

of winding up the association, and the vote to dissolve it and sell its property was unauthorized. The members of the association were entitled not only to notice of the time and place of the meeting, but of the business proposed to be transacted, especially if the business was of an unusual character, and the vote was not binding upon the absent or dissenting members. They had no notice of a meeting to act upon the question of dissolving the association; nor would the vote have been binding if the notice had been sufficient. By the provisions of its constitution, the association had no power to dissolve while ten members were willing to continue it; and it appears that at the September meeting, after the passage of the vote of dissolution, the president gave notice in the presence of Lynch that the regular monthly meeting would be held, if ten members were willing to continue the association; and that, as early as the next day, ten members signed a paper protesting against the proceedings of the meeting, and stating their willingness to continue the association. Upon these facts the vote to sell the property was a nullity. It conferred no authority upon the committee appointed to carry it into effect, and the expenses incurred by Lynch in making preparations for the sale were not a legal claim against the association. Neither were the costs and expenses of the injunction suit chargeable to the association. It was prosecuted by fifteen members, and a temporary injunction was served on Lynch the second day of October; there is no evidence of any request or authority from the association to contest the suit, and there is no ground for charging the association with the costs and expenses of it.

Set-off disallowed.

BLODGETT, J., did not sit: the others concurred.

WILLEY v. PORTSMOUTH.

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An exception to the admissibility of evidence on one point does not ordinarily raise the question of nonsuit for want of evidence on another.

CASE, for obstructing and digging up the plaintiff's way by excavating and carrying away gravel. The city of Portsmouth owned the gravel and sand on the lot over which the plaintiff's way passed. Subject to exception, the plaintiff was permitted to show acts of surveyors of highways, and of persons acting under their direction, in making excavations in the plaintiff's way, by taking and carrying away gravel for repairing highways. Verdict for the plaintiff, and motion to set aside and for a new trial.

S. W. Emery, for the defendants. I. We have to see whether, under the statutes of New Hampshire and the common law, a surveyor of highways is an officer, agent, or servant of a municipal corporation in such sense that the corporation is liable for his active torts, or omissions amounting to tortious negligence.

(1) May a municipal corporation be regarded as setting the surveyor of highways in motion, and does it hold him forth to the public as its servant? (2) Is the appointing or choosing of the surveyor optional with the town and its officers? We consider the above two queries together for the sake of logical connection in the argument.

Towns may choose as many surveyors of highways as they think proper. If none are so chosen, the selectmen shall appoint such surveyors. *G. L., c. 72, s. 5*. Under the above section, the choice, either by the town, or the selectmen acting for the town, of a surveyor or surveyors of highways is mandatory. Positive law requires it,—not the ordinance of a municipal corporation, but the statute of the state. It is very doubtful, even if the town under section 25 should contract for the keeping of highways and bridges in repair, whether the choice of a surveyor or surveyors could be dispensed with; and we think it could not. The statute says they “shall” be appointed by the selectmen. Therefore it is not optional with a municipal corporation in New Hampshire to appoint or not to appoint a surveyor or surveyors of highways. *Ball v. Winchester*, 32 N. H. 435. One of the elements thus necessary to constitute a surveyor of highways a servant or agent of a municipal corporation, so that the corporation may be charged for his torts while acting within the scope of his duty, is totally eliminated. Here, then, is not the relation of master and servant, or principal and agent. *Wood Master and Serv.* (2d ed.) 920 *et seq.*

In *Maxmilian v. Mayor, etc., of New York*, 62 N. Y. 165, *Folger, J.*, says,—“A municipal corporation elects or appoints an officer in obedience to an act of the legislature, to perform a public service in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, and such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable. It has appointed or elected him in pursuance of a duty laid upon it by the law, for the general welfare of the inhabitants or of the community. He is the authority selected by it as the authority empowered by law to make selections; but when selected, and its power is exhausted, he is not its agent. He is the agent of the public for whom and for whose purposes he was selected.” Here was an action by the plaintiff administrator against the city of New York, for injuries sustained by the plaintiff’s intestate by reason of being run over by an ambulance wagon being driven along the streets by an employé of the commissioners of public charities. The plaintiff was nonsuited, upon the ground that the city, as such,

did not control the operations of the commissioners, but that their duties were defined by statute, and the board itself was created by statute. The nonsuit was sustained. *Wood Master and Serv.* (2d ed.) 921; *Hafford v. New Bedford*, 16 Gray 302; *Ham v. Mayor, etc., of New York*, 37 Super. Ct. 458; *Walcott v. Swampscott*, 1 Allen 101; *Ball v. Winchester*, 32 N. H. 445; *Grimes v. Keene*, 52 N. H. 335; *Hardy v. Keene*, 52 N. H. 377; *Morse v. Weymouth*, 28 Vt. 824; *Palmer v. Carroll*, 24 N. H. 314; *Thompson v. Fellows*, 21 N. H. 425; 2 Dill. Mun. Corp. (3d ed.), s. 979; *Barney v. Lowell*, 98 Mass. 570; *Oliver v. Worcester*, 102 Mass. 489; *Alcorn v. Philadelphia*, 44 Pa. St. 348; *Erie City v. Schwingle*, 22 Pa. St. 384; *Dean v. New Milford Township*, 5 Watts & Sergt. 584; *Dayton v. Pease*, 4 Ohio St. 80, 100; *McCarty v. Bauer*, 3 Kansas 237; *Rowe v. Addison*, 34 N. H. 313; *Judge v. Meriden*, 38 Conn. 90; *Makepeace v. Worden*, 1 N. H. 16; *Bindon v. Robinson*, 1 Johns. 516.

