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ELECTIONS—VOTE FOR INELIGIBLE CANDIDATE—EFFECT—KNOWLEDGE OF DISQUALIFICATION.

Where a candidate on a primary ticket met a tragic death a few days before the election, and the fact of his death was generally published in newspapers throughout the state, together with the statement that, if he received the greatest number of votes at the primary, the state central committee would fill the vacancy, and such statements were repeated in circular letters addressed to political workers of the same faction of the party as that to which the candidate belonged, so that it might be assumed that the electors were very generally informed of the candidate's death on election day, and that a number thereof equal to the 5,287 majority, which he received over the next highest candidate, voted for him, with knowledge that he was dead, such votes could not be counted, and the living person receiving the next highest number of votes for the office was entitled to have his name go on the ticket as the party candidate therefor. *State v. Frear*, 128 N. W., 1068.

It is the fundamental idea in American politics that the majority shall rule, and that no person can be elected to office unless he shall receive a majority or at least a plurality of all the votes cast.

In England where votes are cast for candidate known to be dead or disqualified or for a fictitous person, the rule is that such ballots are ineffectual for any person and cannot be counted in determining the result of the election, and the one receiving the next highest number of good votes is elected. All the English cases uniformly so hold. *King v. Hawkins,* 10 East 211; *King v. Parry,* 14 East 549.

But, where the candidate receiving the majority of votes is ineligible, in order to elect the candidate receiving the next highest number of votes, it must be shown that the voters had sufficient notice of the facts constituting his ineligibility, or that they were chargeable at law with such knowledge. *Rex v. Monday,* 1 Cowp., 530; *Rex v. Parry, Supra.* Lord Campbell, C. J., said in *Reg. v. Coaks,* 2 C. L. R. 947, "Now it is the law, both the common law and parliamentary law, and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person, as it has been said, as if he gave his vote for the man in the moon."

The English rule has been followed in its strictest sense in but one American jurisdiction, that of Indiana, where it has been held that where voters at an election either know as a matter of fact or are bound to know in law, of the ineligibility of any candidate, the election does not result in failure but the eligible candidate receiving the next highest number of votes is elected. *Vogel v. State,* 107 Ind. 374; *Gulick v. New,* 14 Ind. 93. The Indiana courts seem to have carried this doctrine to the extent of saying that where the majority candidate is ineligible, the minority candidate is elected even though the electors were ignorant of such ineligibility. *State v. Gallagher,* 81 Ind. 558; *State v. Johnson,* 100 Ind. 489. This extreme construction, however, is not in accord with the American policy that the majority shall rule and later cases have modified the rule to the extent that unless there is knowledge of the ineligibility on the part of the voter at the time he casts his ballot, the candidate receiving less than a plurality of the votes is not elected. *State v. Bell,* 169 Ind. 61; *State v. Ross,* 170 Ind. 704.

The great weight of authority, both English and American, is to the effect that votes *knowingly* cast for a candidate who cannot possibly exercise the functions of the office if elected, are thrown away. Cases intimating this are *Commonwealth v. Cluley,* 56 Pa. St. 270 and *Howe v. Parry,* 92 Ky. 260. "A minority of the whole body of qualified electors may elect to an office when the majority decline to vote, or where they vote for one who is ineligible to the office, knowing of the disqualification. Notice of the disqualifying fact, and of its legal effect may be given so directly to the voter as to charge him with actual knowledge of the disqualification, or the disqualifying fact may be so patent or notorious as that his knowledge of the ineligibility may be presumed as a matter of law. But not only the fact which disqualifies, but also the rule or enactment of law which makes it thus ineffectual must be brought home so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it in order to render his vote a nullity." *People v. Clute,* 50 N. Y. 451.

