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Dec. 1, 2, 3.
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*June 8.

RICHARD WEST AND MARY JANE WEST (WIFE OF THE SAID RICHARD WEST) BY EDWARD HENRY BOODY HER NEXT FRIEND (PLAINTIFFS) ..... APPELLANTS;

AND

THE CORPORATION OF THE VILLAGE OF PARKDALE AND THE CORPORATION OF THE CITY OF TORONTO (DEFENDANTS)..... RESPONDENTS.

ROBERT CARROLL AND WILLIAM HENRY DUNSPAUGH (PLAINTIFFS) APPELLANTS;

AND

THE CORPORATION OF THE VILLAGE OF PARKDALE AND THE CORPORATION OF THE CITY OF TORONTO (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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Municipal Corporation—Construction of subway by—Authorized by special statute—46 Vic. ch. 45 (Ont.)—Agreement with Railway Companies—Order in Council under 46 Vic. ch. 24 (D.)—Work done as agent of companies or as principal—Injury to property by construction of subway—Corporation a wrongdoer.

A special statute in Ontario (46 Vic. ch. 45) authorized the municipalities of the city of Toronto and the village of Parkdale, jointly or separately, and the railway companies whose lines of railway ran into the city of Toronto, to agree together for the construction of railway subways; provision was made in the Act for the issue of debentures to provide for the cost of the work, and the by-law for the issue of such debentures was not required to be submitted to the ratepayers; there was also provision for compensation to the owners of property injuriously affected by such work, such compensation to be determined by arbitration under the Municipal Act if not mutually agreed upon. The municipalities not being able to agree, Parkdale and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on the application of Parkdale and the railway companies to the Privy Council of Canada, purporting to be made under 46 Vic. ch. 24 (D.), an order of the Privy Council was obtained authorizing the work to be done according to the terms of such agreement. The municipality of Parkdale then contracted with one G. for the construction of the subway, and a by-law providing for the raising of Parkdale's share of the cost of construction was submitted to, and approved of by, the ratepayers of that municipality. In an action by the owner of property injured by the work:

Held,—Per Ritchie C.J., Fournier and Henry JJ., that the work was not done by the municipality under the special Act, nor merely as agent of the railway companies, and the municipality was therefore liable as a wrongdoer.

Per Gwynne J.—That the work should be considered as having been done under the special Act, and the plaintiffs were entitled to compensation thereunder.

Per Taschereau J.—That the work was done by the municipality as agent of the railway companies and it was therefore not liable.

APPEAL from a decision of the Court of Appeal for Ontario (1); reversing the judgment of the Divisional Court (2); and of Wilson C.J. (3).

(1) 12 Ont. App. R. 393. (2) 8 O. R. 59.
(3) 7 O. R. 276.

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The material facts of the case are as follows.

By a special statute of the Ontario Legislature, 46 Vic. cap 45, authority was given to the councils of the city of Toronto and the village of Parkdale, jointly or separately, to construct certain railway subways, to enter into agreements with any or all of the railway companies whose tracks crossed the public streets lying within the limits of the said city and village for the construction of such subways, and to pass such by-laws and make all such agreements as might be necessary for the performance of the work; provision was made for compensation to any person whose lands might be injuriously affected by such construction, to be determined by arbitration under the Municipal Act if not mutually agreed upon; and the respective councils were authorized to issue debentures to provide for the cost of the proposed subways and were not required to submit to the rate-payers any by-law ordering said debentures to issue.

The two councils not being able to agree as to the mode of doing the work Parkdale and the said railway companies entered into an agreement for the construction of a subway partly in Parkdale and partly in Toronto, and obtained an order of the Privy Council of Canada, under 46 Vic. cap. 24, based on a report of the railway committee, authorizing the construction of such subway under the said agreement.

The by-law of the council of Parkdale approving of this agreement and providing for the issue of debentures was submitted to, and ratified by, the rate-payers, and a contract was entered into by the council with one G. who proceeded to construct such subway.

Separate actions were brought by West and wife and by Carroll and Dunspaugh against the corporations of Parkdale and Toronto for injury to their respective properties by the lowering of the street

under which such subway was made. The statement of claim in each case alleged that the work was done under the special Act and that the defendants had not passed by-laws as thereby required, in consequence of which the plaintiffs could not obtain compensation under the Municipal Act.

The defence raised by Parkdale was, that the work was not done under the special statute, but was done by the municipality as the agents of the railway companies.

On the trial it was agreed that if the court should find the defendants liable a reference might be had to determine the amount of compensation.

The two suits were carried on and argued together, and on the hearing before Wilson C J., judgment was given for the plaintiffs and an order for reference made. Parkdale being ordered to pay the costs of the defendants, the city of Toronto. This judgment was affirmed by the Divisional Court but reversed by the Court of Appeal. The defendants in both suits then appealed to the Supreme Court of Canada, and an order was made consolidating the two appeals.

S. H. Blake Q.C. and *Lash* Q.C. for the appellants the Wests, and *R. Snelling* for the appellants Carroll and Dunspaugh, contended that Parkdale could not be considered agents of the companies ; that they entered into the agreement with the contractor for the construction of the subway ; they agreed to bear an equal share with each company of the cost of the work; and they acted through as principals and not as agents. It was also argued that the Privy Council could not authorize this work, which would be an interference with provincial rights, and that there was no recourse against the railways as no land had been taken.

The following authorities were cited in addition to those mentioned in the previous reports. *Bissell* v. *The*

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Michigan Ry. Co. (1); *Miners' Ditch Co.* v. *Zellerbach* (2); *Clegg* v. *Dearden* (3); *Bank of New South Wales* v. *Owston* (4); *Barwick* v. *English Joint Stock Bank* (5); *Pearsall* v. *Brierley Hill Local Board* (6).

McCarthy Q. C. and *McDonald* Q. C. for the respondents referred to *White* v. *Gosfield* (7); *Richett* v. *The Metropolitan Ry.* (8); Story on Agency (9); Angell & Ames on Corporations (10); *London & Birmingham Ry. Co.* v. *Winter* (11); *Western Bank of Scotland* v. *Addie* (12); *Ex parte Parkes* (13); *Fotherby* v. *The Metropolitan* (14).

