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ILLUSTRATIVE CASES

ON

PRIVATE CORPORATIONS

BY

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PREFATORY NOTE TO THE SECOND EDITION.

It is now almost a score of years since the collection of cases on the Law of Private Corporations by Judge Elliott first appeared. Their purpose was to accompany and illustrate his textbook. The text has been revised periodically and is now in its fourth edition. The collection of cases illustrated the text so adequately that hitherto it has remained untouched. During the past few years the developments in the subject have been so fundamental, however, that a new edition of the cases seemed imperative. The present editor has endeavored to supply the want. The following topics, in particular, have needed and received additional emphasis: The Conception of Corporate Entity and Personality, Ultra Vires Acts, Corporate Liability for Torts and Crimes, Foreign Corporations, Rights of Stockholders, especially with regard to Minority Stockholders' Suits, and Management of Corporations. No attempt at elaborate annotation has been made, for the reason that the cases are designed primarily to supplement the text. Yet, whenever deemed useful, brief references and comments have been inserted.

The editor is deeply indebted to his wife, and to his friend, Professor Robert D. Petty of the New York Law School, for valuable suggestions and helpful criticism.

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CHAPTER I.

DEFINITION AND CLASSIFICATION.

Co. Lit. 250 a. "Bodies politike, &c. This is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called here by Littleton a body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant, &c. * * * Every body politike, or corporate is either ecclesiasticall or lay. * * * And again it is either sole, or aggregate of many. And this body politike, or corporate, aggregate of many, is by the civilians called *collegium* or *universitas*."

1 Bl. Com., 467-8. "But as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called bodies politic, bodies corporate, (*corpora corporata*), or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and forever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. * * * When they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of individuals: * * * The privileges and immunities, the estates and possession, of the corporation, when once vested in them, will be forever vested, without any new conveyance to new succession; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant."

THOMAS v. DAKIN.[1]

1839. 22 Wend. (N. Y.) 9.

Nature of a Corporation.

NELSON, C. J.: This is an action brought by the plaintiff, as president of the Bank of Central New York, an association formed under what is familiarly known as the General Banking Law, passed April 18, 1838, to recover several demands due the institution.

The defendant has demurred to the declaration, and urges the unconstitutionality of the law, by way of defense; and it is insisted, in his behalf: 1. That the associations formed under this law are corporations; and 2. That a general law authorizing the creation of these bodies is inconsistent with the ninth section of the seventh article of the Constitution. On the part of the plaintiffs, it is urged in reply: 1. That the associations are not corporations: 2. That if they be, the act authorizing them may be passed by a majority bill; and 3. If within the ninth section, still the law may be passed by two-thirds of the members elected.

I. Are these associations corporations? In order to determine this question, we must first ascertain the properties essential to constitute a corporate body, and compare them with those conferred upon the asociations; for if they exist in common, or substantially correspond, the answer will be in the affirmative. A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term "corporation" in its creation is of itself unimportant, except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. It has been well said by learned expounders, that a corporation aggregate is an artificial body of men, composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation.

The "franchises and liberties," or, in modern language, and as more strictly applicable to private corporations, the powers and faculties, which are usually specified as creating corporate existence, are: 1. The capacity of perpetual succession; 2. The power to sue and be sued, and to grant and receive, in its corporate name; 3. To purchase and hold real and personal estate; 4. To have a common seal; and 5. To make by-laws. These *indicia* were given by judges and elementary writers at a very

[1] See also as to the nature of corporations, Warner v. Beers, 23 Wend. (N. Y.) 103 (1840); The Conservators of the River Tone v. Ash, 10 Barn. & Cress, 349 (1829).—Ed.

early day; since which time the institutions have greatly multiplied, their practical operation and use have been thoroughly tested, and their peculiar and essential properties much better understood. Any one comprehending the scope and purpose of them, at this day, will not fail to perceive that some of the powers above specified are of trifling importance, while others are wholly unessential. For instance, the power to purchase and hold real estate is not otherwise essential than to afford a place of business; and the right to use a common seal, or to make by-laws, may be dispensed with altogether. For as to the one, it is now well settled that corporations may contract by resolution, or through agents, without seal; and as to the other, the power is unnecessary in all cases where the charter sufficiently provides for the government of the body. The distinguishing feature, far above all others, is the capacity conferred, by which a perpetual succession of different persons shall be regarded in the law as one and the same body, and may at all times act, in fulfilment of the objects of the association, as a single individual. In this way, a legal existence, a body corporate, an artificial being, is constituted, the creation of which enables any number of persons to be concerned in accomplishing a particular object, as one man. While the aggregate means and influence of all are wielded in effecting it, the operation is conducted with the simplicity and individuality of a natural person. In this consists the essence and great value of these institutions. Hence it is apparent that the only properties that can be regarded strictly as essential are those which are indispensable to mould the different persons into this artificial being, and thereby enable it to act in the way above stated. When once constituted, this legal being created, the powers and faculties that may be conferred are various,—limited or enlarged, at the discretion of the legislature, and will depend upon the nature and object of the institution, which is as competent as a natural person to receive and enjoy them. We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity: 1. To have a perpetual succession under a special name and in an artificial form; 2. To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and 3. To receive and enjoy in common, grants of privileges and immunities.

We will now endeavor to ascertain with exactness, the powers and attributes conferred upon these associations by virtue of the statute. The first fourteen sections (1 to 14) prescribed the duties of the comptroller in furnishing notes for circulation, taking the required securities, etc. The 15th provides, that any number of persons may associate to establish offices of discount, deposit, and circulation. The 16th, that they shall make and file a certificate, specifying: 1. The name to be used in the business; 2. The place where the business shall be carried on; 3.

The amount of capital stock, and number of shares into which divided; 4. The names of the shareholders; 5. The duration of the association. The 18th confers upon the persons thus associating the most ample powers for carrying on banking operations, together with the right "to exercise such incidental powers as shall be necessary to carry on such business;" also to choose a president, vice-president, cashier, and such other officers and agents as may be necessary. By the 21st and 22d sections, contracts, notes, bills, etc., shall be signed by the president and cashier; and all suits, actions, etc., are to be brought in the name of, and also against the president for the time being; and not to abate by his death, resignation, or removal, but to be continued in the name of the successor. 24th section: The association may purchase and hold real estate, etc., the conveyance to be made to the president, or such other officer as shall be designated, who may sell and convey the same free from any claim against shareholders. 19th section: The shares of capital stock to be deemed personal property, transferable on the books of the association; and every person becoming a shareholder by such transfer shall succeed to all the rights and liabilities of the prior holder. 23d section: No shareholder to be personally liable; and the association is not to be dissolved by the death or insanity of any shareholder.

1. Upon a perusal of these provisions, it will appear that the association acquires the power to raise and hold for common use any given amount of capital stock for banking purposes, which, when subscribed, is made personal property, and the several shares transferable the same and with like effect as in case of corporate stock; to assume a common name under which to manage all the affairs of the association; to choose all officers and agents that may be necessary for the purpose, and remove and appoint them at pleasure. It will hence be seen, that although the association may be composed of a number of different persons, holding an interest in the capital stock, its operations are so arranged that they do not appear in conducting its affairs; all are so bound together, so moulded into one, as to constitute but a single body, represented by a common name, or names (the knot of the combination), and in which all the business of the institution is conducted by common agents. In this way it purchases and holds real and personal property, contracts obligations, discounts bills, notes, and other evidences of debt, receives deposits, buys gold and silver bullion, bills of exchange, etc., loans money, sues and is sued, etc. It is true, some portion of the business is conducted in the assumed name, and some in the name of the president for the time being; but this in no manner changes the character of the body. A corporation may have more than one name; it may have one in which to contract, grant, etc., and another in which to sue and be sued; so it may be known by two different names, and may sue and be sued in either; and the name of the presi-

dent, his official name, or any other, will answer every purpose (2 Bacon's Abr. 5; 2 Salk. 451; 2 *id.* 257; Ld. Raym. 153, 680). The only material circumstance is a name, or names, of some kind, in which all the affairs of the company may be conducted. So much, and no more, is essential to give simplicity and effect to the operation. An artificial being is thus plainly created, capable of receiving all the ample powers and privileges conferred upon the associations, and of managing their diversified concerns in an individual capacity. All business is to be conducted in a common or proper name.

2. This artificial being possesses the powers of perpetual succession. Neither sale or shares, nor death of shareholders, affects it; if one should sell his interest or die, the purchaser or representative, by operation of law, immediately takes his place. § 19. Nor can the insanity of a member work a dissolution. *Id.* Officers and agents for conducting the business of the association are secure. In case of vacancy, by death or otherwise, the place may at once be filled. § 18. For the entire duration, therefore, of the association, and which may be without limit, § 16, sub. 5, the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable. § 23. Then, as to the powers conferred, without again specially recurring to them, it will be seen at once that the associations possess all that are deemed essential according to the most approved authorities, to constitute a corporate body. They have a capacity: 1. To have perpetual succession under a common name and in an artificial form; 2. To take and grant property, contract obligations, to sue and be sued by its corporate name, in the same manner as an individual; 3. To receive grants of privileges and immunities, and to enjoy them in common. All these are expressly granted, and many more, besides the general sweeping clause, "to exercise such incidental powers as shall be necessary to carry on such business" (meaning the business of banking), under which even the seal and right to make by-laws are clearly embraced, if essential in conducting the affairs of the institution. * * * *

Upon the whole, I am of the opinion, 1. That these associations are corporations; 2. That the legislature possesses no power to pass a general law like the one under consideration, by a majority bill; and 3. That they may pass it by two-thirds of the members elected.

The plaintiff is, therefore, entitled to judgment on the demurrer, with leave to amend on the usual terms.

WILLIAMSON'S SYNDICS v. SMOOT.

1819. 7 Martin O. S. (La.) 31, 12 Am. Dec. 494.

Corporation as Entity—Distinct from Stockholders.

MATHEWS, J.: The plaintiffs having caused an attachment to be levied on the steamboat Alabama, the St. Stephens Steamboat Company intervened in their corporate capacity, and claimed her as their property. The intervening party are a body politic, created by an act of the legislature of the territory of Alabama, the capital stock of which is divided into shares of a certain amount, and Smoot, the defendant, owns ten of them, subscribed for by him.

The questions to be decided are: * * * 2. Can the shares of stock of any individual stockholder be legally attached? * * *

II. The existence of the claimants being recognized as a body corporate, and it being admitted that the boat attached belongs to them as a part of their common stock, it is clear that Smoot does not possess such certain and distinct individual property in it as to make his interest attachable. The estate and rights of a corporation belong so completely to the body that none of the individuals who compose it has any right of ownership in them, nor can dispose of any part of them (Civ. Code, 88, art. 11).

The court is of opinion that the district court erred in disallowing the claim of the company.

It is, therefore, ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and that the attachment of the plaintiff and appellant be quashed, so far as it relates to the said steamboat, the Alabama, and that she be released therefrom.[1]

BUTTON v. HOFFMAN.[1]

1884. 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.

Nature of a Corporation—Title of Property in Corporation—Corporation Sole.

ORTON, J.: This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer. In

[1] Statutes ordinarily provide today a method whereby a creditor can levy on his debtor's shares in a corporation.—Ed.

[1] See Wheelock v. Moulton, 15 Vt. 519 (1843); Newton Manufacturing Co. v. White, 42 Ga. 148; Winona, etc., R. Co. v. St. Paul, etc., R. Co., 23 Minn. 359; King v. Barnes, 109 N. Y. 267; Saranac & L. P. R. Co. v. Arnold, 167 N. Y. 368, 60 N. E. 647; Palmer v. Ring, 113 App. Div. (N. Y.) 643, 99 N. Y. S. 290; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706.

But *cf.* Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336.—Ed.

his instructions to the jury the learned judge of the circuit court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Company," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Company, but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation, and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation: its members, as natural persons, are merged in the corporate identity. Ang. & A. Corp. §§ 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. Id. § 557. The corporation is the trustee for the management of the property, and the stockholders are the mere cestui que trust. Gray v. Portland Bank, 3 Mass. 365; Eidman v. Bowman, 4 Amer. Corp. Cas. 350.

The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. Corp., § 191; Pope v. Brandon, 2 Stew. (Ala.) 401; Whitwell v. Warner, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the

property itself, which produces them, continues to belong to the corporation. Bradley v. Holdsworth, 3 Mees. & W. 422; Waltham Bank v. Waltham, 10 Metc. 334; Tippets v. Walker, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. Corp., §§ 160, 190, 557; Hyatt v. Allen, 4 Amer. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Wilde v. Jenkins, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the *sole* stockholder. Ang. & A. Corp., § 779a.

These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property, and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at the same time, it would belong to the corporation. *One* stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do. It is said in City of Utica v. Churchhill, 33 N. Y. 161, "the interest of a stockholder is of a *collateral* nature, and is not the interest of an *owner;*" and in Hyatt v. Allen, supra, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In Winona & St. P. Railroad Co. v. St. Paul S. C. Railroad Co., 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interests in its rights, property, and immunities. In Baldwin v. Canfield, 26 Minn. 43, S. C. 1 N. W. Rep. 261, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In Bartlett v. Brickett, 14 Allen (Mass.), 62, an action of replevin was brought by A. B., and C., as the "trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate

name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B., and C., trustees as aforesaid," became bound, and the officer, in his return, certified that he had taken a bond "from the within named A., B., and C.," and the property was receipted by "A., B., and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in Van Allen v. Assessors, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In Wilde v. Jenkins, supra, where a copartnership bought all the property and effects, together with the franchises, of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In Mickles v. Bank, 11 Paige, 118, it was held that, although a corporation was deemed to have surrendered its charter for non-user, it was not dissolved, and would not until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In Bennett v. American Art Union, 5 Sandf. Super. Ct. 614, it was held that, "as a general rule, the whole title, legal and equitable (to its property), is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant, as a shareholder in the art union, for an injunction against a certain disposition of its property, was denied, because it had no interest in it. See, also, Goodwin v. Hardy, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. Timp v. Dockham, 32 Wis. 146; Sensenbrenner v. Mathews, 48 Wis. 250; S. C. 3 N. W. Rep. 599. In analogy to the above principle it was held in Murphy v. Hanrahan, 50 Wis. 485, S. C. 7 N. W. Rep. 436, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

STATE v. STANDARD OIL CO.

1892. 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541.

Disregard of Entity Doctrine.

This is an application by the state for a writ of quo warranto against the Standard Oil Company, a corporation organized under the laws of the State of Ohio to oust it of the right to be a corporation on the ground that it has abused its corporate franchises by becoming a party to an agreement that is against public policy. Demurrer to the answer.

MINSHALL, J.: * * * It will be observed on reading the answer that while the defendant denies that it "entered into or become a party to either or both of the agreements in said petition set forth" and also "denies that it has at any time or in any manner acquiesced therein or observed, performed, or carried out either or both of said agreements," it does not deny the averment of the petition that "all of the owners and holders of its capital stock, including all the officers and directors of said company, signed said agreements." Nor could it have been the intention to do so, as the answer proceeds to admit "that it [the corporation] is informed and believes that the individuals named in the agreement, being the same individuals who executed" it, "did enter into the agreements set forth" in the petition; claiming "that said agreements were agreements of individuals in their individual capacity and with reference to their individual property, and were not, nor were they designed to be, corporate agreements." The claim is based upon the argument that the corporation is a legal entity, separate from its stockholders; that in it are vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf by its corporate agencies, acting within the legitimate scope of their powers; that its stockholders are not the corporation; that their shares are their individual property, and that they may each and all dispose of and make such agreements affecting their shares as best suits their private interests; and that no such acts and agreements of stockholders, subservient of their private interests, can be ascribed to the company as a separate entity, though done and concurred in by each and all of its stockholders. The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for

corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim in fictione juris subsistit aequitas is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts. Broom, Leg. Max. 130. "It is a certain rule," says Lord Mansfield, C. J., "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted." Johnson v. Smith, 2 Burrows, 962. "They were invented," says Brinkerhoff, J., in Wood v. Ferguson, 7 Ohio St. 291, "for the advancement of justice, and will be applied for no other purpose." And it is in this sense that they have been constantly understood and applied in this state. Hood v. Brown, 2 Ohio R. 269; Roseman v. McFarland, 9 Ohio St. 381; Collards' Admr. v. Donaldson, 17 Ohio R. 266.

No reason is perceived why the principles applicable to fictions in general should not apply to the fiction "that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented." One author seems to think that it has outlived its usefulness; that it is "a stumbling block in the advance of corporation law towards the discrimination of the real rights of actual men and women," and should be abandoned. Taylor Corp., § 51. Among the many attempts that have been made to define the nature of a corporation, that given by Mr. Kyd, discarding, or at least not adopting, the metaphysical distinction of a legal entity separate from the persons comprising it, is certainly the most practical, presenting, as it does, the real nature of a corporation as seen in its constituents, and in the manner that it is formed and transacts its business. His definition is: "A collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence." 1 Kyd, Corp. 13. In brief, then, a corporation is a collection of many individuals, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual. "The statement," says Mr. Morawetz, "that a corporation is an artificial person or entity

apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact." See his work on Corporations, § 227. So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, when the question is as to whether a certain act was the act of the corporation or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result.

Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined whether the act in question, though done by shareholders,—that is to say, by the persons uniting in one body,—was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation, and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because, the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then in one department of the law fraud would enjoy an immunity awarded to it in no other.

Therefore the real question we are now to determine is whether it appears from the face of the pleadings, giving effect to all the denials of fact contained in the answer, that the execution of the agreement set forth in the petition should be imputed to the association of persons constituting the Standard Oil Company of Ohio, acting in their corporate capacity. The agreement provides, in the first place, that the parties to it shall be divided into three classes, the first class to embrace all the stockholders and members of certain corporations and limited partnerships, the defendant, the Standard Oil Company of Ohio, being one. It is then covenanted by the parties that as soon as practicable a corporation shall be formed in each of certain states, under the laws thereof (Ohio being one), to mine for, produce, manufacture, refine, and deal in petroleum and all its products, with the proviso, however, that, instead of organizing a new corporation, any existing one "may be used for the purpose when it can advantageously be done," and in Ohio the defendant has been so

used. In a subsequent part of the agreement nine trustees are selected, their powers and duties are defined, and provision made for the selection of their successors. As will hereafter appear, it is made the duty of the parties to the agreement to transfer their stocks or interests in their respective companies or firms to these trustees who hold the same in trust, but with the power to vote on the same as though the real owners; in consideration of which trust certificates are issued to the owners, who, as the owners of such certificates, elect the successors of the trustees. It is then provided that all the property, assets, and business of the corporations and limited partnerships embraced in the first class "shall be transferred to and vested in the said several Standard Oil Companies." And in order to accomplish this purpose it is provided that "the directors and managers of each and all of the several corporations and limited partnership mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets, and business of said corporations and limited partnerships."

Now, in the case of the defendant it will be observed, that this contemplated, and could not have been accomplished, without corporate action. The Standard Oil Company of Ohio was required to transfer all its property, assets, and business to a new company, to be organized in the state; and this was to be accomplished by the obligation imposed on its members and stockholders, all of whom are parties to the agreement, to authorize and require the directors and managers to make the transfer. The property and assets of the corporation could only be transferred by a corporate act, and the agreement could not, in this respect, be carried into effect, other than by such corporate act, and clearly indicates that the purpose of the stockholders of the defendant in becoming a party to it was to affect their property and business as a corporation; in other words, was to act in their corporate, and not in their individual capacity. The subsequent agreement of January 4, 1882, does not materially change the original agreement in this regard. Reciting that "it is not deemed expedient that all of the companies and associations should transfer their property to the said Standard Oil Companies at the present time," and "that it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer" should be made, it provides that, "until said trustees should so decide, each of said companies shall remain in existence and retain its property and business; and the trustees shall hold the stock thereof in trust as in said agreement provided." So that, under the agreement as modified, the directors and managers of

the defendant may be required by its stockholders and members, all of whom are parties to the agreement, to make the transfer of the property and business of the defendant whenever the trustees may, in their discretion, direct. The effectiveness of this provision to secure all intended by it may be better understood by observing that "the directors and managers," "the stockholders and members," and "the trustees" here mentioned are substantially the same persons, occupying these different relations at one and the same time. It signifies nothing that the transfer here provided for has not, as respects the defendant, been made. It does not change the evidence it affords of the purpose and object of the members of the corporation in becoming parties to the agreement.

Again, the agreement, as performed by the members of the defendant, as effectually places the property and business of the defendant under the control and management of the Standard Oil Trust as if the same had been transferred as provided in the original agreement. It is averred in the petition, and not denied in the answer, "that prior to the dates of the trust agreements aforesaid defendant's capital stock consisted of 35,000 shares of $100 each, and upon the signing of said agreements in the manner aforesaid 34,993 shares of said stock, belonging to the persons who signed the agreements in manner above set forth (in what proportions, however, plaintiff is unable to state), were transferred, by defendants transferring officers upon defendant's stock-books, to the certain nine trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares, and in pursuance of the provisions of said trust agreements; the remaining seven of said shares of stock being retained by or transferred to the directors of defendant company. That at the time said transfer of stock was made there were seven directors of defendant, and each one of the seven held one share of the stock aforesaid, but the number of said directors was thereafter reduced to five, who still hold and vote said seven shares of stock, and no more. That in lieu of the transfer of said 34,993 shares, as aforesaid, to the nine trustees above mentioned, an equal amount, in par value, of certificates of the Standard Oil Trust, which were provided for and described in said trust agreements, was issued and delivered by said nine trustees to the persons aforesaid, from whom said nine trustees had received said 34,993 shares of stock in defendant company. That the capital stock of said defendant company is still $3,500,000, and the nine trustees before mentioned still hold and control the 34,993 shares thereof which were transferred to them as above stated." So that all but seven of the 35,000 shares of the defendant's capital stock has been transferred by the owners, who are parties to the agreement, to the trustees of the Standard Oil Trust, and continue to be held in trust, as appears by the supplemental agreement the transferrers receiving in lieu

thereof trust certificates equal at par value to the par value of the stock received. The control which this gives and was intended to give over the business of the defendant appears from the following provision contained in the trust agreement: "It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships any portion of whose stock is held in said trust. It shall be their duty, as stockholders of said companies, to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates." Thus the trustees, as the legal owners of the stock, may not only elect who they please, but may elect themselves, as directors of the defendant; and not only may manage, but it is their duty to have "the affairs" of the defendant managed and directed in the manner they may deem most conducive to the best interests of the holders of the trust certificates. In other words, it is to be managed in the interests of the Standard Oil Trust, whose principal place of business is in New York City, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; for the holders of the trust certificates received in exchange for their stock transferred to the trustees remain, in law and in equity, the real owners of the stock so transferred. And the averment in the answer that the dividends of the company are paid to the holders of its stock, "appearing as such on its stock-books," is immaterial, since these persons are not the owners, but the trustees, of the stock. In fact, the averment is simply a part of the evidence that the company, through its directors, recognizes and performs the agreement on its part. The payment of its dividends to the persons appearing as stockholders on its stock-books is what enables the parties to the agreement to realize the primary object of the trust agreement—the accumulation of the earnings of the various companies, partnerships, and individuals named in the agreement, as a common fund, from which the holders of the trust certificates are to be paid dividends when declared by the trustees, and whereby many separate interests, being united under one management, form a virtual monopoly, through the power acquired, of so controlling the production and price of petroleum and its products as to destroy competition.

Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it

in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers, and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is ultra vires of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in quo warranto. * * *

The defendant, as we have shown, in making and entering into the trust agreements, exercised a power for which it had no authority under the laws of this state, and is continuing to perform the agreement on its part. In addition to a prayer for the forfeiture of the defendant's right to be a corporation, the state prays for such other relief as to the court may seem just and proper; and, in the opinion of the court, the defendant should be ousted from the power to make and perform the agreement set forth in the petition, or any part of it. And in this connection it is proper to say that, in the judgment of the court, if the company, through its directors or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for it in the trust agreement, or should hereafter make such transfers, or should pay dividends to them instead of to the real owners of the shares, or should permit such trustees to vote on shares so held by them in the election of

its directors, in every such case it must be regarded and held as performing the agreement in violation of the judgment of this court. Judgment ousting the defendant from the right to make the agreement set forth in the petition, and of the power to perform the same.[1]

DONOVAN v. PURTELL.

1905. 216 Ill. 629, 75 N. E. 334.

Incorporating to Effect a Fraud.

APPEAL from the Appellate Court for the Fourth District; heard in that court on appeal from the Circuit Court of St. Clair county; the HON. R. D. W. HOLDER, Judge, presiding.

This is an action in assumpsit, begun by appellee against appellant on November 24, 1903, by attachment in the circuit court of St. Clair county. The writ of attachment was levied on appellant's interest in certain land situated in that county. Before the trial, to-wit, on March 23, 1904, by agreement of the parties an order was entered, releasing the real estate, levied upon under the writ of attachment, upon the execution and filing by appellant of an indemnity bond. The declaration consists of the common counts for money lent by appellee to defendant at his request; for money paid out and expended by appellee for the use of appellant at his request; for money received by appellant for the use of appellee; for money for interest on divers sums of money forborne by appellee to appellant at his request, etc. A bill of particulars was filed, which, besides the items for money loaned and due in 1901, contains items for money lent by appellee to appellant in the name of the Fidelity Realty Company in 1901, and for money lent to appellant by appellee and promised to be paid by him in the name of the J. T. Donovan Real Estate Company in 1901. The general issue was filed to the declaration. A trial was had before the court and jury, resulting in a verdict in favor of appellee against appellant for the sum of $1,430.00, from which the plaintiff remitted the sum of $71.80, making the amount of the verdict $1,358.20, which remittitur was approved by the court. Motion for new trial was overruled and judgment rendered on the verdict in favor of appellee against appellant for $1,358.20 and costs. An appeal was taken to the Appellate Court where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

The facts of this case as stated by the Appellate Court in their opinion are as follows:

"Appellee for many years worked for her living in St. Louis,

[1] See article, "Piercing the Veil of Corporate Entity," by I. Maurice Wormser, 12 Columbia Law Review, 496 (June, 1912).—Ed.

Missouri, doing housework. Some time prior to this suit, having accumulated the sum of $1,200.00, she placed it at interest on real estate security, and the note representing the loan came due in January, 1901. At that time appellant was engaged in the real estate and loan business in the city of St. Louis. He was president of the J. T. Donovan Real Estate Company, of which his son, Joseph M. Donovan, was vice-president. The latter was also president of the Fidelity Realty Company, which did business in the same room with the other company, and in which appellant was likewise interested. Shortly after her note became due, appellee took it, and the trust deed by which it was secured, to appellant's place of business, for the purpose of having him collect the money due and reinvest it for her, but at the office she made arrangements to that end with Joseph M. Donovan, whom, she testified, she considered a clerk. In June, 1901, she left the city and did not return until the following October. In the meantime she made arrangements with a friend, Miss Slaterly, to attend to her business. During her absence the note owned by her was collected, and a new one for a like amount secured by deed of trust, was given Miss Slaterly, who afterwards turned the papers over to appellee. The new note was made by the Fidelity Realty Company, by J. M. Donovan, its president, and was payable to the order of George M. Cooper, a clerk in appellant's office, who endorsed the same without recourse. It was secured by a deed of trust upon a 25-foot lot on San Francisco avenue in the city of St. Louis, made by the Fidelity Realty Company to appellant, as trustee. The note and trust deed were dated January 19, 1901, but were not delivered to Miss Slaterly until the following August. With these papers there was also delivered to Miss Slaterly a written guaranty, executed by J. T. Donovan Real Estate Company, by J. T. Donovan, its president, which, after reciting the assignment to appellee of the note and securities in question, proceeded as follows: 'And whereas, there is being erected on said lot of ground, certain improvements, which may not yet be fully completed and paid for; now, therefore, in consideration of said sum of $1,200.00, we hereby promise and agree to cause said improvements to be fully completed and paid for, and to hold the said Miss Julia Purtell harmless from all loss or damage on account of mechanics' liens, or on account of the failure of the said Fidelity Realty Company to fully complete said improvements, and to pay for the same. For the consideration aforesaid, we further obligate ourselves to hold Miss Julia Purtell and her assigns harmless from all loss on account of said investment, principal or interest.' The guaranty also contains an undertaking on the part of the maker to pay the interest notes in case of default in the payment thereof for a longer period than thirty days, and to purchase the principal at its face value, with interest added, within six months after default in the payment of the same.

"Some time after appellee received the last named papers she ascertained that the lot described in the deed of trust was vacant; that no improvements were being made, and that it was worth only about $150.00. She thereupon called upon J. M. Donovan, the president of the Fidelity Realty Company, who offered to give her in exchange other securities, which, on examination, she found to be entirely inadequate to properly secure the debt. She then made a similar demand of appellant and he offered her to substitute some other piece of property for that which appellee had, but, upon examination of the properties named, appellee refused to accept any of them on the ground that the security was wholly insufficient. While negotiations were pending, two of the interest notes were paid by appellant. Appellee testified that, when she asked appellant what security he could give on said notes, he said he could not give her money, but offered to pay her in eighteen months and told her she would not be at any loss, but this appellant denies. Afterwards negotiations ceased, and this suit was brought.

"Upon the trial the appellant * * * introduced the evidence of himself and Joseph M. Donovan. * * * These witnesses were corroborated to some extent by the securities held by appellee, purporting to have been executed by the two corporations above named. On the contrary, appellee * * * testified that she dealt with appellant on account of the confidence she had in him; that his boys, several of whom were in the office, acted just as other clerks; she said, 'I paid all the confidence to Mr. Donovan I could. I would not pay as much to my brothers as I paid to Mr. Donovan, because he was a Catholic and a member of my church and a good living man, as I supposed.' The manner of transacting business at the Donovan office was fully explained by Lydia M. Cooper, who was appellant's stenographer and typewriter from October, 1897, to April, 1903. She testified that the office was a long, narrow room about twenty feet wide and sixty to seventy-five feet long; and that there was a partition in the front like a banking counter, and in the rear there was a place about ten feet square, where a number of different companies known as the J. T. Donovan Real Estate Company, the Fidelity Realty Company, the Cunliff Realty Company, the Fenimore Realty Company, the Cappa Realty Company and the McKinley Company had headquarters; that the different corporations had different presidents, but that appellant was really the man who ran the whole thing; that there were three sons of appellant in the office, and several other clerks; that J. T. Donovan controlled the business of the Fidelity Realty Company; that there was a bookkeeper and cashier in the office; that over the door there was the sign, 'J. T. Donovan Real Estate Company;' that J. M. Donovan 'never made any transaction without J. T. Donovan sanctioned it;' that the Fidelity Realty Company did not have any financial standing, but was simply gotten up to keep the property

out of judgment, so that the property could be sold and transferred without judgment being paid off; that she had heard appellant say so himself; that 'he said there were judgments against these different companies, and he would get up another company and put the property in the name of the new company, in order that it could be transferred, so that there would be no judgment against it;' that he used the property of the companies indiscriminately; that he would settle the debts of the J. T. Donovan Real Estate Company with these properties, no matter to which company they belonged; that the stock of the J. T. Donovan Real Estate Company was all held by members of the family; that Mr. Donovan got the property named in the deed of trust in question for $325.00, and put a $1,200 loan on it.

"Joseph M. Donovan, when placed upon the witness stand, denied some of the statements made by Miss Cooper but appellant, when placed upon the stand, did not see fit to deny any of them."

Mr. Justice Magruder delivered the opinion of the court. * * *

The evidence tends to show that, although the appellant and his sons turned over to appellee these worthless securities in exchange for her money, yet that appellant himself received the money, and used it for his own private purposes, and sought to escape personal liability by covering up the transaction in the name of a corporation, which was entirely under his own control. This being so, the trial court committed no error in refusing to instruct the jury to find the issues for the defendant. It would have been improper to give such instruction, in view of the fact that the evidence tended to prove that the appellant received the money, and declined to pay it over.

This suit is not brought upon the notes, executed by the Fidelity Realty Company. Those notes and the trust deed securing them were tendered back to the appellant upon the trial, and, upon his refusal to receive them, placed in the custody of the court for the use and benefit of appellant. The object of the suit is to recover, under the common counts, the money actually received by the appellant.

The instructions, given by the court to the jury on behalf of the appellee, submitted to the jury the question of fact, whether the affairs of the J. T. Donovan Real Estate Company and the Fidelity Realty Company were controlled by J. T. Donovan for the transaction of his private business, and whether or not he personally controlled both of these corporations when they received the appellee's money, and whether or not her money was received for appellant's own private individual uses and purposes. The instructions also left it to the jury to find, whether or not the appellant was conducting his business in the name of the J. T. Donovan Real Estate Company, and, through that company, received appellee's money and appropriated the same to his own use and gave her, in payment of it, the worthless securities above referred

to. The judgments of the lower courts, finding for the appellee, settle these questions of fact, so far as we are concerned, against the appellant.

Appellant was president of the J. T. Donovan Real Estate Company, and his son, Joseph M. Donovan, was the vice-president of that company, and Joseph M. Donovan, the appellant's son, was the president of the Fidelity Realty Company. Both of these concerns were controlled, managed and dominated by the appellant, J. T. Donovan. The officer or controlling manager of a corporation cannot use it, and its name, for the transaction of his own private business, and to escape personal liability on his part. The theory, upon which the appellant defends this suit, is that the liability to appellee was not his liability, but that of the corporation known as the Fidelity Realty Company.