The contrary rule to this was adopted by the St. Louis Court of Appeals in *State v. Walsh,* 7 Mo. App., 142. "If it is true that a majority vote operates only to elect, and failing of that, goes for nothing, then the most innocent mistake of fact on the part of the majority, as the age of the person voted for—might avail to elect a candidate who had received only a few scattering votes. It is said, on the other hand, that if the American doctrine is correct, votes cast for a fictitious person avail to defeat an eligible candidate; that if the voters choose to stay away, or what is the same, throw away their votes, those votes should not be counted as against valid votes. The force of this argument lies in the assumption of an intent to throw away the vote. If the voter can make his vote effective only by voting it in a certain way, and if the result of his voting in this way is to secure a new election, at which the majority can elect, how can it be assumed that the voter intended to throw away his vote? If the death of a candidate of a political party takes place, as here, immediately before the election, there is no time for organization or for preparing new ballots. If the sudden death of a candidate renders the votes ineffectual for some purposes, it is not therefore to deprive the voter of his vote. The majority are not obliged to fold their hands, nor are the minority entitled because of his death, to prevail over the majority; yet this would be the result if the majority vote is not

to be counted against the minority candidate. But the majority of voters, so far from desiring or intending to throw their votes away, wish to use them to their utmost effect, and it is only by a fiction, raised if at all, by the law, that the majority in such cases throw their votes away.

"Though the fact that the candidate died on the morning of the election, before the polls were opened, is known to the voters and the judges of the election, if the deceased receives the highest number of votes, they avail to defeat the opposing candidate, and it cannot be assumed, on grounds of public policy, that the voters intended to throw their votes away." The Missouri Court seems to be the only state court taking this view of the question.

The Senate of the United States in the case of Joseph C. Abbott, of North Carolina, rendered its decision against the English rule and the rule as followed in all the American states except Missouri, as being anti-republican and anti-American. And Abbott, who nothwithstanding he received only a minority of the votes cast, claimed a seat upon the ground that he was the only eligible person voted for, was declared not elected. And it was distinctly asserted in the report of the committee that the fact that the voters have notice of the ineligibility of the candidate at the time they cast their votes for him makes no difference. They asserted the broad doctrine, that in this country an election by a minority of persons voting ought not to be tolerated under any circumstances. *Senate Rep. No.* 58. *42nd Cong., Second Session.*

The United States generally agree with the English cases that where the candidate receiving the majority of votes is ineligible, and that fact is not actually known to the voters, the next highest candidate is not thereby elected. "And so where a sheriff who was disqualified received the majority of votes cast, the next highest in vote is not to be returned elected. The votes cast at an election for a person who is disqualified are not nullities. They cannot be rejected by the inspectors, or thrown out of the count by the judges. The disqualified person is a person still, and every vote thrown for him is formal. *Commenwealth v Cluley, Supra.* Nor does the death on election day before the polls closed, of the candidate receiving the majority of votes, thereby give the election to the eligible candidate receiving the next highest number of votes. *State v. Speidel,* 62 Ohio St. 156. One who has not received a majority or plurality of the votes cast at an election is

not entitled to the office. Therefore, the fact that the candidate who received a majority of the votes cast at an election died before the polls closed does not give the only surviving candidate the right to the office as he did not receive a majority. And the votes for the deceased candidate, having been cast for him in good faith, it is immaterial whether they were cast before or after his death. *Howes v. Perry, Supra.*

Where for any reason not attributable to the electors, the popular will is not expressed, the election is void and a new one must be held. *Cooley's Const. Lim.*, p. 616.

In the case at hand, however, in accordance with the overwhelming weight of authority, both English and American, all the voters at the primary had such knowledge of the death of the nominee who received the highest number of votes, as made it reasonable for the court to assume that they intended to throw their votes away and give the election to that person receiving the highest number of votes.

THE LIMITATION OF THE RIGHT TO RECOVER FOR LOSS OF CONSORTIUM IN NEGLIGENCE CASES.

Consortium is essentially an interest that grows out of the marital relation. By the old common law acception of the term consortium was the exclusive right which the husband and wife had, respectively, to the society, co-operation and aid of each other in every conjugal relation. Any act which was in its nature destructive of the marriage status resulted in a loss of consortium and gave rise to a right of action. Though it has never been denied that this right to recover for the loss of consortium existed in the wife as well as in the husband, in the early actions only the husband was found seeking a recovery. The reason for the failure of the wife to avail herself of her right was the technicality which forbade a wife to sue in her own name. With the enactment of modern statutes, came a time when the wife sought the recovery as often as the husband. During this period the courts were very lax in their examination into the character of the wrongful acts and their effect upon the marital relation. No attempt was made to discover whether the act destroyed the rela-

tion or merely disturbed it. The third period in the development of this right began a few years ago when this distinction was first drawn. As a result, it is now held that in those cases where the wrongful act merely disturbs the conjugal relation neither the husband nor the wife can recover for the loss of the consortium of the other. A number of cases have so held, one of the most recent being *Marri vs. Stamford Ry. Co.*, 78 Atlantic, 582 (Conn.).

