JAMES McSORLEY.....APPELLANT; 1881

AND *Oct. 31.

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THE MAYOR, &c., OF THE CITY OF ST. JOHN AND WILLIAM SANDALL.....RESPONDENTS. *Mar. 28.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

False imprisonment—Arrest—Assessment—41 *Vic., ch.* 9, *N.B.*—*Execution issued by Receiver of taxes for City of St. John*—"*Respondeat superior.*"

The 41 *Vic.*, ch. 9, entituled "An Act to widen and extend certain public streets in the city of *St. John*" authorized commissioners appointed by the Governor in Council to assess the owners of the land who would be benefited by the widening of the streets, and in their report on the extension of *Canterbury* street, the commissioners so appointed assessed the benefit to a certain lot at $419.46, and put in their report the name of the appellant (*McS.*) as the owner. The amount so assessed was to be paid to the corporation of the city, and, if not, it was the duty of the receiver of taxes, appointed by the city corporation, to issue execution and levy the same. *McS*, although assessed, was not the owner of the lot. *S.*, the receiver of taxes, in default, issued an execution, and for want of goods *McS*, was arrested and imprisoned, until he paid the amount at the Chamberlain's office in the city of *St. John*. The action was for arrest and false imprisonment, and for money had and received. The jury found a verdict for *McS.* on the first count against both defendants.

Held (reversing the judgment of the Supreme Court of *New Brunswick*), that *S.*, who issued the warrant, founded upon a void assessment and caused the arrest to be made, was guilty of a trespass, and being at the time a servant of the corporation, under their control and specially appointed by them to collect and levy the amount so assessed, the maxim of *respondeat superior* applied, and therefore the verdict in favor of *McS.* for

* PRESENT—Sir William J. Ritchie, Knight, C. J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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$635.39 against both respondents on the first count should stand. (*Ritchie*, C. J., and *Taschereau*, J., dissenting.)

Per *Gwynne*, J.: That the corporation had adopted the act of their officer as their own by receiving and retaining the money paid and authorizing *McS.'s* discharge from custody only after such payment.

THIS was an appeal from a judgment of the Supreme Court of the Province of *New Brunswick* (1), whereby it was ordered that the verdict entered for the plaintiff at the trial of this cause be set aside and a new trial granted. The facts and pleadings sufficiently appear in the judgments hereinafter given.

Mr. *Weldon*, Q. C., for appellant:

It is clear a gross injustice has been done to the appellant; he has been compelled to pay under duress a large amount of money, which has come into the hands of the respondents, which he had no right to pay.

The jurisdiction of the commissioners was only a limited authority; they could only assess certain parties, or rather, a certain class, of which the appellant was not one. They had no jurisdiction over the appellant; he was not an owner, proprietor, lessee, or a party or person in any way interested, legally or equitably, in any lands or premises benefited by the widening and extension of the said street, and therefore a person over whom the commissioners could not exercise any jurisdiction or power.

They could not, by inserting the appellant's name in the report, or in the plan, give to themselves jurisdiction.

The report was only final and conclusive on an owner, etc., and the provisions of the eleventh section apply only to cases where the objector disputes the amount and correctness of the assessment, but not his

(1) 20 New Brunswick Reports (4 P. & B.) 479.

liability to pay. *Hesketh* v. *Local Board of Atherton* (1).

Taxing acts must be construed strictly (2). The chamberlain of the city was bound to see that the assessment against the appellant was properly made before he issued his execution. Where there is no jurisdiction the whole matter is void *ab initio*. *Burroughs* on Taxation (3).

I contend also that the execution in this case against the defendant was issued without lawful authority, even assuming the appellant liable to assessment, upon two grounds.

1st. That no proper demand was made on the appellant.

By the 14th section the parties liable were to pay on demand "to such person or persons as the said mayor, alderman and commonalty of the city of *St. John* shall appoint to receive the same."

By the evidence of Mr. *Peters*, the common clerk, page 13 of case, the respondent, *William Sandall*, was appointed to demand and receive the amount

Now the evidence shows that *William Sandall* made no demand. He could not delegate his authority to *Frederick Sandall*. When appointed, a statutory power was given to him, or to be exercised by him, and, being an official act rendering the party upon whom the demand was made liable both in person and property, he could not authorize another person to do that act. He was the agent of the other respondents, and alone was authorized to receive the amount. *Frederick Sandall* had no right to receive it.

2nd. The respondent *Sandall* was not authorized to issue an execution except upon the terms under which assessments are levied under the Assessment Acts of *St. John*. By those acts there must be some evidence of a

(1) L. R. 9 Q. B. 4.

(2) 3 App. Cases 473,

(3) P. 246.

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demand or notice. Here there was none properly shown.

In the special plea, it is alleged that the said *William Sandall* made the demand. This is a necessary averment, and is put in issue by the replication.

The receiver of taxes is the officer of the city, appointed and paid by the city, and their authorized agent to receive their moneys. Payment to him is payment to the other respondents, and he held it subject to their order, and they have adopted his act.

Dr. *Tuck*, Q.C., for respondents :

Neither the city nor the chamberlain were responsible for the legality of the assessment, the chamberlain only did that which the statute ordered him to do. The appellant's name being down on the list, the chamberlain could not act otherwise. It may, in the ordinary sense, seem hard that a person, not an owner, and having no interest in the lands on the line of *Canterbury* street, should be assessed and compelled to pay. But if any wrong has been done in this case, it was the fault of the commissioners, and not of the defendants, or either of them. It cannot be contended that the commissioners who were appointed by the Governor in Council were the officers of the corporation, and, if it is their fault, the maxim of *respondeat superior* cannot apply. Besides, it is pretty clear, as regards the plaintiff, that no wrong was done him, for he knew as early as the sixteenth of March, 1878, that he had been assessed, the land upon which the assessment had been made, and that, if the land was not registered in his own name, yet he knew all about it, and that, whilst the legal title was in his son, the property really belonged to himself.

The only count upon which the corporation could be held liable is on the money count, and the jury found for the city on that count.

Mr. *Weldon*, Q.C., in reply.

RITCHIE, C. J.: —

This was an action commenced in the month of October, in the year 1878, for a wrongful arrest and false imprisonment, upon an execution issued by the defendant, *William Sandall*, Receiver of Taxes of the city of *Saint John*, on the fifth day of September, A. D., 1878, against the plaintiff. The declaration contains a count for false imprisonment, and also, by leave of a judge, a count for money had and received, and for interest.

To the first count of this declaration the defendants plead "not guilty;" and for a second plea to the same count they justify under an execution issued by the defendant, *William Sandall*, Receiver of Taxes of the city of *Saint John*

To the second and third counts the defendants plead "never indebted."

The plaintiff joins issue on the defendant's first, third, and fourth pleas; and to the second he replies specially, setting forth that he is not the owner of the land and premises in question.

Everything turns upon the second plea and the replication thereto.

The 41 *Vic.*, c. 9 authorizes the extension of *Canterbury* Street. Section 2 provides for the appointment by the Governor in Council of "three or more discreet and disinterested persons commissioners for the purpose of extending *Canterbury* street (from etc. to etc.) and for performing the duties in the said act in that respect mentioned and prescribed." Section 3 requires the commissioners to be sworn "faithfully to perform the trusts and duties severally required of them by the said act." Section 7 provides how *Canterbury* street shall be extended, and its width. Section 8 declares it

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to be the duty of the commissioners to cause plans and surveys of the streets to be widened or extended and the several lots of land fronting on them respectively, to be made by the city engineer, and for that purpose power is given to the commissioners to enter upon the lands upon or near the said streets. Section 9, "as soon as plans are made the commissioners are to make a just and equitable estimate of the value of the lands, &c., required for widening and extending the streets, and to assess and apportion the amount of such estimated value," that is to say, for the extension of *Canterbury* street the Commissioners shall assess and apportion the whole estimated value of the lands, etc., required and taken for the extension and opening of said street upon the parties owning or interested in any lands etc., along the line of such extension, and in the discretion and opinion of the Commissioners benefited thereby in proportion to the benefit accruing to such parties respectively.

Section 10 requires the commissioners immediately upon completing any such estimate, assessment and apportionment, to file with the common clerk of the city, the said plan as and for a record of their doings in that respect, and shall forthwith report their proceedings and all matters and things connected with their duties as such commissioners to the common council of the city, and in said report shall set forth the names of the respective owners, lessees, parties and persons entitled unto or interested in such lands, etc., as far forth as the same shall be ascertained by them, and an apt and sufficient description of the land required for extending the street and also of the lots fronting on the street assessed for said benefit, also the sums estimated and assessed for compensation to be made for land taken, and also sums assessed upon same for the benefit of the owners in fee or for compensation, and for the assess-

ment for the benefit of the owners of the leasehold estate or other interest separately, but in every case "where the owners and parties interested or their respective estates and interests are unknown or not fully known to the commissioners, it shall be sufficient for them to estimate and assess and to set forth in their report in general terms the respective sums to be allowed and paid to or by the owners generally and parties interested therein in respect of the whole estate and interest of whomsoever may be entitled to or interested in said lands without specifying the names or estates or interest of such owners and parties interested, and upon the coming in and filing of such report the same shall be final and conclusive as well upon the mayor, &c., of the city as upon the owners, lessees, parties or persons interested in and entitled, mentioned in said report, and the mayor, etc., shall be possessed of the lands so required for extending the street to be appropriated, converted and used for such purpose and none other, and the mayor, etc., may take possession without suit.

