This action was brought by the Northern Central Railway Company to recover from the United Railways and Electric Company of Baltimore, the sum of $2099.87 claimed to be due and owing as its proportion of the cost of repairs to two bridges known as the Charles Street, and Maryland Avenue Bridges, which respectively form a continuation of Charles Street and of Maryland Avenue, two of the public streets of Baltimore City, running parallel to each other. Both of these bridges cross ~~upon the grade of the street~~, the valley below in which flows the stream known as Jones Falls, and on the banks of which beneath said bridges are located the tracks of the Northern Central Railway.

To avoid the repetition of long names, we shall in this opinion refer to the Northern Central Railway Company as the "Railroad Co"; to the United Railways and Electric Company as the "Railway Co", and to the Mayor and City Council of Baltimore, as "the City".

The declaration as filed contained six counts, the first four being the common counts for money payable by defendant to plaintiff, and the fifth and sixth counts being special counts, which we shall request the reporter to have transcribed in connection with this opinion. The defendant pleaded the general issue, ~~never promised~~ as alleged, and demurred to the fifth and sixth counts, and the demurrer to each of these counts was sustained with leave to amend. The plaintiff declined to amend these counts, but by leave of the Court amended the declaration by striking out the four common counts,

whereupon judgment was entered on the demurrer for defendant, and plaintiff appealed. Before the ruling on the demurrer an agreement was filed that all ordinances of the City in anyway relating to the subject matter of the suit should be considered as a part of the declaration in this case as fully as if the same had been set out at length therein.

It will be seen by reference to the fifth count of the declaration that it is there sought to recover upon the strength of the obligation alleged to be imposed by the condition in the grant of the City, upon the defendant as successor to the rights and obligations of the Baltimore City Passenger Railway Company, and of the Baltimore Traction Company, the cost of repairs between the tracks on these two bridges, and two feet upon either side thereof, upon the legal theory that these bridges are parts of the respective streets; and it will appear by reference to the sixth count that it proceeds upon the defendants theory that these bridges are not parts of these streets respectively; and upon the further legal theory, that if they are not parts of said streets, then they are the private property of the plaintiff, and that the defendant cannot occupy or use that property without making compensation for the increased cost imposed upon the plaintiff as owner, by such use and occupation.

Three questions were raised at the argument:

1st. Are these bridges parts respectively of Charles Street and Maryland Avenue/

within the meaning of the ordinances of the City relating to the laying of street railways thereon?

2nd. If so, is the plaintiff entitled to maintain this action upon the obligation alleged to be imposed by the condition in the said ordinances upon the defendant as successor to the rights and obligations of the original grantees?

3rd. If these bridges are not parts of these streets respectively, and therefore not within the scope of the supposed obligation, can the plaintiff recover in this suit the increased expense to which it is put by the use of its property by the defendant?

In order to a proper understanding of the legal effect of the averments of the declaration it will be necessary to state the substance of some of the City ordinances which it was agreed should be considered as set out in the declaration, and also something of the physical situation at the location of these bridges before the passage of any of these ordinances.

Previous to the year 1868, the Rail Road Co. after entering what were then the Northern limits of the City, went upon the west side of Jones Falls down and across certain streets to its station on Calvert St. in Baltimore City. About the year 1868, its tracks under proper legal authority after entering the Northern limits of the City, were changed to the Northerly or Eastern side of Jones Falls, and in going to Calvert Station, crossed Charles and Eager Sts at grade, Maryland Avenue, North and Calvert Streets not being opened