In this case, the plaintiff and his wife, while driving, were run into and injured by a car, which was negligently operated by a servant of the defendant. The wife sued in her name and recovered full compensation for her injuries, including pain and suffering. The husband also sued and was awarded damages for his injuries, and the sum of three hundred dollars was allowed him for the loss of the consortium of his wife. The allowance of this sum was assigned as error. The court upheld the contention that such allowance was error, stating that in view of the married women's statutes, a husband in an action for personal injuries to his wife, may not recover for the loss of consortium, whether for loss of what is termed service, or society, or both.

The common law theory that husband and wife were one necessitated the joining of the husband whenever the wife wished to sue for a personal injury. That one was the husband and in him were merged the wife's rights. 1 *Chitty on Pleading,* 84. Technically it was often impossible to join the husband in a common law action, as in a case of criminal conversation, where the husband was really a party to the wrong. Furthermore, whatever damages were recovered became his property and not the wife's. *Cooley on Torts,* p. 227. These conditions have been modified by modern statutes as is shown in *Betser v. Betser,* 186 Ill., 537, decided in 1900. In this case a wife was permitted to sue in her own name and recover for the loss of her husband's affections from one who had alienated them. This recovery rests upon the same grounds and is with the same rights which a husband has under similar circumstances. So, too, in *Seaver v. Adams,* 66 N. H., 142, the wife was permitted to sue in her own name. The tendency of modern legislation is to place the husband and wife on a footing that is more nearly equal in the eyes of the law. This right which the wife now possesses to recover for a personal injury is property and regarded as the separate property of the wife. *Musselman v. Galligher,* 32 Iowa, 383.

There are three types of cases in which the question of recovery for a lessening or entire deprivation of the enjoyment of consortium may arise, namely, abduction, alienation of affections, and criminal conversation; and maltreatment of such a serious nature as to deprive one spouse of the comfort and society of the other for considerable period. 3 *Blackstone Commentaries,* 139. Such offences pierce the very heart of the marital relation, and in these cases a recovery will always be permitted. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action and it is not necessary for him to prove the alienation of the wife's affections, or actual loss of her society and assistance. *Chambers vs. Caulfield,* 6 East, 244; *Wilton v. Webster,* 7 C. & P., 198; *Yundt v. Hartrunft,* 41 Ill.. 9.

That actual service of a household nature is the basis of a recovery for loss of consortium is an erroneous idea. In *Bigaouette v. Paulet,* 134 Mass., 123, a husband was permitted to recover for loss of consortium from a person who had criminal conversation with his wife, although the act caused no actual loss of her services to him, for it was held that the husband is not the master of the wife, and cannot maintain an action for the loss of her services as his servant. In *Long v. Bove,* 106 Ala., 570, which was a criminal conversation action, there was a claim for damages for loss of wife's services. The claim was allowed, but the services were not regarded as meaning labor performed, or assistance in any material sense. The court held that the deprivation of services, for which the claim was allowed did not imply a loss measurable by pecuniary standards of value such as obtained when a master is deprived of the labor of his servant.

A wrongdoer is conclusively presumed to intend the direct consequences of his acts. *Hale on Damages,* 36. One who has criminal conversation with another's wife, or who alienates her affections, strikes at the foundation of the marital relation. The destruction of that relation is the direct consequence of his act, and a recovery for the loss of consortium will be allowed. *Noxon v. Remington,* 78 Conn., 296; *Foot v. Card,* 58 Conn., 1.

In negligence cases, however, it cannot properly be said that any effect upon the marital relation as such is the direct result of an injury occasioned by a want of care on the part of a third

person. *Feneff v. R. R.*, 203 Mass., 278. This is the most modern doctrine in regard to consortium. For many years concortium has not been so restricted in negligence cases. In *Baker v. Bolton*, 1 Campbell, 493, decided in 1808, a case not unlike most modern negligence cases, the husband was permitted to recover for the loss of the consortium of his wife. But this error was based on what has recently been shown to be an even more flagrant error, namely, the theory that service in the material sense and consortium were one and the same thing.