By section 11 the commissioners, after completing estimates and assessments, and fourteen days before making the report to the common council, shall deposit a true copy of such estimate and assessment in the office of the common clerk for the inspection of whom it may concern, and give notice in two newspapers of such deposit, and of the day on which it will be finally filed, as and for a record of their proceedings; and any persons whose rights may be affected thereby, or who shall object to the same or any part thereof, may, within ten days after first publication, state their objections in writing to the commissioners, and the commissioners shall reconsider their estimate or assessment, or part objected to, and in case the same shall appear to them to require correction, but not otherwise, shall and may

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correct the same, but if they adhere to their original opinion and notify the party objecting, then the party interested objecting may nominate by writing, within five days, one arbitrator, the commissioners another, and the two a third, who shall arbitrate and determine the question, provided the award shall be filed in the office of the common clerk within ten days, and then the commissioners shall correct the estimated assessment agreeably to the award.

Section 12 requires the mayor, etc., within one month after assessment collected and received by them, to pay parties mentioned in report the sums estimated and reported in their favor, deducting any amount they may be declared liable to pay by reason of benefit, and in default, parties, after application first made, may sue the corporation, and the act, and the report of the commissioners, and proof of the right and title of the plaintiff to the sum demanded, shall be conclusive evidence in such suit.

Provision is made that sums reported to infants, persons *non compos mentis*, *feme covert*, or absent, or where the names are not set forth in the report, or where owners, after diligent enquiry, cannot be found, that the mayor, etc. may pay the sums mentioned in said report, into the equity side of the Supreme Court, and every such payment shall be a complete discharge of, and for, any liability under the act, and the report of the commissioners in the case in which such payment is made; and there is this proviso:

That when sums reported in favor of any person or persons whatever, whether named or not in said report, shall be paid to any person or persons whomsoever, when the same shall of right belong or ought to have been paid to some other person, it shall be lawful for the person or persons to whom the same ought to have been paid, to sue for and recover the same, with lawful interest and costs, as so much money had and received for his use, by the person to whom the same shall have been so paid.

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Section 13 declares that sums directed to be paid, assessed and reported by the commissioners for the allowance to be made by the person or persons respectively in the said report as owners and proprietors of or parties interested in lands deemed to be benefitted by the extension, shall be borne and paid respectively to the mayor, etc., by the said persons respectively; and imposes on the corporation all the costs of opening, extending, making and finishing *Canterbury* street, and all the expenses incurred under the act, and authorized the city corporation to issue debentures for payment thereof.

Section 14 makes the several sums described to be paid to the mayor, etc., be a lien and charge upon the lands in the report mentioned, and the amounts assessed are made payable to such person or persons as the mayor, etc., shall appoint to receive the same; and in default of payment of the same, or any part thereof, it shall be lawful for, and it shall be the duty of, the receiver of taxes of the city of *St. John* to issue execution under his hand to levy the same with lawful interest thereon, and after thirty days from the filing of the said report of the commissioners, in the same manner and with the like effect, power and authority as upon an assessment of rates and taxes made by the assessors of rates in the said city; and the marshall to whom any such execution shall be delivered shall proceed to levy and collect the same in the same manner and with the like power, authority and effect as upon execution for rates and taxes under the law relating thereto.

Then follows this proviso:

Provided that if any money so to be assessed be paid by or collected or recovered from any person or persons when by agreement or by law the same ought to have been borne and paid by some other person or persons, it shall be lawful for the person or persons paying the same, or from whom the same shall be collected or recovered, to sue for and recover the money so paid by or recovered from him or

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them, with interest and costs, as so much money paid for the use of the person or persons who ought to have paid the same; and the said report of the commissioners, with proof of payment, shall be conclusive evidence in the suit.

So far as the proceedings under this act are concerned, there is no dispute in fact, except as to plaintiff's being the owner of land for which he was assessed. The pleadings admit that the commissioners were duly appointed by the Governor in Council—that they were duly sworn and entered on the duties of their office—that they did cause surveys and plans of *Canterbury* street, and the several lots fronting thereon, to be made and prepared by the city engineer; that the city engineer did make and prepare such plans; that having received such plans, the commissioners did proceed to make a just and equitable estimate of the value of the lands required for extending the street; that they did assess and apportion the whole estimated value of the lands in their discretion and opinion benefited thereby in proportion to the benefit accruing to the parties respectively; that the commissioners did, fourteen days before making their report to the common council, deposit a copy of such estimate and assessment in the office of the common clerk, and did give notice in two public newspapers thereof and of the day on which it would be finally filed as and for a record of their proceedings, and the said commissioners did, at the time named, file with the common council of the city the said plan as and for a record of their doings in that respect, and did forthwith report their proceedings and all matters and things connected with their duties as such commissioners to the common council, and in said report did set forth the names of the respective owners, etc., as far forth as the same was ascertained by them, and a sufficient description of the lots of land, etc, required for extending the street and

the lots fronting said street so assessed, as also the sums estimated and assessed for compensation; that defendant appeared in and by the said report as assessed for the purposes of said street on a lot of land along the line of extension of said *Canterbury* street and fronting thereon, for the benefit accruing to him of $419.46.

That after the filing of the plan and report the council appointed Mr. *Sandall*, chamberlain of the city, to receive from the plaintiff the said sum assessed by the commissioners and all other sums mentioned in the commissioners' report assessed by them; that the said *Wm. Sandall*, being also receiver of taxes in and for the city of *St. John*, duly demanded the said amount from plaintiff; and after due notice given and demand made and after the proper time had elapsed, defendant, *Sandall*, being the receiver of taxes in and for the city of *St. John*, duly issued an execution under his hand for the recovery of the amount for which plaintiff was assessed, and the same was duly delivered to one *Hancock*, then being a marshal of the city of *St. John*, to be executed; that the said marshal proceeded to levy and collect the said assessment in the manner pointed out in the statute, and that plaintiff neglecting and refusing to point out goods and chattels, although requested so to do, he, said marshal, for want of goods and chattels whereon to levy, took the plaintiff and delivered him to the keeper of the jail of the city and county of *St. John*, in obedience to the exigencies of the warrant to him directed.

For this imprisonment the present action is brought, as also for money received by defendants to the use of plaintiffs, as also for money payable by defendants to plaintiff for interest. In other words, it is not disputed in this action that all the proceedings were duly had and taken in strict accordance with the provisions of the statute, and that had plaintiff been the owner of or

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interested in the lot of land for which he was assessed, he could have no cause of complaint. So that the only question on these pleadings is, does the fact of plaintiff not being the owner of this lot make the corporation of *St. John* responsible in damages for his name having been placed on the report of the commissioners, or for the act of the receiver of taxes in issuing the warrant, or for the arrest of the plaintiff under it by the marshal? In my opinion none of the parties acting under this statute were in any sense of the term the servants of the corporation, or in any way subject to their orders or control. The whole proceedings were purely statutory, and over which the corporation of *St. John* had no power, authority or supervision, corporate or otherwise. The commissioners were government officers, and for what they did or omitted to do they were not amenable to the corporation of *St. John*, and the corporation had no right to interfere with their proceedings, and when the report of the commissioners was filed of record the corporation had no right to alter, amend, take from, add to, or interfere with it in any way. The only duty in relation to their proceedings, or in connection with the assessment or collecting the amount assessed, was when the commissioners had filed their report and it had thus become of record to nominate who should receive the money assessed. They did nominate the chamberlain of the city, but they might quite as well, had they thought proper, have named any other individual. By virtue of such nomination the chamberlain did not become an officer of the corporation in relation to this matter, but a statutory officer under the act, and when he received the money he did not receive it as chamberlain, as an officer under the city charter, but as such officer by virtue of his nomination under the act. So with respect to the receivers of taxes, it so happened that *Sandall* was also

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a receiver of taxes. In his character as such under his general appointment, he had no authority to collect those assessments, it was only by virtue of the special duty cast on him by the act that he had any right to intermeddle, and when he discharged the duty thus imposed on him he did so, not as an officer of the corporation or under corporate control, but as a statutory officer independent of the corporation altogether in respect to all acts in relation to this duty so expressly and specially cast on him by the statute; all the corporation could do was to obey the law, take the record as they found it, and act accordingly, without venturing to amend or alter it in any particular; so, too, the marshal, all he had to do was to execute the warrant delivered to him to be executed; the corporation, the appointee of the corporation, the receiver of taxes and the marshal, did just what the law declared they were to do and nothing more. How, then, can it be possible that, assuming the plaintiff to have been intentionally or inadvertently placed by the commissioners on the record as owner when he was not, the corporation can be made liable for the consequences of the act of government officers over whom they had no control and for an act with which they had nothing whatever to do, as they could neither direct who should be put on the commissioners record, nor could they direct any name or names to be taken off, and an act, too, of which they could have no knowledge, nor the means of knowledge, and an act wholly beyond and outside of their corporate functions, and in relation to a matter from which they, as a corporation, received no benefit whatever in their corporate capacity,—the same not being for the corporate advantage and the emolument of the city—the extending of the street may have been, and no doubt was, an improvement to the city generally, and therefore for the benefit of all the citizens and the public at large, but

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all the duties discharged or acts done in performance of those duties, whether of omission or commission, by the commissioners, the defendant, as collector of taxes, *Sandall*, in receiving the money, or the marshal in executing the warrant of distress, were not corporate duties performed by servants of the corporation, but duties discharged and acts done by independent officers in the performance of specific duties enjoined on such officers by statute, and over the performance of which the corporation had no control, and therefore no act of the municipal corporation or its agents or servants, and for which the corporation are not responsible at common law nor made so by statute.

The statute gave the person named to receive the money, the person appointed to collect it, and the marshal directed to execute the warrant issued for its collection, nothing for their guidance but the report of record of the commissioners, which report they had no right to question but were bound to act on by virtue of the mandatory injunctions of the statute.

