

## BANGOR SAVINGS BANK v. CITY OF STILLWATER.

*(Circuit Court, D. Minnesota, Third Division. March 31, 1892.)***MUNICIPAL INDEBTEDNESS—INVALID NEGOTIABLE CERTIFICATES—MONEY HAD AND RECEIVED.**

Where negotiable certificates of indebtedness issued by a city have been sued upon by the payee, and declared invalid for want of power to issue negotiable instruments, the payee may maintain an action for money had and received, provided the city had power to make the contract out of which the indebtedness arose; and the fact that the payee was not a party to that contract is immaterial when the certificates were issued to him at the request of the contractor, and the money was received by the city and paid over to the contractor.

At Law. Action by the Bangor Savings Bank against the city of Stillwater for money had and received. On demurrer to amended complaint. Overruled.

F. H. Lemon & Co. made a contract December 21, 1887, with the city of Stillwater, whereby they agreed to "vest" title in the city to two strips of land, each 50 feet wide, and to widen Main street 50 feet a certain distance, and to do all the excavating and filling that may be necessary to reduce the 50 feet to the present grade, and to secure the relocation of certain railroad tracks and certain sewer privileges. For the services to be performed and the land so acquired the city agreed to vacate and abandon certain condemnation proceedings, and vacate and surrender all its right to certain parts of Laurel, Cherry, and Linden streets; and, furthermore, on the completion of the contract by Lemon & Co., to pay them \$21,250, in three certificates of indebtedness, to become due, respectively, on July 1, 1889, July 1, 1890, and July 1, 1891. Subsequently, on October 27, 1888, the certificates of indebtedness were issued to the Bangor Savings Bank as payee, reciting on their face that they were so issued at the request of Lemon & Co., and that a resolution of the city council was passed, and duly approved by the mayor, authorizing the making and delivering of the certificates to the bank. An action to recover on the certificates failed for the want of power in the city to issue them. Suit is now brought for the money paid to the city of Stillwater, the certificates having been decided illegally issued. A demurrer to the complaint is interposed.

*Sanders & Bowers and Owen Morris, for plaintiff.*

*Fayette Marsh, for defendant.*

NELSON, District Judge. It is the settled doctrine that if a municipal corporation has received money for an authorized purpose, derived from the issue of illegal and void bonds, and has applied it to that purpose, an action will lie as for money had and received, although the corporation had no authority to issue the bonds. *Louisiana v. New Orleans*, 102 U. S. 204; *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. Rep. 62; *Hitchcock v. Galveston*, 96 U. S. 341. The contract with Lemon & Co. was valid. It was within the scope of the chartered powers of the city of Stillwater. (See Judge THAYER'S opinion in this case, v.49F.no.9—46

46 Fed. Rep. 899, citing City Charter, c. 8, § 2, etc.) The city certificates are in the hands of the payee, and contain a recital that they were issued in consideration of the performance of the Lemon & Co. contract. The observation of Justice Strong in *Hitchcock v. Galveston*, 96 U. S. 341, forcibly applies. In that case the city of Galveston made a contract with Hitchcock & Co. to pave streets. The charter gave the city power to contract for this purpose, but the city agreed in the contract to pay for the work in negotiable city bonds, payable at a future day. There was no express power under the charter to issue bonds for this purpose. The court, *inter alia*, said:

"It is enough for them [the plaintiffs] that the city council have power to enter into a contract for the improvement of the sidewalks; that such contract was made with them; that under it they have proceeded to furnish material and do work, as well as assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

There is a striking similarity in the above case and the one at bar. It is true that in the former the action was brought by a party to the contract with the city, but that fact does not change the principle involved. The demurrer interposed to the complaint in this case admits the contract made with Lemon & Co., its performance by them, and that the certificates, drawing interest, and payable at a future day, were issued to plaintiff in consideration of the performance by Lemon & Co. of its contract with the city. The counsel for the defendant has very forcibly presented his views, which must prevail, unless the contract with Lemon & Co. was authorized under the charter. Having determined that the city could lawfully make the contract, and by the demurrer the receipt of the money being admitted, and the use of it in payment on the contract, I am constrained to overrule the demurrer, with leave to the defendant to answer in 20 days; and it is so ordered.

## NEW JERSEY &amp; N. Y. R. CO. v. YOUNG.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

1. **MASTER AND SERVANT—PERSONAL INJURIES—IMPUTED NEGLIGENCE.**  
Negligence cannot be imputed to a fireman because he does not endeavor to enforce upon the engineer obedience to the regulations of the railroad.
2. **SAME—KNOWLEDGE OF DEFECTS—CONTINUANCE IN SERVICE.**  
For a fireman, knowing of a defect in the air-brake, to remain upon a locomotive is not conclusive of negligence on his part, and it is a proper question for the jury whether the defect is such that a man of ordinary prudence and intelligence would not have remained, and also whether the accident would have happened had the brake been in proper order.
3. **SAME—PROMISE TO REPAIR.**  
That a servant continues in a dangerous service in consequence of the master's assurances that the danger shall be removed precludes any argument that the servant, by remaining, assumes its risks, and recovery can be had for an injury caused by the defect after the lapse of a reasonable time for its correction.
4. **SAME—FELLOW-SERVANTS.**  
The negligence of a fellow-servant does not excuse the master from liability for an accident which would not have happened had the master performed his duty. 46 Fed. Rep. 160, affirmed.

On Writ of Error from Circuit Court, Eastern District of New York. Action by William H. Young against the New Jersey & New York Railroad Company, for damages for personal injuries. The cause was originally brought in the supreme court of New York, and subsequently removed to the federal court. Verdict and judgment were there rendered for plaintiff, and a new trial was denied. Defendant brings error. Affirmed.

*Robert W. De Forest*, for plaintiff in error.

*Charles C. Suffren*, (*Irving Brown*, of counsel,) for defendant in error. Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the original suit to review a judgment for the plaintiff rendered upon a verdict of the jury. The plaintiff, a fireman in the employ of the defendant, while firing the locomotive of an express train on the defendant's railway on a trip from Jersey City to Haverstraw, was injured by a collision between his train and some cars upon a side track of the railway. The side track was not disconnected from the main track at the time, and this fact was indicated by a danger signal of a red light, indicating that the switch was open. A white light would have indicated that it was closed. The track was straight for a considerable distance ahead of the switch. The side track was at a station where there is a junction between the tracks of the defendant's railway and those of another railway. Among the regulations of the defendant, furnished to its engineers, were the following:

"All trains must approach \* \* \* junctions \* \* \* prepared to stop; and must not proceed until the switch or signals are seen to be right, or the track is plainly seen to be clear. \* \* \* He [the engineer] must always run upon the supposition that at any station he may find a switch out of place, and he must have his train well in hand, on approaching a switch or station."