In Hoffman v. Reichert, 147 Ill. 274, it was held that the directors of a private corporation have no right under any circumstances to use their official position for their own individual benefit.

In the case of Bank v. Trebein Co., 59 Ohio St. 316, it was said: "The fiction, by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application, as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members; and have repudiated it in all cases where it has been insisted on as a protection to fraud, or any other illegal transaction."

In Cook on Corporations (5th ed., sec. 663), it is said: "A corporation is often organized to act as a 'cloak' for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud." (See also Lachman v. Martin, 139 Ill. 450.) In Morse on Banks and Banking (vol. 1—4th ed.—sec. 128), it is said: "If bank directors do not manage the affairs and business of the bank according to the directions of the charter and in good faith, they will be liable to make good all losses, which their misconduct may inflict upon either stockholders or creditors, or both. * * * They may be held to account to an injured party in a court of chancery, or they or any of their number, who shared in the wrong-doing, may be sued at law for damages." So, in the case at bar, appellant, as an officer of one or more of the corporations here involved, was guilty of such a fraud in transferring to appellee these worthless securities in payment of the money which he owed her, that he can be held liable personally for the loss inflicted upon her.

Even if the corporation be regarded as the real debtor, and the appellant as only its agent, yet inasmuch as he was guilty of fraud perpetrated upon appellee, the law will hold him liable. In 1 American and English Encyclopedia of Law (2d ed., p. 1135), it is said: "An agent will be held personally liable to third persons for all damages, sustained by them in consequence of any fraudulent or malicious acts committed by him on behalf of his principal, and, in an action against the agent for fraud, the fact that he derived no personal profit or benefit therefrom is immaterial." In Ree v. Peterson, 91 Ill. 288, it is said: "In an action at law for damages, the fact that a defendant acted throughout in the capacity of agent, in a fraud perpetrated by him, will afford him no excuse." (See also Seddon v. Connell, 10 Simons, 86; Windram v. French, 151 Mass. 549.)

It is claimed, on the part of the appellant, that the court below erred in permitting appellee to prove that the appellant promised to repay the money to her. It is said that this was a promise to pay the debt of a third person, to-wit: of the Fidelity Realty Company, and that, under the Statute of Frauds, the promise to pay the debt of a third person must be in writing. The statute of the state of Missouri in relation to the Statute of Frauds upon this subject, which is almost identical with our own, was introduced in evidence over the objection of appellee. It was not pleaded as a defense; and the general rule is that, where the statute of another state is relied upon as a defense, it must be pleaded as set out, at least in substance, and must be proved on the trial, and, if it is not pleaded, it is error to permit it to be proved. (Palmer v. Marshall, 60 Ill. 289.) But whether or not this rule applies here, where the declaration contained merely the common counts, and did not set up any contract, makes no difference under the circumstances of this case, because the proof tends to show that, when appellant received appellee's money, he was not conducting business under a bona fide corporate organization, but was using a corporate entity for the transaction of his private business, and, as he was, therefore, personally liable to the appellee for the repayment of her money, his promise was to pay his own debt, and not the debt of a third person.

It is said that the court erred in the admission of certain testimony, introduced by the appellee. We are satisfied with the following statement upon this subject, made by the Appellate Court in their opinion deciding this case, to-wit: "Appellant also claims that the court erred in permitting appellee to show the course of business pursued by him, his exercise of control over the various companies in the same office, and the indiscriminate manner, in which he used the money of said companies, and in admitting evidence, tending to show the reason why the appellee had special confidence in him. In our opinion, this evidence was all proper, as bearing upon the question whether the appellant was really conducting his own business under the name of the several cor-

porations for his own benefit, and also whether he took advantage of appellee's special confidence in him to use her money, and give her securities, which were practically worthless."

The objection is made that a recovery cannot be had in this kind of case under the common counts. We are unable to concur in this contention. In Wilson v. Turner, 164 Ill. 398, this court said (p. 403): "An action for money had and received will lie whenever one person has received money which, in justice, belongs to another, and which, in justice and right, should be returned. * * * When, therefore, according to this rule, one person obtains the money of another which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery." Inasmuch as, in the case at bar, there was evidence, tending to show that appellant had obtained money from appellee, which it was unjust and inequitable for him to retain, she is entitled to maintain the present action for the recovery of such money. * * *

For the reasons above stated, we are of the opinion that the judgments of the lower courts were correct. Accordingly, the judgment of the Appellate Court, affirming that of the circuit court, is affirmed.

LIVERPOOL INSURANCE CO. v. MASSACHUSETTS.[1]

1870. 10 Wall. (U. S.) 566, 19 L. ed. 1029.

The State of Massachusetts, claiming of the plaintiff in error a tax of four per cent. on the premiums received in the course of its business in that state, obtained a decree in her courts enjoining the company from further prosecution of its business, until the taxes found to be due were paid. The law of Massachusetts under which this tax was assessed, enacts that "Each fire, marine, and fire and marine, insurance company incorporated or associated under the laws of any government or state other than one of the United States, shall annually pay to the Treasurer of the Commonwealth a tax of four per cent. upon all premiums charged or received on contracts made in this Commonwealth for insurance of property."

The case is brought to this court on the ground that in its application to the plaintiff in error, the statute of Massachusetts is in conflict with the provision of the Constitution which confers on Congress the right to regulate commerce with foreign nations and among the states, and with that which secures to the citizen of each state all the privileges and immunities of citizens in the several states.

[1] See the decision of the court below in Oliver v. The Liverpool and London Life and Fire Insurance Co., 100 Mass. 531.

Assuming that the plaintiff in error is not a corporation, but is a partnership or association of individuals, some of which are subjects of Great Britain, and others citizens of the State of New York, it is argued that the rights of the former are protected by the treaty between the United States and Great Britain, and the rights of the latter by section 2, article 4, of the Federal Constitution above referred to.

The company was originally formed by a "deed of settlement." This instrument, as far as it could be done without the aid of Parliament, established a company under the name of The Liverpool Life and Fire Insurance Company, with a capital of £2,000,000, which was divided into one hundred thousand shares of £20 each, and declared its purpose to be, making insurance on life and against fire. These shares could be sold and transferred, and executors and administrators represented them in the company on the death of the owner. If, by the laws of the association, a share became forfeited, the owner was released from all further liability to the company. The business of the company was to be conducted by a board of directors, exclusively, and they could make by-laws and change and modify them. There was a covenant that suits might be brought by or against the company in the names of one or more directors, which should bind the stockholders, and that no stockholder would plead in abatement the nonjoinder of the others; and it was further covenanted that a judgment so obtained against a director might be made out of the property of any of the stockholders. Numerous other provisions are found in the original articles, which consisted of over a hundred sections, but only those are referred to here which bear on the question we are considering. There were also three subsequent deeds of settlement, and three Acts of Parliament were passed to give efficiency to the purposes of the association.

The first of these Acts provided that the association might sue and be sued in the name of the chairman or deputy chairman of the board of directors; that the stockholders might sue the company as plaintiffs, or be sued by it as defendants. It regulated the manner in which the shareholders might be made individually liable for the debts of the association; and it declared that the Act should not be construed to incorporate the company or relieve its members from their individual liability, except as provided in the Act.

The second Act of Parliament changed the name of the company to that which it now bears, and authorized it to make contracts by the new name; and it also contained a provision that the Act should not make the company a corporation; and there was a third Act which authorized amalgamation with another company, and which again provides against its being construed into an Act of incorporation or a limited liability partnership.

MR. JUSTICE MILLER: The case of Paul v. Virginia, 8 Wall. 168, decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one state, having an agency by which it conducted the business in another state, was not engaged in commerce between the states.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, and that a corporation created by a state could exercise none of the functions or privileges conferred by its charter in any other state of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the Acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the Act of Parliament which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be overestimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combining the capital and the

energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the states of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the states of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the states the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the Acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So, also, it is said that the fact that there is no provision either in the deed of settlement or the Act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an Act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several Acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which ren-

dered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these Acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is, whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that state on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

Judgment affirmed.

MR. JUSTICE BRADLEY: Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it is one of those special partnerships which are called joint stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the states from imposing taxes or license laws upon either British corporations or joint stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other states have chosen to take some of their shares.[2]

[2] The New Jersey cases are in *accord*. See Tide-Water Pipe Co. v. State Board of Assessors, 57 N. J. L. 516, 31 Atl. 220, 27 L. R. A. 684; Edgeworth v. Wood, 58 N. J. L. 463, 33 Atl. 940.

But see, Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 44 L. ed. 482, 20 Sup. Ct. 690.—Ed.

PEOPLE ex rel. WINCHESTER v. COLEMAN et al.

1892. 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

Joint Stock Association.

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 13, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, vacating an assessment.

This was a proceeding by certiorari to review the action of the commissioners of taxes and assessments of the city of New York, in imposing an assessment upon the capital stock of the National Express Company, a joint-stock company, of which the relator is treasurer for the year 1888.

The facts, so far as material, are stated in the opinion.

FINCH, J.—The relator was taxed upon its capital on the ground that it had become a corporation within the meaning of the provision of the Revised Statutes which enacts that "all monied or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." (1 R. S. title 4, chap. 13, part 1.) The company was formed as a joint-stock company or association in 1853 by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common-law rights of the individuals and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement and depended in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the legislature had explicitly recognized the existence and validity of such organizations, founded upon contract and evolved from the common-law rights of the citizens. (Laws of 1849, chap. 258.) That act provided that any joint-stock company or association, which consisted of seven or more members, might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates. But the act explicitly disclaimed any purpose of converting the joint-stock associations recognized as existing, into corporations by a section prohibiting any such construction. (§ 5.) In 1851 the act was amended in its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that when the company

was formed and went into operation the law recognized a distinction and substantial difference between joint-stock companies and corporations and never confused one with the other, and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations.

But two things have since occurred. The legislature, while steadily preserving the distinction of names, has with equal persistence confused the things by obliterating substantial and characteristic marks of difference, until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation, without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. (Thomas v. Dakin, 22 Wend. 9; Bank of Watertown v. Watertown, 25 Ind. 686; People v. Niagara, 4 Hill, 20.) It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (Laws of 1853, chap. 153, Laws of 1854, chap. 245, Laws of 1867, chap. 289); that the lines of distinction between the two, however far apart in the beginning, have steadily converged until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated, and no reason remains why joint-stock associations should not be in all respects treated and regarded as corporations.

Some of this contention is true. The case of People ex rel. Platt v. Wemple (117 N. Y. 136), shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the acts of 1880 and 1881, which formed the subject of consideration in the Wemple case, the legislature, dealing with the subject of taxation and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company or association whatever now or hereafter incorporated or organized under any law of this state." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock companies could not properly be said to be "incorporated," but

might be correctly described as "organized" under the laws of the state. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest, or out of which it grew, for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in Supervisors of Niagara v. People (7 Hill, 512), and in Gifford v. Livingston (2 Den. 380), by the statement that the corporators lost their individuality and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on the part of the respondents to be "an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and non-existent." I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial we may take the nature of the individual liability of the corporators on the one hand and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character.

It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the

intervention of an expressed command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never at common law rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to show in Rogers v. Decker (131 N. Y. 490), but is retained by force of the express command of the statute and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily, these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required in the first instance a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence. We so held in Witherhead v. Allen (4 Abb. Ct. App. Dec. 628), and at the same time said that the associations were not corporations but mere partnership concerns. Even that mode of procedure has been modified by the Code (§§ 1922, 1923), so that the creditor at his option may sue the associates without bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates and not to substitute for it that of corporators; and preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand corporations have been

created with positive provisions retaining more or less the individual liability of the members, and on the other the joint-stock companies have been clothed with most of the corporate attributes, but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two.

We may thus see upon what the legislative intent to preserve them as separate and distinct is founded and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other, the common-law liability remains unchanged and unimpaired and needing no statutory intervention to preserve or restore it; the debt of the corporation is its debt and not that of its members, the debt of the joint-stock company is the debt of the associates however enforced; the creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the state. The two are alike but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint-stock company is a corporation, we can say as we did say in Van Aernam v. Bleistein (102 N. Y. 360), that a joint-stock company is a partnership with some of the powers of a corporation. Beyond that we do not think it is our duty to go. Order affirmed.[1]

[1] Compare Hibbs v. Brown, 190 N. Y. 167.—Ed.

CHAPTER II.

THE CREATION, PERSONALITY, AND CITIZENSHIP OF CORPORATIONS.

STATE v. DAWSON.

1861. 16 Ind. 40.

Special Act—Acceptance of Charter.

PERKINS, J.: Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in January, 1849, the legislature of the State of Indiana enacted a special charter of incorporation (which is set out at length) for a railroad from Fort Wayne, Indiana, to Jeffersonville, to be called the Fort Wayne and Southern Railroad; that the persons named in the charter as directors did not accept said charter till June 2, 1852, when they did meet and accept the same and organize under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The court below sustained a demurrer to the information; thus holding the defendants to be a legal corporation.

The present constitution of Indiana took effect on November 1, 1851. It contains these provisions:

"All laws now in force and not inconsistent with this Constitution shall remain in force until they shall expire or be repealed." Sched. (1 subsec.) of Const.

"Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Art. II, § 13.

"All acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly shall, in its discretion, modify or repeal the same." Sched. supra, subsec. 4.

The charter for the Fort Wayne and Southern Railroad was not a charter for municipal purposes, and hence was not specially continued in existence. Art. II, § 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through, or by virtue of, such special act or charter, after November 1, 1851. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us to ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the legislature, did not create the corporation. It required one act on the part

of the persons named in the charter to do that, viz.: acceptance of the charter enacted.

Says Grant, in his work on Corporations, vide p. 13, "Nor can a charter be forced on any body of persons who do not choose to accept it." And again, at page 18, he says, "The fundamental rule is this: No charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. Bagg's Case, 2 Brownl. & G. 100; s. c. 1 Roll. Rep. 224; Dr. Askew's Case, 4 Burr. 2200; Rutter v. Chapman, 8 M. & W. 25; per Wilmont, J., Rex v. Vice-Chancellor of Cambridge, 3 Burr. 1661. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate. Townson v. Tickell, 3 B. & Ald. 31." See, also, Ang. & Am. § 83, where it is said if a charter is granted to those who did not apply for it, the grant is said to be in fieri till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till June, 1852, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the state; a consent that the persons named in the charter might become a corporation, might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the state, in 1849, was withdrawn by the state, November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her legislature would prescribe.

This pretended corporation, then, was not created before November 1, 1851, and it could be created afterwards only by the concurrent consent of the state and the corporators. But at that date, the constitution prohibited both the state and corporators from giving consent to such a corporation, to wit: one coming into existence through a special charter; and hence necessarily prohibited the creation thereof. This decision accords with that of the Supreme Court of the United States in Aspinwall v. Daviess County, 22 How. 364; where it was held that the new constitution prohibited a subscription of stock to the Ohio and Mississippi Railroad Company, authorized by the charter of the corporation, granted under the former constitution, and actually voted by the people of the county under that constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old constitution, must be determined on a trial of the cause below.

Had the provision in our constitution, like that on this subject in the constitution of Ohio, ordained that the legislature should "pass no special act conferring corporate powers," the restraint

would clearly have been imposed alone upon future legislative action; but, in our constitution, the restraint is plainly imposed upon the creation, the organization, of the corporation itself. See The State v. Roosa, 11 Ohio St. 16.

PER CURIAM.—The judgment is reversed, with costs.

FRANKLIN BRIDGE CO. v. WOOD.

1853. 14 Ga. 80.

General Laws—Delegation of Legislative Authority.

This was an action on a subscription to stock. The defendant claimed that the plaintiff was not legally incorporated, and that the act of the legislature prescribing the mode of incorporating certain corporations was unconstitutional.

LUMPKIN, J.: Is the act of 1843 and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges, and liabilities, unconstitutional?

By the first section of the Act of 1843, it is provided, "That when the persons interested shall desire to have any church, campground, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge company, and ferry company, incorporated, they shall petition in writing the superior or inferior court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court shall pass a rule or order directing said petition to be entered of record on the minutes of said court."

Section 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and be contracted with; to sue and be sued; to answer and be answered unto in any court of law or equity; to appoint such officers as they may deem necessary; and to make such rules and regulations as they may think proper for their own government; not contrary to the laws of this state; but shall make no contracts or purchase or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual

members of such manufacturing, trading, theatre, ice, and hotel companies, shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act, for a longer period than fourteen years; but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the superior and inferior courts respectively, the power to change the names of individuals.

Section fifth. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names,—in which case, the clerk of said court shall be entitled to the fee of one dollar. And that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this state." Cobb's Digest, 542, 543.

By the act of 1845 the provisions of the act of 1843 are extended to all associations and companies whatever, except banks and insurance companies; and the individual members of all such incorporations are made personally liable for all the contracts of said associations or companies. Ibid.

The argument against the validity of the charter of the Franklin Bridge Company, created under these statutes, is this:

1. That in England corporations are created and exist by prescription, by Royal Charter, and by act of Parliament. With us they are created by authority of the Legislature, and not otherwise. That to establish a corporation is to enact a law; and that no power but the legislative body can do this.

2. That legislative power is vested under our Constitution, in the General Assembly, to consist of a Senate and House of Representatives, to be elected at stated periods by the citizens of the respective counties.

3. And that the General Assembly is bound to exercise the power of making laws thus conferred upon them by the people in the primordial compact, in the mode therein prescribed, and in none other; and that a law made in any other mode is unconstitutional and void. That the legislature is but the agent of their constituents; and that they cannot transfer authority delegated to them to any other body, corporate or otherwise,—not even to the Judiciary, a co-ordinate department of the government, unless expressly empowered by the Constitution to do so. That to do this would be to violate one of the fundamental maxims of jurisprudence as well as of political science, namely, delegata potestas non potest delegari. That to do this would not only be to disregard the constitutional inhibition which is binding upon the representative, but by shifting responsibility introduce innovations upon our system, which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the bill of exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take however of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so, not only on account of the delicacy of the task, in pronouncing an act of legislature unconstitutional and void,—one which is never justifiable unless the case is clear and free from doubt; and even then one might almost be forgiven for shrinking from the performance of a duty which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense; manufacturing and innumerable other associations have been formed in Georgia, and are in full operation, under charters incorporated under this law. And in view of the consequences any court might hesitate, unless the repugnance between the statute and the constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

4. It was formerly asserted that in England the act of incorporation must be the immediate act of the king himself, and that he could not grant a license to another to create a corporation. 10 Reports, 27. But Messrs. Angell and Ames, in their Treatise on Corporations, state that the law has since been settled to the contrary; and that the king may not only grant a license to a subject to erect a particular corporation, but give a general power by charter to erect corporations indefinitely, on the principle that qui facit per alium facit per se; that the persons to whom the power is delegated of establishing corporations, are only an instrument in the hands of the government. I Kyd, 50; 1 Black. Com.; Ang. & Am. 63.

Before the revolution charters of incorporation were granted by the proprietaries of Pennsylvania under a derivative authority from the Crown; and those charters have since been recognized as valid. 3 Wilson's Lectures, 409. A similar power has been delegated by the Legislature of Pennsylvania with regard to churches. 7 S. & R. 517. The acts of the instrument in these cases become the acts of the mover, under the familiar maxim above mentioned. See also 1 Mo. R. 5.

5. Our opinion is that no legislative power is delegated to the courts by the acts under consideration. There is simply a ministerial act to be performed—no discretion is given the courts. The duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made obligatory upon the courts; and should they refuse to discharge it, a mandamus would lie to coerce them. It is true the legislature

has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the Free Banking Law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized, is required merely to be proven and acknowledged, and recorded in the office of the clerk of the superior court, where any office of the association is established, and a copy filed with the Comptroller General. Cobb's Digest, 107, 108.

And so under the act of 1847, authorizing the citizens of this state, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges. The persons who propose to embark in that branch of business are required to draw up a declaration specifying the objects of their association and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them; which declaration is required to be first recorded in the clerk's office of the superior court of the county where such corporation is located, and published once a week for two months in the two nearest gazettes; which being done, it is declared the said association shall become a body corporate and politic, and known as such, without being specially pleaded, in all courts of law and equity in this state, to be governed by the provisions and be subject to the liabilities therein specified. Cobb's Digest, 439, 440.

In these two instances, and others which might be cited, the legislature have dispensed with the action of the courts, or of any other agency, to carry out their enactments with regard to the various associations which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.

All these statutes were complete as laws when they came from the hands of the legislature, and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration, and giving publicity to the purpose of the association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test! For it requires the acceptance of the charter to create a corporate body; for the government cannot compel persons to become an incorporate body without their consent. And this consent, either express or implied, is generally subsequent in point of time to the creation of the charter. And yet, no charter that we are aware of has been adjudged invalid, because the law

creating it and previously defining its powers, rights, capacities, and liabilities, did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result therefore of our deliberation upon this case, is that the Acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the constitution, and that the charter of the Franklin Bridge Company and all others created under them, and in conformity to their provisions, are legal and valid. With the policy of these statutes we have nothing to do. The province of this and all other courts is jus dicere, not jus dare. Judgment reversed.

BUTLER PAPER CO v. CLEVELAND.

1906. 220 Ill. 128, 77 N. E. 99, 110 Am. St. Rep. 230.

De Jure Incorporation—Directory Provisions.

MR. JUSTICE SCOTT delivered the opinion of the court.

This suit was brought in the superior court of Cook county by the J. W. Butler Paper Company against Frederick W. Chamberlain, Harold I. Cleveland and Harriet F. Cleveland, to recover the sum of $1,305.80 alleged to be due the plaintiff for merchandise sold by it to the defendants as officers and directors of the C. & C. Company, a corporation organized under the statute of this state. Chamberlain was a resident of the state of Michigan, and process was not served upon him. The other two defendants entered their appearance and filed the general issue to the plaintiff's declaration. A trial was had before the court without a jury, by agreement of the parties, upon a stipulation of facts, and the court found the issues in favor of the defendants, and, after overruling a motion for a new trial, entered judgment against the plaintiff for costs of suit. The plaintiff appealed to the Appellate Court for the First District, and that court having affirmed the judgment of the superior court, a further appeal has been prosecuted to this court.

The only question arising upon the record in the case, which is presented by certain propositions of law offered by the plaintiff below and refused by the court, is whether there was such a failure to comply with the provisions of "An act concerning corporations" (approved April 18, 1872, in force July 1, 1872), in organizing the C. & C. Company, of which the defendants were officers and directors at the time the merchandise was sold by the plaintiff to the C. & C. Company, as to render the defendants individually liable to the plaintiff therefor under section 18 of chapter 32, Hurd's Revised Statutes of 1903. That section, which

was construed by this court in Loverin v. McLaughlin, 161 Ill. 417, reads as follows:

"If any person or persons being, or pretending to be, an officer or agent, or board of directors, of any stock corporation, or pretended stock corporation, shall assume to exercise corporate powers, or use the name of any such corporation, or pretended corporation, without complying with the provisions of this act, before all stock named in the articles of incorporation shall be subscribed in good faith, then they shall be jointly and severally liable for all debts and liabilities made by them, and contracted in the name of such corporation or pretended corporation."

The sole ground relied upon by the plaintiff as showing a defective incorporation of the C. & C. Company is the fact that the meeting of the subscribers to the capital stock of the company, held for the purpose of electing directors and for the transaction of such other business as might come before them, was not called in the manner pointed out by the statute.

Section 3 of chapter 32, supra, provides that notice of such meeting shall be given "by depositing in the postoffice properly addressed to each subscriber, at least ten days before the time fixed, a written or printed notice, stating the object, time and place of such meeting."

Frederick W. Chamberlain, Harold I. Cleveland and Harriet F. Cleveland were the only subscribers to the capital stock of the C. & C. Company. The license to open books of subscription to the capital stock of the company was issued on December 10, 1902. On December 12, 1902, the three subscribers above named executed a written instrument by which they waived the notice provided for by section 3, supra, and requested the commissioners to convene the meeting at 12 o'clock, noon, of that day at Room 913, Monadnock block, in the city of Chicago, for the purpose of electing directors and transaction of such other business as might come before them. Prior to the meeting, in pursuance of this written instrument, a notice was personally delivered to each of the three subscribers, notifying them of the object, time and place of the meeting. The subscribers met at the time and place specified and elected a board of directors, consisting of themselves and George A. Miller, who was one of the commissioners to whom the license had been issued by the Secretary of State.

A decision of this case depends upon the question whether the C. & C. Company is a corporation de jure. Proof of a corporation de facto does not relieve the directors and officers of the corporation from the liability imposed by section 18, supra. There must be a corporation de jure in order to escape that liability. Loverin v. McLaughlin, 161 Ill. 417; Gunderson v. Illinois Trust and Savings Bank, 199 Id. 422.

The statute prescribes a certain course to be pursued in organizing a corporation in this state. It does not necessarily follow, however, that any departure from that course will prevent a cor-

poration from becoming one de jure. Whether or not such departure will have that effect depends upon the nature of the provision which is violated. If it is a mandatory provision, a failure to substantially comply with its terms will prevent the corporation from becoming one de jure; but if the provision is merely directory, then a departure therefrom will not have that consequence.

In Cooley's Constitutional Limitations (star page 78) it is said: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute."

The provision of the statute here under consideration, requiring notice of the first meeting to be given to the subscribers to the capital stock of a corporation being organized, by mailing to them notices stating the object, time and place of such meeting at least ten days before the time fixed for such meeting, is evidently intended only as a direction "given with a view merely to the proper, orderly and prompt conduct" of the commissioners in calling such meeting, and a failure to obey that provision will not prejudice the rights of any persons interested therein if the same result is reached in some other mode. The only persons interested in the result to be attained by giving notice of the object, time and place of a meeting of the subscribers to the capital stock of a corporation for the purposes specified in the statute are the subscribers themselves. We perceive no reason why such persons, where all agree thereto, may not waive the giving of the statutory notice, if the meeting is actually held, as the purpose of the statute in requiring the notices to be given has in such case been accomplished.

The mere fact that the word "shall" is used in the statute in providing for the notice does not render the provision mandatory. Canal Commissioners v. Sanitary District, 184 Ill. 597.

In the case of Newcomb v. Reed, 12 Allen (Mass.), 362, in discussing the effect upon the legality of a corporation where the call for the first meeting was signed by only one of the persons named in the act of incorporation instead of by a majority of such persons, as required by the statute of Massachusetts, the court said: "The organization was not strictly regular, but can hardly be considered even as defective. And if the object of the statute is regarded, by which it is required that the first meeting shall be called by a majority of the persons named in the act of incorporation, it will be evident that it is directory, merely, and only designed to secure the rights conferred by the charter to those to whom it was granted, among themselves, by providing

an orderly method of organization. Thus, if all the persons interested should come together without any notice or call whatever, and proceed to accept the charter and do the other acts necessary to constitute the corporation, we cannot doubt that their action would be valid, and that neither the public, nor any persons not belonging to the association, would have any interest to question their proceedings. The purpose of the statute was probably to avoid such difficulties as were disclosed in the case of Lechmere Bank v. Boynton, 11 Cush. 369, where two parties had attempted to organize separately under the same charter, each claiming to be the corporation."

Cases have also arisen in this state in which the effect of a failure to give notice of corporate meetings in the manner provided by statute have been considered and it has been uniformly held that it is immaterial whether or not such notice has been given in the manner pointed out by the statute, if the persons entitled to such notice actually attend the meeting and participate in the business there transacted. Thomas v. Citizens' Horse Railway Co., 104 Ill. 462; Gade v. Forest Glen Brick Co., 165 Id. 367.

This case is distinguishable from Loverin v. McLaughlin, supra, which is relied upon by appellant, in that notice of the first meeting of subscribers is not intended for the benefit of the public, as no publicity of such meeting is required, but is merely for the benefit of the subscribers, while in the Loverin case the provision which was not complied with was that requiring the certificate of complete organization issued by the Secretary of State to be filed and recorded in the office of the recorder of deeds of the county in which the principal office of the corporation is located, and a compliance with the statute in that regard was essential because the provision was one for the benefit of the public, and could not be waived.

It is urged that the fact that section 4 of the act in question requires a copy of the notice provided for by section 3, supra, to be included in the report made to the Secretary of State, shows that the statute contemplates compliance with the statute in regard to giving notice. We think this provision is fully satisfied by including in such report the written instrument signed by all the subscribers in which such notice is waived.

The superior court did not err in refusing the propositions of law and in entering judgment upon the stipulation of facts in favor of the defendants and against the plaintiff for costs.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.[1]

[1] Mokelumne &c. Mining Co. v. Woodbury (1859), 14 Cal. 424; Humphreys v. Mooney (1880) 5 Colo. 282; Newcomb v. Reed (1866) 12 Allen (Mass.) 362, *Accord.*

The general incorporation laws required the insertion in the articles of the number and names of the directors. These were omitted. *Held,* the provision was imperative and not merely directory and that the

WILLMOTT v. LONDON ROAD CAR COMPANY, LIMITED.

1910. 2 Chan. Div. 525.

Appeal from a decision of Neville, J.[1]

By a lease, dated May 31, 1900, the plaintiff granted a certain land and buildings at Putney to one Porter for a term of sixty-two and a half years from September 29, 1899, at the yearly rent of 95*l* 10*s*, and Porter for himself, his executors, administrators, and assigns covenanted (among other things) to use the premises for the business of a jobmaster and livery stable keeper, and not without the previous written consent of the plaintiff or his heirs or assigns to assign or underlet or part with the possession of the premises or any part thereof, but such consent was not to be withheld "in respect of a respectable or responsible person;" and the lease contained the usual power of re-entry on breach of any of the covenants therein contained.

In February, 1901, the lease was, with the plaintiff's consent, assigned to the defendants, who entered into and took possession of the premises under the lease.

In 1908 the defendants sold their undertaking and property to the London General Omnibus Company, Limited, and in December, 1908, the defendants applied to the plaintiff for leave[1] to assign the lease to that company. On April 9, 1909, the plaintiff refused to give his consent to the assignment. In the following July the defendants, without the plaintiff's consent, let the London General Omnibus Company, Limited, into possession of the premises in the lease. Thereupon the plaintiff commenced this action and claimed a declaration that was entitled to re-enter and recover possession of the demised premises as on a forfeiture of the said lease by reason of (inter alia), the defendants having without his written consent parted with the possession of the premises to the omnibus company on the ground that that company was not "a person" within the meaning of the aforesaid covenant in the lease.

The defendants alleged in their defense that the London General Omnibus Company, Limited, was "a respectable and responsible person" within the meaning of those words in the lease, and counterclaimed for a declaration that they were entitled to assign the said premises to the omnibus company without the further application to or receiving the consent of the plaintiff.

Neville, J., held, following Harrison, Ainslie & Co. v. Barrow-in-Furness Corporation,[2] that a corporation was not capable of being "a respectable and responsible person" within the meaning

plaintiff company could not recover upon a subscription to its capital stock. Reed v. Richmond St. Ry. Co. (1875) 50 Ind. 342.—Ed.

[1] [1910] 1 Ch. 754.

[2] 63 L. T. 834.

of the covenant, and that the plaintiff was entitled to recover possession.

The defendants appealed.

COZENS-HARDY, M. R.—This is an appeal from a judgment of Neville, J., by which he has declared that the London General Omnibus Company, being a corporation, is not a respectable and responsible person within the meaning of a covenant contained in a lease, which I will read in a moment, and has declared that the lessor is entitled to recover possession of the demised premises. The appeal raises a question undoubtedly of importance and undoubtedly, too, in my judgment, of difficulty. Two learned judges, Romer, J., and Neville, J., have taken a view which, with the utmost respect, I am able to accept. The lease was a lease granted in 1900 to a Mr. Porter of some premises at Putney. The rent was 95*l* a year. The property was insured for 5000*l*; it was a valuable property apparently, and the lease contained this covenant. [His Lordship read the covenant.] Mr. Porter did assign to the present defendants, the London Road Car Company, in 1901, and the plaintiff gave his consent to the assignment. The defendants were minded to assign to the London General Omnibus Company. It is quite immaterial, but we are told that the assignment was a part of a scheme of reconstruction.