There is another reason why a recovery for the loss of consortium should not be permitted in negligence cases. By modern legislation, as has been shown, each spouse may now redress his or her injury in a suit for damages. Suppose a wife were injured through the negligence of a third person, she may recover in her own name for all expense attaching to the injury, and for pain and suffering. Under the old theory, the husband would still have a right of action for the loss of consortium, but this would be the sole basis of such an action. However, this is answered by the language of Lord Wensleydale in *Lynch v. Knight*, 9 House of Lords cases, 577, 598: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." Therefore, consortium cannot be the only basis of a recovery; it must be used as aggravation of damages or not at all.

A husband cannot recover in negligence cases for loss of wife's consortium, *Bolger v. Boston Elevated Ry Co.*, 205 Mass., 420, nor can a wife recover in such cases for the loss of her husband's consortium. *Feneff v. R. R.*, 203 Mass., 278.

Therefore it is submitted that the only cases in which compensation should be granted are those in which the wrongful act interferes with the exclusiveness of the marital relation, for this is the essence of the right of consortium, or where the act is wanton, malicious or intentional. In such cases, the loss of consortium is the direct result of the act and necessarily foreseen. But in the case of an injury arising from ordinary negligence the interference with the relation is indirect, remote, consequential and contingent.

CHARACTER OF A PORTABLE HOT AIR FURNACE WHEN ANNEXED TO THE REALTY.

Fixtures are a species of property which give rise to much litigation. The courts are agreed with respect to the principles involved, and the tests to be supplied in determining whether a chattel is or is not a fixture. But there has been much fluctuation of judicial opinion in applying these principles. In deciding concrete cases the courts are in direct conflict with respect to certain species of property, which have been annexed to the realty. Portable hot air furnaces have been held to become part of the realty when annexed to it by some courts while there are decisions of other courts which hold that they do not become part of the realty when so annexed. It is interesting to note, that cases, the facts of which are identically the same, have been decided differently.

The recent case of *Henry N. Clark Co. v. Skelton et al.*, 94 N. E., 399 (Mass.), holds that a portable hot air furnace resting by its own weight upon the ground, placed in a house by a person rightfully in possession, does not become part of the realty, though connected with the house by a cold air box, and hot air pipes and registrars in the usual manner. The question has been settled in Massachusetts, and this case was appealed for a refusal to give certain instructions. The case is of interest because of the fluctuation of opinion with respect to hot air furnaces of this character.

"Real fixtures consist of things, originally chattels personal, which have been annexed to the land, or to things permanently attached to the land, by the owner of the chattel or with his assent, and with the intention to make the annexation permanent. The most important element of the definition is the intention with which the annexation is made. In order that it may be a real fixture and become part of the land itself, it is essential that the chattel should have been annexed permanently; that is without intention to remove it, or sever the connection between it and the land. This intention, however, is to be drawn from the surrounding circumstances or the express agreement of the parties, and not from their mere declarations or idle conjectures." *Minor and Wurts on Real Property*, Sec. 23. This is the main test to be applied in determining the character of a chattel which has been

annexed to land. But from the decisions to be considered it will appear that the test has lead to different conclusions in similiar cases.

In *Baldwin v. Merrick,* 1 Mo., App. 281, it was held that a furnace not fastened down, but set upon a stand of brick work, and which could be carried out without disturbing the ceiling walls or doors or floors of the house, even though a fixture as between vendor and vendee, is not a fixture within the meaning of the mechanic's lien law. And *Rahway Sav. Inst. v. Irving St. Baptist Church,* 36 N. J., Eq. 61, is in harmony with this decision. It was there held that a portable furnace standing on the cellar floor, and held in position by its own weight, and capable of being detached, together with its pipes and registers, without injury to the building, is not as between mortgagor and mortgagee a fixture. It must be noted that in the cases cited the word, "fixture" is used in the sense of "real fixture." *Towne v. Fiske,* is also to the same affect. 127 Mass., 125.