That a municipal corporation could, under such circumstances, be held liable I should not have thought possible, but for the opinions entertained by a majority of my learned brethren. Principle and authority seems to me alike opposed to the idea of making a municipal corporation liable for acts which are not the acts of the corporation, nor of its agents or servants, but which are the acts of independent officers, and consequently where no relation of principal and agent or master and servant exists, and without which the maxim *respondeat superior* cannot apply.

In *Wood's* law of master and servant (1) it is said:

> For the acts of an independent officer whose duties are fixed and prescribed by law, the city cannot be held chargeable upon the principle of *respondeat superior*, for the relation of master and servant

(1) Sec. 463.

does not exist. Such officers are quasi civil officers of the Government, even though appointed by the corporation. "Where," says *Folger*, J., in a very able, thoroughly and carefully considered opinion in a recent case heard before the Court of Appeals in *New York* (*Maxmilian* v. *New York*, 62 *N.Y.*, 165), "a municipal corporation elects or appoints an officer in obedience to an act of the legislature, to perform a public service in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. It has appointed or elected him in pursuance of a duty laid upon him by the law for the general welfare of the inhabitants or of the community. He is the person selected by it as the authority empowered by law to make selections; but when selected and its power is exhausted, he is not its agent. He is the agent of the public, for whom and for whose purposes he was selected."

In *Shearman and Redfield's* Law of Negligence it is said (1):

A municipal corporation is not answerable for the illegal and wrongful acts of the officers, though done *colore officii*, notwithstanding they were done by its specific directions or were afterwards approved of and ratified by it; for in directing the doing of such acts, or in ratifying them when done, the corporation acts *ultra vires*. But the corporation is liable for the irregular and illegal exercise, by its authorized agents, of a power which the corporation possesses, as when an officer levied and collected from the plaintiffs a sum imposed by a void assessment, the corporation having had authority to levy the assessment in a regular way, or where a common council, having authority to grade a street on obtaining the consent of two-thirds of the adjacent owners, failed to obtain such consent, but directed the work to be done nevertheless whereby the plaintiff was injured.

In *Wallace* v. *The City of Menasha* (2) it was held that

A city is not liable in tort for the act of its treasurer, acting in good faith in the execution of his tax warrant, in seizing and selling the chattels of one person for the delinquent taxes of another. In *Thayer* v. *City of Boston* (3) it is said that as a general rule a municipal corporation is not responsible for the unauthorized and unlawful

(1) 3rd Ed., 1874, § 140, p. 179. (2) 21 Albany L. J. 176.
(3) 19 Pick. 511.

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acts of its officers, though done *colore officii*. It must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bonâ fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that in either case the act was adopted and ratified by the corporation. The levy and collection of taxes are governmental rather than municipal functions, delegated to municipal officers for convenience. It may well be claimed that in the exercise of those functions such officers are public officers, discharging public and not municipal or corporate duties. If so, there seems to be no ground for holding the municipality liable for their torts committed in the exercise of those functions, no room for the application of the rule *respondeat superior* in such cases. A distinction is made in many cases between torts committed by municipal officers or agents in the discharge of such public duties, and those committed in the discharge of purely municipal or corporate duties by the officers or agents of the city or village, the municipality being held liable for the latter but not liable for the former class of torts.

In *Hayes* v. *The city of Oshkosh* (1) *Dixon*, C. J. says:

The case made by the plaintiff is in no material respect distinguishable from those adjudicated in *Haffard* v. *New Bedford* (2), and *Fisher* v. *Boston* (3), as well as in several other reported decisions cited in the briefs of counsel, and in all of which it was held that the actions could not be maintained.

The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable, but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given, and hence the maxim *respondeat superior* has no application.

In *Wood's* Law of Master and Servant (4), it is said:

(1) 33 Wisconsin 318.
(2) 16 Gray 297.
(3) 104 Mass. 87.
(4) Sec. 458, p. 916.

But where the duties of an officer are prescribed by law and are independent in their character, and he is not subject to the direction and control of the corporation as to the time, place or manner of their discharge, he is a public officer, and in no sense a servant or agent of the corporation, and the corporation is not liable for the manner in which he discharges his duties. "Their powers," says *Foster*, J., in *Harvey* v. *Keen* (1) cannot be enlarged or abridged by any action of the town, and what they do, or omit to do, in the proper exercise of their authority, is done or omitted because the law enjoins and prescribes their duties independent entirely of municipal control or authority." In this case it was held that a highway surveyor is a public officer.

In *Oliver* v. *Worcester* (2), *Gray*, J., says :—

The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although enuring, of course, ultimately to the benefit of the public.

* * * * * * * *

In *Bailey* v. *New York* (3), Chief Justice *Nelson* clearly stated the distinction between acts done by a city or town as a municipal or public body, exclusively for public purposes, and those done for its own private advantage or emolument.

In *Walcott* v. *Inhabitants of Swampscott* (4), *Bigelow*, C. J., says :—

We cannot disitnguish this case from *Haffard vs. City of New Bedford* (5). * * *

After stating what was decided in that case, hereinbefore mentioned, by *Dixon*, C. J, he says :—

This is especially true in the case of surveyors of highways. They are elected by towns and cities, not because they are to render services for their peculiar benefit or advantage, but because this mode of appointment has been deemed expedient by the legislature in the distribution of public duties and burdens for the purposes of government, and for the good order and welfare of the community.

(1) 52 N. H. 335.
(2) 102 Mass. 499.
(3) 3 Hill 531.
(4) 1 Allen's R. (Mass.) 101.
(5) 16 Gray 297.

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They are, strictly speaking, public officers, clothed with certain powers and duties which are prescribed and regulated by statute. Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; they are not amenable to towns for the manner in which they discharge the trust imposed in them by law; nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties, they are wholly independent of towns, and can in no sense be considered their servants or agents.

In *Dillon* on Corporations, it is said (1):

If the duty though devolved by law upon an officer elected or appointed by the corporation is not a corporate duty, the officers of the corporation in performing it do not act for the corporation, and hence the corporation is not responsible (unless expressly declared to be by statute) for the omission to perform it or for the manner in which it is performed.

In *Wood* on Master and Servant (2), it is said, under the heading, "Who are independent officers?"

Independent officers are those who are appointed or elected by the legislature or by the people, or whose duties are fixed and defined by law, and over whose official acts the corporation has no immediate or direct control.

The case of *Barnes* v. *District of Columbia* (3) has been said to be opposed to the doctrine of the cases cited. However that may be, I think that case clearly distinguishable from the present, as it was a decision on a statute in every respect different from the one we are considering; were it not so I should consider it but a questionable authority, which I should be loath to follow, opposed as it is to so many judicial decisions of so many States, and likewise, in my opinion, sound law as applicable to the case before us. And as it was decided by a bare majority of five to four I cannot look upon it as a decision in itself entitled to much weight outside of the court in which it was delivered.

(1) Sec. 165.

(2) Sec. 464.

(3) 91 U. S. 540.

But it is now contended that the defendants are liable for false imprisonment on the ground of ratification Whether this question can be properly raised under the pleading it is unnecessary to discuss, because, in my opinion, there is not the slightest ground, either in law or fact, to justify the contention that defendants made themselves in any way liable or responsible for plaintiff's arrest and imprisonment, either by directing or authorizing or adopting or ratifying such arrest and imprisonment. After plaintiff was arrested and in custody he caused the amount of the assessment to be paid to a clerk in the chamberlain's office and obtained his discharge. This is his account of the transaction. He says in his direct examination :

It was in this gaol here I paid the deputy clerk $437 or $439 to get out.

Again :

I paid $437 and some cents.

Cross-examined : I did not say I paid the money to *Rankin*, [the gaoler.] I did not pay it at all. I did not see the money paid. I don't think I swore the money was paid in my presence. It was not paid in my presence.

James McSorley, son of plaintiff, says :

I recollect the day he was taken to gaol. Under your (Mr. *Thomson's*) directions, I paid the money in the chamberlain's office. I paid it to Mr. *Humbert*, a clerk in the office. He was not satisfied at first to give me a receipt.

This is *verbatim et literatum* every word as to the payment in plaintiff's case, and there is not another word on the subject in defendant's case. Mr. *Thomson* raised eight questions, but not one of them has any reference to the payment of the money to obtain release, or to any payment under protest, or to any receipt by the corporation, or to any ratification by the receipt of the money, but rests his right to recover on entirely distinct and different grounds. The learned Chief

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Justice, in his charge, for the first time apparently, raises the question of ratification, but this he entirely abandons in the full court. I think it clear law that a party cannot be made liable as a trespasser by ratification unless the trespassing was originally done on his behalf and for his benefit. Nor can there be a ratification, unless the party who is sought to be made liable by means of the ratification is shown to have had at the time full knowledge of all the circumstances of the case.

There is not a tittle of evidence that this money ever went into the coffers of the corporation of *St. John*, or that as a corporate body the corporation ever knew that it had been so paid, and if it had it was not corporation money, but money to be held and distributed among the land owners injured by the extensions, and yet it is argued that such payment constituted a ratification and adoption—but of what? I cannot but confess myself at a loss to understand of what this payment was a ratification. Was it of the act of the commissioners? of the receiver of taxes in issuing the warrant and collecting the assessment? of the marshal in executing the warrant? or of the receipt of the money by the clerk of the chamberlain, who must have received it for the chamberlain? and he could only receive it as collector of taxes appointed under the statute, and who, after such receipt under the statute, would be bound to hand it over to the corporation, but of which there is not a particle of evidence that he ever did or that he even ever notified the corporation that it had been so received. There is no evidence whatever to show that the corporation had the slightest knowledge or notice that this plaintiff was not the owner of the land, nor that his name was wrongfully put in the commissioners record, nor that the receiver of taxes had issued the execution, nor that the marshal had executed it, nor that the plaintiff was imprisoned, nor that he had paid

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the money to obtain his release. How this can be converted into a ratification, or make the corporation wrong doers and liable for false imprisonment, I am at a loss to conceive. Had the chamberlain, after having received the money, accounted for and paid over the amount to the corporation and they had received it, they would have only been doing what the law required they should do. How can the mere fact of the money having been paid into the office of the receiver of taxes — the party the statute required to collect, it and who in collecting it exercised legislative functions, because he happened to be chamberlain, and as such the party nominated under the statute to receive it—make the corporation wrong doers and trespassers, guilty of false imprisonment, and that, too, without it being in any way shown that the corporation ever knew of any illegality in the proceedings, or even that the money was so paid, or that if paid, it was received otherwise than as money legally paid and received under the statute, to be distributed as directed by the statute.