Sir W. J. RITCHIE C. J.—On the 2nd day of September, 1884, the Hon. C. J. Wilson delivered his judgment in this case, which is reported at 7 O. R. 270, and the formal judgment entered thereupon is in the words following:—

(1) This action coming on for trial before this court at Toronto, at the special sittings appointed for the trial of actions in the Chancery Division, on the sixth day of May last past, in the presence of counsel for all parties, upon hearing read the pleadings, and upon hearing the evidence adduced and what was alleged by counsel aforesaid, and upon motion of Mr. Osler Q. C., of counsel for the defendants the corporation of the village of Parkdale, it was ordered that the said trial should stand adjourned until the 12th day of the said month of May, and that the said defendants should be at liberty to deliver an amended statement of defence, and that the plaintiffs should have liberty thereupon to deliver an amended statement of claim; and this action having again come on for trial on the said 12th day of May last past, in presence of counsel for all parties, upon hearing read the said amended pleadings, and upon hearing the further evidence adduced, and what was alleged by counsel aforesaid, this court was pleased to direct that this action should stand over for judgment; and the same coming on this day for judgment:

(1) 22 N. Y. 258.
(2) 37 Cal. 543.
(3) 12 Q. B. 567.
(4) 4 App. Cas. 270.
(5) L. R. 2 Ex. 259.
(6) 11 Q. B. D. 739.
(7) 10 Ont. App. R. 555.
(8) L. R. 2 H. L. 202.
(9) Sec. 16.
(10) Sec. 186, 278.
(11) 1 Cr. & Ph. 57.
(12) L. R. 1 Sc. App. 145.
(13) 9 Dowl. 614.
(14) L. R. 2 C. P. 188.

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(2) This court doth declare that the plaintiffs are entitled to recover from the defendants, the corporation of the village of Parkdale, compensation for the damages (if any) sustained by them by reason of the wrongful acts of the said defendants, complained of in the statement of claim herein, and doth order and adjudge the same accordingly.

(3) And this court doth further order and adjudge that it be referred to his honor the junior judge of the county of York, an official referee, to take an account of the damage (if any) sustained by the plaintiffs, or either of them, by reason of said wrongful acts, and to fix the compensation proper to be paid to them, or either of them, in respect thereof.

(4) And this court doth further order and adjudge that the defendants, the corporation of the village of Parkdale, do pay to the plaintiffs and to the defendants, the city of Toronto, their costs of this action up to and inclusive of this judgment, and including the costs of the motion for an injunction herein, forthwith after taxation thereof.

(5) And this court doth further order and adjudge that the defendants, the corporation of the village of Parkdale, do pay to the plaintiffs the amount which the said referee may find proper to be paid to them, or either of them, for compensation for damages as aforesaid, together with their subsequent costs, to be taxed as aforesaid forthwith after the said referee shall have made his report.

The contention of the defendants, as clearly set forth in their factum, is that the Parkdale council had no power under the Ontario act, 46 Vic. cap. 45, to do this work, and that they did not do it under the Act, That they assumed to act only under the agreement with the railway and the order in council of the 27th of March, 1883. In the words of their factum "they wholly deny having acted under the Ontario act," and they further say: "in any view of the effect of the act the fact was, and it was clearly established, that the respondents did not do, or purpose to do, the work under its provisions, but that the work was done under the railway act and the order of the Privy Council made thereunder," and which justified what they did. That if the act was wrongful it was contended that it was *ultra vires* on the

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part of the Parkdale council to construct the subway, and on this ground the corporation of Parkdale is not liable.

All the judges of the courts below have concurred in the opinion that the work was not done under the Ontario act, 46 Vic., and I have been unable to arrive at the conclusion that on this point they were wrong.

It cannot be denied that the plaintiffs have been seriously damnified and ought to recover compensation therefor, and the real question in this case is: Are the defendants, the village of Parkdale, liable to the plaintiffs for such damage?

The village of Parkdale having entered into an agreement with the four railway companies for the performance of this work, and having taken the control of the work, and having contracted with Mr. Godwin for the execution of the work, how can they escape liability to make compensation to the parties who have been injured by such work, either under the statute or as wrongdoers?

Chief Justice Wilson was of opinion that the work was not being done under the special act; that the village had not observed its terms and had not assumed to act under it, but only under the order in council; that they had exceeded their powers as to all the work done in the city of Toronto; and that applied to the action of West and his wife whose property is situate in Toronto; and also that the village is not authorized by the order in council to do the work, and could not be so authorized, as the order could have no binding effect in law. But if the order could confer such a power the village would not be liable, because a liability arises under it only in those cases in which lands have been taken and none have been taken here; and as the village has not proceeded under the special act, it cannot be compelled to go to arbitration; that they

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are, in effect, wrongdoers, and answerable as such for the damage they have caused to the plaintiffs and others by reason of these works; and he found that the village of Parkdale is doing the work in question unauthorizedly, and on that ground, wrongfully, and that they are bound to make compensation to the parties injured, and referred the question of compensation to the master.

Had the municipality proceeded to do this work under the provisions of the Ontario statute 46 Vic. cap. 45, as in my opinion it should have done, the compensation now claimed would have been provided for. The corporation did not do this, but, on the contrary, by works carried on under their control, and by their contractor, unquestionably injuriously affected the lands of the plaintiffs; and not having proceeded under the Ontario statute the plaintiffs cannot obtain compensation in the manner provided for by that act. Are they therefore to be remediless? I think not. They are, to the injured parties, in my opinion, immediately primarily liable. In doing this work I think the municipality of Parkdale acted as, and must be treated as, principals and not as agents, the construction of the subway being, as recited in the Parkdale by-law, essential to the interests of the village. The work performed being just what the act authorized to be done, I think they cannot escape liability by alleging that they did not do, or assume to do it, under the act, or that having power to do the work, they did it in a manner not authorized by the act and without complying with the conditions required by the act.

The Ontario act 46 Vic. cap. 45, authorized the councils of Toronto and Parkdale, jointly or separately, to do work of the kind in question, and provided that the councils should make to the owners or occupiers or other persons interested in the real property entered

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upon, taken or used by them or either of them in the exercise of any of the powers conferred upon them or either of them by the act, or injuriously affected by the exercise of such powers, due compensation for any damage resulting from the exercise of such powers beyond any advantage derived from the works. Is it not, then, clear that the doing of this description of work is not a matter *ultra vires* the corporation of Parkdale; in other words, not beyond the scope of their corporate powers? They should have proceeded under the Ontario statute; they did not do so, but undertook to do the same work in a different, and unauthorized, manner, and now seek to escape from making due compensation to parties injuriously affected thereby; in other words, because they did not choose to act strictly in accordance with the law they can, by acting contrary to it, and so making themselves wrongdoers, obtain the same benefit they would have done if their proceedings had been regular and proper and at the same time injuriously affected real property, and through the instrumentality of their irregular and improper proceedings escape the responsibility of making compensation. This, I humbly think, law, reason and common sense alike repudiate. The village is the only contracting party and pays by funds raised from the property holders within the municipality, and I cannot see how the railway companies agreeing with the municipality of Parkdale to pay a part of the expense of the work can relieve Parkdale from making compensation by paying for the damage they have caused the plaintiff and others by reason of these works. The order in council imposed no obligation on the village of Parkdale to execute this work or to do anything whatever in connection therewith. The order in council required the railway companies to do the work and pay the expense and damage resulting therefrom.

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I think this appeal should be allowed, and the judgment of Chief Justice Wilson and of the Divisional Court should be restored.