The real question, and the only question which has been decided by Neville, J., is that in his view a corporation is not a "person" and cannot be a "responsible and respectable person" within the meaning of this covenant. I think it is necessary to consider with some care what is the true prima facie meaning of the word "person"—what is its meaning at common law and apart from any statutory enactment. I go back to Lord Coke and his exposition of the statute of 39 Eliz. c. 5. The language of the statute there was quite positive. It was a statute that all and every person and persons seised of an estate in fee simple might—I am stating the substance of the act very shortly—found hospitals or almshouses, and Lord Coke upon those words "all and every person and persons" says this (2d Inst. (1797 ed.) p. 722): "These words regularly doe extend to any body politick or corporate, but not to such as are restrained by an Act of Parliament to alien, etc., but doth extend to such bodies politick and corporate as may alien." He does not put that on any context in the act—on the contrary, there is no context—but he puts it as a general proposition. "These words regularly doe extend to any body politick or corporate such as may alien." Of course, a corporation which had no power of alienation could not be a person within the meaning of this act, which says that any person may alien. It did not authorize an act which was otherwise ultra vires. Then we come to Blackstone's authority. The passage which was read by Farwell, L. J., from the commentaries (i 123) is quite explicit. "Persons are divided by the law into

either natural persons, or artificial." Then, again, we come to the very important case of *Pharmaceutical Society v. London and Provincial Supply Association*[3] in the House of Lords. Lord Selborne, in language which I think is perfectly unambiguous, said that prima facie in a statute the word "person" would include an artificial person or a corporation. Lord Blackburn indicated the same view, although he said he was not so clear about it. It is said, true, that may be so as to statutes, but that is a construction which is limited to statutes; it has no application to instruments even of the most formal character under seal such as this lease is. Is there any authority for that? So far as I am aware, there is not. Is there any authority to the contrary of that? I think there is, for Chitty, J.'s decision in *In re Jeffcock's Trusts*,[4] which was a case of a will, shews that where trustees of a will have power given to them to grant leases to any person or persons as they may think fit, a limited company, that is to say, a corporation is, within the meaning of that power, a person to whom the trustees may lawfully and properly grant a lease. I am not aware that the precise point has arisen with reference to a lease, but certainly I should be most unwilling to draw a distinction which I think would be contrary to the whole trend of modern dealings, and to say that a corporation in a lease of this kind was not to be regarded as a person. The real stress of Mr. Peterson's and Mr. Draper's able arguments rested on the words "responsible and respectable." Let me take them one by one. It is plain, of course, that under this lease and apart from this covenant a company could be an assign of the lease. There is no dispute about that. It was not ultra vires of the company to accept a lease and it was perfectly competent to become an assign. Suppose the words had simply been that consent should not be withheld in the case of a responsible person, I cannot bring myself to doubt that in that case a company which admitted to be responsible in the sense of being able to discharge all obligations in respect of rent and covenants under the lease would be a responsible person within the meaning of the covenant, and therefore a person with respect to whom consent could not be refused. But then it is said, and this is the point which alone has given me difficulty in this case, "Can it be said that a corporation can be respectable? Does not the addition of that word 'respectable' compel you to say that in this case the word 'person' must be limited to an individual, a human personality, a person who is capable of acts, moral or immoral? In my opinion that is not so. I think the ordinary use of language justifies you in saying that a company is a respectable company. We all use that language habitually; we talk of a respectable insurance company, or a respectable bank, and in that case we refer to the mode in which the company or the bank conducts its business.

[3] 5 App. Cas. 857.
[4] 51 L. J. (Ch.) 507.

But I think we are not without assistance from authority which is absolutely binding on us. A limited company or a company whether limited or not can maintain an action of libel for an injury to its reputation without proving any special damage. *South Hetton Coal Co. v. North Eastern News Association,*[5] which is a decision of this court in 1893, is a clear authority on that point. The material passages of the judgment have been read, and I do not propose to read them again. I am content to rely on a passage there quoted from the judgment of Pollock, C. B. in *Metropolitan Saloon Omnibus Co. v. Hawkins,*[6] where he says that in order to carry on business it is necessary that the reputation of a corporation should be protected, and therefore in cases of libel and slander it must have a remedy by action. A company can have a reputation which is not the reputation of the individual directors, but the reputation of the company, the reputation which the company itself, and itself alone, can protect by means of an action of libel. Are we to draw a distinction and say, "True, that might be applicable if the word in the covenant had been 'reputable,' but it is not 'reputable,' but 'respectable?'" I decline to draw that fine distinction. It seems to me that the better view (which I think is in accordance with modern policy and the trend of all mercantile proceedings) is to say that a company in a clause of this kind is a person who may be both respectable and responsible, and that therefore there can be no right to refuse to assign it. In other words, I think, taking the whole context of this clause that it really amounts to this: "You shall not assign or underlet without my previous consent, but such consent shall not be withheld in the event of the contemplated assignee or underlessee, who might be an incorporated company, being a respectable and responsible person," the word "person" being there used as a term which is equally applicable to an artificial and to a natural person.

I am aware that the view I am taking in this case is contrary to that expressed by Romer, J., in Harrison, Ainslie & Co. v. Barrow-in-Furness Corporation.[7] That decision may have been right on other grounds, as to which I say nothing, but the learned judge, from whom I never differ but with great hesitation, says this: "No doubt, for many purposes, the word 'person' includes corporation, as, for example, for the purposes of the Conveyancing Act 1881. The question I have to decide is, whether, looking at this particular lease, I can hold that a corporation such as that of Barrow-in-Furness falls within the definition of 'a person of responsibility and respectability.' I think not. Although the word 'person' may under many circumstances and for many purposes include a corporation, I do not think that is prima facie the natural meaning of the word, but whether that be so or not,

[5] [1894] 1 Q. B. 133.
[6] [1859] 4 H. & N. 87, 90.
[7] 63 L. T. 834, 836.

I have here to deal with a clause about a person of responsibility and respectability. Looking at the phrase as a whole, and considering the terms of the lease, I do not hold that the corporation can be said to come within the fair meaning of these words." With that decision before him, I think that Neville, J., was perfectly right in giving the decision which he did, following the decision of a judge of co-ordinate jurisdiction and leaving the parties to come to the Court of Appeals; but having arrived at a clear opinion in my own mind that both those decisions are wrong, I think that the only course open to us is to say that this appeal must be allowed and the action dismissed with costs here and below.

LOUISVILLE, ETC., R. CO. v. LETSON.

1844. 2 How. (U. S.) 497, 11 L. ed. 353.

Corporation as a Citizen

ERROR to the circuit court of the United States for the district of South Carolina, in an action of covenant brought by Letson, a citizen of New York, against the Louisville, Cincinnati and Charleston Railroad Co., a South Carolina corporation.

The defendants filed a plea to the jurisdiction. A general demurrer to this plea was sustained and defendant appealed.

MR. JUSTICE WAYNE delivered the opinion of the court.

The jurisdiction of the court is denied in this case upon the grounds that two members of the corporation sued are citizens of North Carolina; that the state of South Carolina is also a member, and that two other corporations in South Carolina are members, having in them members who are citizens of the same state with the defendant in error. * * *

A suit then brought by a citizen of one state against a corporation by its corporate name in the state of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state. The corporators as individuals are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the state where the suit is brought, jurisdiction attaches over the corporation—nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different state. It may be said that the suit is against the corporation, and that nothing must be looked at but the legal entity, and then that we cannot view the members except as an artificial aggregate. This is so, in respect to the subject matter of the suit and the judgment which may be rendered; but if it be right to look to the

members to ascertain whether there be jurisdiction or not, the want of appropriate citizenship in some of them to sustain jurisdiction, can not take it away, when there are other members who are citizens, with the necessary residence to maintain it.

But we are now met and told that the cases of Strawbridge and Curtis, 3 Cranch, 267, and that of the Bank of the United States and Deveaux, 5 Cranch, 84—hold a different doctrine.

We do not deny that the language of those decisions does not justify in some degree the inferences which have been made from them, or that the effect of them has been to limit the jurisdiction of the circuit courts in practice to the cases contended for by the counsel for the plaintiff in error. The practice has been, since those cases were decided, that if there be two or more plaintiffs and two or more joint-defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction, and in cases of corporations to limit jurisdiction to cases in which all the corporators were citizens of the state in which the suit is brought. The case of Strawbridge and Curtis was decided without argument. That of the Bank and Deveaux after argument of great ability. But never since that case has the question been presented to this court, with the really distinguished ability of the arguments of the counsel in this—in no way surpassed by those in the former. And now we are called upon in the most imposing way to give our best judgments to the subject, yielding to decided cases everything that can be claimed for them on the score of authority except the surrender of conscience.

After mature deliberation, we feel free to say that the cases of Strawbridge and Curtis and that of the Bank and Deveaux were carried too far, and that consequences and inferences have been argumentatively drawn from the reasoning employed in the latter which ought not to be followed. Indeed, it is difficult not to feel that the case of the Bank of the United States and the Planters' Bank of Georgia (9 Wheat. 907) is founded upon principles irreconcilable with some of those on which the cases already adverted to were founded. The case of the Commercial Bank of Vicksburg and Slocomb (14 Peters, 60) was most reluctantly decided upon the mere authority of those cases. We do not think either of them maintainable upon the true principles of interpretation of the Constitution and the laws of the United States. A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state. We remark, too, that the cases of Strawbridge and Curtis and the Bank and Deveaux have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have

been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert, that a majority of the members of this court have at all times partaken of the same regret, and that whenever a case has occurred on the circuit, involving the application of the case of the Bank and Deveaux, it was yielded to, because the decision had been made, and not because it was thought to be right. We have already said that the case of Bank of Vicksburg and Slocomb, 14 Peters, was most reluctantly given, upon mere authority. We are now called upon, upon the authority of those cases alone, to go further in this case than has yet been done. It has led to a review of the principles of all the cases. We can not follow further, and upon our maturest deliberation we do not think that the cases relied upon for a doctrine contrary to that which this court will announce, are sustained by a sound and comprehensive course of professional reasoning. Fortunately a departure from them involves no change in a rule of property. Our conclusion, too, if it shall not have universal acquiescence, will be admitted by all to be coincident with the policy of the Constitution and the condition of our country. It is coincident also with the recent legislation of Congress, as that is shown by the act of 28th of February, 1839, in amendment of the acts respecting the judicial system of the United States. We do not hesitate to say, that it was passed exclusively with an intent to rid the courts of the decision in the case of Strawbridge and Curtis. * * *

The case before us might be safely put upon the foregoing reasoning and upon the statute, but hitherto we have reasoned upon this case upon the supposition, that in order to found the jurisdiction in cases of corporations, it is necessary there should be an averment, which, if contested, was to be supported by proof, that some of the corporators are citizens of the state by which the corporation was created, where it does its business, or where it may be sued. But this has been done in deference to the doctrines of former cases, in this court, upon which we have been commenting. But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs

from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued. * * *

Judgment affirmed.[1]

[1] In Blake v. McClung (1898), 172 U. S. 239, Harlan, J., said at page 259:

"It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the state creating such corporation; and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the State under whose laws it was organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'"—Ed.

CHAPTER III.

PROMOTERS.

McARTHUR v. TIMES PRINTING CO.

1892. 48 Minn. 319, 51 N. W. 216, 31 Am. St. 653.

Contracts Made by Promoters—Adoption by the Corporation.

MITCHELL J.: The complaint alleges that about October 1, 1889, the defendant contracted with plaintiff for his services as advertising solicitor for one year; that in April, 1890, it discharged him in violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defenses: (1) That plaintiff's employment was not for any stated time, but only from week to week; (2) that he was discharged for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks and others were engaged as promoters in procuring the organization of the defendant company to publish a newspaper; that, about September 12, Nimocks, as such promoter, made a contract with plaintiff, in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1, the date at which it was expected that the company would be organized; that the corporation was not, in fact, organized until October 16, but that the publication of the paper was commenced by the promoters October 1, at which date plaintiff, in pursuance of his arrangement with Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company he continued in its employment in the same capacity until discharged, the following April; that defendants board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors, and officers of the corporation knew of this contract at the time of its organization, or where informed of it soon afterwards, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. Abbott v. Hapgood, 150 Mass. 248, 22 N. E. Rep. 907; Beach, Corp. § 198. This, however, seems to be more a question of name than

of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason, as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters, before its organization, it may after its organization make such engagements its own contracts. And this it may do precisely as it might make similar original contracts; formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not requisite that such adoption or acceptance be express, but it may be inferred from acts or acquiescence on part of the corporation, or its authorized agents, as any similar original contract might be shown. Battelle v. Northwestern Cement and Concrete Pavement Co., 37 Minn. 89, 33 N. W. Rep. 327. See also Mor. Corp. § 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because, "by its terms not to be performed within one year from the making thereof," which counsel assumes to be September 12, the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification, which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet "a ratification" properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. In re Empress Engineering Co., 16 Ch. Div. 128; Melhado v. Porto Alegre, N. H. & B. Railway Co., L. R., 9 C. P. 505; Kellner v. Baxter, L. R., 2 C. P. 185. What is called "adoption," in such cases, is, in legal effect, the making

of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that the plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by the corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of a variance between it and the complaint. The assignments of error are very numerous, but what has been already said covers all that are entitled to any special notice. Order affirmed.

PITTSBURGH MINING CO. v. SPOONER.

1889. 74 Wis. 307, 42 N. W. 259, 17 Am. St. 149.

Fiduciary Relation.

This action was brought by the Pittsburgh Mining Company for the purpose of recovering $70,000 of money had and received by the defendants for the use of the company. The material allegations in the complaint are:

(1) That in February, 1887, the defendants conceived the idea and agreed together to promote the organization of the plaintiff corporation for the ostensible purpose of carrying on the business of mining iron on the Gogebic range, so called, in the state of Michigan, but for the real purpose of cheating those who might deal with said corporation, and by so doing enrich themselves.

(2) That in pursuance of such scheme the defendants obtained for the purpose of purchase or temporary control a mining option on said range, conferring the right to prospect, explore, and mine for iron on a tract of land described in the complaint. This option was owned by certain parties named in the complaint, and the price demanded by them for it was $20,000, and no more.

(3) That, having obtained the control of such option for the purposes of the corporation, the defendants proceeded to obtain subscriptions to the capital stock of the proposed corporation, to raise the money to buy it; that to induce subscriptions to said capital stock the defendants falsely and fraudulently represented to divers persons, and to all persons who became and now are stockholders in said corporation, that the price demanded by the

owners of said option was $90,000, and that it could not be bought for less; that the defendants were themselves desirous of buying it, but were unable pecuniarily to pay so much money, but desired to organize a corporation to purchase it; that they would themselves become stockholders in the corporation to the extent of their ability to pay for the same; that there was no speculation in the purchase price; that the defendants were making nothing out of it—not even their expenses, unless the corporation saw fit to reimburse them—except what all stockholders would make alike through the operation of the proposed corporation in mining the ores covered by said option.

(4) The defendants also represented that for the purpose of the successful operation of the business of mining on said tract of land it would be necessary for the corporation to raise the sum of $100,000 in money—$90,000 for the purpose of purchasing the option from the owners thereof, and $10,000 to be put in the treasury of the company for the purpose of developing the mines.

(5) In furtherance of said fraudulent scheme the defendants drew up, and by said fraudulent representations procured to be signed, a subscription paper, of which the following is a copy: "The undersigned hereby agree with A. H. Main, of the city of Madison, Dane county, Wisconsin, the owner of a mining option upon, in, and to all of the north half of the southwest quarter of section number 11, town 47, range 45, east of the Michigan meridian, situate, lying, and being in the county of Ontonagon, state of Michigan, and with each other, that they will take of and from the said A. H. Main the number of shares of non-assessable paid up stock in the Pittsburgh Mining Company, proposed to be formed, set opposite their respective names, and pay for the same the sum of $2.50 per share; said payment to be made as soon as the company is duly incorporated, under and by virtue of either the laws of the state of Michigan or Wisconsin; and the said A. H. Main shall assign and transfer over to said corporation, and give and convey to said corporation, a perfect title to the same said option. It is understood that the capital stock of said corporation shall be $1,000,000, in 40,000 shares, of $25.00 each. It is also understood and agreed that a shaft has been sunk upon the land covered by said option, to a depth of about seventy feet, and that there is in sight, at such depth below the surface of the land so covered by said option, ten thousand tons of iron ore."

(6) The complaint then alleges that this subscription paper was signed by a large number of persons, agreeing to take shares in a sufficient amount in the whole to cover the entire proposed stock of the projected corporation, to-wit, $1,000,000.

(7) Immediately after said stock had been all subscribed, and on the 21st day of March, 1887, the defendants organized a corporation in conformity to the laws of this state, under the name of the "Pittsburgh Mining Company," now the plaintiff in this

action. The defendants were the only original incorporators; and on the 22d day of March, 1887, the first meeting of said corporation was held at Madison, in this state. All the defendants were present at such meeting. The defendant Spooner was elected president, and the defendant Main treasurer. That about the time of said meeting, and in furtherance of said fraudulent scheme, the defendant Main, with the advice and procurement of the other defendants, Spooner and Oakley, but in the joint interest of all of them, subscribed for the entire stock of said corporation, viz., $1,000,000, except one share each of $25, which were taken by the defendants Spooner and Oakley; and thereupon at the same meeting, by the unanimous vote of the defendants as sole corporators and directors, the following resolution was adopted, viz.: "*Resolved*, that in accordance with the subscription of A. H. Main to the capital stock of said company, the president and secretary hereof issue to him, or to such person or persons as he may direct, and in such number of shares as he may direct, all of the said stock, except two shares thereof, one of which is held by said Phillip L. Spooner, Jr., and the other by said F. W. Oakley; the said stock to the said Main to be issued as paid up in full, in consideration of his making and delivering to the president of the said corporation, for the said corporation, an assignment in writing, duly executed, of an option which he now owns on the north half of the southwest quarter of section eleven (11), township forty-seven (47), range forty-five (45) west, Ontonagon county, Michigan."

(8) It is further alleged in the complaint that none of the stock subscribed for by said Main was ever issued to him, except the sum of $25,000 now held by defendant Main. That although he conveyed to the corporation the mining option before mentioned in nominal payment for all of the stock of said corporation, neither the defendant Main nor any of the defendants ever had or held any valuable interest in said option above the price of $20,000, which had to be paid to the owners thereof. That, said option having been procured and being held by the defendants, or by the defendant Main for them, as promoters and trustees of said corporation, whatever value or interest they possessed or could possess therein inured to and was the property of said corporation, when formed, without advance in price or other conditions; and it is further alleged that $20,000 was the full value of said option.

(9) The complaint further alleges that the defendants, in furtherance of their fraudulent scheme, after said subscriptions were obtained, caused said option to be conveyed to said Main without any consideration; then caused the corporation to buy it from him for substantially its entire capital stock, caused the agreement to take shares in the projected company, as hereinbefore set forth, to read as an agreement to take them of said Main and pay him for them, instead of the company, and then issue

the shares so subscribed for to the several persons who, by the agreement aforesaid, had agreed to take them; and collected from them the sum of $100,000, paid the owners of the option $20,000 for the same, kept $10,000 in the treasury of the company, and fraudulently converted the remaining $70,000 to their own use, in violation of their duty to the company, as its promoters, trustees, and directors; whereby the plaintiff has sustained a loss of $70,000.

(10) The complaint further alleges that in procuring control of the said mining option, in organizing the corporation, securing subscriptions to the capital stock, collecting moneys thereon, paying for said option to the owners thereof, having it conveyed to the defendant Main, and by him to the plaintiff corporation, and in all other matters touching the organization of the plaintiff corporation, and the purchase of said option, the defendants became and were the promoters, agents and trustees of the plaintiff, and, while so acting, they could not, in law, by any pretext, pretense, or contrivance gain any personal profit or advantage over the plaintiff, or make any valid contract with it to its prejudice, and to further their individual advantage.

(11) It is further alleged in the complaint that the amount paid to the owners of said option by the defendants in behalf of the plaintiff was the sum of $20,000; that the amount obtained by the defendants from the corporation on the fraudulent pretext that such payment was $90,000, $70,000 of which the defendants have diverted from the company, and fraudulently appropriated to their own use, and for this amount they are jointly indebted to the plaintiff as for so much money had and received to its use, and the plaintiff demands judgment for the said sum of $70,000, with interest and costs.

To this complaint the defendants demurred, and allege as grounds of demurrer: (1) That the plaintiff has not legal capacity to sue; (2) that the complaint does not state facts sufficient to constitute a cause of action. Upon the argument of the demurrer in the circuit court, the court sustained the demurrer, and from the order sustaining the demurrer, the plaintiff appealed to this court.

TAYLOR, J.: Upon the hearing of the appeal in this court, no contention was made by the learned counsel for the respondents that the demurrer was properly sustained upon the first alleged ground, viz., that "the plaintiff has not legal capacity to sue." The only question argued at length was whether the complaint stated facts sufficient to constitute a cause of action. The learned counsel for the appellant corporation contends that the complaint states facts constituting a cause of action—*First,* upon the ground of actual fraud committed by the defendants upon the company by the sale of the mining option to the company for a sum greatly in excess of its real value, brought about by false

representations as to its actual cost; and, *second*, that it states a cause of action against the defendants as the promoters of the corporation, and, as such, holding a relation of trust and confidence towards it; and that, acting as the agents and officers of the corporation, they sold to the corporation, and bought for the corporation, the mining option for the sum of $70,000 more than its actual value and more than they paid for the same; that this was done without the knowledge and consent of the real stockholders of the corporation, and in fraud of their rights, and upon that ground they are liable to the corporation for the profits made by them on such sale to the corporation. The last alleged cause of action is the one upon which the learned counsel for the appellant mainly relies in this court, and is the one in favor of which the main argument of the learned counsel for the appellant is made.

Considering the defendants as the officers and promoters of the corporation at the time of the alleged purchase and sale complained of, it seems to me very clear that—laying out of view the fact that the money of the stockholders paid for their stock to the corporation, and which money was paid to defendants for the mining option, was obtained by the issuing of full-paid shares to the stockholders upon the payment of 10 per cent. of their par value, in violation of the statute—there can hardly be room for a contention that, upon the facts stated in the complaint, a cause of action is not stated against the defendants. Under the allegations of the complaint we must treat the alleged sale of the mining option to the defendant Main for the entire stock of the corporation, viz., $1,000,000, as a mere subterfuge and device to cover up the real transaction, which is substantially as follows: The defendants having obtained a right to purchase the mining option mentioned in the complaint for $20,000, proceeded to form a corporation to make such purchase, representing to the persons who subscribed for the stock that it would cost $90,000 to make such purchase, and, having first induced other persons to subscribe for the stock upon such representations, and to pay to the corporation upon or for their stock $100,000, the corporation then, through its officers, the defendants themselves, purchased the option for $90,000, paying the $20,000 which it cost them with the money received by the corporation, and converting the $70,000 to their own use. This is the substance of what is alleged to have been done by the company, and it appears to me to be immaterial as to the manner of doing it. It being shown that the defendants formed the company for the purpose of purchasing this option, and having induced the present stockholders to furnish $90,000 of their money to make the purchase under the false impression created by the defendants that the defendants would be compelled to pay that amount for the purchase price, and the defendants having afterwards, as officers and agents of the company, purchased for the company such option,

and paid themselves $70,000 more than they knew they could purchase it for, and $70,000 more than they in fact paid for the same, it seems to me there can be no doubt of their liability to refund to the corporation the $70,000 so obtained. In making this statement we are not to be understood as making any charge of fraud or unfair dealing on the part of the very respectable citizens who are the defendants in this action; all that is intended is that, admitting that the allegations of the complaint in this action are true, then the result indicated follows. The truth or falsity of these statements is not now under consideration. For the purposes of this case, the defendants do not controvert them.

That the defendants were promoters of the corporation, and as such, and as the officers of the same, they assumed the position of agents and trustees of the corporation in the transaction of its business, admitting the facts to be as stated in the complaint to be true, there can be no doubt. This is well established by the following cases cited by the learned counsel for the appellant, viz.: Society v. Abbott, 2 Beav. 559; New Sombrero Phosphate Co. v. Erlanger, L. R., 5 Ch. Div. 73; and Phosphate Sewage Co. v. Hartmont, Id. 394; 1 Mor. Priv. Corp. § 291; In re Paper Box Co., L. R., 17 Ch. Div. 471. See, also, the case of Railroad Co. v. Tiernan, cited by the learned counsel for the respondents, 37 Kan. 606. Assuming that these defendants were the promoters of this corporation, and it being alleged in the complaint that two of them were the officers of the corporation when the sale and purchase were made, they must be treated as the agents and trustees of the corporation, and as such their duties and obligations towards it are clearly defined by the authorities above cited. The learned judge, in deciding the case of Railroad Co. v. Tiernan, cites the rule of law governing their action, as laid down by the supreme court of Massachusetts in the cases of Parker v. Nickerson, 137 Mass. 487, and Parker v. Nickerson, 112 Mass. 195. In these cases the rule is stated as follows: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on account of another what he sells on his own account; * * * and, if he does so, the cestui que trust or principal, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustees or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit." See Tyrrell v. Bank, 10 H. L. Cas. 26; Kimber v. Barber, L. R., 8 Ch. 56; Simons v. Vulcan etc. Mining Co., 61 Pa. St. 202. This rule has been sanctioned and affirmed by this court. See Puzey v. Senier, 9 Wis. 370; Pickett v. School-Dist., 25 Wis. 551; Cook v. Mill Co., 43 Wis. 433; In re Orphan Asylum, 36 Wis. 534. Construed as I think the allegations in this case ought to be construed upon a demurrer, they present the case of trustees and agents of the corporation selling property to the corporation on the one hand,

and on the other hand buying for the corporation, and making a profit for themselves by the transaction of $70,000. Under the rule of law above stated the corporation may charge such profits made by the trustees and agents with an implied trust for the benefit of the corporation, and may recover such money in an action brought by the corporation.

It is urged against this claim that at the time of the sale and purchase there were no persons interested in the corporation except the said agents and trustees themselves, and so no one was injured, as all parties then interested were fully aware of all the facts. We do not think this a true statement of the case. According to the allegations of the complaint, all the present owners of the stock were interested parties. They were in fact the corporation, and the defendants represented them in making the sale, and not merely themselves. The relations which the defendants bore to the corporation in this case, according to the facts alleged in the complaint, are well stated by Chief Justice Thompson in the case of Simons v. Vulcan etc. Mining Co., supra. After stating that it was claimed that the organized board of directors was the company, and whatever it did could not be inquired into by the corporation put in motion by the instance of the stockholders, he says: "This is an error, and results from overlooking the fact that directors are but the agents and trustees of the company; that they have power to act only for the interest of the company, and not against it. The shareholders constitute the company, where there is stock, and not the directors. It was therefore well put in the charge of the learned judge that the directors had no power to bind the stockholders by allowing profits to the defendants, after holding out in their prospectus that the property was obtained at original prices, and that the defendants could not claim any if they hold out that they had purchased the property for the company, and were conveying at original prices. A fraud perpetrated against the corporation by any or all of the directors may assuredly be redressed by such an action in the name of the corporation. As already said, they are its agents and trustees, which implies accountability to their principal." In the case In re Paper Box Co., L. R., 17 Ch. Div. 471, the Master of the Rolls says: "I quite agree to this: that, if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved of by the directors of the company, who are the promoters, just before the allotment or just after. In both cases it is intended to cheat the future shareholders, and of course it makes no difference whatever that the persons who at the time the allotment was made were in fact the promoters or their nominees, knew of the fraud." It seems to me, unless we are prepared to go contrary to the cases above cited, and to very many others cited in the brief of the appellant, we must hold that an action can be

maintained in the name of the corporation to redress the wrong alleged to have been done by the defendants.

What would have been the relations of the defendants to the corporation if they had in fact owned the mining option, and had formed the corporation and issued full-paid stock to themselves for such option, and transferred such stock to themselves in payment for such mining option, and then, by exaggerated or false statements as to the value for such mining option, or as to its actual cost, had induced others to purchase from them such stock, need not be determined in this action; nor whether in such case any action for such fraud could be maintained by the corporation. Under the allegations of the complaint, such was not the transaction in this case. In this case no sale to or purchase by the corporation was made until all the stock, or nearly all, had been agreed to be taken by other parties than the defendants, and, although the written agreement which they signed stated that they were to buy the stock of defendants, the allegations of the complaint show that at the time such contract was signed by the present stockholders the defendants did not have or own any of the stock of the corporation, nor did they own the mining option. The allegations also show that no stock was ever issued to the defendants except to the amount of $25,000, and the balance of the stock was issued by the corporation directly to the present holders; and the mining option was bought by the defendants and sold to the company after such stock had been subscribed and paid for by the present stockholders, with the money paid by the stockholders to the corporation. What is said by the learned author (1 Mor. Priv. Corp. § 292, p. 279) in commenting upon the case of the Sombrero Phosphate Co., L. R., 5 Ch. Div. 73, is peculiarly applicable to the case at bar. In discussing the question whether the action would lie in favor of the corporation he says: "Before any shares had been issued the existence of the company was a fiction. The shareholders really formed the company, each one becoming a member when he took his shares. While the contract for the purchase of the property was nominally in force from the time of its approval by the board of directors, yet it really took effect only after the shareholders had taken their shares. It then became binding upon all the shareholders collectively, or, in other words, on the company. The fraud really consisted in inducing the shareholders to enter into this contract in their collective capacity, and in using the funds belonging to the shareholders collectively in paying the purchase price. It is evident, therefore, that the injury to the shareholders was an injury to their collective or corporate interests, and that the company was the proper complainant." These remarks are strictly applicable to the transaction in this case. It is true that it is alleged that the defendants formed a corporation under the statutes of this state, and that such corporation passed a resolution to permit the defendant Main to subscribe for the whole

capital stock, and pay for it by a transfer of the mining option to the corporation; but it appears from the complaint that before this was done an agreement had been made between the defendants and the corporation that other persons should become the owners of the stock of the corporation, and pay a certain sum of money for such stock, and thereby become the real parties constituting the corporation, and that their money should pay for the mining option; and it further appears that the transfer was not made to the corporation until after the real stockholders had become such by paying their money for the stock. The fraud in the sale was therefore a fraud upon the collective interests of the shareholders, as it was in the Sombrero Phosphate Co. case.

Taking all the allegations of the complaint together, they charge the defendants with purchasing the mining option for the sum of $20,000 from themselves for the benefit of the corporation, the corporation at the time of the sale and purchase representing the present holders of its stock, and not simply the interest of themselves. That this complaint states a good cause of action in favor of the corporation against the defendants, we think, is well settled upon principles and authority. The cases above cited of New Sombrero Phosphate Co. v. Erlanger, L. R., 5 Ch. Div. 73, Phosphate Sewage Co. v. Hartmont, L. R., 5 Ch. Div. 394, and Simons v. Vulcan etc. Mining Co., 61 Pa. St. 202, as well as many of the other cases cited in the brief of the counsel for the appellant, very clearly sustain this action.

It is, however, urged in a very able argument by the counsel for the defendants that, admitting the corporation would have a cause of action against the defendants for the profits made by them on the sale of the mining option to the corporation, had the corporation obtained the money with which it paid the defendants for such option in a lawful way, still, as the allegations of the complaint show that it obtained such money by an illegal issue or sale of its stock to its corporators, no action will lie to recover of the defendants any part of the money so illegally obtained by the corporation. Under my construction of the allegations of the complaint, it is very clear that the fact that the corporation received the money which paid the defendants for their mining option upon an illegal issue of its stock cannot be a defense to this action to compel them to refund to the company so much of the purchase price as was unlawfully received by them on such sale. The basis of the argument of the learned counsel is that these defendants received the money of the stockholders upon this alleged illegal sale of the stock as the agents of the corporation, and that as such agents they cannot be made to account to their principal for the money so received by them upon such illegal sales. Admitting this to be a true statement of the facts alleged in the complaint, I think, under the decisions of this and many other courts, these agents cannot set up the illegality of the transactions as a defense to an action by the principal to recover the

money of its agents. I think, however, that the allegations of the complaint show that the money received on the sale of the stock was in the possession of the corporation, and not merely in the possession of its agents, and, being so in the possession of the corporation, the defendants and agents of the corporation paid it over to themselves as the consideration for their mining option. Under the allegations of the complaint, they are not refusing to account for money collected by them as agents of the corporation in making sales of its stock, but they are refusing to account for money wrongfully obtained from the corporation upon a sale of their mining option to the company. Having changed their position in regard to this money by receiving it from the corporation as payment for the mining option sold to the company, they cannot now claim to hold it as money received by them as the agents of the corporation in making illegal sales of the stock of the corporation. The money paid to the corporation on such an illegal issue or sale of stock was, notwithstanding such illegal sale, the money of the corporation, as against all the world. The purchasers of such illegally issued stock could not recover back the money paid by them to the corporation upon such illegal transaction (see Clark v. Lincoln Lumber Co., 59 Wis. 655, 661, 665, 18 N. W. Rep. 492); and, if they cannot recover it back from the corporation, no one else can. The corporation, having the possession of the money, is for all practical purposes the owner of it; and, if these defendants took the money from the corporation in an illegal and fraudulent way, it is no defense to such illegal act that the corporation obtained the money by a violation of the statute in selling its stock. If A. obtains the title and possession of property from B. by some fraudulent device, and C. obtains the same property of A. by fraud, and A. brings an action against C. to recover the property back, or for damages for the fraud it would be no defense for C. that A. had fraudulently obtained it from B. This would certainly be so, unless B. made a claim for the property against C. In this case the persons whose money came to the possession of the corporation cannot enforce any claim to it as against the corporation, and consequently they could not enforce a claim to it as against the persons to whom the corporation transferred it, and, if the present stockholders were instrumental in bringing this action in the name of the corporation, as they must be held to be, by bringing it in the name of the corporation, they affirm the right of the corporation to the money so received by it. By what rule of law have the defendants the right to challenge the title of the corporation to the money which was paid to them upon the sale of their mining option to the corporation? I am unable to perceive any such right, especially in a case of this kind, where no other person can claim the money.