II. The surveyor of highways is not under the control of the town by which he is chosen. Reference to the provisions of chapter 72 of the General Laws plainly discloses this. Neither the town nor its officers can direct and control the surveyor as to when he shall work, whom he shall employ, where within his district he shall work, the number of persons to be employed, the depth to which he may cut, the height to which he may fill. He is a public officer, possessing judicial discretion as to many of his acts (*Wells v. Goffstown*, 16 N. H. 53, *Waldron v. Berry*, 51 N. H. 141, *Turnpike v. Champney*, 2 N. H. 199, *Palmer v. Carroll*, 24 N. H. 314, *Rowe v. Addison*, 34 N. H. 313); and how, unless by express statute, may an officer clothed with judicial or discretionary powers be the servant or agent of a municipal corporation so as to charge the corporation with liability for his tort? We say that an officer, acting under judicial discretion, cannot be a servant or agent of any municipal corporation or person so as to charge the corporation or person with liability for his tort, committed while about the business his judicial discretion is to be exercised in. If acting with discretionary powers, the rule is the same. *Wood Master and Serv.* (2d ed.) 924; *Ball v. Winchester*, 32 N. H. 435. Full control of the acts of an alleged servant within the scope of the business he is about, is essential to charge a master for the tort of his servant committed within the scope of the master's business. *Clapp v. Kemp*, 122 Mass. 481; *Stables v. Eley*, 1 C. & P. 614; *Laugher v. Pointer*, 5 B. & C. 547; *Wood Master and Serv.* (2d ed.) 926.

III. Is a surveyor of highways amovable at pleasure of the town? Under the laws of New Hampshire we think he is not; and so another element of the relation of master and servant is lacking. The truth is, every essential which goes to establish the relation of master and servant between the municipal corporation and a surveyor of highways has been shown, by the cases cited, to

be wanting. The courts of more than one half the states in the Union have declared it to be so, and there is but one case decided in this country or in England which in any way is opposed to the conclusion which follows from the overwhelming mass of decisions. In *Grimes v. Keene*, the officer for whose negligence the town was held liable was an officer of the town; his employment by it was optional, he was set in motion by the town, he was under full control by the town, and amovable at pleasure. The correctness of the decision has never been doubted. In *Hardy v. Keene*, an obstruction of the highway was caused by the act of the surveyor of highways, and the court held the town liable,—not, however, because of a tort of the surveyor against the traveller, but because the statute says the town shall be liable for injuries occasioned by a deficient highway; and the town would have been just as liable had an adjoining land-owner erected the derrick, and the town had had reasonable opportunity to remedy the defect. And in this case it was held that the surveyor might be deemed the agent of the town for the purpose of taking notice of the defect in the highway. Why? Judge *Foster's* admirable opinion discloses the complete and unanswerable ground, viz., “But, although the surveyor cannot be regarded as the agent of the town for the purpose of imposing upon the town a liability on account of his negligence, for many other purposes he may be deemed the agent of the town, as, for example, to purchase material, if necessary, to repair the highways. So, also, he may be the town’s agent, so to speak, to charge it with notice of a defect in a highway. Defects and obstructions are supposed to be peculiarly under the observation of the surveyor: especially was it so in the present case. If this derrick and appurtenances were improperly and insecurely placed and fastened, through the carelessness or fault of the surveyor, he who placed them thus knew of the defect; and if he knew it, it would be evidence from which the jury might find that the town knew it.” See *Rowe v. Portsmouth*, 56 N. H. 295, where notice to the city marshal was held to be notice to the city. *Buttrick v. Lowell*, 1 Allen 172.

Gilman v. Laconia, 55 N. H. 130, was decided at the March term, 1875. We submit that Judge *Ladd's* opinion therein is in direct conflict with every decision on the subject. It is assumed by him in that case that *Hardy v. Keene* established the doctrine that a surveyor of highways is a servant in all senses of the town choosing him. We think *Hardy v. Keene* will not, as above shown, bear any such construction. The learned judge further cites many Massachusetts cases as establishing the same doctrine. We respectfully submit that they may, and do, perhaps, support *Hardy v. Keene*, and still are not in conflict with *Ball v. Winchester*. In proof of this fact we cite a few of the very many Massachusetts cases in which the doctrine of *Ball v. Winchester* is adopted and declared. *Oliver v. Worcester*, 102 Mass. 489; *Hafford v. New*