FOURNIER J.—I am in favor of allowing these appeals for the reasons given by the learned Chief Justice, and also for those given by Chief Justice Wilson, whose judgment, I think, should be restored.

HENRY J.—These actions were brought by the respective plaintiffs for an alleged damage to their property by certain public works, and I think the evidence shows very clearly that the plaintiffs have been injured by the work done. The law as to public nuisances is very plain, and where one is committed, and a party has suffered special damage thereby, he can bring an action. Now it is evident that the parties here did sustain serious damages by the work done. The defendants justify under an order in council, and claim that they were merely the servants of a railway company, or certain railway companies, in doing the work. But in order to sustain that position they would require to show that the railway companies were authorized to do this work. In that I think they have wholly failed. The evidence does not show any such agency. They were, in fact, principals, and contributed a portion of the cost of the work.

The evidence is very clear that this corporation authorized the doing of the wrong complained of. By-laws were passed under the seal of the corporation, and the whole of the work which caused the injury complained of was done under the authority of the corporate seal. They are therefore primarily liable to the parties to whom the wrong was done.

In looking over the statutes I have come to the conclusion that there was no justification for this injury. I think the law is very plain and very easy of applica-

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tion to a case of this kind. I agree with the reasons given by His Lordship the Chief Justice and with the conclusion at which he has arrived; and also in the conclusion arrived at by Chief Justice Wilson in the court below.

I think the appeal should be allowed.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. If Parkdale was to be considered as having acted under the Ontario statute no action would lie, but the plaintiffs only remedy would be by arbitration. But Parkdale did not act under the Ontario statute. That is clear, it seems to me, and was so found, as a matter of fact, by Chief Justice Wilson, and, if I mistake not, by all the judges in the courts below who have had the case before them. The debentures issued were certainly not those authorized by that statute, and the submitting of the by-law to the votes of the ratepayers in the face of a clause which says that any by-law under the act need not be so submitted is conclusive evidence that Parkdale did not purpose to build this sub-way under the act. I cannot see that, such being the case, the appellants can say to Parkdale as they do in this case: "You, in fact, did not act under the statute, but you ought to have done so. You have acted so as not to be liable, but you ought to have acted so as to be liable, and, therefore, you are liable." Then, if not acting under the order of the railway committee Parkdale was a wrong-doer, acting clearly without the scope of its powers, and in West's case even outside of its territorial limits, this action consequently does not lie against the corporation (1). But if, as undoubtedly is the case, Parkdale built this sub-way for the railroad companies, it cannot be denied that these companies had the right to build it. Then they were at liberty to build it themselves, or to employ Parkdale to

(1) *Smith* v. *Rochester*, 76 N. Y. 509, and authorities there cited.

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do it as their agent. If Parkdale had not the power to so act as agent, their doing so was *ultra vires* of such a character that no action lies against them. And if they had the power to act as agents of the companies, then the order of the Privy Council protects them from the action of the plaintiffs. And could they possibly be held liable for the companies, the only remedy to the plaintiffs under the railway act is again by arbitration.

For the reasons given by Burton, Paterson and Osler JJ., in the Court of Appeal, I would dismiss the plaintiffs' action. Their only recourse is against the companies.

GWYNNE J.—That a most serious injury, indeed one of the very greatest magnitude, has been inflicted on the plaintiffs by the work performed by Godson under a contract executed by the corporation of the village of Parkdale under their corporate seal cannot admit of a doubt, but the corporation contend that they are not responsible to the plaintiffs for this injury, for the reason that, as is alleged, they only entered into that contract as agents of certain railway companies who, as is also alleged, were under a legal obligation to do the work, while on the part of the plaintiffs it is suggested that the corporation having power and authority to do the work, subject to a liability to the plaintiffs to indemnify them, now pretend that in executing the contract with Godson they were acting only as agents of the railway companies, under the impression that the work could thus be performed by them without their being liable to indemnify the plaintiff. If the law not only authorizes but, as is contended, requires the railway companies to do the work and exempts them from all responsibility to the plaintiffs for the injury done to them, and if upon a proper understanding of the facts of the case the cor-

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poration of Parkdale are to be regarded in the transaction merely as the agents of the railway companies in doing an act lawful for them to do the result will be that the plaintiffs will be deprived of all means of obtaining redress for a most egregious wrong; but before arriving at this conclusion it will be necessary to examine with critical acumen two acts of parliament, the one an act of the Legislature of Ontario and the other of the Dominion Parliament.

On the 1st of February, 1883, an act respecting the city of Toronto and the village of Parkdale was passed by the legislature of the province of Ontario 46th Vic. ch. 45.

The preamble of that act recites as follows:—

(His Lordship here read the preamble and first section of the act.)

It is to be observed that the corporations of the city of Toronto and the village of Parkdale are the promoters of the act; it is passed upon the petitions of those corporations, respectively, as the parties having a peculiar interest in procuring the construction of the works authorized by the act; and by this first clause power is given, first, to the two corporations to enter into an agreement with each other as to the construction and future maintenance of the works; but lest they should be unable to agree provision is made, secondly, that the several railway companies, whose tracks cross any of the public streets within the limits of the city of Toronto and village of Parkdale, may all jointly, or any of them separately, enter into such agreement with the city of Toronto and the village of Parkdale jointly, or with either of those corporations separately, for the construction and future maintenance of the works authorised by the act as they may deem necessary for the safety and protection of the persons and property of all persons concerned.

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By the 2nd section it is enacted that:

(His Lordship here read the second section).

The object of this section primarily seems to be to make provision that either of the said municipalities, in case they should not be able to agree upon such a plan of the proposed works as should be undertaken jointly by them, might separately undertake the whole work to be executed within the limits of both municipalities, and might enter into a contract for such work according to a plan to be suggested by their own engineer and approved by themselves, a provision which, under the circumstances appearing in the case, seems to me to have been a very prudent one; for we find that the authorities of the municipality of Parkdale at an early period conceived an idea, to which they appear ever since to have persistently adhered, that in lowering the grades of Queen street so as to carry that street under the railways crossing it the width of that street might be considerably diminished, and as early as 1881 they procured an engineer to make a plan for such a work by which it was proposed that Queen street should be narrowed in the subway and its approaches to less than two-thirds of its original width, while we find that the difficulty which stood in the way of the city of Toronto coming to an agreement with Parkdale, upon the plan of the work, arose from the fact that the city of Toronto insisted that the original width of Queen street, (which was a great thoroughfare, namely, 66 feet,) should be maintained throughout, while the authorities of the village of Parkdale adhered to the plan as prepared by their engineer. This section then appears to me to be so framed as to enable either municipality alone (if mutually they should be unable to agree upon a plan) to construct the whole of the authorized work as of necessity, one undivided work, according to a plan prepared under its own direc-