If it should be urged that the allegations of the complaint show that there are no legal stockholders, and no legal stock

issued, and so no corporation which can maintain this action, it is answered by saying that the defendants are in no position to attack either the issue of the stock or the illegality of the organization of the corporation. These defendants, who were the active agents in the formation of the corporation, who were instrumental in the issue of the alleged illegal stock, and who contracted with the corporation, having full knowledge of all of its transactions, are in no position to contest the regularity of the formation of the corporation. 2 Mor. Priv. Corp. §§ 750-754, and the numerous cases cited in the notes; Chubb v. Upton, 95 U. S. 665-667; Cowell v. Springs Co., 100 U. S. 55, 60; People v. La Rue, 67 Cal. 526, 8 Pac. Rep. 84. In my view of the case, these defendants, as agents and trustees of the corporation, sold their mining option to the corporation, and received from the corporation $70,000 in money of the corporation more than in law and equity they were entitled to receive therefor; and in law and equity they hold this money in trust for the corporation from which they received it. That the defendants, after having obtained from the corporation its money, which, in accordance with the principles of equity, they have no right to retain, may now refuse to refund on the allegation that the corporation was not in all respects organized in accordance with law, seems to me a proposition wholly unsupported by authority, and contrary to justice and equity. Under a proper construction of the allegations of the complaint, the illegal issue of the stock by the corporation, and the receipt of the money for such stock, was a completed transaction before the acts upon which the corporation rely for a recovery against the defendants transpired; and so the illegal act is in no way the foundation of the action. Briefly, the foundation of the claim of the plaintiff is this: The corporation having in its possession $90,000, the defendants, as agents and trustees of the corporation, sold their mining claim to the corporation for $90,000, and, acting for the corporation, they bought it for the corporation, and paid out its money to complete the purchase; and that, in making such sale and purchase, they so conducted themselves that they were and are not entitled, as against the corporation, to retain the profits made on the sale, but hold such profits in trust for the corporation. Under such circumstances, it appears to me wholly immaterial how the corporation became possessed of the money received by the defendants, unless they can show that some other person or party has a better claim to such money than the corporation.

I have not discussed the question as to the right of the corporation to recover the money on the theory that they collected the same as the agents of the corporation, for the benefit of the corporation, and now hold it as such agent, because it seems to me that a fair construction of the allegations of the complaint do not show that such is the position of the defendants. If, under the allegations of the complaint, these defendants ever held this

money as the agents of the corporation, they abandoned that position when they received it from the corporation as the purchase price of their mining option; and if they are entitled to hold the money at all they must hold it as vendors of such option, and as the purchase money thereof; and if they cannot, according to the rules of law and equity, hold it as such purchase money, then they must return it to the corporation. They cannot now assume to hold it as the agents of the corporation. In receiving the money as the purchase price of their option, they abandoned their position as agents of the corporation, if they ever were such as to this money, and cannot now assume such agency to defeat a recovery. Fox v. Cash, 11 Pa. St. 207; 2 Benj. Sales, 681. We think the complaint states a good cause of action in favor of the plaintiff, and that the circuit court erred in sustaining the demurrer to the complaint. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

Lyon, J., dissents.

CHAPTER IV.

CORPORATIONS EXISTING WITHOUT LEGAL RIGHT.

Section 1.—The De Facto Doctrine.

STOUT v. ZULICK.

1886. 48 N. J. L. 599, 7 Atl. 362.

De Facto Corporation—Stockholders Not Personally Liable.

THE CHANCELLOR.—The plaintiffs in error, who were plaintiffs below, seek to recover from the defendants the amount of a bill of goods sold by them to the New Jersey and Sonora Reduction Company. The goods were sold in New York to the company, September 16, 1884, upon the order of its purchasing agent, and were charged to the company upon the plaintiffs' books of account, and the plaintiffs accepted the note of the company at two months, signed by the treasurer for the price, and the goods were shipped to the company at Sonora, in Mexico. The note has not been paid. The plaintiff brought suit for the price of the goods against the defendants, who were the persons who signed, as stockholders, a certificate of incorporation, dated August 4th, 1883, the object of which was to incorporate the company under the provisions of the act "concerning corporations." The ground upon which the plaintiffs base their claim of liability on the part of the defendants is that the proceedings for incorporation were not in compliance with the provisions of the act applicable to the subject. The act provides for the incorporation of any company of three or more persons associating themselves together for any lawful business or purpose. The steps to be taken are the making, recording and filing of a certificate which is to be proved or acknowledged and recorded as required in case of deeds of real estate. In this case the certificate of acknowledgment of one of the defendants, Willard Richards, does not state that the contents of the certificate of incorporation were made known to him by the officer taking the acknowledgment (a notary public of Saratoga county, in the State of New York), and the accompanying certificate of authentication of the notarial act by the clerk of the courts of that county does not state that the notary was authorized by the laws of New York to take acknowledgments and proofs of deeds or conveyances for lands, tenements or hereditaments in that state, which statement is required by the supplement to the act respecting conveyances, (Rev., p. 1280,) in case of deed for land,

the acknowledgment or proof of which is taken in another state or territory before an officer so authorized. By reason and solely on account of those alleged defects, the plaintiffs insist that the certificate of incorporation is a nullity, and that the defendants are consequently liable as partners for the price of the goods.

It will have been seen that the goods were not sold to the defendants, but to the company to which the credit was given, and to which they were charged upon the plaintiffs' books, and for the price of which the plaintiffs accepted a note of the company, signed by the treasurer. The contract was not with the defendants, but with the company, and the defendants were guilty of no fraud. None is imputed, but, as before mentioned, the claim of liability is based entirely upon the proposition that the proceedings intended to effect the incorporation are, because of the alleged defects before referred to, a nullity. In the absence of a statutory provision making shareholders liable in case of failure to comply with the requirements of the charter, or with the requirements of the act under which the company is incorporated, persons who have contracted with a de facto corporation, as a corporation, cannot deny its corporate existence in order to charge its shareholders individually as partners. Taylor on Corp., § 739. See, also, Fay v. Noble, 7 Cush. 188. Where it is shown that there is a charter or a law under which a corporation with the powers assumed might lawfully be incorporated, and there is a colorable compliance with the requirements of the charter or law, the existence of a corporation de facto is established. Methodist Church v. Pickett, 19 N. Y. 482; Buffalo and Allegheny R. R. Co. v. Cary, 26 N. Y. 75. And it is entirely settled that the corporate existence of such corporation de facto cannot be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation de jure. The legality of its corporate existence may be inquired into by the state, but not by anyone else. And this is as true where the corporation is formed under a general law as it is where the corporate existence is claimed under a special charter. Cochran v. Arnold, 58 Penna. St. 399; Eaton v. Aspinwall, 19 N. Y. 119. Had this suit been brought against the company it could not have denied its corporate existence; neither can the plaintiffs, who contracted with it as a corporation, do so. Taylor on Corp., § 146; Swartwout v. Michigan Air Line R. R. Co., 24 Mich. 389; Rafferty, Receiver, v. Bank of Jersey City, 4 Vroom, 368. Our act provides that upon making the certificate and causing it to be recorded and filed, the persons so associating, their successors and assigns, shall be, from the time of commencement of the corporate existence fixed in the certificate, and until the time limited therein for the termination thereof, incorporated into a company by the name mentioned in the certificate. The time fixed for such termination in this case was August 4, 1933. The law authorized the formation of the corporation; the proceeding

purported to be in compliance with the requirements of the law, the certificate was made, recorded and filed, and the company claimed the right to exercise the powers conferred upon corporations duly created under the law, and it exercised them accordingly. The transaction under consideration furnishes an instance of such user. The company was a corporation de facto, and the plaintiffs, who contracted with it, cannot be permitted to deny the legality of its existence. The state alone can call that in question. Nor are the cases (Hill v. Beach, 1 Beas. 31, and Booth v. Wonderly, 7 Vroom, 250), cited by plaintiffs' counsel, in anywise opposed to the views above expressed. In the former, persons who associated themselves together for the purpose of carrying on the quarrying business in this state, took proceedings to incorporate themselves into a company under a general corporation law of New York. They were held liable as partners upon the ground that they were not a corporation, the Chancellor saying that they were not a domestic corporation and could not be sued as such, and that they were not a foreign corporation, for it was perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York was a fraud upon that law. In Booth v. Wonderly, persons who had got control of a special charter creating a corporation to be located in Trenton, but who were not named as corporators therein, attempted to use it to establish a company under it, to be located at Jersey City, and to give such company a corporate color under that charter. The court said that the company had some semblance of a corporation in name, form of organization, and assumption of a seal, yet not enough to give it a de facto corporate existence; that the attempt to establish the company in Jersey City under the charter was a palpable and entire perversion of the object of the act, and a fraud upon the act; that it gave no corporate color to the company; that the doctrine that the organization cannot be inquired into collaterally had no application to that case, because the charter did not fit the company and was not intended for it, and that the organization was entirely outside of the act and had no existence as a corporation, real or de facto. It will have been seen that in each case the ratio decidendi was that the pretended incorporation was a fraud upon the act under which the defendants claimed corporate existence. The judgment of the Circuit Court should be affirmed.

FINNEGAN v. KNIGHTS OF LABOR BUILDING ASSOCIATION.

1893. 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. 552.

Essentials of De Facto Corporation.

GILFILLAN, C. J.: Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, c. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling and leasing, of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the "Knights of Labor." The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction amounting to $599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because—*First*, the act under which it attempted to become incorporated, to wit, Laws 1870, c. 29, is void, because its subject is not properly expressed in the title; *second*, the act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; *third*, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a de jure corporation, so that it could defend against a quo warranto, or an action in the nature of quo warranto, in behalf of the state; for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation de facto—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a de facto corporation is stated by Selden, J., in Metho-

dist, etc., Church v. Pickett, 19 N. Y. 482, as "(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." This statement was apparently adopted by this court in East Norway Church v. Froislie, 37 Minn. 447, 35 N. W. Rep. 260; but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: "When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally." To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a de facto corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in Johnson v. Corser, 34 Minn. 355, 25 N. W. Rep. 799, in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a de facto corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required. "Color of apparent organization under some charter or enabling act" does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation de jure. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation de jure; but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation de facto.

The title to chapter 29 is "An act in relation to the formation of co-operative associations." Appellant's counsel argues that the body of the act does not contain a single element of co-operation," as that term is generally understood. But how it is generally understood he does not inform us. In a broad sense, all associations, whether corporations or partnerships, are co-operative, for all the members, either by their labor or capital, or both, co-operate to a common purpose. There is undoubtedly, in popular use of the terms, a more limited sense, though the precise limits are not well defined. There is no legal, as distinguishable from their popular, signification. In the Century Dictionary the

term "co-operative society" is defined, "A union of individuals, commonly laborers or small capitalists, formed * * * for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member." Taking the distinctive feature of a co-operative society to be that it is made up of laborers or small capitalists, it is manifest that the chapter intends to deal with just that sort of associations. Not only does it contemplate that the operations of the corporations shall be local, but the capital stock is limited to $50,000, the stock which one member may hold to $1,000. No one can become a shareholder without the consent of the managers, and no one is entitled to more than one vote. The provisions in the body of the act are in accord with the title, and it is therefore not open to the objection made against it. The purposes for which, under the act, corporations may be formed, are "of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business." The main purpose of the act being to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations, for the purpose of giving employment to such capital or labor and skill, the language expressing the purposes for which such corporations may be formed ought not to be narrowly construed. Giving a reasonably liberal meaning to the word "trade" in the act, it would include the buying and selling of real estate, and, upon a similar construction the word "mechanical" would include the erection of buildings. The doing of the mason, or brick, or carpenter, or any other work upon a building is certainly mechanical. There can be little question that corporations might be formed to do either of those kinds of work on buildings, and, that being so, there is no reason why they may not be formed to do all of them. There is no reason to claim that such a corporation must do its work as a contractor for some other person. It may do it for itself, and, as the act authorizes the corporation to "take, hold, and convey such real and personal estate as is necessary for the purposes of its organization," it may, instead of working for others as a contractor, make its profit by buying real estate, erecting buildings on it, and either selling or holding them for leasing. The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a de jure corporation, would not prevent it becoming one de facto. The foundation for a de facto corporation having been laid by the attempt to organize under the law, the user shown was sufficient. Judgment affirmed.[1]

[1] There must always be at least a colorable attempt in good faith to comply with the law's requirements. For a good recent instance of what will not be deemed sufficient, see Stevens v. Episcopal Church History Co., 140 App. Div. (N. Y.) 570.—Ed.

SOCIETY PERUN v. CLEVELAND.

1885. 43 Ohio St. 481, 3 N. E. 357.

De Facto Corporation as a Reality.

ERROR to the District Court of Cuyahoga county.

On the 28th of January, 1874, the city of Cleveland conveyed to Perun (an incorporated school and library society), certain real estate situated in that city, and to secure the unpaid purchase-money therefor, Perun, on the same date, executed and delivered to the city its four promissory notes and a mortgage upon the premises conveyed.

The city neglected to file this mortgage for record until the 21st day of October, 1879. In February, 1874, certain persons attempted to organize a mutual benefit association under an act supplementary to an act to provide for the creation and regulation of incorporate companies passed May 1, 1852 (S. & C. Stat. 271), passed April 20, 1872 (69 Ohio L. 82), under the corporate name of Society Perun. Thereafter, in May, 1874, Perun delivered to Society Perun its deed purporting to convey to the latter the premises theretofore mortgaged to the city. From that time forward, and prior to the filing of the city's mortgage for record, Society Perun, acting in its supposed corporate capacity, from time to time, executed and delivered deeds, mortgages, and executory contracts of sale, purporting to convey, incumber and sell parcels of these mortgaged premises to various parties, who were made defendants in the action below, and some of whom (including Amasa Stone, a mortgagee, and who had paid taxes upon the premises mortgaged to him), are cross-petitioners in error. Thereafter, in June, 1880, in a proceeding in quo warranto, in this court, instituted by the Attorney-General, Society Perun was adjudged not to have become incorporated in conformity to the laws of this state, but that its pretended incorporation was in violation thereof; and it was accordingly ousted of all rights and franchises to be a corporation.

These proceedings in quo warranto were had pending, and prior to the final judgment in the action below, which was brought by the city to foreclose her mortgage, and also to foreclose her supposed vendor's lien on the mortgaged premises, as against these subsequent grantees, mortgagees, and purchasers.

The cause was appealed from the court of common pleas to the district court, wherein it was tried upon the issues, the court finding among other things, that, as to the city of Cleveland, Society Perun was not a corporation either in law or in fact, and that the conveyance to it by Perun was void as against the city; and that the mortgages and other liens and claims of all the defendants (except the lien of Amasa Stone for taxes, and the claims of certain defendants for improvements on the premises), were subse-

quent and inferior to the lien of the city, in whose favor the court adjudged the second lien, and subsequent only to the lien of Amasa Stone for taxes paid by him, but of equal rank and merit with the holders of liens for expenditures on account of improvements above mentioned.

By the judgment in the quo warranto proceeding it was by this court in form adjudged that the defendants (the pretended incorporators) ever since their pretended incorporation, had unlawfully and without authority exercised the franchises of, and usurped the right to be, a body corporate; that the pretended organization of these defendants as a corporation was wholly void and of no effect, and vested in them no corporate rights, powers, privileges, or franchises of any description whatever.

It was further in form adjudged that the defendants never had, nor had any of them, the authority or lawful right to be a body corporate or to exercise or hold any of the powers, rights and liberties, privileges, functions or franchises of a body corporate; but that they and each of them in the use and exercise of the same were and had ever been usurpers thereof. The sole ground upon which this judgment of ouster was rendered was that while the statute required that they should set forth in their certificate of incorporation (among other things) the manner of carrying on the business of the association, the attempted compliance with this requirement was in these words:

"*Third.* That the manner of carrying on business of said association shall be such as may be from time to time prescribed by the by-laws of such association; provided that the same shall not be inconsistent with the laws of the state of Ohio."

Upon the trial below the plaintiff gave in evidence, against the objection of defendants, the record of the quo warranto proceedings.

The defendants offered in evidence the writing which was filed with the secretary of state as the certificate of incorporation of Society Perun.

They also offered to prove that the pretended incorporators proceeded to comply strictly with the requirements of the statutes; that they elected trustees, prepared a certificate of incorporation stating explicitly the manner of carrying on the business; that this was forwarded to the secretary of the state, who submitted it to the attorney-general for examination and approval; that the secretary of state returned this paper with another form of certificate which had been approved by the attorney-general and secretary of state, and which was the identical certificate actually filed with the secretary of state, and under the supposed authority of which an organization was in good faith attempted, and that they proceeded in good faith to act and transact its business under the supposed authority of such incorporation.

All this was excluded, and the defendants excepted. To reverse this judgment the present proceeding is prosecuted.

The alleged errors chiefly relied upon are the exclusion of the evidence offered to prove an attempt, in good faith, to incorporate Society Perun; the finding and holding of the court that Society Perun had never been in law or fact a corporation; that as against the city the deed from Perun was void; and adjudging the city's lien to be prior to the rights and liens of Society Perun and its mortgagees, grantees and purchasers.

OWEN, J.—The defendants below, conceding that Society Perun had never been a corporation de jure, maintain that the court below should have permitted them to prove that such society was a de facto corporation; that it attempted, in good faith, to become a body corporate; proceeded to act and transact business in good faith under the supposed authority of incorporation, and that its acts ought not to have been declared to be wholly void as against the city of Cleveland.

The judgment of ouster was an adjudication between the state and the society upon the right of the latter to exercise corporate franchises. For the purposes of such adjudication it was competent for this court to consider and determine what had been its status from its first attempt to incorporate. But it had no power to pass upon or determine the rights of parties not before it.

It was not competent for this court to determine in that proceeding that Society Perun had never been a corporation de facto, or that its acts and business transactions, under the color of its supposed charter powers, were void. The authority of the court in that behalf was derived from sec. 6774 (Rev. Stats.), which provides: "When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom, and that the relator recover his costs."

When the court had excluded the society from its franchises to be a corporation, it exhausted its jurisdiction over the subject-matter. It had no power to speak concerning whatever rights may have been acquired by the society as a corporation de facto, or by third parties in their transactions with it as an acting corporation.

It is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence. But it is maintained that the city, having engaged in no transactions with it, is free to challenge its existence as a corporation de facto as well as de jure. The argument is that: "No case can be found where it is held that there is a corporation de facto against persons who have in no way recognized its existence as a corporation," and that: "The notion of a de facto corporation is

based on the doctrine of estoppel; when estoppel cannot be invoked there can be no de facto corporation."

The theory that a de facto corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A de facto corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a *corporation*.

"It is a self-evident proposition that a contract cannot be made with a corporation unless the corporation be in existence at the time. A real contract with an imaginary corporation is as impossible, in the nature of things, as a real contract with an imaginary person. It is essential, therefore, in order to establish the existence of a contract with a corporation, to show that the corporation was in existence, at least de facto, at the time the contract was made." Morawetz Private Corporations, § 137.

It is bound by all such acts as it might rightfully perform as a corporation de jure. Where it has attempted in good faith to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.

Proof was offered upon the trial below to show (1) that the persons seeking to incorporate first filed with the secretary of state a certificate which fully complied with the requirements of the statutes, and free from the defect which finally proved fatal to its existence, but which was disapproved by the attorney-general; (2) That the certificate of incorporation which was finally filed with the secretary of state recited that, "said association has been formed and organized for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of said association; that the officers of said association have been duly chosen; that for the purpose of becoming a body corporate under an act passed by the general assembly of the state of Ohio, entitled, an act supplementary to an act, entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, passed May 1, 1852, passed April 20, 1872;" (3) That this certificate was approved by the secretary of state, and also by the attorney-general, as provided by the statutes (69 Ohio

L. 150); (4) That it proceeded in good faith to transact business peculiar to corporations provided for by the act under which it attempted to incorporate.

All this was excluded, and the decision of the court below practically rested on the proof offered by the city, that Society Perun had been ousted of its franchises, which was evidently construed as determining that such society had from the first no corporate existence, either de jure or de facto, and consequently no capacity to receive or impart any interest in or title to real estate except as against such parties as were by reason of their recognition of or dealings with it, estopped to deny its incorporate existence.

Did the court err? This fairly presents the controlling and very important question: Was it competent to show, as against a party who was not estopped to deny its corporate existence, that Society Perun was, at the time of the transactions involved in controversy, a corporation de facto?

In Attorney-General ex rel. Pettee v. Stevens, Saxton (N. J. Eq.) 369, the relator sought to enjoin the Camden and Amboy R. R. and Transportation Co. and others acting under its authority from erecting a bridge over a navigable stream. The claim was that the act authorizing the corporation had been perverted and disregarded, and that there was no legal incorporation. The relators were in no manner estopped to attack the corporate existence of the respondent. The court held:

"Where a set of men claiming to be a legally incorporated company under an act of the legislature, have done everything necessary to constitute them a corporation, colorably at least, if not legally, and are exercising all the powers and functions of a corporation; they are a corporation, de facto, if not de jure; and this court will not interfere, in an incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers."

The chancellor, speaking for the court, said:

"Here, then, is a set of men claiming to be a legally incorporated company under the act of the legislature, exercising all the powers and functions of a corporation. They are a corporation de facto, if not de jure. Everything necessary to constitute them a corporation has been done, colorably at least, if not legally; and I do not feel at liberty, in this incidental way, to declare all their proceedings void, and treat them as a body having no rights or powers. It has been seen that the court will not do this where a corporation properly organized has plainly forfeited its privileges; and there is but little difference in principle between the two cases. In both the corporation is actually in existence, but whether legally and rightfully so is the question. And it appears to me that if the court can take cognizance of the matter in this case, it must in all others where it can be brought up, not only directly, but incidentally."

This case is approved and followed in National Docks R. Co. v.

Central R. R. Co., 32 N. J. Eq. 755, which held: "When a corporation exists de facto, the court of chancery cannot, at the instance of private parties, restrain its operations upon the ground that its organization is not de jure. In such case the proper remedy is by quo warranto, or information in the nature thereof, instituted by the attorney-general." The rule of estoppel found no place in this case.

In S. & L. G. R. Co. v. S. & C. R. R. Co., 45 Cal. 680, it was held that: "If a corporation de facto is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser cannot justify his entry thereon on the ground that it was only a corporation de facto, and was not de jure entitled to the franchise."

In Williams v. Kokomo B. & L. Ass'n, 89 Ind. 339, one Leach gave to an acting corporation his mortgage on real estate. Subsequent to the execution and recording of it, he executed another mortgage on the same land to Williamson. In a proceeding to foreclose the junior mortgage, Williamson maintained that the pretended corporation had no legal existence, by reason of defects and omissions in the proceedings to incorporate, and that the senior mortgage was void. He was in no manner estopped, by dealings with, or recognition of, the first mortgagee to deny its corporate existence. The court held that: "A junior mortgagee cannot defeat a senior mortgage by showing that the corporation to which the senior mortgage was executed was defectively organized, if it be a corporation de facto." Elliot, J., said: "Where persons assume to incorporate under the laws of the state, and in part comply with their requirements, assume corporate functions and transact business as a corporation, private persons can not collaterally question the right of such an association to a corporate existence, although there has not been a full compliance with the provisions of the statute. Baker v. Neff, 73 Ind. 68. *This rule is not limited to cases where one by contract admits corporate existence, but is a rule of general application.*" It is not easy to distinguish the principle of this case from that of the case at bar.

In Pape v. Capitol Bank, 20 Kan. 440, Pape and wife gave their notes to "James M. Spencer or bearer," and their mortgage on real estate to secure them. Spencer transferred the notes to the Capitol Bank of Topeka, an acting corporation, with this indorsement: "Pay the bearer, without recourse on me; James M. Spencer." The mortgage was also transferred to the bank, which proceeded by suit to collect the notes and foreclose the mortgage. Pape and wife interposed the defense that the bank was not, and never had been, a body corporate, by reason, among others, of a defective organization. The bank had assumed corporate functions after an attempt, in good faith, to incorporate, and for a number of years was in the actual and notorious exercise of corporate franchises. Pape had transacted banking business with the

plaintiff prior to the purchase of the notes and mortgage, but such business was wholly unconnected with the notes and mortgage in suit. His wife, however, had not in any manner recognized the existence of the bank as a corporate body, and the doctrine of estoppel was not invoked to aid the court in sustaining a judgment of foreclosure against Pape and wife. Brewer, J., says: "The corporation is one de facto; and only the state can inquire, and that, in a direct proceeding, whether it be one de jure. * * * There must, in such cases, be a law under which the incorporation can be had; there must, also, be an attempt, in good faith, on the part of the corporators, to incorporate under such law; and when, after this, there has been for a series of years an actual, open, and notorious exercise, unchallenged by the state, of the powers of a corporation, one who is sued on a note held by such corporation will not be permitted to question the validity of the incorporation as a defense to the action. No mere matters of technical omission in the incorporation, no acts of forfeiture from misuser after the incorporation, are subjects of inquiry in such an action. *This is not upon the ground of equitable estoppel but upon grounds of public policy.* If the state, which alone can grant the authority to incorporate, remains silent during the open and notorious assertion and exercise of corporate powers, an individual will not, unless there be some powerful equity on his side, be permitted to raise the inquiry."

In Thompson v. Candor, 60 Ill. 244, Willetts, in February, 1858, deeded to "Mercer Collegiate Institute," a body pretending to be a corporation, the tract of land in controversy. He died in March, 1858. In 1868 his heirs quitclaimed their interest in the land to Thompson, who filed a bill in chancery for the cancellation of the deed from Willetts to the "Institute," alleging, as one of the grounds of relief, that the named grantee was not legally incorporated—had no capacity to take the title, and that the deed was void. The court held:

"Where parties endeavor to organize a corporation for educational purposes, under the general law, adopt a name, elect trustees, and organize by electing a president and officers, and the trustees had acted for years in managing the property, had leased and mortgaged it, and expended a large sum of money in its improvement, these acts constitute it a corporate body de facto, and the regularity of its organization cannot be questioned collaterally. Such irregularity can only be questioned by quo warranto or scire facias."

Thornton, J., says: "In 1856 an attempt was made to organize a corporation under the general incorporation law. A corporate name was selected, trustees were appointed, and an organization effected by the election of a president and proper officers. The trustees thus appointed acted for years in the general management of the property, leased and mortgaged it, and expended a large amount of money. Here then was a corporate body de

facto, which had been engaged in an undertaking involving important interests. The regularity of its organization cannot be questioned collaterally. Any alleged non-compliance with the law can only be inquired into by the writ of quo warranto or scire facias."

There is no suggestion throughout the entire case of the rule of estoppel as an element affecting its disposition.

In Paper Works v. Willett, 1 Robertson (N. Y. Sup.), 131, it is held that formal defects in proceedings to organize a corporation are not available to defeat an action brought by a corporation for trespass in wrongfully taking property out of its possession.

See also, as illustrating the principle under discussion: Smith v. Sheeley, 12 Wall. 361; Grand Gulf Bank v. Archer, 8 S. & M. 151, 173; Dunning v. R. R. Co., 2 Carter (Ind.) 437; Dannebroge Mining Co. v. Allment, 26 Cal. 286; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315; Mitchell v. Deeds, 49 Ill. 416; Eliz. Academy v. Lindsey, 6 Ired. 476; Darst v. Gale, 83 Ill. 136; Rondell v. Fay, 32 Cal. 354; De Witt v. Hastings, 40 N. Y. (Superior Court) 463; Rice v. R. R. Co., 21 Ill. 93; Douglas County v. Bolles, 94 U. S. 104; The Banks v. Poitiaux, 3 Randolph (Va.), 136; Goundie v. Northampton Water Co., 7 Pa. St. 233; Baker v. Backus, 32 Ill. 79; Tarbell v. Page, 24 Ill. 46; Thornburgh v. R. R. Co., 14 Ind. 499; Tar River Nav. Co. v. Neal, 3 Hawks, 520; Bear Camp River Co. v. Woodman, 2 Me. 404.

In Jones v. Dana, 24 Barb. 395, it was held that if a company has in form a charter authorizing it to act as a body corporate, and is in fact in the exercise of corporate powers at the time of taking a note from an individual, it is, as to him *and all third persons,* a corporation de facto, and the validity of its corporate existence can only be tested by proceedings on behalf of the people.

In the case at bar, the certificate which was last filed by the society embraced a full statement of the objects of incorporation and indicated what the nature of its business must necessarily be, and was strongly suggestive of the manner in which it must necessarily be transacted; and while it is not our purpose to call in question the action of this court in the quo warranto proceedings, we have no hesitation in saying that if we were now called upon to determine whether the corporate life of Society Perun should be taken, the question, upon the facts offered in proof at the trial below, would not be free from doubt and difficulty. It is very clear that the proceedings to incorporate were colorable; and so far as this fact is a test of the existence of a corporation de facto, it is most amply established. That there was proof of user is manifest from the evidence which was received without objection.

That the judgment of ouster did not and could not have a retroactive effect upon the rights of the society, and of parties

who had dealt with it during its de facto existence, is suggested by the opinion of Wright, J., in Gaff v. Flesher, 33 Ohio St. 115.

The evidence which was offered and excluded would, if credited, have shown Society Perun capable of holding and transferring the legal title to the land in controversy. Walsh v. Barton, 24 Ohio St. 43; Darst v. Gale, 83 Ill. 136; Shewalter v. Pirner, 55 Mo. 218; Nat. Bank v. Matthews, 98 U. S. 628; Goundie v. Northampton Water Co., 7 Penn. St. 233; Barrow v. Nashville Turn. Co., 9 Humph. 304; Kelly v. People's Trans. Co., 3 Ore. 189; Bogardus v. Trinity Church, 4 Sandf. Ch. 758.

The public and all persons dealing with this society were justified in assuming that the certificate filed with the secretary of state, and by him admitted to record in his office, had been approved by him, and also by the attorney-general, as required by statute (69 Ohio L. 150), and that it so far conformed to all legal requirements that, as provided in section 2 of the act of incorporation (69 Ohio L. 83), "a copy, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such association."

It would seem that such approval, record, and certificate, followed by uninterrupted and unchallenged user, for nearly six years, of all of which proof was tendered, would constitute a corporation de facto, if such a body is, under any circumstances, entitled to legal recognition.

The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity, and all of its transactions void.

The principle of the above cases is to be distinguished from a case where a mere corporation de facto attempts to assert the power of eminent domain by the appropriation of private property to public use. It has been held that the exercise of this right (which is but a delegation of the sovereign power of the state), depends upon the sufficiency and legal validity of the certificate of incorporation and public record of its organization. R. R. Co. v. Sullivant, 5 Ohio St. 276; Atkinson v. R. R. Co., 15 Ohio St. 21.

The case of Raccoon River Nav. Co. v. Eagle, 29 Ohio St. 238, is relied upon by the defendant in error. It was an action to recover upon a stock subscription. A plea of nul tiel corporation was interposed. The plaintiff claimed to be organized under an act to authorize the incorporation of companies "for the purpose of improving any stream of water * * * declared navigable by any law of the state of Ohio." On the trial the plaintiff offered in evidence a certificate by which it appeared that the company was formed for the purpose of improving, etc., Big Raccoon river. Unfortunately there was no navigable stream in Ohio by that name. No other testimony was offered. There was no proof of user. There was no defect in the form of the proceedings to incorporate, but an attempt to organize and incor-

porate for a purpose impossible of accomplishment. There was neither a de jure nor de facto corporation. Judgment was properly rendered for defendant.

In excluding proof of what was actually done looking to the incorporation of Society Perun, and of the subsequent acts of user, which was offered in evidence, there was error, for which the judgment in the first entitled case (as well as that in the same plaintiff against Hay et al., which was tried with it and involves the same general questions) is reversed. Numerous other questions are presented by the voluminous records in these cases, but as they all depend upon the one central and controlling question discussed above, and as the disposition here made of the cases must lead to a re-trial in the light of the principles indicated in this opinion, they are not separately considered.

Judgment reversed.

Section 2.—Estoppel to Deny Corporate Existence.

FOSTER v. MOULTON.

1886. 35 Minn. 458, 29 N. W. 155.

Estoppel Between Stockholders Inter se.

BERRY, J.: The complaint in this action sets out what purport to be the articles of incorporation of a mutual benefit association, which appears to have been intended to be a sort of mutual insurance company, and alleges that said articles were duly executed by defendants, and duly recorded with the register of deeds and secretary of state; that one McCarty became a member of the association, paid his dues and received a certificate of membership; that he sustained bodily injury entitling him, as such member, to pecuniary benefit; that the amount due him under the terms of his membership has not been paid; and that he has duly assigned his right to such benefit to the plaintiff.

The association did not comply with the statute so as to become an insurance corporation de jure. The appellant (one of the defendants) contends that it was duly incorporated as a benevolent society under Gen. St. 1878, c. 34, title 3. This cannot be so, for it is no more a *benevolent* society than any mutual insurance company, or other mutual company, or any partnership of which one member undertakes to do something for the pecuniary advantage of another member, in consideration of the undertaking of the latter to do a like thing for him. The undertaking is not in a proper sense *benevolent,* but it is for a quid pro quo; it is paid for. People v. Nelson, 46 N. Y. 477. The association involved in the case at bar is, in substance, for purposes of *mutual insurance.* State v. Merchants' Exch. Mut. Ben. Soc., 72

Mo. 146; State v. Benefit Ass'n, 6 Mo. App. 163; Com. v. Wetherbee, 105 Mass. 149; May, Ins. § 550a.