Bedford, 16 Gray 297; *Fisher v. Boston*, 104 Mass. 87; *Walcott v. Swampscott*, 1 Allen 101; *Barney v. Lowell*, 98 Mass. 570; *Denniston v. Clark*, 125 Mass. 216; *Johnson v. Dunn*, 134 Mass. 523. In *Groton v. Haines*, 36 N. H. 392, the court had no occasion to use the rule in *Ball v. Winchester*, did not use it, and most certainly, we submit, did not overrule that case. *Eaton v. B. C. & M. R. R.*, 51 N. H. 504, is wholly immaterial to this case; likewise *Gilman v. Laconia*. And as to *New York v. Furze*, 3 Hill 612, which is cited by Judge Ladd: that case was criticised in *Wilson v. New York*, 1 Denio 600, and *Mills v. Brooklyn*, 32 N. Y. 499, and has been virtually overruled by the court rendering it. Further, it has been overruled in *Hill v. Boston*, 122 Mass. 344—*S. C.*, 23 Am. Rep. 332, 363; and disapproved in *McConnell v. Dewey*, 5 Neb. 388, *Imler v. Springfield*, 55 Mo. 119, 127—*S. C.*, 17 Am. Rep. 645, 652. The opinion of *Cushing, C. J.*, does not, we submit, go so far as to overrule *Ball v. Winchester*. *Smith, J.*, seems to hold that *Ball v. Winchester* and *Groton v. Haines* do not conflict.

In this case it is sought to charge the city for an active tort of a surveyor of highways. We say that if a municipal corporation can be held liable in this case, where not an element in the relation of master and servant or principal and agent exists, it can be held liable for torts of police officers committed within the scope of their duty,—and all because the law has cast upon municipal corporations the duty of preserving the peace, and has made a municipal corporation liable for damage done by mobs;—therefore, as the officers are the persons to prevent mobs' doing damage or forming, the police officer is a servant of the city. So it would be liable for the malicious and corrupt acts of a police judge chosen by it; and so on, until a municipal corporation would become a vast life and accident insurance company for the benefit of all the world. We say, finally, that to follow not *Gilman v. Laconia*, but Judge Ladd's opinion therein, would be to deny every decision of American courts on the subject, every decision of English courts on the subject, the opinions of able text writers such as Judge Dillon and Mr. Wharton, and would precipitate extreme confusion in the law of master and servant.

Frink & Batchelder, for the plaintiff, cited and commented on *Edes v. Boardman*, 58 N. H. 590, *Walker v. Walker*, 63 N. H. 322, *Denniston v. Clark*, 125 Mass. 217, *Waldron v. Berry*, 51 N. H. 136, *Eastman v. Meredith*, 36 N. H. 284, *Hardy v. Keene*, 52 N. H. 370, *Groton v. Haines*, 36 N. H. 392, *Parker v. Nashua*, 59 N. H. 413, *Vale Mills v. Nashua*, 63 N. H. 137, *Carpenter v. Nashua*, 58 N. H. 37, *Wakefield v. Newport*, 60 N. H. 376, *Gilman v. Laconia*, 55 N. H. 132, *Maximilian v. Mayor*, 62 N. Y. 160, *Adrich v. Tripp*, 11 R. I. 141, *Hunt v. Boonville*, 65 Mo. 620, *Eaton v. B. C. & M. R. R.*, 51 N. H. 534, Dillon Mun. Corp. 780.

BINGHAM, J. The defendants owned the gravel over which the plaintiff's way passed, and, subject to exception, were permitted to show that the persons moving the gravel from his way were surveyors of highways, and persons acting under them. The case is meagre in narrative, but it is understood that the gravel-bank was outside the limits of any highway, and that the exception is to evidence showing for whom the persons digging the gravel claimed to be working. The manner in which the wrong was done, by whom and under what claim, were things so closely connected with the main fact as to be admissible as a part of the *res gestæ*.

If it was the purpose of the defendants, in taking the exception, to raise the question of their liability for the acts of highway surveyors, the case fails to show it. For aught that appears, the ruling in that particular may have been satisfactory. An exception to the admissibility of evidence on one point does not ordinarily raise the question of nonsuit for want of evidence on another.

Judgment on the verdict.

CLARK, J., did not sit: the others concurred.

CONCORD & PORTSMOUTH RAILROAD AND CONCORD RAILROAD CORPORATION v. PORTSMOUTH.

Section 3, c. 161, Gen. Laws, which relates to securing railroad crossings of highways, is not repealed by s. 7, c. 101, Laws of 1883.

PETITION for the examination of a railroad and highway crossing. March 25, 1886, the city councils of Portsmouth voted that the plaintiffs be required forthwith to protect, guard, and secure said crossing by gates. April 26, an attested copy of the vote was served on the plaintiffs, and May 22 they filed this petition. At the October term, 1886, the city moved that the petition be referred to the county commissioners, the railroads claiming that it should be referred to the railroad commissioners. The question so raised was reserved for the opinion of the court.

J. W. Fellows, for the plaintiffs.

S. W. Emery, for the defendants.

BINGHAM, J. The question raised is, whether s. 3, c. 161, Gen. Laws, providing that a town by vote may require a railroad to secure the crossing of a highway by gates on both sides, is by implication repealed by s. 7, c. 101, Laws of 1883, authorizing the