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tion and approved by itself, and, in so doing, to close, break up and otherwise alter, improve and change the streets, or any of them, within the limits of both municipalities to such extent and in such manner as the engineer of the corporation undertaking the work might think fit and necessary for the purpose of the said work; the legislature, as it appears, not unreasonably thinking, that if the two municipalities could not agree upon a plan for executing the work jointly, and one alone should be willing to undertake the work, the mode in which the streets which were common to both should be interfered with might safely be entrusted to the municipality which should, if either should, alone undertake the work; but this section, as it appears to me, was intended to have operation equally in case the railway companies, or any of them, whose railways cross the streets should unite with the two municipalities, or with either of them, in procuring the authorized works to be constructed; in that case, the municipalities, being the parties interested in the question as to the manner in which their streets were to be interfered with by the construction of the works, were the parties whose assent to the plan of operations, whatever it might be, was absolutely necessary, and for this reason, whether the municipalities were jointly, or one of them alone was, undertaking the work, or both, or either of them, were, or was, acting in concert with the railway companies, or any of them, any contract for the actual work of construction must be entered into and executed by the municipalities, or one of them, if both are acting, or by the one which is, if one only is, acting in concert with the railway companies or any of them; just as if the two municipalities together were, or one of them alone was, undertaking the work, one or other of the two municipalities by reason of their peculiar interest in the streets to be affected by the authorized

works being a necessary party to any contract to be entered into for the actual construction of the works authorized by the act.

By the third section it is enacted that (His lordship read the section.)

The object of this section, or the necessity for it, is not very apparent. If the city of Toronto and the village of Parkdale should agree jointly to execute the works authorized by the act, it would seem to be a necessity, not requiring a special clause like this to secure its fulfilment, that they should in the agreement contemplated by the 1st section for "construction, erection and future maintenance" of the works, agree upon the proportions they should respectively bear in the cost and maintenance of the works and all incidental expenses. Yet it is apparently to the case of their having agreed to execute the work jointly under the authority vested in them by the 1st section that this 3rd section points. It does not provide for the possible case of the municipalities being unable to come to an agreement between themselves and of one of them, in consequence, entering into an agreement with the railway companies, or some or one of them, for the construction, erection and maintenance of such work, as they might deem sufficient and necessary, which is also authorized by the first section. In case the city of Toronto and village of Parkdale should jointly proceed with the construction of the works, or should execute a contract with any person for that purpose without first mutually agreeing upon the proportions they should respectively bear in the cost thereof, including compensation for damages, and future maintenance, this section might, perhaps, in such case, give to any person whose property might be injuriously affected by the proposed work, a right to restrain the municipalties from proceeding with the work as in dis-

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obedience of this section, although how such persons could be affected injuriously in any way by the municipalities proceeding with the work before they should mutually agree among themselves upon their proportionate cost of the work and its maintenance, is not, to my mind, very apparent. I cannot think that the default of the municipalities to comply with the provisions of this section before proceeding with the works would deprive the parties injured of their right to force an arbitration under the provisions of the Municipal Act. The section appears to me to be simply directory, not a condition precedent in the sense of making the work done to be *ultra vires*, if done before such agreement should be entered into. But however this may be, the section does not appear to apply to the case of an agreement for the construction of the authorized work being entered into between one of the municipalities only and the railway companies, or any of them, which is also authorized by the first section By the fourth section it is enacted that:—

His Lordship read the fourth section of the Act: —

The clauses of the municipal acts here referred to are the following sections of 46 Vic. ch. 18 Ont.

Section 387 provides that the appointment of all arbitrators shall be in writing under the hands of the appointers, and in the case of a corporation, under the corporate seal and authenticated in the same manner as a by-law.

Section 388 that the arbitrators on behalf of a municipal corporation shall be appointed by the council thereof or by the head thereof if authorized by a by-law of the council.

Section 389 that in cases where arbitration is directed by the act either party may appoint an arbitrator and give notice thereof in writing to the other party calling upon such party to appoint an abitrator on behalf of

the party to whom such notice is given. A notice to a corporation shall be given to the head of the corporation.

Section 390 that the two arbitrators appointed by or for the parties shall within seven days from the appointment of the lastly named of the two arbitrators appoint in writing a third arbitrator.

By section 393 it is enacted that (His Lordship read the section):

Then by section 396 it is enacted that (His Lordship read this section):—

The other Act which is relied upon as having a bearing upon the matter in question is the Dominion Statute 46 Vic. ch. 24, passed upon the 25th of May, 1883, whereby the 48th section of the Consolidated Railway Act, 1879, is repealed and the following substituted therefor.

(His Lordship reads section four of 46 Vic. ch. 24).

Into the question whether this section provides for compensation being paid by railway companies, acting in obedience to the order of the railway committee made under the authority of this section, to persons whose property is injuriously affected as is that of the plaintiffs here, although no land is taken from them, we need not now enter, as the railway companies are not parties before the court in this suit. What effect the section has upon the question involved in this suit may have to be considered by-and-by when the manner in which it is relied upon by the municipality of Parkdale as a defence to the plaintiffs' claim to make that municipality liable comes under consideration.

The above being the statutes bearing on the case, the facts so far as we can gather them from the evidence furnished to us appear to be that the city of Toronto refused to come to any agreement with the municipality of the village of Parkdale under the provisions of the

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Ontario statute 46 Vic. ch. 45, because the city insisted upon the full width of Queen street being maintained throughout, while Parkdale adhered to the plan it had procured to be made by its engineer in 1881, which made a considerable diminution in the width of the street. What step the village first took in consequence of being unable to effect an agreement with the city of Toronto does not appear, nor what was its nature, namely, whether any attempt was made by the village authorities to procure the railway companies to enter into an agreement with Parkdale under the provisions of the Ontario statute before application was made to procure the interference of the railway committee of the Privy Council under the provisions of the Dominion Act, but that Parkdale did make some application to the railway committee to procure its interference appears from a recital contained in an agreement which the railway companies and Parkdale did voluntarily enter into while the matter of such application was under the consideration of the committee, and before they had arrived at any conclusion thereon, which agreement was, in fact, laid before the committee and constituted the basis of their subsequent action in the premises. A report of the committee of works of the city of Toronto of the date of the 27th August, 1883, which was put in evidence with an admission that it also was laid before the railway committee, throws some light on the matter.

(His Lordship here read the report as set out in 7 O. R. 278).

The agreement between the railway companies and the village of Parkdale, which was laid before the committee and formed the basis of their report made in relation to the subject matter thereof, is as follows. It has no date affixed to it but was executed before the 21st of September, 1883, the date of the report of the

committee of council.

Memo. of heads of an agreement respecting the Queen street crossing in Toronto :—

The Northern Railway.
The Grand Trunk Railway.
The Credit Valley Railway.
The Toronto, Grey and Bruce Railway.
The Village of Parkdale.

The above named parties agree as follows :—

The subway shall be made upon plans and specifications which shall be agreed on, and on failing agreement, as shall be fixed by Mr. Schreiber.