But notwithstanding it is not a corporation de jure, we think it must, at least, as between its members, be regarded as a corporation de facto. It is manifest that the understanding between the members, and the basis upon which certificates of membership were issued, was that the association was a corporation in fact as it was in form. Morawetz, Priv. Corp. § 139. It never could have been intended or expected that the members of the association, whether original founders—members like defendants—or those who should become members by joining at any time, should or would be liable as individuals, either jointly or severally, to any particular member who should, by virtue of and under the terms of his membership, become entitled to pecuniary relief or benefit. On the contrary, the intention and the real contract was that the association, as a corporation in the contemplation of the parties, i. e., the members, should be liable, and the association only. In such a state of facts, though the association is not a corporation de jure, and perhaps not for every purpose a corporation de facto, it is, as between the members themselves, to be treated as a corporation de facto (for that is the way in which the *contract* of the parties treats it); and the right of a member to pecuniary benefit from the association by virtue of his membership must stand upon the basis that it is a corporation de facto. Being presumed to know the significance of his membership, its rights and liabilities (Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 425), he is estopped to take any other position. This is not only intrinsically just and fair, but it is in accordance with the principles of the authorities. Morawetz, Priv. Corp. §§ 131, 132, 134-137; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75, followed in 57, 64, 67, N. Y., and 95 U. S.; White v. Ross, 4 Abb. Dec. 589; Aspinwall v. Sacchi, 57 N. Y. 331; Eaton v. Aspinwall, 19 N. Y. 119; Sands v. Hill, 46 Barb. 651; Sanger v. Upton, 91 U. S. 56; Chubb v. Upton, 95 U. S. 665.

It is important to bear in mind that no fraud is alleged against defendant; and, further, that this is a case in which a member of the association is seeking relief by virtue of his membership. If the action were between a purported or pretended corporation, which was wholly unauthorized and invalid, and a stranger, different rules and principles might, in some circumstances, be involved.

The application of the foregoing views is that, the action having been brought against defendants as individuals merely, the general demurrer of the appellant, who was one of the defendant members of the association, was erroneously overruled. The overruling order is accordingly reversed.[1]

[1] See also, Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 27 N. E. 596.—Ed.

JONES v. CINCINNATI TYPE FOUNDRY CO.

1860. 14 Ind. 89.

Recognition as a Corporation—Dealing on Corporate Basis.

PERKINS, J.—Suit upon a promissory note.

"The Cincinnati Type Foundry Company, a corporation," etc., "complains of David W. Jones, defendant," etc., upon a promissory note, of which a copy is set out thus:

"$279. Indianapolis, Indiana, October 11, 1857.

"Six months after date, I promise to pay to the order of the Cincinnati Type Foundry Company, two hundred and seventy-nine dollars, for value received, without relief from valuation laws. David W. Jones."

The defendant demurred to the complaint. The demurrer was overruled, and rightly.

The defendant then answered—

1. That he was not indebted to the plaintiffs.
2. That each and every allegation of the complaint was untrue.
3. That the plaintiffs had not a legal capacity to sue, because not a corporation.

Issue. Trial. The note constituted all the evidence. Judgment for the plaintiffs on the note.

The appellant contends that the case was not made out against him, because it was not proved that the appellees were a corporation, and thus possessed of the capacity to sue.

The appellees insist that the note sued on is a contract with them as a corporation, and that their existence is thereby admitted.

As a general proposition, it is the law of this state that a contract with a party as a corporation estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such. Shappel v. Hubbard, at this term.

And it has been held in other states that where individuals are incorporated upon performance of certain acts, a person who contracts with them by their corporate name, cannot, in an action against him on the contract, deny the performance by them of the acts necessary to give them a corporate existence. Hamtranck v. The Bank of Edwardsville, 2 Miss. R. 169.—Tarr River Navigation Co. v. Neal, 3 Hawks, 520. See 1 U. S. Dig. 593; 4 id. 433.

In New York, to work such estoppel, it has been necessary that the contract should state that the party contracted with was a corporation. But this rule does not prevail in other states. It has not been acted upon in this state.

If the style by which a party is contracted with is such as is usual in creating corporations, viz., naming an ideality, but disclosing that of no individual, as is usual in the cases of simple

partnerships, it has been treated as prima facie, at least, indicating a corporate existence. And such seems to have been the rule at common law. Grant on Corp., 62. Probably, a special answer, in such cases, in the nature of a plea in abatement, might, at the proper time, be made available. See Ang. and Ames on Corp., 506, 507, and the numerous cases in our own Reports.

And there is no hardship in this. The party executing the note owes the amount of it. The judgment upon it in the suit merges it, and the payment of the judgment satisfies it, and bars any other action against the maker for the money.

But, in this class of cases, it would seem, after all, that the Courts have proceeded upon a rule of evidence, rather than the strict doctrine of estoppel. They have treated the contract with a party by a name implying a corporation, really as evidence of the existence of a corporation, more than as an estoppel to disprove such fact. Grant, in his late learned work on Corporations, says: "Generally, the fact of an aggregate body being called by a name, is, prima facie, evidence that they are incorporated, 'for the name argues a corporation.' Norris v. Staps, Hobart, 11. But the courts take judicial notice that 'A. B. and company' is not the name of a corporation. Rex v. Harrison, 8 T. R. 508."

The doctrine of conclusive estoppel seems more properly applied to cases involving the question of legality of organization, where the fact of an existing statute, authorizing, in the given case, such corporation, is known to the court, either by judicial notice or actual evidence in the cause.

In such cases, where a party has contracted with a body as being organized as a corporation under the law, he will be estopped to dispute the legality of the organization. See the cases cited in the U. S. Dig., and Ang. and Ames, ubi supra. * * *

Judgment affirmed.

CHAPTER V.

THE CORPORATION AND THE STATE.

TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.[1]

1819. 4 Wheat. (U. S.) 518, 4 L. ed. 629.

Power of the Legislature Over Corporations.

MARSHALL, C. J.: This is an action of trover, brought by the trustees of Dartmouth College against William H. Woodward, in the State Court of New Hampshire, for the books of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June and on the 18th of December, 1816, be valid and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise, it finds for the plaintiffs.

The Superior Court of Judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of a state is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no state shall pass any

[1] As to the legislative control over corporations, see also Charles River Bridge Co. v. Warren, 11 Pet. (U. S.) 420 (1837); Thorpe v. Railroad Co., 27 Vt. 140 (1855); Greenwood v. Freight Co., 105 U. S. 13 (1881); Commonwealth v. Eastern R. Co., 103 Mass. 254 (1869); Railway Co. v. Lackey, 78 Ill. 55 (1875); Commonwealth v. Essex Co., 13 Gray. (Mass.) 239 (1859); Detroit v. Plank Road Co., 43 Mich. 140 (1880).

As to the circumstances leading up to the Dartmouth College Case, see Lodge's Life of Daniel Webster (American Statesmen Series), Chap. III.—Ed.

bill of attainder, ex post facto law, or law impairing the obligation of contracts." In the same instrument they have also said "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control, and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives, of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members ex-officio. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are:

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions which must change with circumstances and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control; that even marriage is a contract, and its obligations are affected by the laws respecting divorces; that the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprotfiable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man and embarrassed all transactions between individuals by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that, since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunals, not to impair a mar-

riage contract, but to liberate one of the parties because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations nor those for whose benefit they were made should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being, whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes, then, the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself it appears that about the year 1754 the Rev. Eleazar Wheelock established, at his own expense and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been, and should be, contributed, which appointment Dr. Wheelock con-

firmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New Hampshire, that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth and any others," the charter was granted, and the trustees of Dartmouth college were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors and other officers of the college such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy the trustees may appoint a president, and in case of the ceasing of a president the senior professor or tutor, being one of the trustees, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is that the Earl of Dartmouth and the other trustees in England were, in fact, the largest contributors. Yet the legal conclusion from the facts recited in the charter would probably be that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity school established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent, and the trustees, who received the money,

were appointed by, and act under, his authority. It is not too much to say that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn, and these salaries lessen the expense of education to the students. It is, then, an eleemosynary (1 Bl. Com. 471), and, so far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading, and in our holy religion, sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a

school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors, and the fact that they were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary. Not from the application of those funds, for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, eithers expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented, and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because

the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. In most eleemosynary institutions the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely, and certainly, without an incorporating act. They apply to the government, state their beneficient object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured. The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of

incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and, also, that the best means of education be established, in our province of New Hampshire, for the benefit of said province, do, of our special grace," etc. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College, as constituted by the charter. But, if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors and the incorporating act were the same; the promotion of Christianity and of education generally, not the interests of New Hampshire particularly.

From this review of the charter it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college nor the youth for whose benefit it was founded complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitious, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being the contributions which had been collected were immediately bestowed. These gifts were made, not, indeed, to make a profit for the donors or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. They were as completely out of the donors at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid, but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the

literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the constitution as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us, to say that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with, and personated by, the trustees, and their rights are to be defended and maintained by them. Religion, charity and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words which, in their natural import, include them? Or do such contracts so necessarily require new modeling by the authority of the legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the government of the Union the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." They have so far withdrawn science and the useful arts from the action of the state governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature as to intend to exclude

them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education, donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must necessarily partake of the spirit of their origin, and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college and to guide the students. Before

we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown, but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented "that, for many weighty reasons, it would be expedient that the gentlemen whom he had already nominated in his last will to be trustees in America should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning a priori, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is that this

is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

From the review of this charter which has been taken it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated that this corporation, thus constituted, should continue forever, and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

By the revolution the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendant power of parliament, as well as that of the executive department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the revolution. The obligations, then, which were created by the charter to Dartmouth College were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts."

It has been already stated that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law two opinions cannot be entertained. Between acting directly and acting through the agency of trustees and overseers no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management

and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for the perpetual application of the funds which they gave to the objects for which those funds were given; they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general, but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trustees, and the charter provides that in case of vacancy in that office "the senior professor or tutor, being one of the trustees, shall exercise the office of president until the trustees shall make choice of and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions the body corporate, as possess-

ing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States, and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must therefore be reversed.

STONE v. MISSISSIPPI.

1879. 101 U. S. 814, 125 L. ed. 1079.

Charter as a Contract—License.

MR. CHIEF JUSTICE WAITE: It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation, is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. Art. 1, sec. 10. The doctrine of the Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has, in fact, been entered into, and if so, what its obligations are.

In the present case the question is, whether the State of Mississippi, in its sovereign capacity, did, by the charter now under consideration, bind itself irrevocably by a contract to permit "The Mississippi Agricultural, Educational and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions, and sell and dispose of certificates of subscriptions which shall entitle the holders thereof to" "any lands, books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable or useful," "awarded to them" "by the casting of lot, chance or otherwise." There can be no dispute but that, under this form of words, the Legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that, in consideration thereof, the company paid into the State treasury $5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of $1,000

and "One half of one per cent. on the amount of receipts derived from the sale of certificates or tickets." If the Legislature that granted this charter had the power to bind the people of the State and all succeeding Legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists therefore, or not, depends upon the authority of the Legislature to bind the State and the people of the State in that way.

All agree that the Legislature cannot bargain away the police power of a State. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Boyd v. Alabama, 94 U. S. 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Beer Co. v. Massachusetts, 97 U. S. 25; Patterson v. Kentucky, 97 U. S. 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in Phalen v. Virginia, 8 How. 163, 168, that "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that, with the same opportunities of indulgence, the same results would be manifested.

If lotteries are to be tolerated at all, it is, no doubt, better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the

government is untrammeled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the Provisional Government of that State, in 1867, at the close of the late civil war, the present Act of incorporation, with more of like character, was passed. The next year, 1868, the people, in adopting a new Constitution with a view to the resumption of their political rights as one of the United States, provided that "The Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Art. 12, sec. 15. There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails against them. Rev. St., sec. 3894; 19 Stat. at L. 90, sec. 2.

The question is, therefore, directly presented, whether, in view of these facts, the Legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot devest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. Beer Co. v. Massachusetts, supra.

In Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a state, would, unnecessarily and unwisely, embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which to subserve those purposes, ought to vary with varying circumstances" (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation

in its charter exemptions from taxation. While taxation is, in general, necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government, dependent on taxation for support, can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptation of the term, mala in se, but as we have just seen; may properly be made mala prohibita. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Anyone, therefore, who accepts a lottery charter, does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has, in legal effect, nothing more than a

license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record, and the judgment is affirmed.

BEER COMPANY v. MASSACHUSETTS.

1877. 97 U. S. 25, 24 L. ed. 989.

The Charter—Legislation Impairing the Obligation of a Contract.

This was a proceeding in the Superior Court of Suffolk County, Massachusetts, for the forfeiture of certain malt liquors belonging to the Boston Beer Company, and which had been seized as it was transporting them to its place of business in said county, with intent there to sell them in violation of an act of the Legislature of Massachusetts, passed June 19, 1869, c. 415, commonly known as the Prohibitory Liquor Law. The company claimed that, under its charter, granted in 1828, it had the right to manufacture and sell said liquors, and that said law impaired the obligation of the contract contained in that charter, and was void, so far as the liquors in question were concerned. The court refused to charge the jury to that effect, and a verdict was found against the claimant. The rulings of the Superior Court having been affirmed by the Supreme Judicial Court of the Commonwealth, the company brought the case here. The statutes of Massachusetts bearing on the case are referred to in the opinion of the court.

MR. JUSTICE BRADLEY delivered the opinion of the court:

The question raised in this case is whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit.

Some question is made by the defendant in error whether the point was properly raised in the state courts, so as to be the subject of decision by the highest court of the state. It is contended that, although it was raised by plea, in the municipal court, yet, that plea being demurred to, and the demurrer being sustained, the defense was abandoned, and the only issue on which the parties went to trial was the general denial of the truth of the complaint. But whatever may be the correct course of proceeding in the practice of courts of Massachusetts—a matter which it is not our province to investigate—it is apparent from the record that

the very point now sought to be argued was made on the trial of the cause in the Superior Court, and was passed upon, and made decisive of the controversy, and was afterwards carried by bill of exceptions to the Supreme Judicial Court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal.

The Supreme Court, in its rescript, expressly decides as follows:

"Exceptions overruled for the reasons following:

"The act of 1869, c. 415, does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals.

"The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the Legislature."

The judgment of the Superior Criminal Court was entered in conformity to this rescript, declaring the liquors, forfeited to the commonwealth, and that a warrant issue for the disposal of the same.

This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised.

As before stated, the charter of the plaintiff in error was granted in 1828, by an act of the Legislature, passed on the 1st of February in that year, entitled "An Act to incorporate the Boston Beer Company." This act consisted of two sections. By the first it was enacted that certain persons (named), their successors and assigns "be, and they hereby are, made a corporation, by the name of The Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements, contained in an act passed on the third day of March, A. D. 1809, entitled 'An Act defining the general powers and duties of manufacturing corporations,' and the several acts in addition thereto." The second section gave the company power to hold such real and personal property to certain amounts as might be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

The general manufacturing act of 1809, referred to in the charter, had this clause as a proviso of the seventh section thereof: "Provided always, that the Legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient."

A substitute for this act was passed in 1829, which repealed the

act of 1809, and all acts in addition thereto, with this qualification: "But this repeal shall not affect the existing rights of any person, or the existing or future liabilities of any corporation or any members of any corporation now established, until such corporation shall have adopted this act and complied with the provisions herein contained."

It thus appears that the charter of the company, by adopting the provisions of the act of 1809, became subject to a reserved power of the Legislature to make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal the act, or any part thereof, establishing the corporation. This reservation of the power was a part of the contract.

But it is contended by the company that the repeal of the act of 1809 by the act of 1829 was a revocation or surrender of this reserved power.

We cannot so regard it. The charter of the company adopted the provisions of the act of 1809 as a portion of itself, and those provisions remained a part of the charter notwithstanding the subsequent repeal of the act. The act of 1829 reserved a similar power to amend or repeal that act at the pleasure of the Legislature, and declared that all corporations established under it should cease and expire at the same time when the act should be repealed. It can hardly be supposed that the Legislature, when it reserved such plenary powers over the corporations to be organized under the new act, intended to relinquish all its powers over the corporations organized under or subject to the provisions of the former act. The qualification of the repeal of the act of 1809, before referred to, seems to be intended not only to continue the existence of the corporations subject to it in the enjoyment of all their privileges, but subject to all their liabilities, of which the reserved legislative control was one.

If this view is correct, the Legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

But there is another question in the case, which, as it seems to us, is equally decisive.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true, and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor, nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be

stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state.

We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the pubilc good without due compensation. But we infer that the liquor in this case, as in the case of Bartemeyer v. Iowa, 18 Wall. 129, was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The Legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim salus populi suprema lex, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Boyd v. Alabama, 94 U. S. 645.

Since we have already held, in the case of Bartemeyer v. Iowa, that as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Of course, we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several states, or otherwise. Brown v. Maryland, 12 Wheat. 419; License Cases, 5 How. 504; Passenger Cases, 7 id. 283; Henderson v. Mayor of New York, 92 U. S. 259; Chy Lung v. Freeman, id. 275; Railroad Company v. Husen, 95 id. 465. That question does not arise in this case.

Judgment affirmed.[1]

[1] As to the extent of legislative control over corporations under the

LOOKER v. MAYNARD.

1900. 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. 21.

This was an information in the nature of a quo warranto, filed August 1, 1896, in the Supreme Court of the State of Michigan, by Fred A. Maynard, Attorney-General of the State, at the relation of Joseph W. Dusenbury and Will J. Dusenbury, against Oscar R. Looker, Charles A. Kent, Will S. Green, William A. Moore, Louis H. Chamberlain, William C. Colburn, Benjamin J. Conrad, John J. Mooney and Michael J. Mooney, to try the rights of the defendants and of the relators respectively to the offices of members of the board of directors of the Michigan Mutual Life Insurance Company. The right to such offices was claimed by the defendants under the original articles of association of the company under a statute subsequently enacted by the Legislature of the State, which the defendants contended to be unconstitutional and void as impairing the obligation of the contract made between the State and the corporation by its original organization.

The Constitution of Michigan, adopted in 1850, art. 15, sec. 1, is as follows: "Corporations may be formed under the general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed." 1 Charters and Constitutions, 1008.

The general law of Michigan of March 30, 1869, entitled "An act in relation to life insurance companies transacting business within this State," contained the following provisions:

By § 1, "Any number of persons, not less than thirteen, may associate together and form an incorporated company for the purpose of making insurance upon the lives of individuals, and every insurance pertaining thereto, and to grant, purchase and dispose of annuities."

By § 2, "The persons so associating shall subscribe articles of association, which shall contain"—"4. The manner in which the corporate powers are to be exercised, the number of directors and other officers, and the manner of electing the same, and how many of the directors shall constitute a quorum, and the manner of filling all vacancies." "7. Any terms and conditions of membership therein, which the corporators may have agreed upon, and which they may deem important to have set forth in such articles."

By § 5, "The articles of association shall be submitted to the attorney-general for his examination, and if found by him to be in compliance with this act, he shall so certify to the secretary of state." Stat. 1889, c. 77; 1 Laws of Michigan of 1869, p. 124.

Under that statute, the Michigan Mutual Life Insurance Com-

constitution, see also, People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684.—Ed.

pany was duly organized July 3, 1870, with articles of association, the fourth of which provided as follows:

"The corporate powers of the company shall be exercised by a board of directors, which shall consist of twenty-one members, which may be increased at the option of the board to not more than forty. The first meeting for the election of directors shall be called by the present officers, and held as soon as practicable after these articles shall take effect. No person shall be eligible who is not owner of at least ten shares of the guarantee capital of the company, and at least two-thirds of the directors shall be residents of the State of Michigan. The board, at their first meeting, shall divide themselves by lot into three equal classes, as near as may be, whose terms of office shall expire at the end of one, two and three years, respectively, and thereafter one-third of the directors shall be chosen annually for the class whose term then expires, who shall hold office for three years, or until their successors are elected; but the first board of directors, whose terms shall not have expired previous to the last Tuesday in January, shall continue in office until the last Tuesday in January following. The election of directors shall be had at the annual meeting of the company, which shall be held on the last Tuesday in January at the office of the company in Detroit. They shall be chosen by ballot, and a majority of all the votes cast shall elect. Every shareholder shall be entitled to one vote for directors for every share of guarantee capital standing in his name on the books of the company and may vote in person or by proxy. And every policyholder insured in this company for the period of his natural life in the sum of not less than five thousand dollars shall also be entitled to one vote in the annual election of directors, which vote must be given in person."

In 1885 the legislature of Michigan passed an act entitled "An act to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors," the first section of which provided as follows: "In all elections for directors of any corporation organized under any general law of this State, other than municipal, every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him for as many persons as there may be directors to be elected; or to cumulate said shares, and give one candidate as many votes as will equal the number of directors multiplied by the number of shares of his stock; or to distribute them on the same principles among as many candidates as he shall think fit. All such corporations shall elect their directors annually, and the entire number of directors shall be ballotted for at one and the same time, and not separately." Stat. 1885, c. 112; Public Acts of 1885, p. 116.

Directors were elected in accordance with the articles of association until the annual meeting of January 28, 1896, when the

whole number of directors being twenty-seven, of which nine were elected annually, the whole number of votes for directors was 4893; the nine defendants received 3655 votes each; and Joseph W. Dusenbury, representing in his own right or by proxy 1283 shares, undertook, under the statute of 1885, to multiply the number of his shares by nine, making the number 11,142, and, dividing this number equally, cast 5571 votes for himself and 5571 for Will J. Dusenbury; and, if his claim had been allowed, they two, the relators in this case, would have been elected directors. But his claim was rejected, his vote was allowed on 1238 shares only, and the non-defendants were declared elected, and assumed and since exercised the offices of directors.

The Supreme Court of Michigan held the statute of 1885 to be constitutional and valid, and adjudged that the relators were elected directors, and should have been so declared. 111 Michigan, 498. The defendants sued out this writ of error.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The single question in this case is whether a power, reserved by the constitution of a State to its legislature, to alter, amend or repeal future acts of incorporation, authorizes the legislature, in order (as declared in the title of the statute of Michigan now in question) "to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors," to permit each stockholder to cumulate his votes upon any one or more candidates for directors.

By the decision in the leading case of Dartmouth College v. Woodward, 4 Wheat. 518, it was established that a charter from the State to a private corporation created a contract, within the meaning of the clause in the Constitution of the United States forbidding any State to pass any law impairing the obligation of contracts; and consequently that a statute of the State of New Hampshire, increasing the number of the trustees of Dartmouth College as fixed by its charter, and providing for the appointment of a majority of the trustees by the executive government of New Hampshire, instead of by the board of trustees as the charter provided, was unconstitutional and void.

Mr. Justice Story, in his concurring opinion in that case, after declaring that in his judgment it was "perfectly clear that any act of a legislature which takes any powers or franchises vested by its charter in a private corporation, or its corporate officers, of which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter," took occasion to add: "If the legislature means to claim such an authority, it must be reserved in the grant." 4 Wheat. 712.

After that decision, many a State of the Union, in order to

secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the legislature. See Greenwood v. Freight Co., 105 U. S. 13, 20, 21. The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs. Sherman v. Smith, 1 Black, 587; Miller v. State, 15 Wall. 478; Holyoke Co. v. Lyman, 15 Wall. 500; Sinking Fund Cases, 99 U. S. 700, 720, 721; Close v. Glenwood Cemetery, 107 U. S. 466; Spring Valley Water Works v. Schottler, 110 U. S. 347; New York & New England Railroad v. Bristol, 151 U. S. 556.

As illustrations of the right of the legislature, exercising such a reserved power, to alter for the future the liability of stockholders to creditors of the corporation, or the mode of computing the votes of stockholders for directors, it will be sufficient to state two of the cases just cited.

The case of Sherman v. Smith, 1 Black, 587, was as follows: The general banking of New York of 1838, c. 260, provided, in § 15, that any number of persons might associate to establish a bank, upon the terms and conditions, and subject to the liabilities prescribed in this act; in § 23, that no shareholder of any association formed under this act should be individually liable for its debts, unless the articles of association signed by him should declare that the shareholder should be liable; and, in § 32, that the legislature might at any time alter or repeal this act. The articles of association of a corporation organized under this act in 1844 expressly provided that the shareholders should not be individually liable for its debts. By provisions of the constitution of New York of 1846, art. 8, sec. 2, and of the general statute of 1849, c. 226, the shareholders of all banks were made liable for debts contracted by the bank after January 1, 1850. This court unanimously held that these provisions were not unconstitutional as impairing the obligation of a contract.

The case of Miller v. State, 15 Wall. 478, was this: By the Revised Statutes of New York of 1828, c. tit. 3, it was enacted that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature." The constitution of New York of 1846, art. 8, sec. 1, ordained as follows: "Cor-

porations may be formed under general laws, but shall not be created by special act," except in certain cases. "All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." 2 Charters and Constitutions, 1363. In 1850 the legislature passed a general railroad act authorizing the formation of railroad corporations with thirteen directors, and providing that the subscribers to the articles of association and all who should become stockholders in the company should become a corporation, and "be subject to the provisions contained in" the aforesaid title of the Revised Statutes. Stat. 1850, c. 140, § 1. In the same year, a railroad corporation was organized under that act for the construction of a railroad from the city of Rochester to the town of Portage; and in 1851, by a statute amending the charter of the Rochester, that city was authorized to become a stockholder in the corporation, and to appoint four of the thirteen directors. Stat. 1851, c. 389, § 24. In 1867 the legislature passed another statute, authorizing the city to appoint seven of the thirteen directors. Stat. 1867, c. 59. This court upheld the validity of the latter statute, upon the ground that the reservation in the constitution of 1846, and in the statutes of 1828 and 1850, of the power to alter or repeal the charter, clearly authorized the legislature to augment or diminish the number, or to change the apportionment, of the directors as the ends of justice or the best interests of all concerned might require. 15 Wall. 492, 498. The full extent and effect of the decision are clearly brought out by the opinion of two justices who dissented for the very reason that the agreement with respect to the number of directors which the city should elect was not a part of the charter of the company, but was an agreement between third parties, outside of and collateral to the charter, and which the legislature could not reserve the power to alter or repeal. 15 Wall. 499. That case cannot be distinguished in principle from the case at bar.

Remembering that the Dartmouth College case (which was the cause of the general introduction into the legislation of the several States of a provision reserving the power to alter, amend or repeal acts of incorporation), concerned the right of a legislature to make a change in the number and mode of appointment of the trustees or managers of a corporation, we cannot assent to the theory that an express reservation of the general power does not secure to the legislature the right to exercise it in this respect.

Judgment affirmed.

CHAPTER VI.

POWERS.

DOWNING v. MOUNT WASHINGTON ROAD COMPANY.

1860. 40 N. H. 230.

Powers of Corporation—Construction of Charter.

Assumpsit to recover the price of certain vehicles made under a contract with the president of the defendant corporation. Defendant denied the authority of the president to make such a contract.

BELL, C. J.: Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental, or necessary to carry into effect the purposes for which they were established. Trustees v. Peaslee, 15 N. H. 330; Perrine v. Chesapeake Canal Co., 9 How. 172. In giving a construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. Enfield Bridge v. Hartford R. R., 17 Conn. 454; Strauss v. Eagle Insurance Co., 5 Ohio (N. S.), 39.

If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.

In the present case the power to take the lands of others, and to take tolls of travelers, must be strictly construed, if doubts should arise on those points; but it is not seen that the other grants to the defendant corporation should not receive a fair and natural construction.

The charter of the Mount Washington road empowers them to lay out, make and keep in repair, a road from Peabody River Valley to the top of Mount Washington, and thence to some point on the northwest side of the mountain. It grants tolls on passengers and carriages, and authorizes them to take lands of others for their road, and to build and own toll-houses, and erect gates, and appoint toll-gatherers to collect their tolls. The remaining provisions contain the ordinary powers of corporations relating to directors, stock, dividends, meetings, etc. Laws of 1853, chapter 1486.

This chapter confers the usual powers heretofore granted to turnpike corporations, and no others. The most natural and sat-

isfactory mode of ascertaining what are the powers incidentally granted to such companies, is to inquire what powers have been usually exercised under them, without question by the public or by the corporators. It may be safely assumed that the powers which have not heretofore been found necessary, and have not been claimed or exercised under such charters, are not to be considered generally as incidentally granted. Such charters have in former years been very common in this and other states, and they have not, so far as we are aware, been understood as authorizing the corporations to erect hotels, or to establish stage or transportation lines, to purchase horses or carriages, or to employ drivers in transporting passengers or freight over their roads; and no such powers have anywhere been claimed or exercised under them. We are, therefore, of opinion that the power to establish stage and transportation lines to and from the mountain, to purchase carriages and horses for the purpose of carrying on such a business, was not incidentally granted to the defendant corporation by their charter. State v. Commissioners, 3 Zab. 510.

But it is contended that the power to make this contract is conferred by the act in amendment of the charter, passed July 12, 1856. By this act the corporation may "erect and maintain, lease and dispose of any building or buildings which may be found convenient for the accommodation of their business, and of the horses and carriages and travelers passing over their said road." By their business, which the buildings to be erected were designed to accommodate, it is said the legislature must have intended some permanent and continuing business beyond that of merely building and maintaining a road; and that it could be no other than that of erecting a hotel on the mountain, and establishing lines of carriages, for the purpose of carrying visitors up and down the mountain.

But the foundation of this implication is very slight. The express grant is of an authority to erect, etc., buildings, not of all kinds, but such as may be found convenient for the accommodation of their business, and of travelers, etc. The business here referred to must be understood to be such as they are by their charter authorized to engage in. If nothing had been said of horses and travelers, there could hardly be any foundation for the idea that a hotel could have been contemplated by the legislature. Buildings suitable for the accommodation of their toll-gathers and workmen employed on their road, would probably be thought everything the legislature intended to authorize by this additional act. Connected as this authority now is with travelers, horses, and carriages, there is scarce a pretence for argument that this additional act goes any further than the original act, to authorize a stage and transportation company. It is not unlikely that some of the projectors of this enterprise intended to secure much more extensive rights than those of a turn-

pike and hotel company, but it seems certain they have not exhibited this feature of their case to the legislature so distinctly as to secure their sanction, and the charter and its amendment as yet justifies them in no such claim.

The power of buying and selling real and personal property for the legitimate purposes of the corporation, and the power of contracting generally for the same purposes, within the limits prescribed by the charter, being granted, we understand the principle to be, that their purchases, sales, and contracts generally, will be presumed to be made within the legitimate scope and purpose of the corporation, until the contrary appears, and that the burden of showing that any contract of a corporation is beyond its legitimate powers, rests on the party who objects to it. Indiana v. Worum, 6 Hill, 37; Ex parte Peru Iron Company, 7 Cow. 540; Farmer's Loan v. Clowes, 3 Comst. 470; same v. Curtis, 3 Seld. 466; Biers v. Phenix Company, 14 Barb. 358.

If a corporation attempt to enforce a contract made with them in a case beyond the legitimate limits of their corporate power, that fact, being shown, will ordinarily constitute a perfect defense. Green v. Seymour, 3 Sandf. Ch. 285; Bangor Boom Corp. v. Whiting, 29 Me. 123; Life, &c., Company v. Manufacturers, &c., Company, 7 Wend. 31; New York, &c., Insurance Company v. Ely, 5 Conn. 560.

And if a suit is brought upon a contract alleged to be made by the corporation, but which is shown to be beyond its corporate power to enter into, the contract will be regarded as void, and the corporation may avail themselves of that defense. Beach v. Fulton Bank, 3 Wend. 573; Albert v. Savings Bank, 1 Md. Ch. Dec. 407; Abbot v. Baltimore, &c., Company, 1 Md. Ch. Dec. 542; Strauss v. Eagle Insurance Company, 5 Ohio, N. S. 59; Baron v. Mississippi Insurance Company, 31 Miss. 116; Bank of Genesee v. Patchin Bank, 3 Kern. 315; Gage v. Newmarket, 18 Q. B. 457.

The contract set up in this case was made not by the corporation itself, by a vote, nor by an agent expressly authorized to sign a contract already drawn, but it was made by the president of the corporation, acting under an appointment as their general agent; and it is argued that he was fully authorized by votes of the corporation to bind them by such a contract as the present; but it is not necessary to consider this question, as we think it settled that the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make. This principle is distinctly recognized in McCullough v. Moss, 5 Den. 567; overruling the case of Moss v. Rossie Lead Co., 5 Hill, 137, and in Central Bank v. Empire Co., 26 Barb. 23; Bank of Genesee v. Patchin Bank, 3 Kern. 315.

This same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the

scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make. 5 Den. 567, above cited. The power of the agent must be restricted to the business which the company was authorized to do. Within the scope of the business which they had power to transact, he, as its agent, may be authorized to act for it, but beyond that he could not be authorized, for its powers extend no further.

This view seems to us entirely conclusive against the claim made for the omnibuses and model, and probably for the baggage wagon.

As to the light wagon, that may stand on a different ground. Such a wagon might be useful and necessary for the use of the agent of the company, in conducting the undoubted business of the corporation—the building and maintaining the road.