I can discover no act done by or on behalf of the corporation which they did or could ratify, nor can I discover any such question raised by the pleadings or on the trial in this case. It may be that if the plaintiff was wrongfully assessed and the money had been actually received by the corporation, and it had had notice that the plaintiff was not a property holder and that the money had been wrongfully levied and paid under protest, which it was not, and plaintiff had demanded repayment from the corporation and it had refused, an action for money had and received might possibly have lain at the instance of the plaintiff against the corporation, but this is not entirely clear; but no such question arises in this case, and therefore it would be neither profitable nor proper to discuss it.

The authorities in respect to ratification are, to my

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mind, very clear, and I think sustain what I have said. I will cite a few of them.

In Scurry v. *Ray* (1), it was held that there could be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept, by the party in whose favor it is made, unaware of the invalidity of the first transaction and has not at the time of the supposed ratification the means of forming an independent judgment.

In Eastern Counties Railway Company v. *Brown* (2), the servant of a railway company took the plaintiff as passenger upon the company's line into custody for an alleged breach of one of the company's by-laws, and carried him before a magistrate. The attorney of the company attended before the magistrate to conduct the charge. Held, this was no evidence that the company ratified the act of their servant.

A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards on demand refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use and benefit (3).

A corporation cannot be made liable for false imprisonment, unless the party complaining gives evidence justifying the jury in finding that the persons actually imprisoning him had authority from the corporation (4).

Where goods of a party are seized under a process which has issued in a suit in which such party is a defendant and the seizure takes place without the knowledge or authority, or in the name of the plaintiff in such suit, the circumstance that the goods afterwards came to his hands, and that he, knowing the

(1) 5 H. L. 627.
(2) 6 Exch. 314.
(3) *Wilson* v. *Baker*, 4 B. & Ad. 614.
(4) *Eastern Counties Railway Company* v. *Brown* 6 Exch. 314.

circumstances of the seizure, refuses to give them up, do not make him a trespasser (1).

A principal is not liable for the wrongful acts of his agents though he receives benefit from them, unless at the time of the receipt he has notice of the illegality (2). In this case it was held a principal is not liable on trespass for the act of his agent, unless he authorized it beforehand, or subsequently assented to it with knowledge of what had been done.

Therefore, when in an action of trespass against a landlord it appeared that he gave a broker a warrant to distrain for rent and the broker took away and sold a fixture and paid the proceeds to the defendant, who received them without enquiry, but without knowledge that anything irregular had been done, held, that no such authority or assent appeared as would sustain the action. In this case *Whiteman*, J., said:

> Where a man is made a trespasser by relation as having assented to it, it is always shown that he knew of the trespass.

But the statute evidently contemplated that assessments might be made on wrong persons, and that payments might be made to parties not legally entitled to receive the money, and for both of these contingencies the legislature has provided.

Thus section 14, which provides that the assets shall be a lien and charge upon the land, and establishes the personal liability of the owners, and authorizes the appointment by the corporation of a person to receive the amounts assessed, and imposes the duty on the receiver of taxes to issue executions, and directs the marshal to proceed to levy and collect, ends with this proviso:

> Provided, that if any money so to be assessed be paid by or collected or recovered from any person or persons when by agreement

(1) *Wilson* v. *Tummon*, 1 Dow. & L. 513; s. c. 12 L.J.C.P. 306.

(2) *Freeman* v. *Rosher*, 13 Q.B. 780.

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or by law the same ought to have been borne and paid by some other person or persons, it shall be lawful for the person or persons paying the same, or from whom the same shall be collected or recovered, to sue for and recover the money so paid by or recovered from him or them with interest and costs, as so much money paid for the use of the person or persons who ought to have paid the same, and the said report of the commissioners, with proof of payment, shall be conclusive evidence of the suit.

And section 12, which provides that the mayor shall, within one calendar month after assessments are collected, pay to the respective persons mentioned in the report the sums estimated and reported in their favor, and giving authority to parties to sue the corporation, if not paid after application, and providing that if persons entitled are under age of twenty-one years, *non compos mentis*, *feme covert*, or absent from roll, or when the names of the owners or persons entitled shall not be set forth, or when persons named cannot be found, the amounts payable to such persons may be paid into the equity side of the Supreme Court, ends with this proviso:

Provided also, that in all and every case and cases whenever such sum or sums, or compensation, so to be reported by the said commissioners in favour of any person or persons whatsoever, whether named or not named in the said report, shall be paid to any person or persons whomsoever, when the same shall of right belong and ought to have been paid to some other person or persons, it shall be lawful for the person or persons to whom the same ought to have been paid to sue for and recover the same, with legal interest as aforesaid, and costs of suit, as so much money had and received for his, her or their use, by the person or persons respectively to whom the same shall have been so paid.

These two clauses very clearly establishing, in my opinion, that if the provisions of the act were complied with and the corporation appointed a party to receive the money when it was received by the corporation, and paid as the report of the commissioners directed, the duty of the corporation was discharged and they were free from liability, and if a wrong party was

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assessed and compelled to pay, or the amount was paid to a person when it belonged to another, then the aggrieved party was to look to the remedies provided by the statute.

The great hardship of this case on plaintiff which has been put forward strikes me as being to a large extent imaginary. The receiver of taxes, upon whom the duty of collecting was cast, as well as the marshal who executed the warrant, appear to have acted with the greatest forbearance and leniency. Plaintiff had ample notice that his name was put down as owner, and so, on the face of the record, was liable for the assessment, but he took no steps whatever to have the record corrected or his name removed; he took no steps to have the collection of the assessment against himself personally restrained, and the lien on the land enforced in lieu thereof; he does not even appear to have notified the commissioners, the receiver of taxes, or the marshal (according to his evidence, and the very contradictory character of plaintiff's evidence precludes his version being accepted), or even the corporation that his name was improperly inserted as owner; but, on the contrary, the evidence shows that by his words and actions he rather encouraged the idea that he was the proper person. He appears to have gone to gaol almost voluntarily, certainly without any necessity, and it would look much as if with the sole view of laying the foundation for an action such as this, for so soon as he is locked up he sends for his money and pays the amount, and that not even under protest; this he could just as well have done without going to gaol. To get the money back there was no necessity whatever for suing the corporation of *St. John*, equity would enforce the lien on the land in his favour, and the statute evidently contemplated, as we have seen, that mistakes

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might be made, and that parties not really liable be compelled to pay, and has provided for such a contingency by enacting as before mentioned, so that in truth and in fact the plaintiff could, had he chosen, by taking at the proper time the necessary proceedings, have had himself relieved from the payment of this assessment, and from the effect of having his name inadvertently placed on the record—(it is not suggested that it being so placed was more than an inadvertency; had it been done wilfully or maliciously by the commissioners, doubtless he would have had a remedy against them)—and could now recover the amount he has paid either from the owner of the land or from the land itself, and so really there is no reason whatever why he should proceed against the corporation of *St. John*, who in this matter have been guilty of no act of omission or commission morally or legally that I can discover, making them wrong-doers in relation to the plaintiff.

Under these circumstances, I think the judgment of the Supreme Court was right, and should be sustained, and this appeal dismissed with costs. The only objection that I think could be raised to the judgment of the court below is, that instead of ordering a new trial a judgment for defendants *non obstante veredicto* should have been entered, by reason of the insufficiency of the replication to the second plea.

STRONG, J.:—

I am of opinion that this appeal should be allowed. The appellant was not the owner, lessee, nor a party or person interested in any of the lands or premises mentioned in the report of the commissioners, or in any lands or premises in any way benefited by the extension and opening of *Canterbury* street. The commissioners had, therefore, no jurisdiction to assess the

appellant, and their assessment of him was consequently wholly void. The 10th sec of the act in question (1), it is true, declares that the report of the commissioners shall be final and conclusive, but the subsequent part of the clause expressly limits this conclusive effect to persons whom the commissioners had jurisdiction to assess.

The language of the act is :—

> And upon the coming in and filing of such report the same shall be final and conclusive as well upon the mayor, aldermen and commonalty of the city of *St. John*, as upon the owners, lessees, parties or persons interested in and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report.

There is nothing here warranting the respondents' contention that the report was conclusive as to all the world, upon strangers having no interest in the street as well as upon the property owners. The language is most explicit—it is to be final and conclusive only upon the city and the property owners. Had it been otherwise, and as the respondents contend, it would have been a most arbitrary and unjust enactment. Had the section stopped at the words "final and conclusive" I should have implied the limitation which follows, and, without the addition of the subsequent words, have been of opinion that the report was only made binding upon those over whom the commissioners had jurisdiction, the owners of property and persons benefited by the opening of the street. I think the decisions upon statutory provisions, taking away the writ of *certiorari*, and many decisions upon the *Ontario* Muncipal Act, would in that case have applied *a multo fortiori* to shew that the plaintiff was not bound by the report (2). The 14th section also shews very clearly that the legislature did not intend to give the report the

(1) 41 Vic., c. 9.

(2) See cases referred to in *Nickle* v. *Douglass*, 37 U. C. Q. B. 51.