beyond Jones Falls.
as streets at that time. In the year 1868, the property owners on Charles and Eager Streets
petitioned the City to raise the grade of Charles and Eager Streets in order to cross the
Rail Road above grade. This resulted in the passage of Ordinance No 77 of 1868.
The first section of this ordinance provided "that the grade of Charles Street between
Hoffman and Lanvale Streets, and of Eager Street between North and Preston Streets
shall be raised by the Mayor and City Commissioner so as to enable the said Rail
Road Co to construct its railway tracks under said streets". It must be noted here
that Charles and Eager Streets were then both graded and paved, and were in use
as streets, and it was therefore provided by section two of that ordinance "that all
expenses incurred in making said change of grade shall be paid by the Northern
Central Railway Co". This necessarily included the cost of maintenance of said
Bridges by which alone this change of grade was accomplished. It seems to be
entirely just and equitable that the Rail Road Co. should bear the cost and ex
pense of of ~~taking~~ up the pavements already laid and cutting through streets in
changing the route of the rail road for its convenience in the accommodation
of the public.
From this ordinance of 1868 it will thus be seen that the Rail Road Co. was
~~primarily~~ obligated to the City to keep in repair the whole bridges joining the North

city extension of Charles Street.

By ordinance No. 144 of the year 1859 the Baltimore City Passenger Railway Co. was granted the right "to lay double tracks upon Charles Street from the Northern limits of the City to Read Street, thence along Read Street to Calvert St &c"

But as a condition of said grant, sec 11 of said ordinance provided "That the owners and proprietors of said railway shall keep the streets covered by said tracks, and extending two feet on the outer limits of either side of said tracks, in thorough repair at their own expense, and shall free the same from snow and other obstructions, in doing which they shall not cause to be obstructed the other portions of the street on either side of the railway tracks authorized by this ordinance to be constructed, and for non compliance the Mayor and City Council may impose such reasonable fines not exceeding twenty dollars per annum to be collected as other City fines are now collected."

So much for the bridge over Charles Street, and we now come to the bridge over Maryland Avenue.

Maryland Avenue was not opened as a public street across the valley of Jones Falls until some time after 1877. In the meantime, in March 1877, the case of the Northern Central Railway Co vs Baltimore, 46 Md 425, was decided

in which it was held ~~that~~ the City must pay for the bridges necessary to carry North and Calvert Streets across the valley of Jones Falls when those streets were opened across ~~said~~ valley, and as the result of that decision the ~~[illegible]~~ bridges now continuing said streets were constructed. Subsequently Maryland Avenue was opened across said valley, and the City accordingly built the bridge necessary for that purpose, and paid both the cost of its construction and maintenance up to the year 1882. Then ordinance No 40 of 1882 was passed, as a supplement to ordinance No 150 of 1880 (which related to the Baltimore Union Passenger Railway Co) and by said ordinance No 40 of 1882, the Baltimore Union Passenger Railway Co, to all whose rights and obligations the Railway Co. in this case has succeeded, was granted the right "to lay down and construct double tracks upon Biddle Street from the intersection of said Railway Cos tracks upon Park Avenue to Maryland Avenue, and like double tracks upon Maryland Avenue from Biddle Street to the Northern limits of the City," the latter authority embracing ~~that~~ part of Maryland Avenue supplied by the said Bridge, and said ordinance further provided "that said tracks should be constructed, used, and operated under the terms and conditions mentioned in ordinance No 150 of 1880."
The terms and conditions mentioned in that ordinance, are stated therein in

the exact language of Ordinance No 44 of 1859. which so far as it relates to the repair of said tracks, has been transcribed in full in the preceding part of this statement of the facts.

When Maryland Avenue was opened and the bridge carrying it across the rail way was constructed by the City, the Rail Road Co had but two or three tracks crossing the line of the street under said bridge. The street when graded so as to conform to said bridge was carried on a fill or bank both to the North and South end of the bridge obstructing the Rail Road Co^s property beneath these fills and preventing the laying of additional tracks on ~~either side of the avenue~~ the property of the Railroad Co. Finding it necessary however to have these additional tracks, the City and the Rail Road Co entered into an arrangement for the removal of both said fills or banks, and the extension of the bridge both North and South. This was for the convenience of the Rail road Co, and the City granted it the right to make those changes in Ordinance No 132 of 1890, entitled "An Ordinance to authorise the Northern Central Railway Company to move the North abutment of the bridge which carries Maryland Avenue over its tracks, and also to extend said bridge Southward to the bridge over Jones Falls", and this ordinance provided "~~that~~ all the work authorised by this ordinance shall be done under

the supervision and to the satisfaction of the City Commissioner <u>and at the sole cost and charge of said Railway Co</u>", and "that the bridge over the tracks of the Railway Co, as well that now existing, as the extension thereof hereby authorised, shall always be maintained at the sole cost of the Northern Central Railway Co."