We are unable to assent to the position taken in the argument, that a ratification of part is a ratification of the whole contract. While the corporation may be restricted from ratifying a contract beyond the scope of the objects of the corporation, there could be no such objection as to any matter clearly within their power. The other contracting party might have a right to reject such ratification, claiming that the contract is entire, and if not ratified as such, it should not be made good for a part only. But if they claim the benefit of the partial ratification, the corporation can hardly object.

PEOPLE EX REL. TIFFANY & CO. v. CAMPBELL.

1894. 144 N. Y. 166, 38 N. E. 990.

ANDREWS, Ch. J.: This appeal is from an order of the General Term dismissing a writ of certiorari to review a decision of the state comptroller subjecting to taxation a portion of the relator's capital employed in this state in the years 1889, 1890 and 1891.

The relator is a manufacturing corporation in this state, organized under the general law for the incorporation of manufacturing companies, for the manufacture and sale of gold and silverware and other articles of ornament and use. Its capital, stated in the certificate, is $2,400,000, which by accretion now exceeds $3,000,000. It has a store for the sale of its products in the city of New York. It employs from six to eight hundred men in its manufacturing business in this state and about eighty per cent. of its capital. All of this capital, except a portion varying in different years from twelve to fifteen per cent. is invested in its manufacturing business. The portion not employed in that way,

amounting on the average to about $300,000 a year, is employed in the purchase and sale of goods, principally of foreign manufacture, of the same general character as the goods manufactured by the relator, but of a cheaper description, which it cannot itself advantageously manufacture, but which are necessary in order to make its stock complete, and to meet the wants of customers. The portion of the relator's capital not employed in this state, being about twenty per cent. thereof, is invested permanently in London and Paris, and a small part in New Jersey.

The question presented relates to the rule of taxation as applied to the relator and the basis upon which the tax is to be computed, assuming that to any extent the capital of the relator is taxable.

The relator insists that, being a manufacturing corporation, it was exempted from taxation by section 3 of chap. 542 of the laws of 1880, which exempted "manufacturing corporations carrying on manufacture within this state," and the further claim is made in behalf of the relator that the amendment of that section by chap. 193 of the laws of 1889, which inserted the words "wholly engaged in" before the words "carrying on manufacture," contained in the act of 1880, was not intended to and did not affect or qualify the exemption given by the prior act, and that by that act a manufacturing corporation was absolutely exempt from taxation in whatever other business it might be engaged. The comptroller, in settling the tax, while expressing a doubt whether the relator's business within this state was not wholly that of manufacture within the fair meaning of the act of 1889, nevertheless concluded that it was taxable on the portion of its capital employed in this state in the purchase or sale of goods manufactured by other parties, and upon this basis adjusted the tax. The attorney-general claims that the comptroller erred in limiting the tax to the portion of the relator's capital employed in a business outside of the manufacture and sale of its own products, and that by uniting therewith the business of buying and selling other articles, although of the same general character, was not entitled to any exemption because not "wholly engaged" in carrying on manufacture within the state, which, it is insisted, is the condition of exemption of manufacturing corporations, imposed by the act of 1889.

We do not assent to the claim of the relator's counsel that the words "wholly engaged in," contained in the amendment of 1889, do not apply to manufacturing corporations. The plain object of the exemption of manufacturing corporations carrying on manufacturing within this state, from taxation, by the act of 1880, was the encouragement of production, and it was assumed that the employment of capital and labor in the business of manufacture here was a just ground for the exemption. The object of the amendment of 1889 was not to withdraw the protection given by the act of 1880, but to define more specifically than in the prior

act, the purpose that the exemption should be confined to corporations whose corporate business was exclusively that of manufacture. Under the broad language of our statutes authorizing incorporations and the provisions of special charters, the corporation powers may be extended to embrace many objects dissimilar in character and not germane to each other. It was to avoid a construction which would enable parties to organize a corporation, naming manufacture as one of its objects, for the purpose of escaping taxation, while in fact that purpose might be a mere cover for the other corporate enterprises embraced in the same certificate, not within the policy of the legislation exempting manufacturing corporations from taxation. The words in the amendment of 1889 were inserted to prevent this evasion of the statute.

It is claimed that the purchase and sale of goods not manufactured by the relator, merely to complete its stock, and limited to articles which it could not advantageously manufacture itself, was incidental and subsidiary to the exercise of its corporate power as a manufacturing company, and, therefore, within the power granted. It is well settled that a corporation possesses not only powers specifically granted in terms, but "as expressed in the Revised Statutes" such powers "as shall be necessary to the exercise of the powers so enumerated and given." (1 Rev. St. 600, 3.) The unexpressed and incidental powers possessed by a corporation are not limited to such as are absolutely or indispensably necessary to enable it to exercise the powers specifically granted. Whatever incidental powers are reasonably necessary to enable it to perform its corporate functions are implied from the powers affirmatively granted. (Comstock, J., Curtis v. Leavitt, 15 N. Y. 64.) But powers merely convenient or useful are not implied if they are not essential, having in view the nature and object of the incorporation. The power assumed by the relator in this case to supply from other sources goods which it could not itself profitably manufacture, was a convenient and useful one, and doubtless contributed to the success of its general business, but it cannot, we think, be said to be essential to its business as a manufacturing corporation. The power to sell its products, even if it had not as in this case been expressly included among the enumerated powers, would be necessarily implied in the charter of a manufacturing corporation. Without the power of sale the business of production could not be carried on. The power to sell is an indispensable adjunct to a manufacturing business. But the same considerations do not apply where a manufacturing corporation is also engaged in the purchase and sale of goods manufactured by other parties. This part of the relator's business was not, we think, within its chartered powers.

The question, therefore, arises whether, by engaging in this business, under the circumstances and for the reasons disclosed by the evidence, the relator, whose main and important business was the manufacture and sale of its own products, lost the benefit

of the exemption given by the act of 1889, to manufacturing corporations within this state, "wholly engaged in carrying on manufacture." The corporate business of the relator was the manufacture of goods and the same of its manufactured products. This is the clear construction of its certificate. It employed a small portion of its capital in doing a business not strictly authorized by its charter, viz., the buying and selling of goods manufactured by other persons. The state could have intervened to prevent this usurpation of power if, in the opinion of the authorities, the public interests required it. The statute of 1889, in exempting from taxation manufacturing corporations "wholly engaged in carrying on manufacture" within this state, had in view corporations whose corporate powers were confined to the exclusive business of manufacturing, and the limiting words were intended to distinguish between such corporations and corporations which embrace a wider scope of power, but which included the power to engage in the business of manufacture. These latter corporations were not exempted unless, indeed, their actual business was confined to the exercise of this specific power. The statute was not aimed at and did not contemplate the exercise by a corporation of powers ultra vires. If a manufacturing corporation is engaged in business outside of its corporate business, it does not cease to be "wholly engaged" in the business of manufacture; that is to say, its only legal and authorized business was that of manufacture. It subjected itself to taxation upon that portion of its capital so used, but nevertheless it remained a corporation which, so far as it exercised its legal powers, was "wholly engaged" in manufacture, and, therefore, entitled to exemption as to its manufacturing business.

The conclusion reached by the comptroller worked exact justice. It exempted the relator as a manufacturing corporation from taxation. It imposed a tax on its capital employed in outside and unauthorized transactions. The relator cannot be heard to complain of taxation to this extent, or that it was not capital taxable under the law of 1889. The apportionment of a tax under circumstances, in many respects, similar to this had been sustained by the courts of Pennsylvania. (Com. v. Lackawanna Co., 129 Pa. St. 346; Com. v. Wm. Mann Co., 150 id. 64.) The case is not free from difficulty. But it is to be borne in mind that very few corporations would be entitled to exemption if the exemption was lost by proof that the corporation had done some business not within its corporate powers. The rule we adopt maintains the policy of the statute, while it subjects all the property of the corporation, outside of its legitimate business, to taxation.

The order below should be affirmed.

All concur, except Bartlett, J., not voting.

Order affirmed.

QUACKENBOSS v. GLOBE & RUTGERS FIRE INS. CO.

1903. 177 N. Y. 71, 69 N. E. 223.

Corporate Seal.

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 26, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a trial term.

This action was brought to recover damages for the breach of an alleged contract between the plaintiff and the Rutgers Fire Insurance Company, which company was subsequently consolidated with the Globe Insurance Company and the obligations of the former assumed by the defendant.

MARTIN, J.: On the trial the plaintiff, after proving that the contract upon which the action was based was signed by the president and secretary of the Rutgers Insurance Company, for whose debts and obligations the defendant was liable, and that the corporate seal of the company was affixed thereto, offered it in evidence. It was rejected and the plaintiff excepted. We think the exception was well taken and constituted error which requires a reversal.

It is an ancient and well-established rule of law that where the seal of a corporation is affixed to a contract or written instrument, to which such corporation is a party, and it is signed by the president and secretary or other proper officers, it will be presumed that such officers did not exceed their powers, as the seal is prima facie proof that it was attached by proper authority, and it lies with the party objecting to its executing to show that it was affixed surreptitiously or improperly. (Whitney v. Union Trust Co. of New York, 65 N. Y. 576; Trustees of Canandarqua Academy v. McKechnie, 90 N. Y. 618; Jourdan v. Long Island R. R. Co., 115 N. Y. 380, 384; Lovett v. Steam Saw Mill Ass'n, 6 Paige, Ch. 54, 60.)

It is manifest that there was no sufficient proof overcoming the presumption arising from the execution of the contract in question to justify the court in excluding it. Whatever proof was given as to the regularity of the contract bore not upon its admissibility, but upon its effect when received. The court could not improperly exclude the plaintiff's most material and important evidence, indeed, that which was the very basis of his action, and then, because he had not made sufficient proof to sustain his complaint, hold that the erroneous ruling should be disregarded. Such a claim finds no justification in law. When the plaintiff was refused his legal right to have the contract admitted, he was not required, nor would he be expected, to introduce other proof to establish his cause of action.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

Parker, Ch. J., Gray, Bartlett and Cullen, JJ., concur; O'Brien, J., dissents; Haight, J., absent.

Judgment reversed, etc.

JACKSONVILLE, ETC., RAILWAY & NAVIGATION CO. v. HOOPER.

1895. 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. 379.

Incidental Powers.

In the Circuit Court of the United States for the northern district of Florida, on the 4th day of December, 1889, Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, for the use of said Mary J. Hooper, citizens of the state of Ohio, brought an action against the Jacksonville, Mayport, Pablo Railway and Navigation Company, a corporation of the state of Florida. The plaintiffs' amended declaration set up causes of action arising out of the covenants contained in a certain indenture of lease between the parties. This lease, dated July 10, 1888, purported to grant, for a term of two years, certain lots of land situated at a place called "Burnside," in Duval County, Florida, whereon was erected a hotel known as "San Diego Hotel." In consideration of this grant the railroad company agreed to pay in monthly instalments a yearly rent of $800, and to keep the premises insured in the sum of $6,000.

It was alleged that on November 28, 1889, during said term, and while the railway company was in possession, the hotel and other buildings were wholly destroyed by fire; that the defendant had failed and neglected to have the same insured, and that there was an arrearage of rent due amounting to the sum of $106.67. For the amount of the loss occasioned by the absence of insurance and for the back rent the action was brought.

The defendant denied that the railway company had duly executed the instrument sued on; denied that Alexander Wallace, the president of the company, and who had executed the lease as such president, had any authority from the company so to do. The defendant also alleged that such a lease, even if formally executed, was ultra vires; also that the covenant to insure was an impossible covenant, as shown by ineffectual efforts to secure such insurance.

The case was tried in April, 1891, and resulted in a verdict and judgment against the defendants in the sum of $6,798.70. On

errors assigned to certain rulings of the court and in the charge to the jury the case was brought to this court.

SHIRAS, J. * * * It is, however, further claimed that the contract sued on was not within the legitimate powers of the company.

This is not a case in which, either by its charter, or by some statute binding upon it, the company is forbidden to make such a contract. Indeed, the public laws of Florida, referring to the powers of railroad companies, provide that every such corporation shall be empowered "to purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its road and canal and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to sell, lease, or buy any land or real estate not necessary for its use." McClell. Digest of the Laws of Florida, page 276, section 10. They are likewise authorized "to erect and maintain all convenient buildings, wharves, docks, stations, fixtures, and machinery for the accommodation and use of their passenger and freight business."

Although the contract power of railroad companies is to be deemed restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may become useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers whom it is its duty to transport.

Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company, within its chartered powers, and to contribute to the comfort of those who travel thereon. To lease and maintain a summer hotel at the seaside terminus of a railroad might obviously increase the business of the company and the comfort of its passengers, and be within the provisions of the statute of Florida above cited, whereby a railroad company is authorized "to sell, lease, or buy any land or real estate not necessary for its use," and to "erect and maintain all convenient buildings * * * for the accommodation and use of their passengers."

Courts may well be astute in dealing with efforts of corporations to usurp powers not granted them, or to stretch their lawful franchise against the interests of the public. Nor would we be understood to hold that, in a clear case of the exercise of a power forbidden by its charter, or contrary to public policy, a railroad company would be estopped to decline to be bound by its own act, even when fulfilled by the other contracting party. Davis v. Old Colony Railroad Co., 131 Mass. 258; Thomas v. Railroad Co., 101 U. S. 71; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24. So, too, it must be regarded as well settled,

on the soundest principles of public policy, that a contract, by which a railroad company seeks to render itself incapable of performing its duties to the public, or attempts to absolve itself from its obligation without the consent of the state, is void and cannot be rendered enforceable by the doctrines of estoppel. The New York & Maryland Railroad Co. v. Winans, 17 How. 30; Thomas v. Railroad Co., 101 U. S. 71; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24.

We do not seek to relax but rather to affirm the rule laid down by this court, in Central Transportation Co. v. Pullman's Car Company (above cited), that "a contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect—the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. Such a contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." 139 U. S. 59, 60.

But we think the present case falls within the language of Lord Chancellor Selbourne, in Attorney-General v. Great Eastern Railway, 5 App. Cas. 473, 578, where while declaring his sense of the importance of the doctrine of ultra vires, he said: "This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be ultra vires." In the application of the doctrine the court must be influenced somewhat by the special circumstances of the case. As was said by Romilly, M. R., in Lyde v. Eastern Bengal Railroad, 36 Beav. 10, where was in question the validity of a contract by a railway company to work a coal mine: "The answer to this argument appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coal to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the court drew from the evidence."

The principle upon which we may safely rule the present question is within the case of Brown v. Winnisimmet Company, 11 Allen, 326, 334. There a contract, made by the treasurer of a ferry company, to lease one of the company's boats for a certain

money consideration, was alleged to be void for want of antecedent authority given by the company to the treasurer, and also because such a contract was not made in the legitimate exercise of the company's powers. On the first point it was ruled that, from evidence showing ratification by the company, it was proper for the jury to infer that the treasurer had been duly authorized to make the contract, and, disposing of the second question, the court, through Chief Justice Bigelow, said: "We know of no rule or principle by which an act, creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created." See also, Davis v. Old Colony Railroad, 131 Mass. 258, 272.

The contract between the parties hereto was for leasing a hotel at the terminus of the railroad, situated at a beach, distant from any town. If not fairly within the authority granted by the statute of Florida "to erect and maintain all convenient buildings * * * for the accommodation and use of their passengers," it certainly cannot be said to have been forbidden by such laws. Nor can it be said to have been, in its nature, contrary to public policy.

To maintain cheap hotels or eating houses, at stated points on a long line of railroad through a wilderness, as in the case of the Pacific railroads, or at the end of a railroad on a barren, unsettled beach, as in the present case, not for the purpose of making money out of such business, but to furnish reasonable and necessary accommodations to its passengers and employes, would not be so plainly an act outside of the powers of a railroad company as to compel a court to sustain the defense of ultra vires, as against the other party to such a contract.

But even if the railroad company might be answerable for the rent of the premises, it is contended that the covenant to procure insurance was so far outside of the company's powers as not to be enforceable.

No one could deny that it would not be competent for a railroad company, without the authority of the legislature, to carry on an insurance business. But this covenant to keep the premises insured is correlative to the obligation of the lessors to rebuild in case the hotel should be destroyed by fire, and to the provision that, in such an event, the rents should cease until the hotel should be put in habitable condition and repair by the lessors.

Such mutual covenants are quite usual in leases of this kind, and are merely incidental to the principal purpose of the contract. * * *

Judgment affirmed.[1]

NICOLL v. NEW YORK & E. R. R. CO.[1]

1854. 12 N. Y. 121.

Power to Acquire and Convey Real Estate.

Ejectment commenced in the supreme court in February, 1847, and tried at the Orange county circuit, held by Mr. Justice Edwards in October, 1848. The jury found a special verdict, from which it appeared that on the first day of July, 1836, Nicholas A. Dederer, being the owner in fee simple of a farm situate in Blooming Grove, Orange county, executed to the Hudson and Delaware Railroad Company a deed, dated that day, whereby, in consideration of the benefits and advantages to him of the railroad proposed to be made by the company, and of one dollar to him paid by the company, he granted to such company the privilege of surveying and laying out by its agents and engineers, through his farm or tract of land, the route and site of its road; and also granted, bargained, sold, and conveyed unto the company and its successors, so much of the farm as might be selected and laid out by the company for the site of its railroad, six rods in width across the farm, provided always, and such grant was made upon the express condition that the company should construct its railroad within the time prescribed by the act incorporating the same. That subsequently and before the 27th of October, 1836, the company selected and laid out, for the site of its railroad through the farm, a strip of land six rods wide extending through the farm. That on the 1st of April, 1844, the farm formerly owned by Dederer, by virtue of sundry mesne conveyances became the property of the plaintiff in fee simple

[1] In Malone v. Lancaster Gas, &c., Co., 182 Pa. St. 309, 37 Atl. 932, it was held that a corporation organized for the purpose of manufacturing and supplying gas might lawfully deal in such appliances and conveniences as would induce new customers to use gas and old customers to use a larger quantity, even though this was "not within the literal terms of the corporate grant."

See also, Brown v. Winnisimmet Co., 11 Allen (Mass.) 326; Powell v. Murray, 3 App. Div. (N. Y.) 273, 73 N. Y. St. 851, 38 N. Y. S. 233, affd. 157 N. Y. 717, 53 N. E. 1130; Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950.—Ed.

[1] See also, Page v. Heineberg, 40 Vt. 81 (1868); White v. Howard, 38 Conn. 342 (1871); Leazure v. Hillegas, 7 Serg & R. 313 (1821); Hough v. Land Co., 73 Ill. 23 (1874); National Bank v. Matthews, 98 U. S. 621 (1878); National Bank v. Whitney, 103 U. S. 99 (1880); Case v. Kelly, 133 U. S. 21 (1890); People v. La Rue, 67 Cal. 526 (1885).—Ed.

subject only to such right as the Hudson and Delaware Railroad Company then had to any portion thereof, sufficient for the track of its road. That this company, on the 27th of October, 1836, commenced the construction of its railroad, but never completed or put in operation a double or single track or any part thereof. That in pursuance of an act of the Legislature, entitled an act authorizing the New York and Erie Railroad Company to construct a branch road, terminating at the village of Newburgh, passed April 8, 1845, the Hudson and Delaware Railroad Company were authorized to, and on the 14th of December, 1846, did execute to the defendant, the New York and Erie Railroad Company, a deed, and thereby for a valuable consideration granted, bargained, sold, and conveyed to the defendant and its successors, the maps, charts, drafts, surveys, and other personal property of the Hudson and Delaware Company, and all its rights, privileges, immunities and improvements, acquired under and by virtue of the original act of incorporation or of any act amending it, or in any other manner; and also all the grants, lands, and real estate acquired by or ceded or conveyed to the Hudson and Delaware Company, and all its right, title, and interest to the same, and particularly the right of way, granted by Dederer to the Company and its successors, by the deed from him above mentioned. That when this suit was commenced on the 25th of February, 1847, the defendant had not completed or put in operation its branch road terminating at Newburgh, or any part of it, nor had it done so when the cause was tried. That on the 2d of December, 1846, the defendant entered upon the strip of land six rods wide, mentioned in the deed from Dederer and laid out by the Hudson and Delaware Company through his farm, as the site of its road, and ejected the plaintiff therefrom, and that the defendant was still in the possession thereof. The suit was brought to recover possession of this strip of land from the defendant.

The justice before whom this cause was tried ordered judgment upon the special verdict in favor of the plaintiff. The defendant appealed, and the Supreme Court, sitting in general term in the 3d district, reversed the judgment, and gave judgment in favor of the defendant. (12 Barb. 460.) The plaintiff appealed to this court.

PARKER, J.: The grant from Dederer to the Hudson and Delaware Railroad Company, bearing date the first day of July, 1836, was made to that company "and their successors." Under that grant, there can be no doubt, the Hudson and Delaware Railroad Company took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations unless they were specially restrained by their charters or by statute. 2 Kent.

281; Co. Litt. 44a, 300b; 1 Kyd. on Corp., 76, 78, 108, 115; 3 Pick. 239. And in this case the power was expressly conferred by the 9th section of the charter (Sess. Laws of 1835, p. 113); and by the 16th section there were given to it the general powers conferred upon corporations (1 R. S. 731), one of which is that of holding, purchasing, and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee, for the statute is now imperative that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant (1 R. S. 748, § 1).

But it is objected that because by the act of incorporation there was given to it only a term of existence of fifty years (Laws of 1835, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held that the grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because in his earthly existence he is not immortal. Under such a rule a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition further to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute. (1 R. S. 748, § 1.) The change made by the statute favors the grantee where there are no express terms in the grant, by presuming the grantor intended to convey all his estate.

At common law it was only where there were no express terms defining the estate in the conveyance, that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual without such words conveyed only a life estate. For the same reason a grant without such words to a corporation aggregate (Viner's Ab., Estate, L. 3), or to a mayor or commonalty (ib. 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and in their absence we look not to the terms of existence of the grantee to

ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All this estate is deemed to have passed by the grant. (1 R. S. 748, § 1.)

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law that "no implication shall be allowed against an express estate limited by express words." Viner's Ab. Implication, A. 5; 1 Salk. 236.

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient (5 Denio, 389). 2 Preston on Estates, 50. Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter." 2 Kent, 282; 5 Denio, 389; 1 Comst. R. 509. Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence. * * *

Upon the whole, my conclusion in this case is that the Hudson and Delaware Railroad Company took from Dederer a fee upon condition subsequent; that at the time of the conveyance by Dederer to the plaintiff, there had been no forfeiture; and that Dederer had, at the time of such conveyance, no assignable interest in the premises.

The judgment of the Supreme Court should be affirmed.

BRADBURY v. BOSTON CANOE CLUB.

1891. 153 Mass. 77, 26 N. E. 132.

Power to Borrow Money.

HOLMES, J.: This is an action upon a promissory note for one hundred and fifty dollars and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a club-house. There is a second count for money lent. At a meeting, duly called, the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff. The money was received by the corporation, and was used by it for the purpose mentioned. The only question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon land of which it held a lease.

The defendant is a corporation formed under the Pub. Sts. c. 115, § 2, for encouraging athletic exercises. By § 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodation, to an amount not exceeding five hundred thousand dollars," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club-house upon it. Having this power, it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of § 7, to receive and hold in trust funds received by gift or bequest, does not confine the corporations to that mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. See Fay v. Noble, 12 Cush. 1, 18; Morville v. American Tract Society, 123 Mass. 129, 136; Davis v. Old Colony Railroad, 131 Mass. 258, 271, 275. As this is a sufficient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are not others.

Judgment for plaintiff.

MONUMENT NATIONAL BANK v. GLOBE WORKS.[1]

1869. 101 Mass. 57, 3 Am. Rep. 322.

Power to make Negotiable Paper—Accommodation Endorser.

HOAR, J.: The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any person taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defense cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. Narragansett Bank v. Atlantic Silk Co., 3 Met. 282. And it was held in Bird v. Daggett, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in Bird v. Daggett; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of ultra vires has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers, and liability of a corporation are to be found in the act creating it. And it no doubt follows as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, everyone dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not

[1] See also, Union Bank v. Jacobs, 6 Humph. (Tenn.) 515 (1845); National Park Bank v. German American Co., 116 N. Y. 281 (1889). Power to accept bill of exchange, Bateman v. Railway Co., L. R. 1 C. P. 499 (1866).—Ed.

conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of ultra vires does not apply. As was said by Selden, J., in Bissell v. Michigan Southern & Northern Indiana Railroad Co., 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a bona fide indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note has virtually represented, that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it it was held in Farmers' & Mechanics' Bank v. Empire State Stone Dressing Co., 5 Bosw. 275, that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of ultra vires to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." Eastern Counties Railway Co. v. Hawkes, 5 H. L. Cas. 331, 373.

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the most part those in which the other contracting

party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants.

Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

Judgment for the plaintiffs.

JONES v. GUARANTEE, &c. COMPANY.

1879. 101 U. S. 622, 25 L. ed. 1030.

Power to Give a Mortgage.

MR. JUSTICE SWAYNE: * * * The central and controlling questions to be determined are:

Whether the Oil Company had the power to give a mortgage for future advances; and,

Whether the mortgage here in question is, in the view of a court of equity, for the debt of the Oil Company or for the debt of Abraham M. Cozzens.

The oral arguments of the eminent counsel who appeared before us were addressed principally to these subjects. Numerous other points are made by the counsel for the appellant in his brief, and have been fully discussed in the printed arguments upon both sides. They are minor in their character, and we think involve no proposition that admits of doubt as to its proper solution. We are satisfied with the disposition made of them by the Circuit Court, and shall pass them by without further remark.

At the common law, every corporation had, as incident to its existence, the power to acquire, hold, and convey real estate, except so far as it was restrained by its charter or by act of Parliament. This comprehensive capacity included also personal effects of every kind.

The jus disponendi was without limit or qualification. It extended to mortgages given to secure the payment of debts. 1 Kyd, Corp. 69, 76, 78, 108; Angell & Ames, § 145; 2 Kent, Com. 282; Reynolds v. Commissioners of Stark County, 5 Ohio, 204; Whitewater Valley Canal Co. v. Valette, 21 How. 414.

A mortgage for future advances was recognized as valid by the common law. Gardner v. Graham, 7 Vin. Abr. 22, pl. 3. See

also Brinkerhoff v. Marvin, 5 Johns. (N. Y.) Ch. 320; Lawrence v. Tucker, 23 How. 14.

It is believed that they are held valid throughout the United States, except where forbidden by the local law.

The statute under which the Oil Company came into existence made it "capable in law of purchasing, holding, and conveying any real and personal estate, whenever necessary to enable" it to carry on its business; but it was forbidden to "mortgage the same, or give any lien thereon." This disability was removed by the later act of 1864, which expressly conferred the power before withheld. This change was remedial, and the clause which gave it is, therefore, to be construed liberally with reference to the ends in view.

The learned counsel for the appellant insisted that a mortgage could be competently given by the Oil Company only to secure a debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute, but not within its letter, or within the letter and yet not within the statute. The intent of the lawmaker is the law. The People v. Utica Insurance Co., 16 Johns. (N. Y.) 357; United States v. Babbit, 1 Black, 55.

The view of the court in Thompson v. New York & Hudson River Railroad Co., 3 Sandf. (N. Y.) Ch. 625, was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose, and bought it. The purchase was held to be intra vires and valid. Here the object of the authorization is to enable the company to procure the means to carry on its business. Why should it be required to go into debt, and then borrow, if it could, instead of borrowing in advance, and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these later cases the ultimate result with respect to the security would be just the same as if the mortgage were given for a pre-existing debt in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of the abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of stockholders would apply with the same efficacy in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in those particulars, would be the same whether the transaction took one form or the other. According to our construc-

tion the company could give no mortgage but one growing out of their business, and intended to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

Such securities are not contrary to the law or public policy of the State. Many cases are found in her reported adjudications where both judgments and mortgages for future advances have been sustained.

Our view is not without support from the language of the statute, that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate." If this mortgage had been given by individuals, the question we are examining doubtless would not have been brought before us for consideration.

When a deed is fatally defective for the want of a sufficient consideration to support it, such consideration subsequently arising may cure the defect and give the instrument validity. Sumner v. Hicks, 2 Black, 532. It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.

The statute of 1864 neither expressly forbids nor declares void mortgages for future advances.

If the one here in question be ultra vires, no one can take advantage of the defect of power involved but the State. As to all other parties it must be held valid, and may be enforced accordingly. Silver Lake Bank v. North, 4 Johns. (N. Y.) Ch. 370; National Bank v. Mathews, 98 U. S. 621. In the latter case this subject was fully examined.

A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor.

No one else can raise the question. All other parties are concluded. Gordon v. Preston, 1 Watts (Pa.), 385.

Where money had been obtained by a corporation upon its securities, which were irregular and ultra vires, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same results follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company. In re Cork & Youghal Railway Co., Law Rep. 4 Ch. 748.

A court of equity abhors forfeitures, and will not lend its aid to enforce them. Marshall v. Vicksburg, 15 Wall. 146. Nor will it give its aid in the assertion of a mere legal right contrary to

the clear equity and justice of the case. Lewis v. Lyons, 13 Ill. 117.

The second point to be considered is whether the mortgage was for the debt of Cozzens or for the debt of the Oil Company. * * *

We are satisfied beyond a doubt that it was the debt of the Oil Company and not his debt that was intended to be secured and was secured by the mortgage. * * *

Decree affirmed.

RAILROAD COMPANY v. MARSEILLES.[1]

SUPREME COURT OF ILLINOIS, 1876.

84 Ill. 643.

Power of a Corporation to Purchase and Hold its Own Stock.

PER CURIAM: On considering the petition heretofore filed, we granted a rehearing to further consider the question, whether the railroad company had the power to contract for and purchase shares of stock of its own company. * * * The rule is familiar, and is not contested, that such bodies can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted and to accomplish the purpose of their creation. Such being the rule, the question arises whether this corporate body might make such a purchase, or is it outside of, and beyond the limit of its power.

Appellant has referred us to a number of cases in our own court, in which it has been held that such organizations have no power to release subscribers for their stock from paying therefore and from their subscriptions; that, when such subscriptions are intended to be fictitious, or the subscribers are released from payment, it operates as a wrong, if not a fraud, on the other subscribers for stock in the same company. But here, the stock had been subscribed, paid for, and certificates thereof issued to, and they were owned and held by, the village at the time this contract was entered into and executed. So, the question is not, whether appellant may release the village from paying for and receiving shares subscribed for, but whether appellant has power to purchase shares of its own stock, paid for, issued to, and held by the village.

In the case of Taylor v. Miami Exportation Co., 6 Ohio (Hammond), 83, it was held that a banking corporation might lawfully receive shares of its own stock from a solvent debtor in

[1] See Clapp v. Peterson, 104 Ill. 26 (1882); Trevor v. Whitworth, L. R. 12 App. Cases 409 (1887).

discharge of his indebtedness. The court went further, and held that, where a large number of shares had been issued to enable the holder to vote for certain persons for directors at an approaching election, and, after the holder had thus voted, the money paid for the shares was returned to him, and he restored the shares to the bank, as there was no loss sustained by the transaction, and the result of the election was not changed, and whilst the court condemned the transaction, it held that equity could afford no relief, as no one had been injured. It was also held in that case that, where the shares of the company were transferred to it in payment of such indebtedness, the corporation might hold and sell it as it did its other property.

In the case of the City Bank of Columbus v. Bruce, 17 N. Y. 507, it appeared that the board of directors passed a resolution that all stockholders indebted to the bank on stock notes, by a specified day, might pay such debts to the bank in its shares of stock, at a named per cent., and that not far from half of the stock of the bank was thus surrendered; and the court held, there was no ground for questioning the validity of the transaction; that no rule of common law or any provision of the charter forbade it; and the Ohio case is referred to and approved by the court.

In the case of Williams v. The Savage Manufacturing Co., 3 Md. Ch. R. 452, it was held that banking corporations had the right to take shares of their own stock in pledge or payment of indebtedness to the corporation, and to reissue the same. On the latter proposition Ex parte Holmes, 5 Cow. 426, is referred to by the court in its support.

In the case of The State v. Smith, 48 Vt. R. 266, it was held, that where a railroad company had purchased 2,350 shares of the stock of the company, the stock did not merge, and the legality of the purchase seems to be recognized by the court. And in further support of the rule see Angell & Ames on Corp. § 280, where it is said it is one of the corporate powers that may be legally exercised.

If, then, as in the cases above referred to, a bank may purchase and hold its own shares, no reason is perceived why a railroad corporation may not do the same thing, and the case of the State v. Smith (supra) was the purchase of stock by a railroad company, and of shares of its own stock. These authorities, we think, fully recognize the power of the directors of a company, when not prohibited by their charter, to purchase shares of stock of their company. It falls within the scope of the power of the directors to manage and control the affairs and property of the company for the best interests of the stockholders, and when they have thus acted, we will presume, until the contrary is shown, that the purchase was for legitimate and authorized purposes.