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binding effect which the respondents insist upon, for it says :

That the respective owners and proprietors of the lands and premises in the said report mentioned, or the parties interested therein, and also the occupant shall be liable to pay on demand the respective sums at which the respective lands so owned and occupied by him, her or them, or wherein he, she or they are so interested, or at which the owners and proprietors thereof shall be assessed, to such person or persons as the said mayor, aldermen and commonalty of the city of *St. John* shall appoint to receive the same.

What language could be clearer than this to show that the only persons bound by the report and liable to pay the amounts assessed against them were owners, occupants and persons interested ? The two English cases of *Hesketh* v. *Local Board of Atherton* (1) and *Cox* v. *Rabbitts* (2) are in point, and show that there is nothing in the act to debar the plaintiff from disputing his liability to assessment. The assessment must therefore be considered as wholly void.

Then a collecting officer who levies a distress or makes an arrest under a warrant, which, though good upon its face, is founded upon a void assessment, is clearly guilty of a trespass, and the same principle applies to the officer who issues the warrant, and thus directs the distress or arrest to be made.

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

(1) L. R. 9 Q. B. 4. (2) 3 App. Cases 473.

length what he says upon the subject. Mr. Justice *Dillon* thus states the rule:

It may be observed, in the next place, that where it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal enquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if their duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be justly regarded as its agents or servants, and the maxim of *respondeat superior* applies. But if, on the other hand, they are elected or appointed by the corporation in obedience to the Statute to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the Government, if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or statutory officers, with such powers and duties as the statute confers upon them, and the doctrine of *respondeat superior* is not applicable. It will thus be seen that on general principles it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved upon him by law or by the direction or authority of the corporation.

Tested by this general rule it appears to me that the liability of the city for the act of *Sandall* is beyond question. He was an officer of the city specially appointed to receive the moneys to be collected and levied under the act in pursuance of the assessments of the commissioners. By the 14th section the parties liable were to pay the sums of money assessed by the commissioners "to such person or persons as the said mayor, aldermen and commonalty of the city of city of

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St. John shall appoint to receive them," and it is then provided that in default of payment it should be lawful, and the duty of the receiver of taxes of the city of *St. John*, to issue execution under his hand, and to levy the amounts as prescribed by the section in question, namely, by distress or imprisonment. In exercise of this power the city appointed *William Sandall*, who was already their officer, being by appointment of the city its chamberlain and general receiver of taxes. The official character of *Sandall* was, therefore, a double one: 1st, he was, by the special appointment of the city under the act, the person to receive the moneys assessed by the commissioners under the statute, and as such it was his duty to make the demand of payment mentioned in the 14th section, and, secondly, he was the general receiver of taxes for the city, and in that character it was incumbent on him to issue execution and make levies for such of these special assessments as the commissioners should have legally imposed. It thus appears to me that *Sandall* was beyond all doubt an officer for whose acts in respect of the collection of these assessments the city was liable, upon the principles stated in the extract from Mr. Justice *Dillon's* note, which I have before given. He was an officer appointed by the city, in obedience to a statute, it is true, but in this respect his appointment in no way differs from that of the great majority of municipal officers whose appointments are prescribed by statute, he committed the wrongful act complained of in the discharge of a duty imposed by law, not for the benefit of the general public, but for the peculiar benefit of the corporate body whose servant he was, the mayor, aldermen and commonalty of the city of *St. John*, and the money which was exacted from the plaintiff, and which was the fruit of *Sandall's* illegal

act, was received and applied to the benefit of the city. Moreover, it was in his character of receiver of taxes, a general officer of the city, not appointed under the statute, that he committed the trespass complained of by causing the false imprisonment of the plaintiff.

It being beyond question on the construction of the statute as before shewn that the assessment of the plaintiff was void, and that the warrant or execution was as a consequence also void, it is not material to inquire whether the commissioners were officers of the corporation for whose acts the city was responsible. If the assessment was void, the acts of *Sandall* were illegal, and the city was responsible for those acts, on the principle before stated, whether the commissioners were or were not persons for whose illegal conduct the city was also liable.

I think, however, that even if we had to go back to the assessment and show that the city was responsible for the illegal conduct of the commissioners, there would not be much difficulty in establishing the liability of the respondents and sustaining this appeal. The commissioners were, it is true, a body appointed not by the corporation, but by the Lieutenant-Governor under the statute. They were, however, appointed, not for the performance of a service for the benefit of the general public, but one of a peculiarly local and corporate character for the benefit of the corporation. This being so, it appears that although not elected by the commonalty or ratepayers, or appointed by the governing body of the city, but by the executive head of the province, they are just as much officers of the corporation as if they had been nominated by it or chosen by the corporators. Very high authorities in the *United States* warrant this conclusion. In the case of

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Barnes v. *District of Columbia* (1), the Supreme Court of the *United States* held that the municipal corporation of the *District of Columbia* was liable for the wrongful acts of commissioners, constituting a board of public works to which was delegated the duty of keeping in repair the streets and avenues of the district, who were not appointed by the corporation, nor elected by the people or ratepayers, but were nominated by the President of the *United States*; it being considered that the duties of the board being of a local and corporate and not of a general public character, it was to be considered as forming a part of the municipal corporation of which its members were consequently the officers. The corporation was therefore held liable for an injury resulting from the neglect of the board in failing to keep a street in proper repair. In giving the judgment of the court, Mr. Justice *Hunt* says :

> The mayor of a city may be elected by the people, or he may be appointed by the Governor with the consent of the Senate, but the slightest reflection will shew that the power of this officer, his position as the chief agent and representative of the city, are the same under either mode of appointment. Whether his act in a case in question is the act of and binding on the city, depends upon his powers under the charter to act for the city, and whether he has acted in pursuance of them, not at all upon the manner of his election. It is equally unimportant from what source he receives compensation, or whether he serves without it, nor are these by any means conclusive considerations in any case.

In the case of *Bailey* v. *The Mayor* (2), the same doctrine had previously received the assent of the Supreme Court of *New York*. In that case the city of *New York* was held liable for the negligence of certain statutory commissioners appointed by the governor under the authority of an act of the legislature for supplying the city with water. *Nelson*, C. J., in giving the judg-

(1) 91 U. S. 540. (2) 3 Hill 531.

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ment of the court states the point raised by the defendants and upon which the case turned to have been that

> The defendants were not chargeable with negligence or unskilfulness in the construction of the dam in question, inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control. In other words, the commissioners, not being their agents in the construction of the dam, the rule *respondeat superior* could not properly be applied.

And he then proceeds to give judgment for the plaintiff upon the ground that the commissioners, although appointed by the state and not by the city, were, by reason of the work which they were appointed to control being for the special and corporate benefit of the city and not for that of the general public, to be considered as the officers and servants of the city, which was therefore responsible for their acts. This case was subsequently affirmed in appeal (1).

In *Maximilian* v. *The Mayor* (2), decided in 1875, the whole of this doctrine is most ably reviewed by a very distinguished judge—*Folger, J.*, since Chief Justice of *New York*—in delivering the judgment of the *New York* Court of Appeals. The principle of *Bailey* v. *The Mayor* was in this late case affirmed, and the conclusion was arrived at that the corporation was liable where the acts complained of were to be done by officers whose powers and duties were given and taken for the benefit of the corporation and as a local and corporate body, but not so when the duties enjoined and powers granted were for the benefit of the general public as distinguished from the local public of the city, and are delegated as a convenient method of exercising a function of general government.

Taking these authorities, and the sound principles of law they enunciate, as guides, as from the high sanction which they have received we safely may, I am of opinion that if it were necessary here in order to entitle

(1) 2 Denio 433. (2) 62 N. Y. 160.

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the appellant to recover to hold that the city of *St. John* was liable for the acts of the commissioners appointed by the Lieutenant-Governor under the statute, in wrongfully and illegally assessing the appellant, we should be justified in doing so. For the reason, however, that it appears to me clear that *Sandall* was guilty of a trespass for which the city is liable for the reasons already stated, I prefer to rest the decision of the case on this latter ground. My judgment must therefore be that the judgment appealed against be reversed with costs, and the rule *nisi* for a new trial in the court below be discharged with costs.

FOURNIER J. :

Après le désastreux incendie qui réduisit en cendre la partie commerciale de la Cité de St. John, en 1877, la législature du Nouveau-Brunswick passa l'acte 41 Vic., ch. 9, autorisant l'élargissement de certaines rues, ainsi que l'extension de la rue Canterbury. Le mode indiqué par ce statut pour l'exécution des travaux à faire pour opérer ces changements ayant été longuement exposé par l'honorable juge-en-chef, il serait inutile pour moi d'y revenir. Il a aussi cité toutes les parties de cette loi qui peuvent lui donner le caractère d'une loi imposant à la Cité de St John, dans l'intérêt public, distinct de celui de la Cité, comme municipalité, l'obligation de faire les améliorations en question. Il conclut, comme la Cour Inférieure, du caractère impératif de ces dispositions que la Cité de St John, dans l'exécution de ces travaux n'a été que l'instrument de la loi, et qu'elle n'a pu non plus que ses officiers, encourir aucune responsabilité à cet égard. Pour décider la question qui s'élève en cette cause, il faut d'abord déterminer le véritable caractère de cette loi.