The village of Parkdale, at the request of said railroads, but without varying and without prejudice to the legal position of any of the parties under the Consolidated Railway Act, 1879, and the amendments thereto, shall take the control of the said work with power to let contracts and compel the carrying out of the same, but it shall be done under the direction of the engineer, who shall be named by the railway companies, but all to be done to the satisfaction of the inspector or engineer of the Railway Committee of the Privy Council. The work shall be put in hand at once and pushed as quickly as reasonably can be, the railway companies giving every facility for carrying out the same.

The cost is estimated at $35,000. Each of the parties named above will at once put up one-fifth of the said sum and will be liable for one-fifth of any extra cost of constructing the same.

Parkdale not to be liable for any expenditure incurred by any of the said railways in altering grades of tracks or other incidental expenses, but only for one-fifth of the actual cost of constructing subway, including altering grades of Queen and Dufferin streets, building retaining walls and abutments and overhead work, save as hereinafter excepted.

The money which shall be deposited in the Bank of Montreal to the credit of this work to be chequed out by the Reeve of Parkdale on the certificate of the engineer appointed by the Railway Companies as the work progresses, who is to certify monthly according to the value of work done, the said certificate to state the gross amount to be paid in each case, the certificate to be attached to the cheque.

The contract with the contractors to provide for a percentage being held back as security for the due performance of the work. The contract to be approved by John Bell and Mr. White, General Superintendent of the Credit Valley R. R., on behalf of the Com-

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panies, and J. E. Rose on behalf of the village.

Dufferin street to be closed between the points shown on the plan annexed hereto in red.

Any legislation required to be had to legalise this agreement or any thing thereunder the parties hereto agree to use all legal means to obtain.

The parliamentary expenses, exclusive of counsel fees, to be shared equally between the parties, each to pay its own agents and counsel fees.

If deemed necessary the sanction of both the Local and Dominion Parliaments will be asked for.

All the parties will use their best exertions and influence to have the acts passed. The railway committee to be asked to sanction this arrangement and order accordingly, and the said work to be done as in compliance with the order of the said committee, and nothing in said agreement contained shall be taken to limit the power of said committee or to remove the work from their jurisdiction or control, or to prevent the said village of Parkdale from applying to said committee to enforce the performance of said work by said railways, in case of failure on the part of them or any one or more of them, and the fact of the said village having control of said work shall be without prejudice, as above stated, until the work shall be fully completed as hereby agreed.

The width of the opening to be forty feet. The streets to be maintained hereafter by the municipalities in which they are; the wall and crossings of the railway overhead by the railways. The municipal authorities take a l risk of the sufficiency of the drainage of the subway. It is also agreed that the parties hereto will join in asking, in the acts above proposed, power to collect from the corporation of the city of Toronto one-sixth of the cost of doing the above mentioned work.

Each company at its own costs will provide the iron girders for carrying its railway tracks across the opening. The municipality of Parkdale to contribute $1,500 to cost of such girders as its full proportion thereof.

The division of the costs contemplated by this agreement is a division of the cost less the said iron girders as above set out.

All matters in dispute to be settled by the Government Engineer.

In accordance with the provision contained in this memorandum of agreement that "the railway committee "should be asked to sanction this agreement and order "accordingly" the memorandum was laid before the

committee which, upon the basis of it, on the 21st Sept., 1883, made a report addressed to the Minister of Railways and Canals to be submitted to His Excellency the Governor General in Council for his approval, in which the committee states that (His Lordship read the report set out in 7 O. R. 279.) :—

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We have it on the evidence of Mr Stokes, the engineer who prepared the plan for the municipality of Parkdale in 1881, that the plan approved by the Railway Committee was that plan so prepared by him with two trifling alterations only, which had been suggested by the Government Engineer and concurred in by the parties, namely, that the descent in the approaches of the sub-way should be one foot in twenty instead of one in eighteen, and that the total width of the subway should be 42 feet instead of 40 as originally designed.

The above report of the railway committee was submitted to His Excellency for approval by him in council on the 24th day of September, 1883, upon which day, as the sanction of His Excellency the Governor General in Council was by the Statute 46 Vic. ch. 24 made requisite to the recommendation of the railway committee acquiring any validity, the report acquired whatever legal force or effect it had and assumed the character of an order in council. Upon the 18th of October, 1883, the council of the municipality of Parkdale gave a first and second reading to a by-law introduced into that council and framed so as to give effect to the agreement contained in the above memorandum of agreement entered into by and between the railway companies and the village. This by-law as the same appears in the printed case, is as follows (Here His Lordship read the by-law.) :

The by-law having been approved by the ratepayers the agreement which had been entered into between

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the companies and the municipality reduced into perfect form was upon the 24th November, 1883, executed under the corporate seals of the parties and is as follows (See 7 O. R. 280 where the agreement is set out in full);

Now it is to be observed that in this instrument the parties declare that it was while the proceedings instituted by the municipality of Parkdale before the Railway Committee were still pending, and before that committee had arrived at any conclusion upon such proceedings, that the railway companies and the village of Parkdale of their own free will came to an agreement upon the several particulars as they are contained in the above instrument formally executed under seal on the 24th November, 1883.

A memorandum of the heads of that agreement had been, in pursuance of a provision to that effect contained therein, submitted to the Railway Committee accompanied with a request made by the parties to the agreement that the committee would sanction the agreement and order accordingly. The alterations suggested by the Government Engineer having been concurred in by the parties, the committee made their report in which the memorandum of agreement is recited and containing a recommendation which conforms with the terms of the agreement previously entered into between the parties; and to verify all this the instrument executed on the 24th November, 1883, declares that it was while the proceedings before the Railway Committee were pending that the agreement as set out in the instrument of the 24th November was concluded between the parties, and in the 14th paragraph of this instrument we find the railway companies declaring that, except for the purposes of this agreement, they do not admit the jurisdiction of the Railway Committee in the premises, and in the 15th paragraph we find that it is only by agreement between the parties that the decision of

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the Engineer of the Railway Committee is to be accepted as binding. In short, by the terms of the agreement the railway companies only recognize the Railway Committee's action in the premises as sanctioning the agreement while the municipality of the village reserves to itself the right, in case of failure by the railway companies or any of them to fulfil their part of the agreement, to fall back upon the authority vested in the Railway Committee of the Privy Council by the Dominion Statute, 46 Vic. ch. 24. Whether under the provisions of that act which provides that "the Rail-"way Committee, if it appears to them necessary for "the public safety, may from time to time, with the "sanction of the Governor in Council, authorize and "require the company to whom such railway belongs," (that is a railway crossing a street) "to carry such street "either over or under the said railway by means of a "bridge or arch," the Railway Committee would have had any power to authorize or require such an alteration of Queen and Dufferin streets, wholly closing up part of the latter and narrowing the former to less than two-thirds of its established width in the city of Toronto and the village of Parkdale as is authorized by the agreement between the railway companies and the village of Parkdale, is a point which I do not think at present calls for a judicial opinion, because I think that the true construction of the action of the Railway Committee in the premises is merely that the committee adopted the agreement of the parties, and, so far as they could, gave their sanction to the work thereby agreed to be done by the railway companies and the village of Parkdale acting in concert as sufficient in the opinion of the committee to give that security to the public which by the 46 Vic. ch. 24, the committee was empowered to secure.