If it were shown that the purchase was made to promote the

interests of the officers of the company alone, and not the stockholders generally, or if for the benefit of a portion of the stockholders and not all, or for the injury of all or only a portion of them, or if it operated to the injury of creditors, or would defeat the end for which the body was created, or if it was done for any other fraudulent purpose, then chancery could interfere. In such case, Melvin v. The Lamar Ins. Co., 80 Ill. 446, and other cases in chancery referred to in appellant's brief, would apply, but the defense cannot be made a law. The case of Belford Railroad Co. v. Bower, 48 Pa. St. R. 29, was in a court where there is no distinction between actions at law and suits in equity, and we presume the defense was allowed by the application of equitable principles, and the cases in the British courts which seem to bear on the question were in equity. Whatever may be the rights of stockholders or creditors, if there are any, relief can only be had in equity, and by a stockholder or other cestui que trust.

The judgment of the court below will, therefore, be affirmed.

Judgment affirmed.[2]

COPPIN v. GREENLESS, &c., COMPANY.

1882. 38 Ohio St. 275, 43 Am. Rep. 425.

Power of a Corporation to Purchase and Hold its Own Shares.

McILVAINE, J.: Whether the defendant corporation was bound by its executory agreement with the plaintiff to purchase shares of its own stock, under the circumstances detailed in the petition, was, undoubtedly, the question upon which the case turned in the district court.

The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been a subject of much discussion in the courts; and the conclusions reached by different courts have been conflicting. Of course, cases wherein the power is found to exist by express or implied grant in the charter, furnish no aid in the solution of the question before us; unless the claim of the plaintiff can be sustained, that such power was conferred on the defendant by section 63 of the corporation act of 1852 (S. & C. 301), as amended, which confers on manufacturing corporations the powers

[2] In the recent case of Richards v. Ernst Wiener Co. (1912), 207 N. Y. 59, affg. 145 App. Div. 353, P sued a corporation on a contract made by it to repurchase from P its own shares of stock. Defense: Contract not enforcible by reason of sec. 664 of the New York Penal Law making it a misdemeanor for a director to apply any of the funds of a corporation "except surplus profits," to "the purchase of shares of its own stock." *Held*, for P. The burden of proof is upon the corporation of showing that there are no surplus profits out of which the purchase can be made.—Ed.

enumerated in section 3 of the act, and among others, the power "to acquire and convey at pleasure, all such real and personal estate as may be necessary or convenient to carry into effect the objects of the corporation." We think, however, that this claim cannot be maintained. The sole object of the defendant organization was "for manufacturing purposes;" and it cannot be said in any just sense, that the power to acquire or convey its own stock was either necessary or convenient "for manufacturing purposes."

The doctrine that corporations, when not prohibited by their charters may buy and sell their own stocks, is supported by a line of authorities; and prominent among them may be mentioned the cases of Dupee v. Boston Water Power Co., 114 Mass. 37, and C. P. and S. R. Co. v. Marseilles, 84 Ill. 145. But nevertheless, we think the decided weight of authority both in England and in the United States, is against the existence of the power unless conferred by express grant or clear implication. The foundation principle upon which these later cases rest is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the Supreme Court of this State; and by no court more emphatically than by this court. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest on a necessity, which arises in order to avoid loss; and was recognized in this State as early as Taylor v. Miami Exporting Co., 6 Ohio, 176, and has been incidentally referred to as an existing right since the adoption of our present constitution. State v. Building Association, 35 Ohio St. 258.

But, however that may be, the right of a corporation to traffic in its own stock, at pleasure, appears to us to be inconsistent with the principle of the provisions of the present constitution, article 13, section 3, which reads as follows: "Dues from corporations shall be secured by such individual liability of stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Now, it is just as plain, that a business or trading corporation cannot exist without stock and stockholders, as it is that the creditors of such corporations are entitled to the security named in the constitution. State ex rel. Att'y-Gen. v. Sherman, 22 Ohio St. 411. The corporation itself cannot be a stockholder of its own stock within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the

right of a corporation to purchase its own stock at pleasure exists and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware, that the amount of stock required to be issued is not fixed by the constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters, creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it, becomes extinct, or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock, because the required security is not furnished, it cannot be, that having brought the corporation into existence, it invests it with power to assume, at pleasure, the identical character or relation to the public, that was an insurmountable objection to the giving of corporate existence in the first place.

Plaintiff in error lays much stress on the averments in the petition, that it had been the custom of the corporation that its officers and others actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with the company such persons had been accustomed to sell, and the company to buy such stock; and that the plaintiff had purchased the stock for the price of which suit was brought while in the employment of defendant.

We cannot see why these averments should take the case out of the general rule.

If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it would buy the same from him when he quit its employment or if the contract of purchase by the defendant had been executed, very different questions would arise.

It is not even averred, that the plaintiff relied upon such custom either in making the purchase or the sale of the stock; so that, in fact, he is unaffected by the alleged custom. But if such custom had been relied on by the plaintiff when he purchased the stock, it would not have made the executory contract of the defendant to buy the stock binding, which, without such custom would be void. The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the State, of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; and these cannot be varied either by usage or contract. The doctrine of estoppel has no application in the case. Nor is there any such

equity in the case as would have arisen between the parties in case the contract had been executed.

Judgment affirmed.

FRANKLIN BANK v. COMMERCIAL BANK.[1]

1881. 36 Ohio St. 350, 38 Am. Rep. 594.

Power of Corporation to Hold Stock in Another Corporation.

BOYNTON, J.: We are met at the threshold of the case with the inquiry, whether an action will lie in favor of the plaintiff against the defendant for refusing to transfer, on the books of the defendant, to the name of the plaintiff, the two hundred shares of the capital stock of the defendant, represented by the certificate issued to Foote, and by him pledged to the plaintiff as security for the loan obtained. Such refusal to so transfer said stock, and an alleged consequent conversion of the same by the defendant constitute the gravamen of the plaintiff's action. The 12th section of the act under which the two corporations were organized and from which they derived their powers, expressly provided, that no banking company organized under its provisions should be the holder or purchaser of any portion of its capital stock or of the capital stock of any other incorporated company, unless such purchase should be necessary to prevent loss upon a debt previously contracted in good faith, on security, which, at the time, was deemed adequate to insure the payment of such debt, independent of any lien upon such stock (1 S. & C. 170, § 12). And by section 29 it was provided, that all the rights, privileges, and franchises which the company derived from the act should be forfeited, if the directors of the company should knowingly violate, or permit any of the officers or agents of the company to violate any of the provisions of the act. That the stock in the present case was pledged or received to secure a precedent loan is not claimed.

There would seem to be little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation can not become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute. Mutual Savings Bank, &c., v. Meriden Agency, 24 Conn. 159; Franklin Company v. Lewiston Savings Bank, 68 Me. 43; Central Railroad Company v. Collins, 40 Ga. 582; Sumner v. Marcy, 3 W. & M. 105. Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire

[1] See, also, Milbank v. Railroad Co., 64 How. Pr. (N. Y.) 20 (1882). In re Asiatic Banking Co., L. R. 4 Ch. App. 252 (1869). First National Bank v. National Exchange Bank, 92 U. S. 122 (1875).—Ed.

management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing and any other corporation could engage in banking by obtaining the control of the bank's stock. Nor would this result follow any the less certainly, if the shares of stock were received in pledge only, to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of a corporation stands on the books of the corporation is, as to the corporation, a stockholder, and has a right to vote upon the stock. State ex rel. White v. Ferris, 42 Conn. 560; Ex parte Wilcox, 7 Cow. 402; In re Barker, 6 Wend. 509; Hopin v. Buffum, 9 R. I. 513; Field on Corp. § 69.

Hence, if the plaintiff appeared on the books of the defendant as the transferee or owner of the two hundred shares of stock represented by the certificate to Foote, it would have the right to vote upon the stock at all meetings of the stockholders of the defendant; and it would only be necessary for it to procure in pledge, as security as money loaned, a majority of the shares of the capital stock of the Commercial Bank, in order to obtain full control of its affairs, and take charge of its banking operations. This would not only be exercising powers granted to the plaintiff neither expressly nor by implication, but those which are clearly opposed to the manifest spirit and intent, if not to the language of the statute. This court has uniformly adhered to the doctrine announced in Straus v. Eagle Insurance Co., 5 Ohio St. 59; that corporations have such powers, and such only, as the act creating them confers; and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred. Bank of Buffalo v. Toledo F. & M. Ins. Co., 12 Ohio St. 601. This principle has recently been most emphatically asserted, both by the Supreme Court of the United States, in Thomas v. Railroad Co., 101 U. S. 71, and by the House of Lords, in Ashbury Railroad Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653. It was claimed in argument in both of these cases, that a corporate body may do any act which is neither expressly or impliedly prohibited by its charter; although it was conceded that a stockholder might enjoin the act, where it was not authorized, either expressly or by implication, and that the State by proper process and proceedings might forfeit the charter. But it was held, in the first case, that the powers of a corporation organized under a legislative enactment are such only as the statute confers, and that the enumeration of them implies the exclusion of all others; and by the second case, that the contract sued on, being of a nature not included in the Memorandum of Association, was ultra vires, not only of the directors, but

of the whole company, and which the whole body of shareholders was incapable of ratifying.

Notwithstanding the rule thus prevailing, the act under which both the plaintiff and the defendant were organized, did not leave the right or power of the plaintiff to acquire the title to shares of stock in another corporation, to be determined alone upon the principle of construction which the rule above stated adopted. The right to deal in shares of stock in other corporations is not only not found among the enumerated powers which the act confers upon banks organized under its provisions, but the power, in language, of the most undoubted import, is denied, and its exercise expressly prohibited. It therefore follows that the refusal of the defendant to permit the transfer upon its books to the plaintiff of the two hundred shares of its stock, violated no right of the plaintiff, and consequently created no liability on the part of the defendant. Such refusal did not amount to a conversion of the stock.

Its action in refusing the transfer was but the denial of any right by the plaintiff to be placed in a position to interfere and participate in the control and management of its internal affairs. To the claim of the plaintiff, that it was the duty of the defendant to make the transfer, when the same was demanded, and leave the State to impose the penalty of forfeiture on the plaintiff for a violation of its charter, we do not assent. The cases of Union National Bank v. Mathews, 98 U. S. 621, and Jones v. Guarantee & Indemnity Co., 101 U. S. 622, and the cases therein cited, do not support such proposition. The principle of those cases is, that where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but voidable only, and that the sovereign alone can object; that the conveyance is valid until assailed in a direct proceeding instituted for that purpose. But they neither, by the principle maintained, nor by the reasoning advanced in support of it, sanction the doctrine that one corporation may buy up the stock of another, and thereby enable itself to interfere with the internal management of its affairs, especially where the power to do so is expressly prohibited by its charter.

In our opinion the petition stated no cause of action against the defendant, and hence laid no foundation for a judgment in favor of the plaintiff. That the plaintiff may have acquired rights by the pledge received from Foote, to such interest in the bank as said certificate of stock represented is quite true. But what that interest is, if any, we cannot in the present case determine.

Judgment affirmed.

EASUN v. BUCKEYE BREWING CO.

U. S. Circuit Court, N. D. Ohio, W. D.

1892. 51 Fed. Rep. 156.

Power of Corporation to Hold Stock in Another Corporation.

This is an action instituted by the plaintiff to recover damages for the failure of the defendants to comply with the provisions of a contract by the terms of which the Buckeye Brewing Co. obligated itself to sell to the vendee certain brewing property.

The purchaser as a consideration for the sale agreed to pay the vendor the sum of $860,000, whereof "the sum of $10,000 shall be paid in cash by way of a deposit; the further sum of $334,000 shall be paid in cash on or before the completion of the purchase; the further sum of $258,000, by issue to the vendors or as they may appoint, of six per cent. debenture bonds of an English joint stock company, proposed to be formed by the purchaser, hereinafter referred to as the 'company,' provided the total amount of such debenture bonds shall not exceed ninety thousand pounds; and the balance of $258,000 by the allotment to the vendors of ordinary shares of the company of that equivalent, nominal value, such shares to be deemed paid up."

The Buckeye Brewing Co. refused to perform its part of the contract.

RICKS, District Judge: * * * In the view which we take of this case, it is only necessary to consider the question of whether or not this contract sued upon was ultra vires. It is well settled in Ohio that corporations have such powers, and such only, as the act creating them confers; and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred. Under this construction of the statute, it was clearly settled in the case of Franklin Bank v. Commercial Bank, 36 Ohio St. 350, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by the statute. The provisions of this contract clearly contemplated that the Buckeye Brewing Company, which, so far as the pleadings before us show, was, at the time of making such contract, not only a solvent corporation, but a prosperous and profitable one, should sell and dispose of its plant and all its assets, and a very large part of the consideration for such sale was to be stock and bonds in an English corporation to be organized to carry on the business of the vendee. The provisions of the contract specified as to the rate of interest such bonds should carry, and the dividend such stock should pay. By implication it is fair to infer that it was contemplated that

the Buckeye Brewing Company, as a corporation, should continue, for the purpose of collecting the interest on these debenture bonds, the dividends on the stock of the new corporation, and to distribute the same among the shareholders of said Buckeye Brewing Company. It was therefore to continue its business as a corporation, not for the purpose of carrying out the objects for which it was organized, viz., the business of a brewing company, but for the purpose of owning stock in a new corporation, and the extent that the ownership of such stock involved participating in the management of that corporation it was to assist in carrying on the business of another corporation. There was no such exigency in the business of this corporation as to make such sale of its property and change in the nature of its corporate business necessary for the protection of its stockholders. Counsel for the plaintiff have cited many cases in which the courts of several of the states, under statutes very similar to those of Ohio, have held that corporations had a right to own and control the stock of other corporations, but in every such case to which our attention has been called such power was conceded to the corporation as incident to its inherent right to protect its shareholders from loss, owing to some peculiar exigency in the affairs of the corporation. An insolvent corporation, contemplating voluntary dissolution by consent of its shareholders, might have a right to dispose of its property, and accept, in whole, or in part, for the purchase price thereof, stock in another corporation; this stock to be either sold, and the proceeds thereof distributed to the creditors, or to be apportioned in kind to such creditors or stockholders as the terms of dissolution might provide. A receiver appointed to manage the affairs of an insolvent corporation and to close out its business might be authorized to dispose of its assets, and receive in payment therefor stock in the corporation, to be disposed of as the court might order in the distribution of its assets. But in all these cases there must be some stringency or emergency to justify this departure from the ordinary course of the business of the corporation. But in this case no such emergency existed. As before stated, the corporation was doing a flourishing business. Its plant and good will and business were considered so desirable that the vendee agreed to pay therefor the large consideration specified in the contract. This sale could undoubtedly have been made for cash and deferred payments. The purchase price might not have been so great upon such a basis, but still would have been adequate. As no emergency existed to compel this sale, and the transaction was purely voluntary on the part of the corporation, there is no reason why it should be permitted to violate the well settled principles of law by taking stock in a new corporation, and thereby enhancing the consideration which it was to receive. Public policy discourages such transactions. As the supreme court of Ohio has well said, in the case in 36 Ohio St., above referred to:

"Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing, and any other corporation could engage in banking by obtaining control of the bank's stock. Nor would this result follow any the less certainly if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation, is as to the corporation, a stockholder, and has the right to vote upon the stock."

All these objections apply with full force to the transactions under consideration before us. There is no reason why there should be a departure from these well-settled rules in this case. There are no creditors whose interests are to be protected by upholding this sale. There are no unfortunate shareholders who are liable to be assessed for unpaid debts under the statutes of the state. There was, in fact, no emergency to justify any such unauthorized transactions on the part of the Buckeye Brewing Company. The plaintiff does not sustain such a relation to this contract as entitles him to any exemption from the application of these principles of law. He must be held to have dealt with this corporation with knowledge of its corporate powers. They were such as were conferred by the laws of Ohio, of which he had the same notice as the defendant and all persons dealing with it. The want of power on the part of defendant to make such a contract prevents the plaintiff from either enforcing it in an action for specific performance or recovering damages for its breach. Coppin v. Greenlees & Ransom Co., 38 Ohio St. 275. For the reason stated we think the contract ultra vires. It cannot, therefore, be enforced, and this proceeding must fail. The other grounds insisted upon in the demurrer it will not be necessary to notice. The demurrer must be sustained, and the petition dismissed.

CHAPTER VII.

THE DOCTRINE OF ULTRA VIRES AND ITS APPLICATION.

JEMISON v. CITIZENS' SAVINGS BANK.

1890. 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. 482.

Appeal from a judgment in favor of defendant.

HAIGHT, J.: The plaintiffs were commission merchants and members of the Cotton Exchange of the city of New York. The defendant was a savings bank and trust corporation organized under the laws of Texas.

This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures.

The defense was that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation; that in the transaction alleged in the complaint it acted as the agent of one Albert P. Clopton, of Jefferson, Texas, and that the fact that he was the principal for whom the defendant acted was disclosed and well known to the plaintiffs prior to the time of the transaction referred to.

Whilst the fact distinctly appears from the correspondence between the parties that the defendant was acting for "good responsible customers," the General Term was of the opinion that this defense could not be sustained for the reason that the defendant did not disclose the name of its principal at the time of the giving of the orders complained of for the purchase and sale of cotton futures. Had this defense been sustained, the principal and not the defendant, his agent, would have been liable. Without stopping to consider the evidence we shall assume that this defense was not established, and proceed to consider the question as to whether the defendant was liable as principal.

Transactions between the parties commenced in January, 1879, by a letter from J. H. Parsons, as cashier of the defendant, asking the plaintiffs the amount of margin and commission they required for the purchase of cotton futures. The plaintiffs answered, giving the amount, and this was followed by an order by telegraph from Parsons, as cashier, under date of February 10, to buy 100 bales, June delivery, and on the same day he wrote the plaintiffs that the order was made for one of their customers who had deposited $250, as per their favor of the twenty-seventh ult. Other

orders followed, the final result of which was a loss, to recover which this action was brought. At the time Parsons was the cashier of the defendant, possessing the powers and duties incident to the office under the charter, constitution and by-laws, having the general charge of the business of the bank and the supervision of the concern, and inasmuch as the answer alleges that the transactions referred to in the complaint were had between the plaintiffs and the defendant acting as agent, we shall treat him as possessing all of the authority to act in the premises that the directors of the defendant had the power to give. * * *

Whilst the buying and selling of cotton to be delivered in the future, may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter and the Constitution and laws of the state, and in so far as this right was violated by the transaction in question it was a misappropriation of the funds and immoral.

It is contended that the defense of ultra vires is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs and that the defendant is estopped from setting up the defense. In the case of Whitney Arms Co. v. Barlow (63 N. Y. 62), the plaintiff was a corporation organized for the purpose of manufacturing every variety of firearms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver 10,000 locks. The locks having been delivered, it was held that the contract was fully executed and that the plea of ultra vires would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in Parish v. Wheeler (22 N. Y. 494), in which it was held that a railroad company having purchased and received a steamboat could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral. (Nassau Bank v. Jones, supra; P. C. & S. L. R. Co. v. K. & H. B. Co., 131 U. S. 371-389.)

In the case at bar, the transaction as we have seen was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York in which the members doing

business therein with other members act as principals and are liable as such. The most that can be claimed is that they held the cotton or the contracts therefore subject to the call or order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property to the defendant. If the steamboat had never been delivered to the railroad company so as to transfer the title thereto, or if the 10,000 locks had never been delivered to the American Seal Lock Company, very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that under the circumstances of this case the defense of ultra vires is still available to the defendant.

The claim is made on behalf of the appellants that the defendant, in making the orders, acted as an agent for an undisclosed principal, and is, therefore, liable as such. If the defendant had no power to engage in the business as principal we do not understand what right it had to do so as an agent, but conceding that it was an agent and that the orders were made for and on behalf of Clopton, then this action should have been brought against Clopton instead of the defendant. But it is claimed that the defendant neglected to disclose its principal at the time of making the orders and for that reason it is liable; but if it neglected to disclose its principal, so far as this action with the plaintiffs is concerned, it must be regarded as principal and liable as such, and if a principal then the question of ultra vires arises. The plaintiffs cannot sustain their action upon the two theories, for they lead in different directions. They cannot proceed upon the theory that the defendant was an agent, for the purpose of avoiding the question of ultra vires, and then upon the theory that the defendant was a principal, for the purpose of establishing a right to recover. Undoubtedly a person may in fact be an agent and still bind himself as a principal, but if he is proceeded against as a principal he is entitled to all of the rights and privileges that the law gives to a person occupying that position.

We consequently are of the opinion that the judgment should be affirmed, with costs.

BATH GAS LIGHT CO. v. CLAFFY.

1896. 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664.[1]

Appeal from a judgment of the General Term of the Supreme Court in the second judicial department, entered December 13,

[1] Plaintiff insured against damage by hail in a corporation authorized to insure "against loss or casualty by fire or lightning." A loss occurred. The corporation denied liability. *Held*, plaintiff could recover. Denver Fire Ins. Co. v. McClelland (1885), 9 Colo. 11, 9 Pac. 771. But see Re Phoenix Life Assurance Co. (1862), 2 Johns. & Hemm. 441; Miller v. Insurance Co. (1893), 92 Tenn. 167, 21 S. W. 39.—Ed.

1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit, a jury having been waived.

The nature of the action and the facts, so far as material, are stated in the opinions.

ANDREWS, Ch. J.—A brief statement of the material facts will present the important questions arising upon this appeal.

The plaintiff is a Maine corporation created under a special law of that state, passed in 1853, for the purpose of supplying gas for the lighting of the streets and buildings in the city of Bath. The United Gas, Fuel and Light Company is also a Maine corporation, organized in 1888, under a general law, by the executing and filing of a certificate, which in pursuance of the law of Maine was first submitted to and approved by the attorney-general, who certified that it was conformable to the Constitution and laws of that state. The certificate, among other things, specified that the corporation was organized to "manufacture, lease, purchase and otherwise acquire, deal in, manage, use and sell any and all machinery, fixtures, appurtenances, appliances and plants for using and furnishing light, heat and power, and for any and all purposes for which gas is now used." The plaintiff under its charter established a plant, and at the time of the execution of the lease now to be mentioned was engaged in supplying the streets and buildings in Bath with gas for lighting and other purposes. On the 10th day of November, 1888, it executed to the United Gas, Fuel and Light Company a lease of its property and franchises for the term of twenty-five years from November 1, 1888, at an annual rent of $2,500, which the lessee covenanted to pay in semi-annual payments on the first day of May and the first day of November in each year, and also the taxes assessed during the term. Provision was made for the payment by the lessor to the lessee, at the expiration of the term, of the value of any improvements or extensions made by the lessee, and it was also provided that the lessee should give to the lessor a satisfactory bond for the faithful performance by the lessee of its covenants in the lease. In pursuance of the provision last mentioned, the United Gas, Fuel and Light Company, on the same day, executed a bond with the defendants John Claffy and John T. Rowland as sureties, conditioned for the faithful performance by the company of the covenants in its behalf contained in the lease, which bond was delivered to and accepted by the plaintiff. The sureties were interested in the United Gas, Fuel and Light Company as stockholders, and Claffy (the appellant) was also a director. The lessee immediately, upon the execution of the lease, entered into possession of the demised property and paid the rent up to the 1st day of November, 1889, but defaulted in the semi-annual payment due May 1, 1890, and on the 2d day of August, 1890 (the rent remaining unpaid), the plaintiff re-entered and took posses-

sion of the demised property under a provision of the lease which authorized the lessor to enter and expel the lessee on failing to pay rent. The entry also was, as may be inferred, with the consent and, indeed, at the suggestion of the officers of the lessee. This action was brought on the bond against the lessee and the sureties to recover as damages the rent which fell due May 1, 1890, and the proportionate rent from that date up to August 2, 1890, and taxes which had been assessed against the property during its occupation by the lessee, which it had failed to pay.

The defendant Claffy alone appeared and defended the action. His sole defense to the general claim is that the lease was ultra vires, illegal and void, because (as is conceded) it was made without legislative sanction. If the court is compelled to accede to this contention by force of controlling authority, or from considerations of public policy which overbear in the particular case the rules of ordinary justice, it will be our duty so to declare and to say that, although the United Gas, Fuel and Light Company received and enjoyed the undisturbed possession of the demised property under the lease until the re-entry, and accepted and appropriated the benefit of the contract, nevertheless, when called upon to pay the rent which accrued during its occupation, it may defend itself on the ground that the plaintiff, in making the lease, exceeded its power and escape the performance of its obligation, and, further, that the defendant Claffy may, for a like reason, avoid his guaranty.

The modern doctrine, as stated by Chancellor Kent, is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others. (2 Kent Comm. 299.) This doctrine is embodied in the Revised Statutes of New York, and the section relating to the subject is regarded as simply declaratory of the antecedent law. (1 Rev. St. 600, § 3.) * * *

The modern and reasonable doctrine that contracts into which corporations may lawfully enter are such only as are expressly or impliedly authorized by their charters, is nevertheless frequently disregarded in practice, and when this is done and a corporation enters into a contract beyond its chartered powers, the question arises which has been the subject of debate and of much difference of opinion, how shall such a contract be treated by the courts, and whether the contract can create any rights as between the parties which the courts will enforce. There are some propositions pertaining to the general subject which are beyond dispute. One is, that a contract by a corporation to do an immoral thing, or for any immoral purpose, or, to use a convenient expression, a contract malum in se, is void and gives no right of action. The doctrine, however, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is

that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed. The series of cases in this state, known as the Utica insurance cases, afford an apt illustration. It was held that the restraining acts which prohibited the exercise of banking powers, including the discount of paper, by other than banking corporations, rendered void securities taken on such discount by corporations not possessing banking powers, and this, although the object of the restraining laws seems to have been the protection of the chartered banks in the monopoly of banking.

But in not infrequent instances corporations enter into unauthorized contracts, which are neither mala in se nor mala prohibita, or when the only prohibition or restriction is implied from the grant of specified powers. It is this class of cases which open the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances or enforce its obligation, whether as to past or future transactions? There are certain English cases which are relied upon by those who maintain the strict view that contracts of corporations ultra vires are under no circumstances enforceable in the courts.

(The learned judge proceeded to discuss and distinguish the English decisions.)

The Supreme Court of the United States seems to be committed to a construction of the doctrine of ultra vires which would sustain the defense in the case now before us. Several cases have arisen in that court upon leases of railroads made without legislative sanction, in which it has been held that such leases are void as between the parties, and that no action can be maintained thereon to recover the rent reserved, even during the occupation by the lessee under the lease.

(The learned judge then considered the leading Federal decisions.)

We concede that a railroad or other corporation invested with powers in the exercise of which the public have an interest, and empowered by reason of its quasi public character to do acts and exercise privileges peculiar and exceptional to enable it to discharge its public duties, cannot, as against the public, abdicate its functions or absolve itself from the performance of such duties through an unauthorized transfer of its property and franchises to another body or corporation. We have so held in the case of

Abbott v. The Johnstown, etc., Railroad Co. (80 N. Y. 27), where it was decided that a railroad corporation which, without legal sanction, had leased its road, was not thereby exempted from liability as carrier to a passenger injured by negligence during the operation of the road under the lease.

There are obvious reasons of propriety and public policy, the prevention of monopolies, among others, aside from the mere question of capacity under their charters, which enforce the now well-settled doctrine, that leases by such quasi public corporations, to be valid and effectual, must be authorized by statute. But where, as in the present case, such an unauthorized lease has been made, and the lessee has received and enjoyed the possession of the property under the lease, is there any public policy which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay the rent reserved during the enjoyment of the property? It is doubtless true, as has been suggested, that the corporation in such cases cannot, without the consent of the state, change its obligations to the state or the public, and discharge itself from its public duties. But the law affords ample remedy for the usurpation by corporations of unauthorized powers, through proceedings by injunction or for the forfeiture of their charters. If a lease by a corporation, made in excess of its powers and without legislative sanction, is illegal in the ordinary and proper sense of the term, it may be properly conceded that no action could be maintained upon it. The lessee, when sued for the rent, could set up the illegality of the contract, and the defense would prevail, however inequitable the defense might be. But the term "illegal," which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word "illegal," as applied to contracts of corporations, ultra vires only, has been frequently alluded to. (Comstock, C. J., Bissell v. M. S. Railroad Co., 22 N. Y. 268; Archibald, J., Riche v. Ashbury Railway Carriage Co., L. R. [9 Exch.] 293; Lord Cairns, S. C. on appeal, L. R. [7 Eng. & Ir. App.] 672.)

The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that it did not, during its occupation, discharge all the obligations to the public which rested upon the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone

is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust. It has been suggested, to avoid the apparent injustice which would result from holding that there could be no recovery on the contract for past-due rent, that there might be a remedy on an implied contract to pay the value of the use of the property. But if the express contract was illegal in a proper sense, and the parties to the lease were guilty of a public wrong, so as to preclude a court of equity to entertain jurisdiction on the application of a lessor to be relieved from the lease and to be restored to the possession of the leased property, as was held in the case of The St. Louis, V. & T. H. Railroad Co. v. Terre Haute & I. Railroad Co. (145 U. S. 393), then surely it would be a mere evasion and would be inconsistent with legal principles for the court to imply a contract from the occupation under the illegal lease to relieve the wrongdoer from the dilemma into which he had voluntarily placed himself. We think the rule which should be applied is that the lessee is bound by the contract so long as he remains in possession.

It is unnecessary now to determine whether a lessee under an ultra vires lease may relieve himself from liability in the future by abandoning the possession and restoring, or offering to restore, it to the lessor.

The courts in this state from an early day, commencing as far back as the Utica Insurance cases, have sought to regulate and restrict the defense of ultra vires so as to make it consistent with the obligations of justice. (Utica Ins. Co. v. Scott, 19 John. 1; Curtis v. Leavitt, 15 N. Y. 9; Bissell v. M. S. Railroad Co., 22 id. 260, Op. Comstock, C. J.; Parish v. Wheeler, id. 495; Whitney Arms. Co. v. Barlow, 63 id. 62; Pratt v. Short, 79 id. 437; Woodruff v. Erie Railway Co., 93 id. 609; Starin v. Edson, 112 id. 206.) The case of Woodruff v. Erie Railway (supra) is very much in point in the present controversy. It was there held that the lessee of a railroad could not resist the payment of rent which accrued during its occupation under the lease on the ground that the lessor's title was derived under an ultra vires transaction. Our conclusion, therefore, is that the main question was properly decided against the defendant. It is said, however, that the contract was a Maine contract, and that by the law of that state the lease was illegal and void and no action could be maintained upon

it. It is a sufficient answer to this claim that the law of Maine on the subject does not appear by the record, and that it is the duty of this court, therefore, to determine the case according to the law of New York as established, or in the absence of controlling authority, as justice having regard to all interests may seem to the court to require.

The question as to the liability of the defendant for the taxes assessed in 1890 was, we think, correctly adjudged.

Finding no error in the record the judgment should be affirmed.

All concur with Andrews, Ch. J., except Vann, J., dissenting.

Judgment affirmed.

CENTRAL TRANSPORTATION CO. v. PULLMAN'S PALACE CAR CO.

1890. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. 478.[1]

Action of covenant by the Central Transportation Co., a corporation of Pennsylvania, against Pullman's Palace Car Co., a corporation of Illinois, to recover the sum of $198,000, due for the last three-quarters of the year ending July 1, 1886, according to the terms of an indenture of lease from the plaintiff of all its personal property to the defendant, dated February 17, 1870.

The plaintiff was originally organized under the general laws of Pennsylvania, which provided for the incorporation of companies "for the purpose of carrying on the manufacture of woolen, cotton, flax or silk goods, or of iron, paper, lumber or salt," or "for the manufacture of articles from iron and other metals, or out of wood, iron and other metals."

The plaintiff's certificate of incorporation stated the object for which it was formed to be "the transportation of passengers in railroad cars constructed and to be owned by the said company in accordance with the several letters patent," which it owned.

By special act of the legislature subsequently passed, the charter of the company was extended and it was "empowered to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them of their railway cars and other personal property."

The defendant was incorporated under a special act of the legislature of Illinois "to manufacture, construct and purchase railway cars, with all convenient appendages and supplies for persons traveling therein and the same to sell or use or permit to be used, in such manner and upon such terms as the said company may think fit and proper."

On February 17, 1870, an indenture of lease was entered into between the two companies whereby the plaintiff leased all its

[1] Statement abridged. Portions of opinion omitted.—Ed.

sleeping cars with their equipment, its contracts, its patent rights and all its other "personal property, rights, credits, moneys and effects," etc., to the defendant for the term of ninety-nine years, covenanting further not to "engage in the business of manufacturing, using or hiring sleeping cars," during the said term.

The defendant, on its part, covenanted inter alia to pay to plaintiff annually the sum of $264,000.

At the trial, plaintiff offered evidence tending to show that the defendant had entered into possession of plaintiff's property under the lease, and had continued in possession during the period set forth in the declaration. Defendant's objection to this evidence, "on the ground that it was beyond the power of either corporation to make the contract," was sustained, and plaintiff excepted. Defendant's motion for a non-suit was granted and from the judgment entered thereon plaintiff appeals.

MR. JUSTICE GRAY, after stating the case as above, delivered the opinion of the court.

The principal defense in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the Circuit Court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made. * * *

It was therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defense of ultra vires, independently of the form in which that question was presented and disposed of.

Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation; there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered in the last twelve years, by the late Mr. Justice Miller, afford satisfactory guides and ample illustrations.

(The learned judge proceeded to consider these decisions in detail.)