If thus appears ~~that the~~ Rail Road Co is under legal obligation to the City to maintain both said bridges in repair by virtue of the ordinances granting it, for its own convenience, rights and privileges in the streets extended by means of said bridges; and that the Railway Co is under legal obligation to the City to keep in repair ~~that~~ portion of the beds of Charles Street and Maryland Avenue occupied by their tracks, and two feet on either side thereof, by virtue of the conditions in the ordinances granting them authority to lay said tracks in the beds of said streets; and if said bridges are parts of said streets, it also appears ~~that~~ this liability of the Railway Co to the City applies as well to said bridges as to any other parts of said streets.

Upon that hypothesis therefore, both the Rail road Co, and the Railway Co are liable to the City for the repair of said bridges, the former to the extent of <u>all</u> the necessary repair, and the latter to the <u>limited extent</u> provided in the

grant of authority to lay its said tracks.

The demurrer admits the averments of the declaration in both counts, that the defendant recognised its liability ever since the passage of said ordinances down to the month of March 1903, and "provided for the repairs needed to the flooring of said bridges, between the tracks, and extending two feet on the outlimits on either side of said tracks, either by furnishing the material and labor therefor, or by paying the plaintiff for the work and materials by it furnished for the same" but that since March 1903 the defendant has refused further to recognise any liability in the premises, and has refused to pay for its proportion of the repairs then made by the plaintiff as set forth.

The first question for determination is whether these bridges are streets, or parts of streets, within the meaning of the word "streets", as that word is used in the ordinances imposing the obligation upon the owners and proprietors of the railway in question to keep in repair "the streets covered by said tracks, and two feet on the out limits of either side of said tracks".

It is not necessary to maintain that a bridge connecting portions of a city street, and forming the only means of passage from one portion to another, is for all purposes and under all circumstances, a part of said street. Our inquiry here is whether

these bridges for the purposes of this case, are parts of these particular streets.
It will be observed at the outset of this inquiry that under a grant from the City to the Railway Co of the right to lay its tracks in the streets of the City, the Railway Co. has laid its tracks on these bridges connecting portions of said streets, and that neither the City nor the Rail Road Co has ever denied or questioned their right to do so under that grant. The grant would have been of no practical value to the grantee if it had been obliged to ~~stop~~ ~~cars~~ terminate its tracks at each end of these bridges, and the Railway would have been of no practical value to the travelling public as a means of conveyance nor to the City as a source of revenue for the Park tax imposed upon the street railway. To exclude therefore the right to use these bridges would be to nullify the practical advantages to the public and to both of the direct parties to the contract. But if the right so to use the bridges is a part of the contract then it must be subject to the conditions upon which the right is granted. In North Baltimore Passenger Railway Co vs The North Avenue Railway Co 75 Md. 243 Judge Alvey has said "Where a contract with a municipality is susceptible of two meanings one restricting, ~~the other extending~~ extending, powers of the other party, that is to be adopted which works least harm to the municipality. In other words where there is a want of plainly expressed intention the construction should be beneficial to the

public," and ~~that~~ language was used in construing a grant made by the City ~~[illegible]~~ to a Street Railway Co for the use of its streets. In the case before us every beneficial interest of the municipality requires the words streets to include these bridges and the beneficial interest of the Railway Co demands the same construction. If we now place ourselves in the situation of the parties to this grant, as we have a right ~~to do~~, and should do, in order to avail ourselves of the light of the surrounding circumstances, and the conduct of the parties at the time, it will be seen ~~that~~ the parties themselves have left no doubt of their construction of the grant. We have examined the charter of the Baltimore City Passenger Co. ch 71 of 1862, and the charter of the Baltimore Union Passenger Co, ch 147 of 1882, and neither of these corporations by their charters, granted any authority to construct or build bridges, or to lay their tracks upon any ~~[illegible]~~ bridges, or in any streets in Baltimore City, except as granted by said city. Their only right, either under their charters, or the ordinances passed in their behalf, is to lay their tracks in streets designated as such, and they have no authority from any source to lay their tracks on bridges as distinguished from streets in Baltimore City,"