If I had not formed this opinion it would be impos-

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sible to avoid determining a very grave point which, as it appears to me, is involved in this question, for if the terms of the Dominion statute do not empower the Railway Committee of the Privy Council to authorize the railway companies whose railways cross Queen street to reduce the width of that great thoroughfare in the city of Toronto and the municipality of Parkdale to less than two-thirds of its original established width, then the work which has been done under the contract entered into by the municipality of Parkdale with Godson is an indictable nuisance unless it can be maintained and justified under the provisions of the Ontario Statute. And if the work can be justified only under the provisions of this latter statute the municipality of Parkdale cannot, in my opinion, be heard to say that the work which they have caused to be done was not caused to be done, or done, under the only statute which authorized it to be done.

The terms of the agreement ignore the idea that the municipality of Parkdale was entering into it, if it was competent for it to do so, merely as agents of the railway companies who were the only principals in the matter and who were acting merely under the authority and control of the Railway Committee. On the contrary, the municipality of Parkdale is in the agreement treated as a principal equally as are the railway companies. The clause that all parties to the agreement shall combine to endeavour to procure legislation to compel the city of Toronto to become a party contributing to the expense of the work, as also the clause whereby the railway companies provide that they will incur no responsibility as to the draining of the subway into the Queen street sewer, and indeed all the clauses of the instrument, are quite inconsistent with the idea of the municipality of Parkdale being in any other position than a principal equally with the railway companies; and, in short, the

agreement in all its substantial parts is, as it seems to me, precisely such an one as the parties thereto might have entered into under the provisions of the Ontario statute 46 Vic. ch. 45.

Then we find that on the 26th November, 1883, a contract for construction of the subway in the shape of an indenture between Arthur William Godson, of the city of Toronto, contractor, of the first part, and the corporation of the village of Parkdale of the second part, was laid before the council of the municipality of the village, when the following by-law was passed:

BY-LAW OF PARKDALE.

Be it enacted a by-law of this municipality that the Reeve and Clerk be authorised to execute the agreement between the municipality and A. W. Godson providing for the building of the Queen street subway, and to affix the corporate seal thereto.

Accordingly the contract under which the work has been done was executed as directed by this by-law, and the work commenced by Godson under that contract.

Thereupon the plaintiffs instituted proceedings in the High Court of Justice for Ontario against the city of Toronto and the village of Parkdale. The case made by their statement of claim was that the defendants, acting together under the authority of the Ontario statute, 46 Vic. ch. 45, had entered into a contract with Godson to execute works which injuriously affected the plaintiffs' property, and that by reason of their having, as was alleged, done so without having passed by-laws as required by the statute, it was impossible for the plaintiffs to obtain compensation under the Municipal Acts as provided by the statute; that the plaintiffs had suffered damage to a large amount by Godson's acts under his contract with the defendants, and the plaintiffs claimed an injunction restraining the continuance of such wrongful acts and an order compelling the defendants to place the road in the same state as it was in before the said works were commenced, and for pay-

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ment of said damages and costs.

The defendants severally filed defences to the said claim of the plaintiffs, in which they severally denied that the wrongful acts complained of had been done by them respectively or that they were, severally, in any way liable in respect thereof. On a motion for an interim injunction the consideration of it was deferred to the hearing of issues joined on the above defences. It being apparent at the trial upon the facts appearing as above detailed that the city of Toronto had in fact taken no part in committing or causing to be committed the acts complained of, and that the defence set out in the statement of defence of the village of Parkdale could not be sustained, and that the actual defence which was offered on behalf of that municipality was that in acting as it did it was merely acting as the agent of the railway companies above named who, as was contended, were acting under the control of the Railway Committee of the Privy Council under the authority of the Dominion statute, 46 Vic. chap. 24, and therefore had a right to cause the works which were complained of to be done, could not be entered into on the record as it stood, and the plaintiffs insisting upon their right to recover damages against the municipality of Parkdale upon the record as it stood, and offering evidence to show the extent of such damages, a discussion took place before the court between counsel for both parties in which counsel for the municipality of Parkdale contended that His Lordship before whom the case was being tried should not assess the damages; that if it was found that the plaintiffs were entitled to damages, the principles upon which such damages should be assessed, should be laid down in any judgment His Lordship might deliver, and a reference should be had to ascertain the amount; that the parties were before His Lordship to test the

question, whether the plaintiffs were, or not, entitled to recover any damages, and if they were, the rule under which compensation should be made; and he submitted that what was necessary to get at on the trial was the legal points and the construction of the statutes and the cases, as the facts were few and might be conceded, and he suggested that the reasonable course to pursue would be shortly to get at the facts and that then the question of law should be disposed of, and that the amount of compensation, if the plaintiffs should be held to be entitled to compensation, should be the subject of a reference. This suggestion was concurred in by counsel for the plaintiffs who accordingly requested His Lordship to take a note that in case His Lordship should adjudicate in favor of the plaintiffs upon the right to compensation there should be a reference to the Master as to the amount. This arrangement having been made, both parties amended their pleadings and the cases were proceeded with. The amended statement of claim alleges that the plaintiffs claim no relief as against the city of Toronto, but submit that the other defendants should be ordered to pay their costs. It then alleged that the defendants, the village of Parkdale, allege that the new subway (in the original statement of claim mentioned) is being constructed by certain railway companies under the alleged authority of and pursuant to the requirements of the Railway Committee of the Privy Council in pursuance of the Dominion statute 46 Vic. ch. 24, and that the railway companies and the corporation have entered into an agreement dated 24th November, 1883, which has been confirmed by a by-law of the village, and that the subway is being constructed pursuant to said agreement with the railway companies and under a contract entered into by Parkdale and pursuant to the authority and agreement of the said Railway Committee, and that the said village of Parkdale claim that they

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are not liable for any damages or injury to the plaintiffs by reason thereof, whereas the plaintiffs contend that the true effect of the said agreement between the railway companies and the village of Parkdale and of the contract entered into by them for the construction of the said subway is that the said subway is being constructed by the last named defendants and not by the railway companies, and that the said defendants, the municipality of Parkdale, are liable to the plaintiffs for the injuries and wrongs complained of. And the plaintiffs further allege that even if the said Railway Committee required or authorized the construction of the said subway, which the plaintiffs deny, the said committee had no power to do so; and that the railway companies did not take the necessary steps under the statute in that behalf prior to the commencement of the work, and did not file in the proper office in that behalf the necessary plans and book of reference, and the plaintiffs submit that the said defendants, the municipality of Parkdale, cannot shield themselves from their responsibility in the premises by any order or requirements of the said Railway Committee or by any rights which may be possessed by said railway companies.