The question as to whether a chattel is or is not a real fixture arises between landlord and tenant, mortgagor and mortgagee, purchaser and seller, and in many other cases where a similiar relation exists. In *Turner v. Wentworth,* 119 Mass., 459, the plaintiff claimed a lien on certain furnaces furnished by him. He built a house for the defendant and by his contract he was required to put in two furnaces. The court held that if the transaction was merely a sale of furnaces and ranges as personal property there would be a lien. But if by this contract the furnaces and ranges were to be furnished as parts of the houses, and were in fact so applied, there was no lien. The case of the *Ridgeway Stove Co. v. Way,* 141 Mass., 557, seems to be in conflict with *Towne v. Fiske, supra,* and the principle case, which are both Massachusetts cases. In this case, a portable furnace was put into a house, under an agreement that it should remain the property of the seller until paid for. It rested by its own weight upon a circle of bricks set on the cellar floor, and was connected by pipes placed in the house when it was built. The defendant purchased the house being ignorant of the agreement. In an action by the seller of the furnace against the purchaser of the house, the court held that the furnaces were part of the realty, and that the defendant had become the owner thereof.

Farrar v. Stackpole, 6 Greenl. (Me.), 154, it was held that by the conveyance of a saw mill with the appurtenances thereto, the mill chains, dogs and bars being in their appropriate places at the time of the conveyance, were passed thereby. The court said: "Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, being on the land at the time of its conveyance by deed, do pass with the realty." A factory bell, hung in a tower built upon the factory to receive it, is a part of the realty. *Alvord v. Carriage Mfg. Co. v. Gleason,* 36 Conn., 86. And in *Stockwell v. Campwell,* 39 Conn., 362, it was held that a portable hot air furnace placed in the cellar of a dwelling house and set in a pit prepared for it, in the bottom of the cellar, where it is held in place simply by its own weight, is a part of the realty. And so also is a smoke pipe leading from the furnace to the chimney of the house. The court also said that a water wheel from a mill is held to be a part of the mill. And *Scottish American Insurance Co. v. Sexton,* 26 Ont., 77, follows *Stockwell v. Campwell, supra.*

Iron stoves fixed to the brick work of the chimnies of a house are part of the house and pass with it, to the extent of an execution upon it. *Goddard v. Chase,* 7 Mass., 432. And iron backs of chimnies belong to the executor. *Harvey v. Harvey,* 2 Str. 1141.

In *Tolson v. Moore,* 19 Me., 252, the court discussed the question of the adaptability of a chattel with respect to its use in connection with the freehold. The court said: "The better opinion is, upon the authorities, that the stove in question being fitted, adapted and designed for the use of the house would pass by a conveyance of it as part of the real estate." The same question is further discussed and explained in *Copen v. Peckham,* 35 Conn., 88. Ordinary implements of a slaughter house, which could easily have been removed, and set up elsewhere, were held to be part of the realty, the court saying, "that to constitute a fixture it is essential that the article should not only be annexed to the freehold, but that it should clearly appear, from an inspection of the property itself, taking into consideration the character of the annexation, the nature of the article annexed, its adaptation to the uses and purposes to which the building was appropriated." In *Jernyn v. Hunter,* 87 N. Y. Supp., 546, an heating apparatus

was held to be part of the realty, following *Stockwell v. Campwell, supra.*

From a consideration of the foregoing authorities, the better opinion seems to be that a portable hot air furnace connected with the house in the ordinary way, is a real fixture, and therefore part of the realty when annexed. The nature of the annexation is such that the premises become adapted to its use, and it becomes an essential part of the realty.

LIABILITY OF MUNICIPALITIES FOR TORTS OF OFFICERS OF THE STREET CLEANING DEPARTMENT.

The liability of a municipal corporation for the torts of its agents committed while in the prosecution of their duties, is a subject which has presented many questions of technical nicety, and has resulted in a diversity of opinion. It is generally conceded that the duties imposed upon a municipal corporation are of a dual nature, one arising from a grant of a special power in the exercise of which it acts as a legal individual, and the other is implied from the exercise of political rights, under the general law, as to which it acts as a sovereign. As to torts of agents arising out of duties of the latter character, there is no question as to the liability. The corporation acting as a sovereign is not liable. And the corporation acting in the performance of duties of the latter character through its agents, is liable for their torts. But what has lead to confusion and diversity of opinion is the question as to what constitutes a duty of the former class. *Dillon on Municipal Corporations,* Vol. 1, section 66 (4th edition), says: "In its proprietary or private character the theory is, that the powers are supposed not to be conferred primarily or chiefly, for considerations connected with the government of the state at large, but for the private advantage of the compact community, which is incorporated as a distinct legal personality or corporate individual; and as to such powers or property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it, is omnipotent."

