing natural watercourses, and surface-water.

A distinction obtains, according to the common law, between the obstructing of a natural watercourse with well-defined boundaries, and the obstruction to the flow of surface-water merely, by a public improvement. In the one case, the corporation would be liable, in the other not. As, for instance, where, within the limits of a public way, the corporation should see proper to construct a drain or culvert, and should also construct water-bars so as to cause the surface-water to flow upon the adjacent property, no action would lie against the corporation for a consequential injury, and the reason assigned is, that the owner may do precisely the same thing if he chooses, so as to throw the surface-water, either upon the highway, or the land of his neighbor, without doing any violence to the maxim, *sic utere tuo ut alienum non lædas*. even

though it be done in *æmulationem vicini: Flagg* v. *Worcester*, 13 Gray 601; *Dickinson* v. *Worcester*, 7 Allen 19; *Barry* v. *City of Lowell*, 8 Id. 127; *Bates* v. *Smith*, 100 Mass. 182; *Emery* v. *Lowell*, 104 Id. 16; *Morill* v. *Hurley*, 120 Id. 99.

While, according to the civil law, the rule is otherwise, and in those courts following the latter, a municipality may render itself liable by so constructing a public improvement, as to flood the land of an adjoining proprietor, precisely to the same extent as conterminous proprietors may, by such acts, render themselves liable: *Nevins* v. *Peoria*, 41 Ill. 502; Washburn on Easements 458; 2 Thomp. on Neg. 748; *Tootle* v. *Clifton*, 22 Ohio St. 247; *City of Aurora* v. *Reed*, 57 Ill. 29; *Bloomington* v. *Brokaw*, 77 Id. 194; *Rhodes* v. *Cleveland*, 10 Ohio 159.

With respect to public improvements generally.

And with respect to public works, it may be said generally, that where, by any special charter accepted by a municipality, or granted at its request, it is required to construct such public works, and assess the expense thereof upon those immediately benefited thereby, or to derive an advantage in its own corporate capacity from the use thereof, by way of tolls or otherwise, it will be liable as any other corporation, for any injury done to any person or property in the negligent exercise of the powers so conferred: *Henly* v. *Lyme*, 5 Bing. 91; s. c. 3 B. & Ad. 77; *Weightman* v. *Washington*, 1 Black 39; *Nebraska City* v. *Campbell*, 2 Id. 590; *Bigelow* v. *Randolph*, 14 Gray 543; *Child* v. *Boston*, 4 Allen 41; *Dayton* v. *Pease*, 4 Ohio St. 80; *Bloomington* v. *Brokaw*, 77 Ill. 194.

Dealing with property held for private emolument or benefit.

And the same principle of liability obtains, where municipal corporations hold or deal with property as their own, not for the direct and immediate use of the public, but for their own benefit. It then becomes liable to the same extent as a private individual would be, for the negligent use of the same to the injury of others: *Eastman* v. *Meredith*, 36 N. H. 284; *Oliver* v. *Worcester*, 102 Mass. 500; *Hill* v. *Boston*, 122 Id. 359.

Application of this principle to quasi corporations under certain circumstances.

And it is believed that this principle is applicable to *quasi* cor-

porations, or such organizations as counties and the like, when dealing with property in no sense for public purposes, but for private emolument solely, to the extent, at least, of the fund. *Eastman* v. *Meredith*, 36 N. H. 295.

With respect to the duty of municipalities to maintain their streets, bridges and sidewalks within their corporate limits, in a reasonably safe condition, it would seem, that this is one of those implied obligations resulting from the very nature and purpose of their organization, so manifestly intended to be imposed by the sovereign authority, in consideration of the privileges and franchises conferred, and so essentially necessary to the comfort and well being of the citizen that it needs no other argument in support of the proposition, and the great weight of reason and authority is this way: 2 Dillon on Municipal Corporations, sect. 789; 2 Thomp. on Neg. 753; *City of Chicago* v. *Hoy*, 75 Ill. 530; *City of Chicago* v. *Brophy*, 79 Id. 277.