And the plaintiffs submit that the only authority under which the defendants, the municipality of Parkdale, can legally construct said subway is the Statute of Ontario above referred to, 46 Vic. ch. 45, and if it should be held by the court that the defendants, the municipality of Parkdale, are authorized by said statute to construct the subway, and that their action in the premises is legal, and that the plaintiffs are entitled to compensation to be fixed by arbitration pursuant to the provisions of the Municipal acts, then the plaintiffs submit that the defendants, the municipality of Parkdale, should be ordered to pass the necessary by-laws and take the necessary proceedings connected with such

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arbitration, the plaintiffs offering on their part to take such proceedings, and the plaintiffs claim a *mandamus* ordering the defendants, the municipality of Parkdale, to proceed to arbitration in the above event, and the plaintiffs claim such further relief as the nature of the case may require. To this amended statement of claim the defendants, the municipality of Parkdale, filed an amended statement of defence wherein they allege that the subway is being constructed by the above named railway companies under the authority and pursuant to the requirements of the railway committee of the Privy Council in pursuance of the provisions of the Dominion statute 46 Vic. ch. 24. That the corporation of the village entered into the agreement of the 24th November, 1883, with the railway companies to which they crave leave to refer; that a by-law of the village confirming the said agreement was passed on the 3rd December, 1883; that the municipality, pursuant to the said agreement and on behalf of the said railways, entered into a contract for the construction of the said works which are being constructed under the said contract and pursuant to the said authority and requirements of the said Railway Committee and under the direction of an engineer appointed by the railway companies. That save as aforesaid the defendants, the corporation of the village of Parkdale, have taken no part in the construction of the said subway, and the same is not being constructed by them, and they claim that they are not liable in respect of any damages or injury which may be sustained by the plaintiffs by reason or on account thereof, and that no action has been taken by the city of Toronto or the village of Parkdale under the statute of Ontario, 46 Vic. ch. 45.

Upon the above amended pleadings and the evidence given in the cause the learned Chief Justice of the

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Queen's Bench Division of the High Court of Justice for Ontario was of opinion that the defendants, the municipality of Parkdale, were not constructing the works under the provisions of the Ontario statute and that they were not acting, and in point of law could not act, as the agents of the railway companies. That in entering into the contract with Godson, under the by-law of the municipality in that behalf, the work was done under the authority of the corporation who, not having proceeded in the manner directed by the statute which authorized them and the city of Toronto to do the work, were liable as wrongdoers to the plaintiffs, and he made a decree accordingly as follows (1): —

The defendants Parkdale appealed from this decree to the Chancery Division of the High Court of Justice, which court affirmed the judgment, whereupon the defendants appealed to the Court of Appeal for Ontario, a majority of which court, the Chief Justice dissenting, allowed the appeal and ordered the actions of the plaintiffs against the defendants to be dismissed with costs. On appeal from this judgment the case comes before us.

It has been well held, in my opinion, by the learned Chief Justice who tried the case and by the divisional court, that the municipality of Parkdale could not in point of law act in the premises, or justify the acts complained of, as agents of the railway companies; but it is, in my opinion, equally clear that in point of fact it was not as agents of the railway companies that the municipality were acting, if in point of law they could have so acted, but as principals jointly with the companies and as the chief and moving principals in whose interest and at whose instance and for whose benefit the work complained of was done. In 1881, as appears by the evidence of their engineer, Mr. Stokes, they devised the plan which was eventually in sub-

(1) See p. 254.

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stance carried out. They petitioned for and procured the passing of the Ontario statute which authorized them to enter into an agreement with the railway companies to procure the performance of the work. Before the Railway Committee made the order, now interposed by way of defence, and wholly independently of that committee who had no authority whatever over them, they entered into an agreement with the railway companies in which they mutually undertook to ask, and they accordingly did ask, the Railway Committee to sanction their agreement and to make an order in compliance with its terms. By this agreement, when reduced to perfect form and executed under the corporate seals of the railway companies and the municipality, the former covenant with the latter that they will by all means in their power afford to the municipality every facility for carrying out and completing the work, and except for the purpose of that agreement, that is, as I understand it, except for the purpose of sanctioning that agreement, the companies repudiate all jurisdiction of the railway committee in the premises. The municipality then pass a by-law affirming this agreement and providing means to give effect to it, wherein they recite that the by-law is passed because it was deemed essential to the interests of the village that the subway should be constructed, and that it was upon the strength of the agreement that the railway committee made the report which was subsequently approved by His Excellency the the Governor General in Council. This by-law is submitted to the ratepayers and approved by them who thereby authorise the levying on them a rate sufficient to raise their contribution as provided by the agreement towards the performance of the work. Thereupon a contract between the municipality and Godson, for the actual performance of the work, is prepared which is approved by a by-law of the municipality

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directing its execution, and which is accordingly executed under the corporate seal, and the work carried on to completion thereunder. It is impossible under these circumstances to say that the municipality were not acting as principals throughout in the transaction, or that the agreement with the railway companies or the contract with Godson were not acts of the corporation, and being acts of the corporation it would be a reproach upon the administration of justice if the corporation should not be liable. In *Mill* v. *Hawker* (1) the point did not directly arise, for there the action was against an individual who acted under the authority of a corporation in doing an act *ultra vires* of the corporation, but the language of Kelly C.B. is very strong as to the liability of the corporation, and is appropriate in the present case. He there says, p. 322:—

It was indeed once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in Comyn's Digest Franchises, F. 19. But besides that many authorities are to be found in the Year Books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority or by its direction, trover or trespass in maintainable.

Among the authorities cited by him is that of *Yarborough* v *The Bank of England* (2), which has much learning on the subject and wherein Lord Ellenborough shows that a corporation may be made liable as disseisors; and many other instances are there cited of corporations being made liable for torts by writing under their seal. The Chief Baron then adds, p. 323:

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*. If the board, by resolution or otherwise, had accepted a bill of exchange, directing their clerk or other officer to write their corporate name or title across the bill drawn upon them for a debt, this would have been *ultra vires* and no holder of the acceptance could have recovered the amount against them. It

(1) L. R. 9 Ex. 309. (2) 16 East 6.

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would have been void on the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and if any, to what, action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized as a trespass or the conversion of a chattel. If such an act is to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it has been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them.

Then referring to *Poulton* v. *London and South Western Railway Company* (1), "that case," he says.

Shows that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of.