Malheureusement le préambule ne nous est d'aucun secours pour résoudre cette première question. Il y est

seulement dit que l'amélioration en question est désirable et il n'appert aucunement par qui elle est demandée. Bien qu'il soit assez raisonnable de présumer que cette loi a été demandée par la cité qui devait en bénéficier, il n'y en a cependant pas de preuve. Toutefois certaines parties de cette loi me paraissent faire voir clairement que la seule partie intéressée dans ces travaux est la Cité qui doit les faire exécuter. Ainsi, dans la 10e sec., après avoir statué que les commissaires chargés de l'évaluation des propriétés qu'il sera nécessaire d'exproprier remettront leur rapport au greffier de la Cité, il est déclaré que ce rapport sera final :

Shall be final and conclusive as well upon the Mayor, Aldermen and Commonalty of the City of St John as upon the owners, &c., &c., and the said Mayor, &c., shall become possessed of all the said lands, tenements, hereditaments and premises in the said report mentioned that shall or may be so required for the widening and extending of the said streets respectivelv, the sum to be appropriated, converted and used to and for such purpose accordingly and none others whatsoever.

La 12e section oblige la cité de St John à payer conjointement les sommes fixées par les commissaires. A défaut de paiement et après demande faite en la manière y spécifiée les intéressés pourront en poursuivre le recouvrement avec intérêt contre la cité.

May sue for and recover the same, with lawful interest at the rate of six per centum per annum, with costs of suit, in action of debt against the Mayor, Aldermen and Commonalty of St. John, in any Court having cognizance thereof.

La 13e section contient la déclaration suivante :

And the said Mayor, Aldermen and Commonalty of the City of St. John shall bear and pay the several amounts which the Commissioners shall determine as aforesaid are to be paid by said City Corporation for the widening of said streets as hereinbefore mentioned, to be certified to them, and also the costs of widening, making and finishing the said streets and parts of streets so to be widened, and also the costs of opening, extending and making and finishing the said Canterbury street, &c.

La 14e section statue que les sommes payables en

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vertu du rapport des commissaires seront payées à telle personne que la Cité nommera pour les recevoir. A défaut de paiement, le receveur des taxes de la Cité a le pouvoir d'en prélever le montant par warrant.

Par la 16e section la Cité doit payer les frais et les services des commissaires.

Par la 17e section les commissaires doivent aussi évaluer les sommes que la Cité sera tenue de payer pour les avantages qui pourront lui résulter des améliorations à faire aux rues Dorset et Wolf et partie des rues Lennox et Smythe. La Cité doit aussi payer le salaire des commissaires avec leurs dépenses et aussi la somme de $15,000, montant estimé pour finir les travaux à faire dans les dites rues.

La 18e section autorise la Cité à emprunter une somme suffisante pour couvrir toutes les dépenses, et les 19e et 20e sections indiquent le mode d'emprunter par débentures. Au cas de défaut dans le fonds d'amortissement qui doit être établi pour le remboursement de l'emprunt autorisé, la balance sera prélevée sur la partie de la Cité située du côté-est du Hâvre de St. John.

Quoique la plupart des dispositions ci-dessus citées s'appliquent à d'autres rues que celle de Canterbury, elles n'en font pas moins voir que tous les travaux ordonnés par cet acte sont d'un caractère municipal—et qu'ils ne sont ainsi ordonnés à la Cité de St. John que comme municipalité et dans son propre intérêt. Bien que les dispositions soient différentes pour les améliorations de la rue Canterbury elles sont cependant comme les autres d'un caractère municipal. L'acte concernant ces ouvrages n'a pas le double caractère d'un acte municipal et d'un acte concernant l'intérêt public de la province. De plus les législatures locales ayant par l'acte de l'Amérique Britannique du Nord un pouvoir illimité de législater sur les institutions municipales, il était au pouvoir de celle du Nouveau-Brunswick

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d'imposer, même directement, à la Cité de St. John, les améliorations mentionnées dans l'acte ci-dessus cité et d'en prescrire le mode de gouvernement. Il s'en suit que la municipalité ne peut éviter la responsabilité provenant soit de sa faute, soit de celle des officiers agissant pour elle dans la mise à exécution des dispositions de cette loi.

En donnant effet au rapport des commissaires et en nommant son receveur de taxes, pour recevoir le montant des évaluations, et au besoin en prélever le montant par warrant, la Cité n'a pu éviter la responsabilité des procédés des Commissaires et de son receveur de taxes.

Les commissaires ayant, sans droit quelconque, obligé l'appelant à payer comme propriétaire tandis qu'il ne l'était pas; de plus la corporation n'étant pas obligée d'exécuter ce rapport, quoique partie à l'instance décidée par eux, mais ayant jugé à propos d'y donner suite, elle doit en conséquence être tenue responsable. En outre cette somme ayant été payée dans le bureau du receveur des taxes en vertu du warrant d'emprisonnement qu'il avait fait émettre contre l'appelant, je suis d'avis que la Cité est responsable et que l'appel devait être alloué.

Ayant pris communication des notes de l'honorable juge Henry, je concours dans les raisonnements qui l'ont amené à la même conclusion.

HENRY, J.:—

This is an action for arrest and false imprisonment with a count for money had and received. The respondents justified under a warrant issued by the defendant *Sandall*, the receiver of taxes in the city of *St. John*, to collect an amount alleged to have been assessed upon the appellant under an act of the legislature of *New Brunswick* (41 *Vic.*, ch. 9) to provide for the widening,

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extension and opening of certain streets in that city, among others, *Canterbury* street.

They also pleaded not guilty, and to the second count never indebted as alleged.

The jury, under the direction of the learned Chief Justice of *New Brunswick*, before whom the case was tried, found for the appellant on the pleas of justification, and "not guilty," and for the respondents on the plea of never indebted.

It was amongst other things alleged, in the second plea of the respondents, that the appellant by an estimate and appraisement, under the act before mentioned of commissioners duly authorized and appointed under that act and duly filed in the office of the common clerk of the city, was duly assessed as the owner of or interested in land fronting on *Canterbury* street, to the amount of four hundred and nineteen dollars and forty-six cents; that payment of the said sum was duly demanded of him by the defendant (*William Sandall*), who had been appointed by the mayor, aldermen and commonalty of the said city to receive and collect the same, and that he, the appellant, failed to pay the same; that subsequently the warrant under which he was arrested was duly issued by the defendant (*William Sandall*), and that the appellant was thereunder arrested and committed to jail. To this plea the appellant, in substance, replied that he never was—

> At any time in any way directly or indirectly the owner of or otherwise in any way legally or equitably, or otherwise howsoever, interested in the lot of land and premises in the said second plea mentioned or any part thereof," nor was he ever "at any time whatever, the owner, occupier, or lessee of any lands and premises in the city of *St. John*, through which the said extension of *Canterbury* street passes, or which are or were affected by the said act of the general assembly, nor had he any interest of any kind whatsoever directly or indirectly, legally or equitably, in any of the lots of land or lands and premises of any kind affected by the said act.

Issue was joined upon the replication by the respondents.

The defence of the mayor, aldermen and commonalty, as well as that of the respondent *Sandall*, was therefore by them, in accepting the issue tendered by the appellant, to depend on their proving that he was liable under the provisions of the act to be assessed. That was the simple issue of fact to be tried. It is not too much to say that so far from any evidence having been given in that direction, it is admitted that the appellant had no land or property fronting on *Canterbury* street or any to be affected by the terms of the act.

That issue was, therefore, in my opinion, properly found in favor of the appellant.

It was not an immaterial but an important issue, as the act limits the right of the commissioners to the assessment of parties who were the owners of, or interested in, lands fronting on the extension of the streets mentioned in the act. The commissioners would, therefore, have no more right to assess a resident of *St. John* whose land was not such as referred to in the act, than they would to tax a resident of *Ottawa* who was not the owner, occupier, or interested in land in any part of *St John.*

It is clear from the evidence, and indeed it was fully admitted, that the assessment upon the appellant was wholly unjustified by the provisions of the statute.

Had the issue not been narrowed by the replication to the one point, by which other allegations in the second plea are to be taken as admitted, I should have been inclined to think the evidence of the notification and demand of payment of the assessment insufficient; and I am not at all satisfied but that previous to the issue of the warrant, evidence under oath of the demand and non-payment of the assessment should have been given to justify the issue of it. Those matters, however, are

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not before us, either in the pleadings or otherwise, and I need give no opinion as to them.

I will now briefly refer to the defence under the plea of "Not Guilty."

None of the respondents were immediately connected with the arrest of the appellant, which was made by the city marshall under a warrant issued by the defendant *Sandall*. If, then, the arrest was illegal, and that the appellant had to pay over four hundred dollars to obtain his discharge from prison, is he entitled to any redress, and from whom?

In the first place, was *Sandall* justified in issuing the warrant? From the best consideration I have been enabled to give to the subject, I am of the opinion he was not. If the commissioners had the right to assess the appellant and did so, and the act provided that the person or persons to be appointed by the city authorities should have authority to demand payment of the assessments made by the commissioners, and issue warrants to collect them, there could be no question of the right of *Sandall* to issue the warrant in question; but the right to issue the warrant depends upon the right of the commissioners to assess the appellant. The legal act of the commissioners is, therefore, the foundation and source of the authority of *Sandall*. The act makes the report of the commissioners, where no objections are made, or provided by it, final and conclusive and binding on the mayor, aldermen, and commonalty, and "upon the *owners, lessees, parties or persons interested in and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report.*" The appellant in this case was assessed for a lot owned and occupied by another. The latter, and not the appellant, is the party to be bound by the act of the commissioners; and the statute provides that the assessment shall be a lien on the lands assessed.