In the case of *Hewitt v. City of Seattle,* 113 Pac., 1084, recently decided by the Supreme Court of Washington, it was held that

the liability of a city for injuries caused by defective streets, is not limited to injuries caused by structural defects or obstructions, and that a city was liable for injuries to one who was negligently run over by an automobile driven by the superintendent of streets while in the exercise of his official duties. In this complaint, the plaintiff alleges negligence on the part of the city through its agent Maloney, and that the automobile was being driven at an unlawful rate of speed, and sues for damages. A verdict was returned for $1,500, judgment was entered thereon, and the city appealed. The decision was affirmed on appeal.

Qui facit per alium facit per se, is a maxim applied to the relation of principal and agent. And from this has developed the doctrine of *Respondeat Superior. Judge v. The City of Meriden,* 38 Conn., 90, held, that surveyors of highways appointed by towns, and street commissioners appointed by cities, are, when repairing defective highways, in the performance of a public duty, and the rule *Respondeat Superior* does not apply to those corporations in respect to such acts of such officers. But on the other hand, *Hall v. City of Austin,* 73 Minn., 134, held that the duty of caring for and supervising the condition of its public streets is one which rests upon a municipal corporation as such and the doctrine of *Respondeat Superior* applies.

In *Severn v. The City and County of San Francisco,* 115 Cal., 648, the court held, that municipal corporations are not liable for dereliction or remissness of municipal officers, or agents, in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers which are prescribed and limited by express law. And when an injury results from the wrongful act or omission of a municipal officer charged with a duty prescribed and limited by law, the doctrine of *Respondeat Superior* is inapplicable, and the officer is not treated as the agent or servant of the corporation in the performance of such duty, but is held to be the servant and agent of, and controlled by the law, and for his acts the municipality will not be held liable. *Baker v. West Chicago Park Commission,* 66 Ill. App., 507, in substance held the same as the case above. The plaintiff was injured from the negligence of the officers of the defendant in giving the plaintiff, an employee, a vicious and unsafe horse to use. The court said: "If agents or servants of a municipal corporation are independent of the corporation as to the term of their

office and the manner of discharging their duties, the corporation is not impliedly liable for their acts of negligence, and the doctrine of *respondent superior* does not apply."

A city is not liable for the negligence of a laborer employed by its superintendent of streets, in the construction of a new street which has been laid out by the Board of Aldermen, and which they have directed the superintendent to build, if, under the charter of the city, the superintendent was acting as a public officer in employing the laborer and in constructing the street. *Jensen v. City of Waltham,* 166 Mass., 344.

The street commissioner in rebuilding a retaining wall set up a derrick so negligently that by reason of such negligence a laborer on the work was injured and the municipality was held not responsible. *Bowden v. The City of Rockland,* 96 Me., 129.

The cases above discussed, for the most part, hold, that the acts of a street commissioner or superintendent of streets in repairing and supervising the repair of the streets of the city, fall under the powers of the municipality, which are considered of a political and public nature. *City of Winona v. Botzet,* 169 Fed., 321, discusses the dual duties of a municipal corporation in the following language: "Municipalities have two classes of powers, the one political, public, in the exercise of which they govern their people and act as delegates of the state; the other private, business, in the exercise of which they act for the advantage of their inhabitants and themselves. They are not liable in damages for the acts and omissions of their officers and agents in the exercise of the former. But they are liable in damages for the negligent and wrongful acts and omissions of their agents and officers within the scope of their authority, in the exercise of the latter." The courts are in direct conflict as to what acts of servants and agents of a municipality fall within this latter class of duties. In *Normile v. The City of Ballard,* 33 Wash., 369, a city engineer was negligent in wrongfully estimating the quantity of gravel removed by a third person, resulting in the plaintiff making an overpayment for such quantity as estimated. The court held that the city is liable for the wrongful and negligent acts of its engineer, done in the course of his official duties, with reference to the improvement of the streets of the city.