The City itself has been delegated by the State no power to build bridges as distinguished from streets, and it has always built such under its general powers

to open and extend streets, and through its Street Commissioners or officers charged with that duty has done this. The North Street and Calvert Street Bridges were so constructed, and in Northern Central Railway Co vs Mayor & City Council 40 Md. 445, where the proceedings in reference thereto were under review, the Court after considering the difficulties of crossing the R.R. tracks either at grade which would be dangerous to the public, or by fills which would destroy parts of the tracks of the Railroad Co, said, "the only mode in which the proposed streets can cross the tracks, without great injury both to the appellant and the appellee is by viaducts or raised ways of some description".

Since neither the charters of these companies nor the ordinances of the City made any reference to bridges as distinguished from streets, and as said Companies laid their tracks upon said bridges without other authority, and the City assented thereto and as said Companies ever since down to 1903 and 1904, complied with the conditions annexed to the grant of the use of the streets by keeping in repair the same proportion of trackage upon these bridges as upon these streets, it would be idle to deny that they regarded these bridges as parts of said streets and that their present attitude is a departure from that which they have maintained for many years.

In North Baltimore Passenger Railway Co vs Baltimore, 75 Md. 247, the appellant had been granted by an ordinance the right to "lay its tracks on, and use North Avenue from McMechen to Charles street," which included North Avenue Bridge, and under that grant had laid its tracks on North Avenue Bridge. It then sought to restrain the City from giving another Railway Co the right to lay its tracks on North Avenue Bridge, and the Court held that it was only "so much of the street as may be actually occupied that can be claimed to be exclusive of other tracks, and other parts of the street may be granted to competing lines". Here there is a plain implication that a grant to use the street is a grant to use a bridge forming the only connection between parts of that street. But that case does not stop with that implication; it states in explicit language that "the bridge known as North Avenue Bridge over Jones Falls is the property of Baltimore City, erected and maintained for public use, and forms a part of North Avenue, one of the highways of the City". The fact that North Avenue Bridge was the property of Baltimore City, is not material to the question in hand. The City had wisely relieved itself of the burden of maintaining Charles Street and Maryland Avenue Bridges, when it granted the Rail road Co. privileges for its own convenience under said bridges, but they were none the less highways of the City as North Avenue Bridge was declared to be,

and the City could no more forbid public travel across these Bridges than it could across North avenue Bridge, merely because it had imposed upon the Rail Road Co, and upon the Railway Co as a condition of the right of the latter to lay its tracks thereon, the obligation to repair these bridges so as to keep them in safe condition as public highways.

An emphatic and significant circumstance in connection with the Charles St Bridge and with Eager St Bridge is found in the language of ordinance No. 77 of 1868, which provided "that the grade of Charles Street between Hoffman and Lanvale, and the grade of Eager St, between North and Buren streets, be raised and changed, under the direction of the Mayor and City Commissioner so as to enable the Northern Central Railway, to construct its railway tracks under said streets"!

This ordinance is not so suggestive of deliberation and design in describing the tracks as laid under the streets, as it is of common sense and natural adherence to language appropriate to the work the City was specifically authorised to undertake viz, the opening and extending of streets, whether at, above or below grade.

The weight of authority in well considered cases sustains the view expressed

in 75 Md. supra. In Chicago v Powers, 42 Ill. 169, plaintiffs intestate stepped off one end of an unlighted bridge spanning a stream which crossed the line of a city street and was drowned. The defence was that though the city had power to lay a tax to light its streets, that power did not include the lighting of bridges. But the Court rejected this defence, and said: "It seems to us to be obvious that a bridge over a stream crossing a street, is a part of the street. It is as much so as the cover placed over a drain, or a sewer crossing a street. Persons travel over it as they do over other portions of the street. It is, and must be, a part of the street."