Now in the case before us the acts complained of are not *ultra vires* in the sense of being altogether beyond the scope of the power of the corporation, but are only wrongful, if wrongful, in the sense of their not having been done in the manner in which, if done, they were within the corporate powers of the municipality. They were corporate acts. And in the case of *Bissell* v. *The Michigan Southern Ry. Co.* (2) the Court of Appeals of the State of New York, in a very learned judgment, have held that for corporate acts, although they may be *ultra vires*, corporations may be held responsible in tort. If the acts here complained of were not within the powers conferred upon the municipality by the Ontario statute, 46 Vic. ch. 45, and for that reason were wrongful, we must, nevertheless, hold that, as done, they were done by and under the authority of the corporation so as to make the municipality liable to the plaintiffs. But in my opinion, as I have already pointed out, the contract entered into between the municipality and the railway companies, and that between the municipality and Godson, for the actual construction of the works, and the by-laws of the municipality confirming and

(1) L. R. 2 Q. B. 534. (2) 22 N. Y. 258.

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authorising these contracts, were all acts within the power conferred by 46 Vic. ch. 45, and being acts capable of being supported on the authority of that statute, which is the only statute in virtue of which the municipality of Parkdale could have done the acts, they cannot, for the purpose of evading liability to the plaintiffs, be heard to say that they did not intend to act under the authority of the only statute which authorised them to do, and justified them in doing, the acts complained of. Whatever may have been the effect, if any, which the order in council had on the railway companies as enabling them to interfere with, close up, and alter the streets of the municipalities, as to which it is, for the reason I have already given, unnecessary in this action to express any opinion, it had no effect whatever so as in any manner to affect the construction of the agreement entered into between the municipality and the railway companies, which must be construed, according to its terms, as a voluntary agreement entered into between the respective parties thereto. In virtue of the above contracts and by-laws the plaintiffs might, in my opinion, have appointed an arbitrator and have called upon the village municipality to have appointed one on their behalf under the statute. It was competent for either party to initiate proceedings by arbitration. There was no necessity, however, for such arbitration being had before the works should be proceeded with, as no lands of the plaintiffs were taken. Their complaint only being that their property would be injuriously affected by the works it might be that in the exercise of prudence the plaintiffs should prefer postponing the arbitration until the whole of their injury should be made apparent by the completion of the works. We see now that in this case there was no question as to the fact of the injury, and that the sole matter in contestation was the liability of the defendants to indem-

nify the plaintiffs for this injury, whatever its amount might be, so that at some time, and in some shape, the question of liability would have to be raised and determined before the plaintiffs could reap the fruits of any arbitration. It might be, had the plaintiffs proceeded to call on the judge of the county court to appoint an arbitrator for the municipality in default of their appointing one themselves, that the judge would have suggested that it would be more convenient that the question of liability should be first determined. It is quite reasonable, as it appears to me, that it should be; and such question might be raised at the choice of the plaintiffs by a motion for a *mandamus* or by an action for a *mandamus* of which nature the present proceeding is. *The Queen* v. *Wallasey Board of Health* (1); *Fotherby* v. *Metropolitan Ry. Co.* (2); *Jones* v. *Stanstead, Shefford & Chambly Ry. Co.* (3); *Pearsall* v. *Brierley Hill Local Board* (4).

In my opinion the plaintiffs are entitled to a declaration being made in their favor of their right to recover compensation from the defendants, the municipality of Parkdale, under the provisions of the Ontario statute 46 Vic. ch. 45, and that upon the plaintiffs appointing an arbitrator on their behalf a *mandamus* should go commanding the municipality to appoint one on their behalf, but for the arrangement made at the trial upon the municipality being allowed to amend their statement of defence so as to raise upon the record the question of their liability, which arrangement I think dispenses with the necessity for a *mandamus*. By that arrangement it was agreed that in case the court should be of opinion that the defendants, the municipality of Parkdale, were liable to compensate the plaintiffs for the injury sustained by them, a reference to ascertain the

(1) L. R. 4 Q. B. 351.
(2) L. R. 2 C. P. 195.
(3) L. R. 4 P. C. 122.
(4) 11 Q. B. D. 747.

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amount should be directed to a referee by the judgment and decree of the court in this suit. Very slight alterations in the decree made in the cause will, as it appears to me, be sufficient to make it applicable whether the liability of the defendants arises under the provisions of the Ontario Statute or as wrongdoers. Such alterations are:

1. Expunge the word "wrongful" before the word "acts" where it occurs in the second and third paragraphs of the decree as made.

2. In the third paragraph between the first and second words insert the following: "it having been agreed, "upon an order being made at the trial for liberty to "the defendants, the corporation of the village of "Parkdale, to deliver an amended statement of "defence for the purpose of raising on the record "their substantial defence, namely, the question "of their liability in the premises, that in case the "court should be of opinion that the corporation "were liable to make compensation to the plaintiffs "for the injury sustained by them, the question of "the amount of such compensation should be submitted "to a referee under the direction of the judgment and "decree of the court in this suit."

3. Strike out the words "and to the defendants, the city of Toronto" from the 4th paragraph of the said decree.

4. Insert after the 5th paragraph a 6th paragraph, dismissing the plaintiffs claim as against the defendants the city of Toronto with costs.

As so varied the decree as made by Chief Justice Wilson to stand. I cannot see that the plaintiffs are entitled to recover these costs over against the corporation of Parkdale, for, as appears by the evidence and the amended statement of claim, the city of Toronto were not parties to the injury inflicted on the plaintiffs

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by the corporation of Parkdale and were not necessary parties to this suit.

The order will be that the appeal be allowed with costs to be paid to the plaintiffs by the corporation of Parkdale in all the courts, and the decree as varied be ordered to be made in the court below.

In West *et al.* v. The Village of Parkdale and The City of Toronto. } The only difference between this case and the last is that the property of the plaintiffs, which is injuriously affected, is situate within the limits of the city of Toronto, but as the work done is one and indivisible, and as all the damage which has been inflicted on property in the city of Toronto, equally as in the village of Parkdale, has been occasioned by the work done under the contract entered into by the corporation of Parkdale for the construction of the work, which contract it was competent for that corporation by the 2nd clause of the Ontario statute to enter into separately from the city of Toronto, the corporation causing the injury must compensate the parties suffering all the injury resulting from their act. The orders on this appeal and the decree in the court below in both cases will be the same.

Whether the compensation to be paid for injuries caused by the work is to be treated as part of the cost of construction of the work, and whether as such the corporation of Parkdale can compel the railway companies to contribute their share of such compensation as part of the cost of construction under their agreement to contribute to such further sum as might be necessary to complete the work, is a question with which the plaintiffs are not concerned.

Appeals allowed with costs.

Solicitors for appellant West: *Blake, Kerr, Lash & Cassels.*

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Solicitors for appellants Carroll & Dunspaugh : *Snelling & Sorley.*

Solicitors for respondents Parkdale : *McLaren, McDonald, Merritt & Shepley.*

Solicitor for respondents City of Toronto : *W. G. McWilliams.*