By virtue of that provision the lot in question is now under a lien for the amount of the assessment, unless removed by irregularities or laches. The appellant was not in any way bound by the act of assessment, as the commissioners had no authority to assess him. Their act in that respect being wholly void, no one acting to the injury of another can justify under it. Every one who interferes with the liberty or property of another, either personally or by means of process issued, must shew a legal right to do so, and the responsibility cannot be shifted by alleging the wrongful act of another by which the party inflicting the injury is induced to do it. A party in the position of the respondent *Sandall* must act at his peril. If the commissioners had no right to assess the appellant, he (*Sandall*) was not bound to issue the warrant. It is alleged that the statute made it his duty to issue warrants in all cases where the assessments were not paid. That duty is, however, limited to assessments legally made. It may be said that the respondent *Sandall* was not to inquire as to the regularity of the assessments. That in some cases may be correct, but in this one the commissioners had a prescribed and limited jurisdiction, and it was the duty of the respondent *Sandall*, before issuing his warrant, to satisfy himself that in making the special assessments the commissioners had not exceeded their jurisdiction. The obligation may seem a hard one, but every one who accepts a public office of emolument has to assume responsibilities which are necessary for the safety and protection of the rights of others. I am of opinion that the respondent *Sandall* was not justified in issuing the warrant, and that the two issues were properly found against him.

The next and only remaining question is as to liability of the other defendants.

The report of the commissioners improperly and ille-

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gally assessing the appellant was laid before the common council on the 18th of Dec., 1877, and that body appointed *Sandall* to collect the assessments (including that of the appellant) on the 27th of February following. The mayor, aldermen and commonalty, therefore, appointed him to collect from the appellant the illegal assessment, and upon failure to pay it, to issue the warrant under which he was arrested. Are they not responsible for that illegal act? Can they be excused when a wrong resulted by the allegation of the illegal act of the commissioners? They were equally bound as *Sandall* to consider the prescribed and limited powers of the commissioners, and were not only not bound to order the collection of the assessment from the appellant, but, on the contrary, to prevent, as they had the power, their own appointee making the collection. It cannot be successfully contended, that the mayor, aldermen and commonalty had not the power to order the name of the appellant to be struck out from the list of assessments. I have carefully considered the reasons for the judgments given in this case by the learned judges in the court below, and have considered also the case of *Hatheway* v. *Cummings* (1) referred to by two of them, but cannot agree with them as to the distinguishable features of the two cases.

In the one just cited, the plaintiff sued in trespass for the seizure of his horse and waggon under a warrant issued by the defendant, who was treasurer and collector of taxes at *Fredericton*, for non-payment of taxes. The court unanimously found that the taxes were illegally assessed, and sustained a verdict for the plaintiff. The court found that the assessors had illegally assessed the plaintiff, and the treasurer and collector was found to have acted illegally in issuing the warrant to enforce the assessment. They did not hold that the treasurer

(1) 6 Allen N. B. R. 162.

and collector was bound by the illegal act of the assessors and to give effect to it by the issue of his warrant. It might have been as well said in that case, as in this, that they were all acting under statutory powers—for, in the former the whole matter of the assessment was regulated by statute, and the duties of those to make the assessment and collect them were specially prescribed. The main, and, indeed, only difference that I can discover is, that in the one case the assessors were appointed by the civic authorities, while, in the other, the commissioners were appointed by the Governor in Council. Both were, however, city assessments, and when collected, were to be paid to the city treasurer. It matters little in the circumstances of this case who appointed the commissioners.

It is, however, contended that in this case the city authorities were nothing but conduit pipes to pass the amount of the assessments from those taxed to those who were entitled to it under the appraisement—that, in fact, the mayor, aldermen and commonalty were trustees of a naked trust without interest in the subject-matter; that no privity existed between them and their appointee, and that as to them the defendant *Sandall* was not in the relation of a servant. I have already shown that they appointed *Sandall* and authorized him to do the illegal act complained of. That, in my judgment, would be sufficient to bind them for his act in carrying out their requisition to him. When, however, we consider the object and purview of the act, it is plain that the city authorities, as representing the city, were interested as owners and principals throughout. By the act the commissioners were authorised to fix the proportion the mayor, aldermen and commonalty should pay of the appraisements for damages to persons whose lands were taken for the improvement of the streets. In reference to two

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of the streets the liability of the city was limited to twenty thousand dollars. In reference to one there was no such limit; but in reference to another, the act provided the city was to pay one-half, and in the several clauses the liability of the city to pay such proportions was enacted because "of the public advantage accruing to the city of *St. John*" by the widening of the several streets. In reference to Canterbury street there is no such provision for requiring the city to pay any part of the appraisements, but on the filing of the report of the commissioners with the necessary plans, it was enacted in section 10, that all the lands taken for the widening and extension of the streets should vest in the mayor, aldermen and commonalty for the purpose of the said streets. Here, then, there was a direct interest from the time of the first proceeding after the act was passed. The city was to be benefited and advantaged, and it was to own the lands upon which the improvements were to be made. It was to pay thousands of dollars for the improvements, and the mayor, aldermen and commonalty were authorized to borrow money on city debentures to pay the sums before mentioned with the charges of the commissioners and other disbursements mentioned in section 16, and also fifteen thousand dollars for "cutting down, opening, making and finishing of said streets so widened, extended and opened under this act," as provided in section 17.

Although there is no evidence of the fact before us, we may fairly assume that the act was passed at the instance of the mayor, aldermen and commonalty, and that it was drafted and prepared under their direction. I could not imagine such a thing as the legislature dealing with the subject except on the application of the city authorities.

By the act they are authorized and undertake to have the contemplated improvements made. They are

the moving parties and the principals from beginning to end, and they, representing the city, have the power over the whole of the proceedings after the report of the commissioners was filed. They may not have been answerable for the illegal act of the commissioners, as they did not appoint them, but they had the power to stay proceedings and could refuse to adopt any illegality or irregularity previous to the authority given to the defendant *Sandall* to collect an illegal assessment. Unless they did so I think they are answerable for the consequences. I think, for the purposes of this suit, the mayor, aldermen and commonalty must, and should, be considered the principals, and *Sandall*, the other respondent, their agent; and if not originally answerable for his illegal issue of the warrant, they certainly made themselves answerable when adopting his wrongful act by receiving the proceeds of it.

It might be contended that the appellant could, under the latter clause of section 14, recover from the owner of the lot in question the amount assessed upon the lot if paid by the former, but even had he that recourse under the statute it would not justify the illegal assessment of a party not liable to it; nor do I think the provision was intended to cover any such case; nor do I think the legislature intended that money should be extracted from a person not in any way within the provisions of the act, and the only indemnity provided being the right of action against one between whom and the party so paying there was no privity in respect of the land for which he was assessed, and from whom he might never be able to recover it. I am of opinion that the mayor, aldermen and commonalty were primarily liable for the illegal act of the respondent *Sandall*, but their adoption of his wrongful issue of the warrant, by receiving and retaining the money recovered through the illegal arrest and imprisonment of the

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appellant, is sufficient, in my opinion, to put the case beyond any reasonable doubt.

I think, for the reasons I have given, that the judgment of the court below should be reversed, the rule for setting aside the verdict for the appellant discharged, and judgment entered for him for the amount of the verdict in his favor, with costs.

TASCHEREAU, J. :—

For the reasons given by the Chief Justice, whose notes he has kindly given me an opportunity to see, I am of opinion that the corporation of *St. John* cannot be held liable for the trespass complained of by the plaintiff in this case. The rule *respondeat superior* cannot apply here, for the very good reason that the corporation was not *Sandall's superior* in the matter of the execution of the warrant against the plaintiff. *Sandall* was not acting for and in the name of the corporation, or for its benefit, or in its interest, when he executed this warrant. The corporation was only the channel through which this money had to pass, and had no control whatsoever over the proceedings. *Sandall* was bound to act—the statute ordered him to do so. The plaintiff has no right of action against the corporation, as I view the case.

GWYNNE, J. :—

That the defendant *Sandall* was liable to have rendered against him the verdict rendered by the jury upon the first count of the declaration does not, in my judgment, admit of a doubt, and I am of opinion also that the other defendants, the mayor and commonalty of the city of *St. John*, whom the jury have found to have adopted the act of the defendant *Sandall*, were also equally liable with him.

The plaintiff was arrested under a warrant signed by

the defendant *Sandall*, who was a servant of the corporation of the city of *St John*, filling as such the offices of receiver of taxes and of chamberlain of the city. Under this warrant so signed the plaintiff was arrested and detained in custody in the common gaol until he was obliged to pay, and did pay, to the defendants, the corporation, in the office of the chamberlain of the city, the sum of $137, and until a clerk in the office of the chamberlain signed a paper acknowledging the receipt of the above sum, and authorizing the discharge of the plaintiff from custody.

To discharge himself from liability for issuing the warrant and causing the arrest of the plaintiff thereunder, it is plain that the defendant *Sandall* must plead and prove a legal justification. He attempts to do this under a provincial statute, 41st *Vic.*, ch. 9. This was an act passed for the purpose of widening certain streets in the city of *St. John*, and among others, *Canterbury* street. The act authorized the Lieutenant-Governor in Council to appoint three commissioners to cause a survey and plan of the proposed improvement, and of the several lots of land fronting on the street proposed to be widened or extended, to be made and prepared by the city engineer, and that so soon as such plan should be made the commissioners should assess and apportion the whole estimated value of the land required and taken for the extension and opening of *Canterbury* street, upon the parties owning or interested in any land along the line of such extension, and in the opinion of the commissioners benefited thereby, according to their best judgment, in proportion to the benefit accruing to such parties respectively from such extension and opening of *Canterbury* street.

By sec. 10 it was enacted that the commissioners, upon completing such estimate, assessment and apportionment, should file with the common clerk of the city the

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said plan, and should forthwith report their proceedings and all matters and things connected with their duties as such commissioners to the common council of the city, and that in such report should be set forth the names of the respective owners, lessees, or persons entitled to, or interested in, the lands mentioned in the report so far as they could ascertain them; and a sufficient designation of the land required for widening and extending the street, and also of the lots fronting thereon so assessed for such benefit as aforesaid; and also the several sums assessed as compensation for the value of the land taken for the street; and also the sums assessed for the benefit of the respective owners of the fee in such lands, and of the respective owners of a leasehold estate, or other interest therein, and that upon such report being filed the same should be final and conclusive, as well upon the mayor, aldermen and commonalty of the city as upon the owners, lessees, parties or persons interested in and entitled unto the lands mentioned in the said report, and that the said mayor, aldermen and commonalty should become possessed of the lands mentioned in the report that should be required for the purpose of the widening and extending the street, to be appropriated and used for that purpose, and for none other.