In McDonald v Ashland 78 Wis. 251, a bridge built by a private citizen with lumber furnished by the city, and forming part of a platted street used by pedestrians was held to be a public way; and in Birmingham v Rochester City Railway Co, 137 N.Y. 13, a bridge over a canal intersecting a highway was held to be part of the highway, the Court saying "In substance and effect it is nothing more than a continuation of the city street."

We have been referred to but one case claimed to sustain the contention of the appellee, viz Cedar Rapids v Railway Co. 108 Iowa 406.

In that case the city granted the right to lay its tracks on "the streets are

nues and bridges of ~~the~~ city", but in terms imposed the duty of repairs only as to paved streets. That case comes within the rule of expressio unius, exclusio alterius, but in so far as it may on other grounds sustain the contention of the appellee, we cannot accept it as satisfactory authority.

We now come to the second question in the case, whether there is such a privity of contract between the parties to this suit as entitles the plaintiff to any recovery. The contention of the plaintiff, in the language of its brief, is, "that where two persons are legally liable to a third person for the same thing ex contractu, if one of said two persons performs the whole obligation to said third person, the other of said two persons is liable to the one who has so performed, in direct proportion as he is liable to said third person."

The right of the Railway Co. to maintain its tracks upon these two bridges under the ordinances of 1859 and 1880 was vested, and its liability ~~to the~~ City to keep in repair the space occupied by its tracks and two feet on either side thereof, was fixed, when under the ordinances of 1868 and 1890 respectively, the Railroad Co. became liable to the City for the construction and maintenance of the bridges then erected. The trackage rights of the Railway Co on these bridges as parts of the streets was not thereby divested, nor was its liability to the City for repair of

its tracks thereon, thereby released or extinguished. It continued unimpaired, though the City could thereafter at its pleasure, call upon the Rail Road Co, to make all the needed repairs, or upon the Railway Co. for the limited repairs for which it is liable, and upon the Rail Road Co for all other needful repairs, and upon performance by the R.R. Co of the primary and continuing duty of the Railway Co to make its limited repairs, the contract of the Railway Co with the City, ought to enure to the benefit of the Rail Road Co, and if the legal proposition of the plaintiff stated above is sustained by satisfactory authority, it does so enure.

Two cases from the Supreme Court of Massachusetts are so strongly in point as to justify extended reference to them. The first of these cases is the City of Lowell vs Proprietors of Locks and Canals 104 Mass. 18. The canal owners constructed a canal across a public highway in the City of Lowell, and built a bridge to restore the severed highway. A street Railway had a grant for its tracks on this highway, upon condition that it should keep in repair the space between its rails and eighteen inches on either side, both on streets and bridges, and its tracks were accordingly laid on this bridge when it was opened for use. In the course of time, repairs became necessary within the limits of the Railway Co's liability, and the City called upon the Canal Co. to make such repairs. The Canal Co refused to make them on the ground that they

could only be demanded of the Railway Co. The City sued the Canal Owners, and the Court held that as the owners had built the bridge to carry their canal across the highway, they were liable to the city in the first instance for its maintenance and for all necessary repairs. The canal owners then brought suit against the Railway Co. both for the amount recovered from it by the City and also for some subsequent repairs made by it within the Railway Co's limits, and a recovery was allowed. Proprietors of Locks and Canals vs Lowell Horse Rail Road Corporation - 109 Mass. 221. The Court said "That a street railway corporation, whose charter requires it to repair such portions of all bridges in a City as are occupied by its tracks, is bound to repair such a portion of a bridge which the owners of a canal have built over the canal, <u>and which as against the City he is bound to repair</u>; and if, on his refusal the City makes such repairs and recovers judgment against him for the expense thereof, he can recover from the corporation the amount of the damages recovered by the City against him. xxx. The duty thus imposed upon the defendant of <u>repairing</u> <u>a part</u> of a bridge, the <u>whole</u> of which, as between them and the City, the plaintiffs were obliged to maintain, was an obligation to do that which would be a <u>benefit</u> to the plaintiffs, <u>assumed</u> by the Railway Co in the acceptance of their charter, and the plaintiffs having been obliged to meet this liability to the City, through the neglect of the defendant are entitled to recover the amount paid in discharge of it." Carnegie vs Morrison 2nd Metcalf 381.