And as a corollary from this proposition, such corporations have the undoubted right to graduate their streets and walks, and make such changes in the surface of the ground as in the judgment of its officers the public necessities require, and so long as they confine themselves within the scope of their authority, and execute the work with reasonable skill and care, although such improvement may occasionally cause serious injury to a contiguous property holder, yet he is remediless, except in the mode and to the extent the legislature has seen proper to furnish him relief: Wills on Eminent Domain, sect. 195; 2 Dillon on Municipal Corporations, sects. 781, 798; *Perry* v. *Worcester*, 6 Gray 546; Shearman & Redfield, sect. 370; 2 Thompson on Negligence 747; *City of Shawneetown* v. *Mason*, 82 Ill. 337; *Scovil* v. *Geddings*, 7 Ohio 562; *Hickox* v. *Cleveland*, 8 Id. 543. Where an individual owns vacant property, or where he has recklessly improved his property without exercising any care in doing so with reference to a probable future reasonable grade of the street, the principle stated, would not seem to be objectionable; but where a property owner has in good faith made improvements with reference to an already established grade which he has good reason to believe to be permanent in its character, and his property rendered valueless by a subsequent alteration, the principle seems harsh and inequitable, and under such circumstances, an eminent court has refused to adopt it: *Crawford* v. *Village of Delaware*, 7 Ohio St.

465; *City of Cincinnati* v. *Penny*, 21 Id. 499; *Youngstown* v. *Moore*, 30 Id. 142; *Akron* v. *Chamberlain Co.*, 34 Id. 334.

So far, we have been considering the acts of municipal corporations, and the acts of these *quasi* corporate organizations while in the exercise of due care, they were performing duties imposed by law, within the scope of their authority either in constructing public improvements, and in maintaining them, in the same way, or proceeding negligently in this regard.

If a municipal corporation were to proceed, however, to construct a public improvement, or to do any other act not within the scope of its authority, then it would clearly not be liable as a *tort feasor*, for injuries sustained either to person or property, and whether its acts were done in the exercise of due care, or otherwise, would not make the slightest difference: *Anthony* v. *Adams*, 1 Met. 286; *Smith* v. *Buffalo*, 1 Sheld. 493; 1 Potter on Corporations 465; 2 Thomp. on Neg. 737; Smith on Reparation 390; *Murphy* v. *City of Louisville*, 9 Bush 89. If, however, it were proceeding to construct a public improvement, clearly authorized by law, but were doing so in an illegal manner, then the corporation would be liable: *Goodloe* v. *Cincinnati*, 4 Ohio 500; *Smith* v. *Cincinnati*, Id. 514; *Fisher* v. *Lowell*, 11 Gray 345.

And the same rule would extend to involuntary *quasi* corporations, acting beyond the scope of their authority: *Commissioners of Hamilton County* v. *Mighels*, 7 Ohio St. 116.

But because a municipal corporation, acting *ultra vires*, would not be liable, it does not follow that an individual, injured in his person or estate by the acts of the agents and servants of such corporation would be remediless, for it is well settled that under such circumstances, so far as municipal corporations are concerned, their agents and servants would be liable, whether their acts were characterized by the exercise of reasonable care or not: *Shepherd* v. *Lincoln*, 17 Wend. 250; *Tearney* v. *Smith*, 86 Ill. 391; *Elder* v. *Bemis*, 2 Met. 599; 2 Thomp. on Neg. 823.

And with respect to officers of involuntary *quasi* corporations, such as counties and the like, which are not liable to actions for the negligence of such officers to the injuries resulting to person or property, simply because of the peculiar nature and purposes of these organizations. Yet the officers of such organizations are so far liable that they must respond for *their own personal negligence*, but not for the negligence of their subordinates: *Hall* v.