Collensworth v. The City of New Whatcom, 16 Wash., 224, goes even further than any of the cases cited, in holding that where a municipal corporation undertakes the construction of a public work which falls legitimately within its corporate powers, it is liable for any injury resulting from the negligence of an employee, although in attempting to exercise such powers, the corporate authorities act in excess of the powers conferred by the charter, and enter into a contract that is clearly *ultra vires.* And in the case of the *City of Denver v. Peterson,* 5 Colo. App., 41, it was held that the board of public works was one of the agencies of the city for the transaction of its corporate business, and if through negligence or malfeasance of this board or of its servants and employees, a cause of action accrues to an individual the city must respond. The defendant in *Hinds v. The City of Marshall,* 22 Mo. App., 208, was also held liable for damages caused by defects in the street, although the failure to repair the same was due to the negligence of the street commissioner. *Funnell v. City of St. Paul,* 20 Minn., 117, and *Niven v. City of Rochester,* 76 N. Y., 619, held the defendants liable under similar circumstances.

In *Fox v. The City of Philadelphia,* 208 Pa., 127, the city was held liable for the death of a passenger, caused by the negligence of an operator of an elevator, employed by the public building commission, where the elevator in question was being used in carrying the public to the courts, and the operator was being paid by the city. And *Missano v. Major, etc., of New York,* 160 N. Y., 123, practically the same question is presented and decided in the same way. This case, in principle, is exactly the same as the principal case. This was an action to recover for the death of a child who was run over and killed by a horse attached to an ash cart of the city cleaning department. The court held that the city was liable for the negligent acts of its employees in its department of street cleaning. And *The New York and Brooklyn Saw Mill and Lumber Co., App., v. City of Brooklyn,* 71 N. Y., 580, held the same as the case above.

The duty imposed upon the city in keeping the highway clear from encumbrances, is in its nature private, and the persons employed to perform it are the agents of the corporation in its private capacity; and for their acts while so engaged, the corporation is liable *civiliter,* precisely to the same extent that any other master

is liable for the acts of his servants while employed in his business. *Scott v. The City of New York,* 50 N. Y. Supp., 191. The commissioner of street cleaning of the City of New York is an agent of the city, and not an officer of the general public, notwithstanding his duties are partly rendered in the interests of the public health, and his powers are plenary, and within their sphere, exclusive of the authority of an officer of the city. The city is, therefore, liable for his negligent acts done in the course of his official duty. *Barney Dumping-Boat Co. et al. v. Major, etc., and The City of New York,* 40 Fed., 50.

It seems from the authorities examined, that they divide themselves territorially. The New England states hold that the duties of supervising the streets of a municipality are of the class denominated public, and therefore the municipality is not liable for damages resulting in the negligent or wrongful performance of such duties by its officers or agents. As such, they are agents of the public at large, exercising their duties under governmental powers, on behalf of the state in general. But in other jurisdictions, the great weight of authority seems to be that such duties are part of the duties of municipalities, exercised for the benefit of the compact community and of the municipalities themselves. Therefore cities are liable for any damages resulting from the negligent performance of duties of this nature, by their agents and officers. Thus the weight of authority seems to be with the principal case, although there are some conspicuous authorities which have taken a decided stand against it, and the bulwark of which is unshakable.

THE STATUS OF A STREET RAILWAY IN THE CITY STREETS.

In the *New York Cent. & H. R. R. Co. v. City of New York et al.,* 127 N. Y. Supp., 513, the Hudson River R. R. Co. which had been organized since 1846 for a term of fifty years obtained from the State of New York the right to lay tracks in certain streets in New York City. This company was afterwards consolidated and became a part of the New York Central lines, under a law that provided that the franchises of each corporation should be vested in the new company. The city ordered the tracks of the plaintiff to be removed at the expiration of the fifty-year term because they had become a nuisance. The court enjoined the

exccution of the order on the ground that the State alone had the power to question the exercise of the franchise, and that the franchises were not limited to the terms of years granted to each corporation, but to length of time which had been granted to the consolidation of the corporations which was five hundred years, and hence all periods of franchises were lengthened to this time.

According to different rulings, the right of way granted to a railway in city streets have been described as franchises, easements, licenses and contracts. *In re Thirty-fourth St. R. R. Co.,* 102 N. Y., 343, held that a franchise is a privilege conferred by grant from the government or a sovereign power and is vested in individuals or corporations.