Brewer vs Dyer 7th Cush 337".

In Carnegie vs Morrison, chief justice Shaw said, "The law operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded. The same instrument may constitute a contract between the original parties, and also between one, or both of them, and others who may subsequently assent thereto, and become interested in its execution." A case more closely analogous in the relation of all the parties can scarcely be found, and the Massachusetts decisions are everywhere regarded as high authority. In Small vs Schaeffer 24th Md. 158, the Court of Appeals of this State adopts the view expressed by chief justice Shaw in Carnegie vs Morrison, supra, and quotes with approval the following passage from the opinion in that case; "When one person for a valuable consideration engages with another by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement". This is not the Massachusetts law alone. In Hendrick vs Lindsay 93 U.S. 149, the Supreme Court of the U.S said, "The right of a third party to maintain assumpsit on a promise not under seal to a third party for his benefit, although much controverted, is now the prevailing rule in this Country", and cites the same authorities cited in Small vs Schaeffer 24th Md supra, 1st Parsons on Contracts 6th Ed. 467.

It is not necessary, as contended by the appellee, that the contract must have been entered into at the time for the benefit of some particular third person. "If the person for whose benefit a contract is made has either a legal or equitable interest in the performance of the contract he need not necessarily be privy to the consideration." 9th Cyc. 381.

The rule is thus stated in 7th Enc. of Law. 2d Ed. 107. "To have this effect the contract must have been entered into for his benefit, or at least such benefit must be the direct result of performance and within the contemplation of the parties".

The following cases from the New York Court of Appeals illustrate the judicial view generally.

In Coster v. Albany 43 N.Y. 399. a statute authorized as a public improvement a bridge connecting a pier with the adjoining land, the removal of which made it necessary in order to reach plaintiff's store to go over another more distant bridge. The statute provided that all damages caused to property should be paid by the city. The Court said; "The result of the passage of the law, and the assent of the city to its provisions was to put the city in the place of the State as to damages. Here is the promise, the consideration, and the promisee definitely brought out. The ultimate beneficiary is uncertain. The third person need not be privy to the consideration, nor need he be specially named." The city was held liable for direct but not for remote damages.

In Little v. Banks 85 N.Y. 258, it was held that "contractors with the State who as

same for a consideration received from the sovereign power, by covenant, express or implied to do certain things, are liable in case of neglect to perform such covenant, to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance.".

These cases and the reasoning upon which they are founded, are satisfactory to us as controlling the present case, and we are therefore of opinion that there was error in sustaining the demurrer to the fifth count of the declaration.

The sixth count of the declaration proceeds upon the theory of the defendant that these bridges are not parts of the streets, but maintains that the defendant is nevertheless liable for the increased cost of repairs caused by the construction, maintenance, and operation of the defendants tracks on said bridges, they being, upon the theory of that count, the exclusive property of the plaintiff, which the defendant cannot use without just compensation for such use.

Having determined that said bridges are parts of said streets within the meaning of the ordinances which impose upon the defendant the liability to repair, and fix the measure of recovery to which the plaintiff is entitled, there was no error in sus

taining the demurrer to the 6th count in the declaration.

For the error in sustaining the demurrer to the fifth count the judgment must be reversed.

Judgment reversed with costs to the appellant above and below and new trial awarded.

No 12.

60 sides

The Northern Central Railway Company
vs
The United Railways and Electric Company

=

Argued before Briscoe
Boyd
Pearce
Schmucker
Burke
Rogers.

Opinion by Pearce J.

To be reported

Filed April 3rd 1907