By the 11th sec. it was enacted, that the commissioners, after completing their estimate, and at least fourteen days before they should make their report to the common council, should deposit a copy of such estimate and assessment in the office of the common clerk for the inspection of whomsoever it might concern, and should give notice by advertisement, to be published in at least two of the public newspapers printed in the city, of the deposit thereof, and of the day on which it could be finally filed. The section then made provision enabling any person whose rights might be affect-

ed thereby to state his objections to the commissioners, and in case they should be unable to agree making provision for an arbitration for the purpose of varying the amount estimated.

Now, the words in this section coming under the designations involved in the words, "for the inspection of whomsoever it might concern," and "any person whose rights might be affected thereby," plainly mean the persons before spoken of as the parties to be assessed as the owners of or interested in land benefited in the opinion of the commissioners, and the owners of land taken for the street who were entitled to receive compensation therefor: these were the only persons whose rights could, under the act, be affected by the commissioners' estimate; a person having no interest whatever in land taken, or in land fronting on the street, and which could derive benefit from the improvement, could have no possible object in inspecting the estimate made in the commissioners' report, and could have no possible right to dispute the amount of the estimate and assessment made in favor of the owners of land taken, as against the owners of land benefited, in the opinion of the commissioners.

By the 12th sec. it was enacted, that the mayor, aldermen and commonalty of the city, within one month after the several assessments, made as in the act is provided, for the purposes of the act, should be collected and received by them, should pay, to the respective parties mentioned or referred to in the report in whose favor any sum should be estimated, the respective sums so estimated as such sum, if any, as they might in like manner be declared liable to pay for any benefit to them respectively accruing from the widening and opening of the street; and that any person entitled to receive such sum might, at any time

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after application first made to the corporation, sue for and recover the same.

From this section it appears that after the commissioners' report should become final, as well upon the corporation as upon the owners of, and persons interested, in lands taken or benefited, the collection of the amounts charged upon the owners of the lands benefited, and the duty of paying the owners of lands taken the amounts assessed in their favor, was by the statute left with the corporation, who became the owners of the lands so taken for the street; and by the 14th section of the act it was enacted, that the several and respective sums by the act directed to be paid to the corporation should be a lien and charge upon the lands in the report mentioned and upon the estate and interest of the respective owners and lessees of such lands for which such sums should be so assessed by the commissioners, and upon the owners thereof, or parties interested therein, and that as well the said owners and proprietors thereof and parties interested, and also the occupants, should be respectively liable to pay on demand the respective sums mentioned in the report at which the respective lands occupied by them, or in which they were interested, were assessed, to such person as the mayor, aldermen and commonalty should appoint to receive the same; and in default of payment of the same that it should be lawful for, and the duty of, the receiver of taxes of the city to issue execution under his hand to levy the same, with lawful interest thereon, from and after thirty days from the time of filing the said report, in the same manner and with the like effect, power and authority as upon any assessment of rates and taxes made by the assessors of rates in the said city.

Now, "the receiver of taxes" here named is an officer of the corporation, and is plainly assigned the duty here

mentioned of collecting by process of law the sums made recoverable by the act, because of the position held by him as such officer and as a duty annexed to his office as a servant of the corporation, in like manner as is imposed upon him the duty, in such his capacity, of collecting by process of law all assessments and rates made payable to the corporation, who have control of such their officer and are empowered by 22nd *Vic.*, ch. 37, sec. 29, to make by-laws for the government of the receiver of taxes (among other officers of the corporation) and to order and direct the mode in which he shall execute his duties, and to impose penalties for the enforcing thereof. The form of execution which the receiver of taxes is authorized to issue for enforcing payments of rates payable to the corporation is given in 24 *Vic.*, ch. 29, and it purports to authorize any marshal of the city

To levy, by sale of the goods and chattels of *A. B.* within the city, the sums which have been assessed upon him, and also for costs of execution and levying, the whole being and have that money at my office on the day of and for want of goods and chattels whereon to levy take the said *A. B.* and deliver him to the keeper of the goal of the city and county of *St. John*, who is hereby required to receive him and keep him sasfely days unless the same, with costs, be sooner paid and make return hereof at the day and place aforesaid.

Under a warrant in this form, signed by the defendant *Sandall* as receiver of taxes of the city of *St. John*, and filled up with a direction to levy of the goods and chattels of the plaintiff the sum of $437 and for want of goods and chattels, &c., to take and deliver him to the keeper of the gaol, who should keep him safely 360 days, unless the above amount, with costs,&c , be sooner paid, the plaintiff was arrested and detained in custody until he was obliged to pay the above sum to the city corporation through their chamberlain, which office, as well

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as that of receiver of taxes, the defendant *Sandall* also filled.

In the report of the commissioners, filed in the office of the clerk of the common council, the name of *John McSorley* is erroneously entered as the owner of a lot on *Canterbury* street, which lot the commissioners assess as benefited by the proposed improvement to the above amount of $437, although on the plan accompanying the report one "*McSorley*," not giving any christian name, is set down as owner. It is now admitted that the plaintiff is not, and that he never was, the owner, or occupant of, or interested in, the lot in question, or of any land on the street, or mentioned in the report. Under these circumstances, it is impossible to contend that the act in question imposes upon the plaintiff any liability to pay the amount assessed as the benefit accruing to the lot in question, or any part of such sum; the act makes the amount assessed a lien and charge upon the lot, but the personal liability which the act imposes is only upon the owner or occupant, or party interested therein, and as the plaintiff fills none of these characters the act affords no justification for his arrest, and the defendant *Sandall* is therefore beyond all question liable on the count for false arrest.

The corporation are in my opinion, equally so. They do not plead separately from *Sandall*. They join with him in their pleas, one of which is a justification under authority of the act, and if the act does not justify him it cannot justify them, and the plaintiff is entitled to have the issue joined upon this plea decided in his favor. But the corporation have also pleaded not guilty, and although matters pleaded in one plea cannot be read as admissions upon an issue joined on another, still, matters given in evidence in relation to an issue joined on one plea, may, if applicable to an issue joined upon another, be applied to the determina-

tion of the latter. Now, it being established that the act in the particular case gave no authority to the receiver of taxes of the city to issue an execution authorizing the arrest of the plaintiff, we must regard the writ as issued by a servant of the corporation under their control without any legal authority to justify its issue; the question then is, was the act authorized by the corporation, or was it done by their servant in their interest, or for their benefit, and have they accepted and retained the benefit, or have they adopted the act of their officer as their own. These were questions wholly for the jury to pass upon.

As to this, then, we find that, in order to enable the receiver of taxes to issue any writ under the act, it was necessary that the corporation, who were to receive the money, should appoint some person to demand and receive it on their behalf. They accordingly, by resolution in council, appointed their chamberlain to demand and receive from the persons named in the commissioners' report the sums therein also mentioned (and among these from the plaintiff the amount of $437). The defendants themselves gave evidence of this appointment and of a demand made thereunder. The object of this evidence was plainly to rely upon it under the defendant's plea of justification, in which the corporation joined with their officer *Sandall*, as warranting the issue of the writ under which the plaintiff was arrested. We see, by the law relating to the duties of the officer who signed this writ, that he is under the control of the corporation, who have authority to order and direct the mode in which he shall execute his duties. It was proved also, that the corporation had in their possession the assessment roll of that same year, which, upon reference to it, shows that the plaintiff was not the owner, or occupant of, or assessed for, any property on *Canterbury* street. They had the means, therefore,

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in their possession of knowing that the report of the commissioners, in setting down the plaintiff as the owner of the lot in question, which they estimated to be benefited by the opening of *Canterbury* street to the amount of $437, was erroneous We find also, that after the plaintiff's arrest, and while he was in custody, the above amount was paid under protest to the corporation, who not only received it, but to this day retain it under a claim of a right to receive and retain it under the statute relied upon in their plea of justification. We find also, that the plaintiff was detained in custody until the above sum was paid to the corporation, and until they, by their officer, in their chamberlain's office, gave a receipt therefor, and authorized thereupon the discharge of the plaintiff from custody. Under these circumstances, the jury was perfectly justified in renduring their verdict against the corporation jointly with the defendant *Sandall*, and the charge of the learned Chief Justice who tried the case to the jury upon the trespass count was unexceptionable. Indeed, it being established that the act relied upon as a justification of the plaintiff's arrest did not warrant his arrest, its having taken place is upon the evidence explicable only as the act of the corporation through their officer, who is under their control, and for the purpose of compelling thereby payment to the corporation by the plaintiff of the amount received from him, and which he was not legally liable to pay. The corporation have also, in effect, made their authority for, and consent to, the plaintiff's discharge conditional upon their receipt of the money levied from him by force of his illegal arrest; and this is the view which, it appears to me, the jury rightly and naturally took of the matter. The corporation, I can well believe, thought, as indeed was their main contention at the trial, that they were justified under the act in availing themselves of this extraordinary and

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exceptional process to enforce payment to them of the amount which they received, but in this we are bound to say they mistook the law, and come within the scope of the maxim *ignorantia legis non excusat.*

Allow appeal with costs and order judgment to be entered in the court below upon the verdict *nunc pro tunc* if necessary—that is of the term in which the verdict was rendered before the death of *Sandall.*

Appeal allowed with costs.

Attorneys for appellant: *James Straton.*

Attorney for respondent: *W. H. Tuck.*