According to *B. & N. R. R. Co. v. Town of Alston,* 54 W. Va., 597, a permit to a railway from a city council for occupation is not a franchise, but an easement, and the council by voting such a permit, gives a license or grant thereof. Another view of a right of way is spoken of in *Mayor of Troy v. Troy and Lansingburgh R. Co.,* 49 N. Y., 657, which held that a permit by a municipal corporation to a railroad is a license granted upon certain terms which becomes a contract between the parties. *The City of Binghampton v. B. P. & D. Ry. Co.,* 61 Hun., 479, brings out the idea of a right of way being a contract in the following manner. In this case, the plaintiff brought an action against the defendant to recover the expense of paving between its tracks. It appeared that there was inserted in the defendant's franchise a condition that they should keep the highways within the rails and one foot outside thereof in good repair. The city paved the street and now seeks to recover damages for non-fulfillment on part of the defendant. Here it seems that a right of way granted to a railway company to lay tracks in its streets is regarded as a contract.

The inability to draw a line of distinction between a right of way and a license seems to have presented itself in *Union Traction Co. v. City of Chicago,* 199 Ill., 484, which held that by a City and Village Act empowering cities and villages to license, tax and regulate hackmen, draymen, etc., and all others pursuing a like occupation and provide them compensation, that they might also treat an ordinary street use as a license, and thus the two were united together and within the power of the municipality.

In regard to a right of way being an easement, the theory for this point is found in *Milhau v. Sharp, 27* N. Y., 611, which held that as a resolution passed by a common council authorizing private persons—that is being for their benefit—the right to operate a railway, if it is without limitation as to time or reserving power of revocation is not a license, and if valid is a contract, which cannot be abrogated.

There is a difference, however, between a right of way, from either a license, easement or contract.

The first point of difference may be noted in *People ex rel. Emsfield v. Murray,* 149 N. Y., 367, which held in considering a question on liquor traffic that a license was not taxable as property, while the street rights of a railway are taxable according to *People ex rel. Met. St. R. Co. v. Tax Commissioners,* 174 N. Y., 417, a franchise, by an amendment to the general tax law is for purpose of taxation considered to be real estate, and also tangible property such as rails and rolling stock is taxable.

As between an easement in gross and street rights of a railway, the former according to *Minor & Wurts on Real Property,* page 82, Sec. 86, is not assignable by the weight of authority, while the rights of a street railway are assignable according to *Parker v. Elmira Co. & N. R. R. Co.,* 165 N. Y., 274, which held that a right of way granted to railway is a privilege or franchise, and in nature of property is alienable and transferable and can be assigned. Between a license and a franchise, a line of distinction may be drawn, for by a license one might do an act which could not be lawfully done otherwise without the grant of the State, but a franchise carries with it an interest of the public according to *Pierce v. Emery,* 32 N. H., 484, which held that land taken by authority of the State for a public use and conveyed by a charter to a corporation, the corporation holds it in trust for the public, in which they have a continual easement. The remaining line of distinction to be drawn is between a franchise and a contract; the former being according to *Queen v. Cambrian Ry. Co.,* L. R. 6 Qu. B., 422, an incorporeal hereditament while the latter is always a chose in action.

The better theory it seems would be to consider the right of a street railway in a street a franchise, which according to *Blair*

v. City of Chicago, 211 U. S., 400, must be shown to have been conferred in plain terms, and nothing passes by a grant of a franchise except as is clearly stated or necessarily implied, and any ambiguity in its terms is to be construed strictly in favor of the grantor and against the grantee.

The City of New York no doubt thought that it was well within its power when it attempted to remove the rails of the street railway company, because they were a nuisance in *N. Y. C. & H. R.R. Co. v. The City of New York,* 127 N. Y. Supp., 517, for the ruling in *Hume v. Mayor of New York,* 74 N. Y., 264, encroachments made against private persons and unauthorized are to be considered as nuisances and it is the duty of the city to remove them and in *The Easton and Amboy R. R. Co. v. Inhabitants of Greenwich,* 25 N. J. E., 565, a similar ruling is noticed, for in this case it was held, that it is within the power and duty of city and town officials to look out for the good of the town, and they may maintain an action for the people and the people through them.

Without a doubt the City of New York over-stepped the limits of its power, because the law of 1869 vested the legislature with the power to determine the duration of the grants and privileges of the consolidated company, which were measured by its life. This case, however, affords the opportunity for one to consider the different theories advanced to determine the status of a street railway in the city streets.