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the

public, that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

* * * The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. Ardesco Oil Co. v. North American Oil Co., 66 Penn. St. 375; Treadwell v. Salisbury Manuf. Co., 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a quasi public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. Pickard v. Pullman Southern Car Co., 117 U. S. 34; York & Maryland Railroad v. Winans, 17 How. 30, 39; Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397.

The evident purpose of the legislature, in passing the statute of 1870, was to enable the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform those duties, is so inconsistent with that purpose, that it cannot be implied, without much clearer expressions of the legislative will looking towards that end, than are to be found in this statute.

The provision of this statute, by which the plaintiff is empowered to contract with other corporations "for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," is fully satisfied by construing it as

confirming the plaintiff's right to do as it had been doing, to "lease" or "hire" (which are equivalent words) to other corporations in the regular course of its business, and to "transfer" under such leasing or hiring, its "railway cars," and "other personal property," either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words "personal property" in their widest sense, including not only goods and chattels, but moneys, credits and rights of action. In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public. * * *

Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.

The necessary conclusion from these premises is, that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public. * * *

The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also ultra vires of the defendant, because, in order to bind either party, it must be within the corporate powers of both. Thomas v. Railroad Co., Pennsylvania Railroad v. St. Louis &c. Railroad, and Oregon Railway v. Oregonian Railway, above cited.

It was argued in behalf of the plaintiff that, even if the contract sued on was void, because ultra vires and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period.

But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court.

(The learned judge then reviewed the Federal decisions.)

In Pittsburgh &c. Railway v. Keokuk & Hamilton Bridge, it was stated, as the result of the previous cases in this court, that "a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a quantum meruit, the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389.

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, to show that it was prohibited by those laws.

The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it.

A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or

money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.

The ground and the limits of the rule concerning the remedy, in the case of a contract ultra vires, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." Pennsylvania Railroad v. St. Louis &c. Railroad, 118 U. S. 317.

Whether this plaintiff could maintain any action against this defendant, in the nature of a quantum meruit, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for.

Judgment affirmed.

PULLMAN'S PALACE CAR CO. v. CENTRAL TRANSPORTATION CO.

1897. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. 808.[1]

The record in this case shows that in 1870 the Central Transportation Company, hereafter called the Central Company, was a corporation which had been in 1862 incorporated under the general manufacturing laws of the State of Pennsylvania. It was engaged in the business of operating railway sleeping cars and of hiring them to railroad companies under written contracts by which the cars were to be used by the railroad companies for the purpose of furnishing sleeping conveniences to travelers. The corporation at this time had contracts with a number of different

[1] Statement abridged. Portions of opinion omitted.—Ed.

railroad companies in the East, principally, but not exclusively, with what is known as the Pennsylvania Railroad system, and it had been engaged in its business with those companies for some time prior to 1870. In the year last named the Pullman's Palace Car Company, hereafter called the Pullman Company, was a corporation which had been incorporated under the laws of the State of Illinois. It was doing the same general kind of business in the West that the Central Company was doing in the East. For reasons not material to detail, the two companies entered into an agreement of lease, which was executed February 17, 1870.

By its terms the Central Company leased to the Pullman Company its entire plant and personal property together with its contracts which it had with railroad companies for the use of its sleeping cars on their roads, and also the patents belonging to it. The lease was to run for ninety-nine years, which was the duration of the charter of the Central Company.

It was also agreed that the Central Company would not engage in the business of manufacturing, using or hiring sleeping cars while the contract remained in force.

In consideration of these various obligations, the Pullman Company agreed to pay annually the sum of $264,000 during the entire term of ninety-nine years, in quarterly payments, the first quarter's payment to be made on the first of April, 1870.

From the time of the execution of the contract its terms were carried out, and no particular trouble occurred between the companies for about fifteen years. During this time up to the 27th day of January, 1885, the Pullman Company paid to the Central Company, as rent under the contract, the sum of $3,960,000, without any computation of interest. About or just prior to January, 1885, differences arose between the companies. The Pullman Company claimed the right to terminate the contract under the eighth clause thereof, or else to pay a much smaller rent. The merits of the controversy are not material.

The two companies not agreeing, and the Pullman Company refusing to pay the rent stipulated for in the lease, the Central Company brought successive actions to recover the instalments of rent accruing. In one of them the Pullman Company pleaded the illegality of the lease, as being ultra vires the charter of the Central Company. The plea prevailed in the trial court, and upon writ of error the judgment upholding this defense was, in March, 1891, sustained in this court. Central Transportation Company v. Pullman's Car Company, 139 U. S. 24.

The present suit was brought by the Pullman Company to enjoin the Central Company from bringing any further suits for rent, the Pullman Company offering to return such of the demised property as was still in existence and to make compensation for the balance as far as the court should find it ought to do so. The Central Company answered the bill, denying many of its material allegations, including the allegation that the lease was illegal. Sub-

sequently the Central Company was permitted to file a cross-bill, in which it claimed to avail itself of the tenders made in the complainant's bill with respect to the return of the property and compensation, and asked for an accounting of all profits; that the Pullman Company should be adjudged to be a trustee for the Central Company of all contracts of transportation, whether original, new or renewals, held by the Pullman Company with railway companies with which there were contracts of transportation with the Central Company at the time of the making of the lease, and that defendant should in the future, from time to time, account for the sums which should be due by reason of future operations under the contracts.

The Pullman Company made a motion for leave to dismiss its bill, and filed demurrers to the cross-bill. Leave to dismiss its bill was denied and the demurrers were overruled with leave to present the questions on final hearing.

MR. JUCTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The facts which were set up in the cross-bill closely affected one of the theories upon which the original bill was filed, viz., the invalidity of the lease. They were relevant to the matters in issue in the original suit, and in seeking affirmative relief the cross-complainant is but amplifying and making clearer the foundations for the intervention of equity which had been appealed to by the Pullman Company, and the continued intervention of which would greatly speed a final termination of all matters for litigation between the parties. The court below did not err in permitting the cross-bill to be filed.

This brings us to a discussion of the principles upon which a recovery in this case should be founded. The so called lease mentioned in this case has been already pronounced illegal and void by this court. 139 U. S. 24. The contract or lease was held to be unlawful and void because it was beyond the powers conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public. It was added that there was strong ground also for holding that the contract between the parties was void because in unreasonable restraint of trade, and therefore contrary to public policy. In making the lease the lessor was certainly as much in fault as the lessee. It was argued on the part of the Central Company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defense to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the States,

finds no support in the judgments of this court, and cases in this court were cited in which such recoveries were denied.

It is true that courts in different States have allowed a recovery in such cases, among the latest of which is the case of Bath Gas Light Co. v. Claffy, 151 N. Y. 24, where Chief Judge Andrews of the Court of Appeals examines the various cases, and that court concurred with him in permitting a recovery of rent upon a void lease where the lessee had enjoyed the benefits of the possession of the property of the lessor during the time for which the recovery of rent was sought.

But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S.), "the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract." And the opinion of the court ended with the statement that, "Whether this plaintiff could maintain any action against this defendant, in the nature of a quantum meruit, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for."

The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield, in Holman v. Johnson, 1 Cowper, 341, decided in 1775, that "the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

The cases upholding this doctrine are numerous and emphatic.

Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24, already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon the subject.

They are substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed.

We may now examine the record herein and learn the grounds for the recovery which has been permitted, and determine therefrom whether the judgment in favor of the Central Company should be in all things affirmed, or if not, then how far the liability of the cross-defendant extends, and, if possible, what should be the amount of the judgment against it.

(The learned judge was of the opinion that the court below erred in the manner of ascertaining the value and *held* that the Central Company was entitled to recover only the value of the property transferred under the lease, with interest, and was not entitled to recover the value of contracts with railroad companies or patents, all of which had expired, or anything for the breaking up of its business.)

Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided. It had the right while both parties acquiesced to so use the property.

There is no question of trustee in the case. Root v. Railway Company, 105 U. S. 189, 215.

The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us. Although the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This

implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible, may be done. So long as neither party takes any objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied, and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time.

As to the claim of the lessor that its business has been broken up, its contracts with railroads terminated and the corporation left in a condition of inability to again take up its former plans, and that all this should be regarded in the measure of the relief to which it should be entitled, the same considerations which we have already adverted to must be entertained. These are results of the illegality of the contract entered into between these parties, and its subsequent repudiation on that ground, and in regard to such illegality the Central Company is certainly as much in the wrong as the cross-defendant herein. The former knew the extent of its obligations under its charter as well as the latter did, and the illegal provisions of the lease were quite as much its doing as they were those of the cross-defendant. To grant relief based upon these facts would be so clearly to grant relief to one of the parties to an illegal contract, based upon the contract itself or upon alleged damages arising out of its non-fulfilment, that nothing more need be said upon that branch of the subject. It is emphatically an application of the rule that in such a case the position of the defendant is the better. * * *

Although the Central Company may have been injured by the result of this lease, yet that is a misfortune which has overtaken it by reason of the rule of law which declares void a lease of such a nature, and while the company may not have incurred any moral guilt it has nevertheless violated the law by making an illegal contract and one which was against public policy, and it must take such consequences as result therefrom.

The judgment appealed from must be *reversed* and the case remitted to the Circuit Court for the Eastern District of Pennsylvania, with directions to enter a judgment for the Central Transportation Company in accordance with this opinion.

MR. JUSTICE HARLAN dissented.

MR. JUSTICE WHITE dissented on the ground that the judgment appealed from was for the correct amount and should not be reduced.[2]

[2] See, also, Appleton v. Citizens' Central Nat. Bk., 190 N. Y. 417, aftd. 216 U. S. 196.—Ed.

KERFOOT v. FARMERS' & MERCHANTS' BANK.

1910. 218 U. S. 281, 54 L. ed. 1042.[1]

The facts, which involve the validity of a transfer of real estate to a national bank, are stated in the opinion.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought in 1894, in the Circuit Court of Grundy County, state of Missouri, to set aside a deed of real property made by James H. Kerfoot to the First National Bank of Trenton, Missouri, and also a deed by which that bank purported to convey the same property to the defendants, Hervey Kerfoot, Alwilda Kerfoot and Lester R. Kerfoot, and for the recovery of possession. The plaintiffs in the action, which was brought shortly after the death of James H. Kerfoot, were Homar Hall, administrator of his estate, and Robert Earl Kerfoot, his infant grandson, who claimed to be his only heir at law and sued by Homer Hall as next friend. The petition contained two counts, one in equity, the other in ejectment. Upon the trial the Circuit Court found the issues for defendants and the judgment in their favor was affirmed by the Supreme Court of Missouri. 145 Missouri, 418. On his coming of age Robert Earl Kerfoot sued out this writ of error.

The plaintiff in error challenges the conveyance made by James H. Kerfoot to the bank, upon the ground that under § 5137 of the Revised Statutes of the United States, relating to national banks, the bank was without power to take the property, and hence that no title passed by the deed, but that it remained in the grantor and descended to the plaintiff in error as his heir at law. It appears that the deed, which was absolute in form, with warranty and expressing a substantial consideration, was executed in pursuance of an arrangement by which the title to the property was to be held in trust to be conveyed upon the direction of the grantor; and the Supreme Court of Missouri decided that a trust was in fact declared by the grantor in favor of Hervey, Alwilda and Lester R. Kerfoot, to whom ran a quitclaim deed, which he prepared and forwarded to the bank to be signed and acknowledged by it and then returned to him.

But while the purpose of this transaction was not one of those described in the statute for which a national bank may purchase and hold real estate, it does not follow that the deed was nullity and that it failed to convey title to the property.

In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a

[1] See, also, Barnes v. Suddard (1886), 117 Ill. 237, 7 N. E. 477; Rector v. Hartford Deposit Co. (1901), 190 Ill. 380, 60 N. E. 528 (distinguishing total want, from abuse, of powers); Hayden v. Hayden (1909), 241 Ill. 183, 89 N. E. 347.—Ed.

purpose not authorized by its charter, is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers. Smith v. Sheeley, 12 Wall. 358; National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99; Reynolds v. Crawfordsville Bank, 112 U. S. 405; Fritts v. Palmer, 132 U. S. 282; Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313. Thus, although the statute by clear implication forbids a national bank from making a loan upon real estate, the security is not void and it cannot be successfully assailed by the debtor or by subsequent mortgagees because the bank was without authority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the bank open to proceedings by the Government for exercising powers not conferred by law. National Bank v. Matthews, supra; National Bank v. Whitney, supra; Swope v. Leffingwell, 105 U. S. 3.

In National Bank v. Matthews, supra, viewing that case in this aspect, the court said:

"The opinion of the Supreme Court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

* * * * * * * *

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. Leazure v. Hillegas, 7 Serg. & R. (Pa.) 313; Goundie v. Northampton Water Co., 7 Pa. St. 233; Runyon v. Coster, 14 Pet. 122; The Banks v. Poitiaux, 3 Rand. (Va.) 136; McIndoe v. The City of St. Louis, 10 Missouri 575, 577. See also Gold Mining Co. v. National Bank, 96 U. S. 640."

This rule, while recognizing the authority of the Government to which the corporation is amenable, has the salutary effect of assuring the security of titles and of avoiding the injurious consequences which would otherwise result. In the present case a trust was declared and this trust should not be permitted to fail and the property to be diverted from those for whom it was intended, by treating the conveyance to the bank as nullity, in the absence of a clear statement of legislative intent that it should be so regarded.

The cases in this court, which are relied upon by the plaintiff in error, are not applicable to the facts here presented and are in no way inconsistent with the doctrine to which we have referred. McCormick v. Market Bank, 165 U. S. 538; California Bank v. Kennedy, 167 U. S. 362; Concord First National Bank v. Hawkins, 174 U. S. 364.

It was also urged by the plaintiff in error that the deed was not accepted by the bank, and was inoperative for that reason. The Supreme Court of Missouri *held* upon the evidence that it was accepted, and this court, on a question of that character, does not review the findings of fact which have been made in the state court. Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86; Egan v. Hart, 165 U. S. 188; Clipper Mining Co. v. Eli Mining & Land Co., 194 U. S. 220.

Assuming that the deed was accepted by the bank, it was effective to pass the legal title, and the plaintiff in error as heir at law of the grantor cannot question it.

Judgment affirmed.

HUBBARD v. WORCESTER ART MUSEUM.

1907. 194 Mass. 280, 80 N. E. 490.

Acquisition of Property by Devise or Bequest.

KNOWLTON, C. J.—This is a petition brought by the heirs of Stephen Salisbury, late of Worcester, deceased, for leave to file an information in the nature of a quo warranto against the respondent, under the R. L. c. 192, §§ 6-13. The Worcester Art Museum is a corporation established under the provisions of the Pub. Sts. c. 115 (R. L. c. 125), "for the purpose," as set forth in its certificate of incorporation, "of founding an institution for the promotion of art and art education in said Worcester; erecting and maintaining buildings for the preservation and exhibition of works and objects of art; making and exhibiting collections of such works, and providing instruction in the industrial, liberal, and fine arts; for holding real and personal estate in the furtherance of this purpose; and for the holding and administering funds acquired by the corporation for these and kindred objects in accordance with the will of the donors. All of said property and funds of the corporation, however, are to be held solely in trust for the benefit of all the people of the city of Worcester." By the will of Mr. Salisbury this corporation is made his residuary legatee, and if the intention of the testator is carried out, it will receive, under the will, real and personal estate amounting in value to between $2,000,000 and $3,500,000. By the R. L. c. 125, § 8, such corporations are authorized to "hold real and personal estate to an amount not exceeding one million five hundred

thousand dollars." By the St. 1906, c. 312, enacted after the probate of the will, the right of this respondent to hold real and personal estate was enlarged to an amount not exceeding $5,000,000. The petitioners contend that, by reason of the limitation in the statute, the gift was void; that, as heirs at law of the testator, their rights in this part of his estate became vested on the probate of the will; that the St. 1906 is prospective in its operation, and does not affect the right of the respondent to hold property under this will, and that, if it were construed as applying to property devised by this will, it would be unconstitutional and void.

The statute under which the petition is brought has been considered in Goddard v. Smithett, 3 Gray 116, in Hartnett v. Plumbers' Supply Association, 169 Mass. 229, and in other cases. We will assume in favor of the petitioners, without deciding, that if they were right in their view of the questions of substantive law involved, it would be available to give them the remedy which they seek. We come directly to the effect of the residuary clause in the will.

The attack upon its validity may be considered from two points of view: first, in reference to the rights of testators, as against their heirs, to dispose of their property for charitable or other purposes; secondly, in reference to the provisions of the law giving this kind of corporations a right to hold property to an amount not exceeding a certain sum.

From the first point of view this gift is perfect and complete. Except for the protection of the statutory rights of a husband or wife, the power of a testator in this commonwealth to dispose of his estate by will is unlimited. There is nothing in our law to restrain one from giving free course to his charitable inclinations, up to the last moment of his possession of a sound, disposing mind. Making charitable gifts in this commonwealth is not against public policy, and we have no legislation, such as has long existed in England and in New York and some of the other American states, putting obstacles in the way of testamentary acts. The only ground of objection to this part of the will is not from the point of view of the testator or of his heirs, but on account of the provisions of the statute regulating the rights of corporations as to the holding of property. We must, therefore, determine the meaning and effect of this statute on which the petitioners rely.

They contend that it is by implication an absolute prohibition against the holding, at any time, in any form, for any purpose, of a greater amount of property than that stated, and that any attempt of a corporation to hold more, or of any person to put more into the ownership of a corporation, is illegal and absolutely void. The respondent contends that this implied limitation of the right to hold is made on grounds of public policy; that it is a provision only in favor of the state, which the state may enforce or not, as it chooses; that grants or devises in excess of the

amounts stated are not void, but only voidable; that third persons cannot question the validity of such grants or devises, but that they are legal so long as the state leaves them undisturbed, and that the state may at any time, by a legislative act or in some other proper way, completely waive its right of enforcement.

In interpreting the act the history of earlier kindred provisions may be helpful. At common law, corporations were authorized to acquire and hold both real and personal property without limit. In re McGraw's Estate, 111 N. Y. 66, 84. "The creation of a corporation gives to it, amongst other powers, as incident to its existence, and without any express grant of such powers, that of buying and selling." Bank v. Poitiaux, 3 Rand. 136. "A corporation has, from its nature, a right to purchase lands, though the charter contains no license to that purpose." Leazure v. Hillegas, 7 S. & R. 313. See also Page v. Heineberg, 40 Vt. 81; Mallett v. Simpson, 94 N. C. 37, 41.

Under the feudal system, when land was given to a corporation, the chief lords of whom the land was held, and the king as ultimate chief lord, lost their chances of escheat, and various other rights and incidents of military tenure. During the middle ages, the accumulation of land in the ecclesiastical corporations was so great as to be thought a national grievance. Hence the English mortmain acts, which go back for their origin to Magna Charta, St. 9 Hen. III, c. 36, and which have continued with various modifications to this day. See 7 Edw. I, c. 2; 15 Rich. II, c. 5; Shelford on Mortmain, 2, 6, 8, 16, 25, 34, 39, 809, 812; Tyssen on Charitable Bequests, 2, 383. Under these acts the alienations were not void, so as to let in the grantors and their heirs; but they merely operated as a forfeiture, which gave a right to the mesne lord and the king to enter after due inquest. This right to enter was often waived by a license in mortmain. See citations above, and Tyssen on Charitable Bequests, 383; St. 7 & 8 Will. III, c. 37. In form these licenses commonly authorized a holding of property "not exceeding" a certain value. In later years this authority sometimes has been inserted in the charter, and this limited power of purchase has, it is said, been exceeded by almost all corporations. Shelford on Mortmain, 55. See also pages 10, 44, 49, 56, 891; Tyssen on Charitable Bequests, 393, 394, 396.

Another act, St. 9 Geo. II, c. 36, which is usually called "The Mortmain Act," but is called by Tyssen the "Georgian Mortmain Act," is of a very different nature. One of its purposes, as declared in the preamble, is to avoid "improvident alienations or disposition made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." Considered in reference to its purposes, it is not properly called a mortmain act. It applies only to gifts for charitable uses; and under it all such gifts, unless made as the statute allows, are absolutely void.

We never have had any real mortmain acts in Massachusetts. The nearest approach to one was the Prov. St. 1754-55, c. 12; 3 Prov. Laws (State ed.), 778. This made deacons a corporation to take gifts for charitable purposes, limited the grants to such as would produce an income not exceeding three hundred pounds a year, and provided that they should be made by deed, three months before death, and that all bequests, devises, or later grants should be void. This statute related only to gifts to deacons, and was repealed by St. 1785, c. 51 (February 20, 1786), which re-enacted a part of the law, but omitted the provision that gifts not authorized by the act should be void. Bartlet v. King, 12 Mass. 537, 545. See R. L. c. 37, § 1.

The significance of this reference to English law and to our legislation is, first, that, except for this short period, we have never had in Massachusetts any legislation prohibiting charitable gifts to trustees or corporations, or providing that any kind of conveyances, devises, or bequests to corporations shall be void. On the other hand, the policy of the commonwealth, as expressed both by legislation and the decisions of its courts, has been exceedingly liberal to testators and public charities. Sanderson v. White, 18 Pick. 328, 333, 334; American Academy v. Harvard College, 12 Gray, 582, 595, 596; Saltonstall v. Sanders, 11 Allen, 446; Jackson v. Phillips, 14 Allen, 539, 550. Secondly, the implied limitations upon the power of corporations to hold property, which appear in numerous enactments, have been made, not in the interest of grantors or devisors or their heirs, but in the interest of the state, on considerations of public policy. The general form of these limitations, which appears in the statute before us, and with slight variations in special charters (a list of which, two hundred and seventy-four in number, granted in this state before 1850, has been furnished us through the industry of counsel) corresponds with the form of licenses granted by the Crown in England under the old mortmain acts, and sometimes embodied in charters granted by parliament. Under these English acts, grants or devises to a corporation to hold property without a license, or in excess of the amount licensed, were not void, but only voidable by the mesne lord or the king, upon entry, after inquest according to law. In view of the close relations between Massachusetts and the mother country in early times, this justifies an argument, of considerable strength, that the implied limitations in our statutes were intended to have no greater force than the old mortmain acts of England, as distinguished from the Georgian mortmain act.

We start with the inherent right, already referred to, of every corporation to take and hold property at common law, by virtue of the act of its creation. This right is recognized in our statutes by implication, without express mention. R. L. c. 109, §§ 4-6. What force is to be given to the words, "may hold real and personal estate to an amount not exceeding one million five hun-

dred thousand dollars"? The respondent contends that their meaning is as if words were added as follows: "and beyond that amount it shall have no right as against the commonwealth; and the commonwealth may take proper measures, through action of the attorney-general or otherwise, to prevent or terminate such larger holding." According to the argument, a taking and holding by a corporation, above the prescribed amount, is under its inherent right. As between it and the state as the guardian of the public interest, a provision as to amount is made, which does not affect its right as to third persons. As to the general legality of the holding, except when the state chooses to enforce the law for its own benefit, the condition is similar to that resulting from a statutory provision which is merely directory. It is not very unlike the old law as to conveyances to aliens. Such conveyances, whether by grant or devise, were good against every one but the state, and could be set aside only after office found. Fox v. Southack, 12 Mass. 143; Waugh v. Riley, 8 Met. 290; Judd v. Lawrence, 1 Cush. 531; Kershaw v. Kelsey, 100 Mass. 561.

That this is the effect of such limitations in statutes of this kind where the title of the corporation is under a grant, as distinguished from a devise, seems to be the universal rule. * * *

The counsel for one of the petitioners says in his brief: "It is fully conceded at the outset that where a corporation takes and holds property by conveyance, or by executed gift inter vivos, contrary to its charter rights, no one but the state can complain. This is settled by a practically unbroken line of decisions in all the states," etc.

But if the statute were a prohibition that renders the holding utterly void, and the taking also void, as is argued in the opinion in In re McGraw's Estate, 111 N. Y. 66, anybody interested could take advantage of the violation of law, unless he was precluded by estoppel. Most of the cases which we have cited do not put their decision on the ground of estoppel. Often the question might arise when there was no estoppel. The ground on which most of the cases go is that the implication is not an absolute prohibition, but only a condition affecting the rights of the corporation as between it and the state. If the holding were an illegality which was utterly void, the condition would be the same whether the taking was by grant or devise, and a variety of unfortunate consequences might follow. The property might greatly increase in value after its acquisition, as was the case in Evangelical Baptist Society v. Boston, 192 Mass. 412. In that case, although the property of the corporation largely exceeded in value the amount authorized by the statute, there was no intimation that the holding was illegal, so long as the state did not interfere. See also Humbert v. Trinity Church, 24 Wend. 587, 605. As to all interests of private persons, in the absence of interference by the state, the cases generally treat titles to property held by corporations in excess of the specially authorized amounts as good.

They allow the corporations to give good titles to purchasers of such property.

Some judges, in holding that such titles cannot be taken under wills, endeavor to found a distinction upon the executed character of a title by grant, and suggests that a devise or bequest is executory. It seems to us that there is no good reason for the distinction. When a will is proved and allowed, it takes effect immediately to pass all property affected by it. The provision in the law against large holdings by corporations has no relation to the probate of the will. The act of the testator in executing the will is confirmed and given effect as a complete and executed disposition of the property, by the allowance of the will. In this respect a recorded will does not materially differ from a delivered deed. The heirs at law are bound by one as well as by the other.

The decisions upon the precise point at issue are conflicting. In Jones v. Habersham, 107 U. S. 174, a case similar to that now before us, it was held by the court, in an opinion by Mr. Justice Gray, that "restrictions imposed by the charter of a corporation upon the amount of property that it may hold, cannot be taken advantage of collaterally by private persons." In the same case in the circuit court the question had been considered previously, and the same result was reached, in an opinion by Mr. Justice Bradley of the Supreme Court of the United States, which is found in 3 Woods 443, 475. The same rule is established in Maryland. Hanson v. Little Sisters of the Poor, 79 Md. 434; In re Stickney's Will, 85 Md. 79, 104. DeCamp v. Dobbins, 2 Stew. (N. J.) 36, 40, was decided by the chancellor on this ground. The decree was affirmed on another ground in the Court of Errors and Appeals, 4 Stew. (N. J.) 671, 690, in an opinion by Beasley, C. J., which contains a dictum disapproving of the view of the chancellor. In Farrington v. Putnam, 90 Maine 405, the court, in a very elaborate opinion, in a case identical in its leading features with that now before us, held that the gift was good. The same doctrine is stated in Brigham v. Peter Bent Brigham Hospital, 126 Fed. Rep. 796, 801; s. c., 134 Fed. Rep. 513, 527. It is also stated in text books. Beach, Corp. (Purdy's ed.), § 825; Thompson, Corp., §§ 5795, 5797.

The leading case which presents the opposite view is In re McGraw's Estate, 111 N. Y. 66. Although the decision necessarily puts a construction upon a statute of that state, this construction seems to be materially affected by the policy of New York in reference to charities. Said Judge Peckham, who delivered the opinion: "We have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise." In Chamberlain v. Chamberlain, 43 N. Y. 424, the court refers to the prohibition of devices, and to the N. Y. St. 1860, c. 360, still in force, which makes void all bequests or devises to charity in excess of one-

half the testator's property, where he leaves relatives. Other statutes have been passed, limiting the amount that can be devised to certain corporations by one testator, forbidding a devise or bequest to charities, by a person leaving relatives, of more than one-fourth of his estate, and making void such gifts where the will was executed within two months before the death of the testator. Gen. Laws of N. Y. 1901 (Heyd. ed.), 4885, 4891, 4892. The policy of that state in regard to charities has been very unfavorable. See Allen v. Stevens, 161 N. Y. 122, 139, 140; People v. Powers, 147 N. Y. 104; Fosdick v. Hempstead, 125 N. Y. 581.

The doctrine of the New York court is stated as the law in Davidson College v. Chambers, 3 Jones Eq. 253, and adopted in Wood v. Hammond, 16 R. I. 98, 115, and House of Mercy v. Davidson, 90 Tex. 529. In the case in North Carolina the decision was by two of the three judges of the court, the chief justice giving an able dissenting opinion. The courts in Kentucky and Tennessee have expressed approval of the McGraw case in New York, but in terms that do not leave the grounds of their decisions entirely clear. Cromie v. Louisville Orphans' Home Society, 3 Bush, 365, 383; Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 686. In reference to supposed errors in the opinion in the last case, see Pritchard on Wills, § 153, note, and Farrington v. Putnam, 90 Maine, 405, 433.

In the construction of our statute, when the question arises whether a different rule shall be established in regard to the taking and holding by a corporation under a will from that which is universally laid down in regard to a holding under a deed, we are much influenced by the policy of our law as to devises and bequests for charitable purposes. We are of opinion that, under the R. L. c. 125, § 8, a gift to a corporation under a will, to an amount in excess of the sum specially authorized, should be held no less valid than a similar acquisition of title under a deed. It is good as against every one but the commonwealth. It follows that the St. 1906, c. 312, operated as a waiver of the commonwealth's right to terminate the holding, and a legislative declaration of the entire validity of the provision in the will.

If we are wrong in this conclusion, the petition must be dismissed on an independent ground. (The judge held also that the gift could be sustained as a gift to a public charity.)

Petition dismissed.[1]

[1] *Contra*, McGraw, In re (Cornell University case), 111 New York 66, 19 N. E. 233.—Ed.

CHAPTER VIII.

LIABILITY FOR TORTS AND CRIMES.

CHESTNUT HILL &c. TURNPIKE COMPANY v. RUTTER.

SUPREME COURT OF PENNSYLVANIA.

1818. 4 Serg. & R. 6, 8 Am. Dec. 675.

Liability of a Corporation for a Tort.

Action of trespass for stopping a water course.

TILGHMAN, C. J.: * * * But it is objected that the present action is not on contract, but on tort, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorized by its charter. But the charter does not authorize it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of laborers who have no property to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed, with respect to torts, the opinion of the courts seem to have been more uniform than with respect to contracts. For it may be shown, that from the earliest times to the present, corporations have been held liable for torts. Many cases have been cited from the Year Books. Upon examination, they do not all answer the citations, but enough appears to show that the law was so understood. In 4 Hen. 7, p. 13, pl. 11, we find an action of trespass against the Mayor and Commonalty of York. Plea, that all the inhabitants had a right of common in the land where the trespass is supposed to have been committed: held, not good, because the action is against the corporation, and the plea is a justification as to individuals. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass without writing. This, if it be law, proves that a warrant may be given by writing, which is sufficient for the plaintiff's purpose,

the point being, whether a corporation can commit a trespass. In 8 Hen. 6, p. 1, pl. 11, and p. 14, pl. 34, trespass was brought against the Mayor and Bailiffs, and Commonalty of Ipswich, and one J. Jabez. It was objected, that a corporation and an individual cannot be joined in one action; but it was not objected that trespass does not lie against a corporation; and the objection is said to have been overruled in 14 Hen. 8, 2. In the book of Assizes (31 Ass. pl. 19), it appears that an assize of novel disseisin was maintained against the Mayor and Commonalty of Winton. Brook lays it down that if the mayor and commonalty disseise one who releases to several individuals of the corporation, this will not serve the Mayor and Commonalty, because the disseisin is in their corporate capacity. In the old books of entries are numerous precedents of writs of quare impedit against corporations, and in Vidian's Ent. 1, is a declaration in an action on the case (16 Car. 2), against the Mayor and Commonalty of the city of Canterbury, for a false return to a mandamus. To come to more modern times, it was held in the Mayor of Lynn, &c. (in error) v. Turner (Cowp. 86), that an action on the case lies against a corporation for not cleansing and keeping in repair a stream of navigable water, which it was bound to do by prescription, in consequence of which the plaintiff was injured. This was in the year 1774, a little before our Revolution. The laws of the Commonwealth forbid my tracing this point through the English courts, since the Revolution, but we shall find abundant authority in the courts of our own country. In Gray v. The Portland Bank (6 Mass. Rep. 364), it is laid down, that the bank was responsible for wrongs done by itself or its agents. In Riddle v. The Proprietors of the Locks, etc., on Merrimack River (7 Mass. Rep. 169), an action was maintained against the company for damage suffered by the plaintiff in consequence of the locks not being kept in repair. And in Townsend v. The Susquehanna Turnpike Company (6 Johns, 91), an action was supported for the loss of a horse killed by the falling of a bridge, which the company had built of bad materials. These authorities put it beyond doubt that the form of action, in the present case, is good.

GOODSPEED v. EAST HADDAM BANK.

1853. 22 Conn. 530, 58 Am. Dec. 439.

Liability for Torts—Malice.

CHURCH, C. J.: This action is based upon the provisions of our statute, entitled, "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the superior court, the defendants moved for a nonsuit, on the ground that the plaintiff by his evidence had failed to make out a prima facie case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the superior court, in granting the nonsuit, as we understand, was founded solely upon the ground that a corporation aggregate was not, by law, liable for such a cause of action as was set up by the plaintiff, in his declaration, at least, no other ground of nonsuit or objection to the plaintiff's action has been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think, that, to turn the plaintiff round to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private —that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of Tilghman, C. J., in a case very similar to the present, in which it was urged that a corporation was not liable for a suit, but only the individuals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury, by means of laborers having no property to answer damages," &c. (4 Serg. & Rawle, 16). To the same effect is the language of Shaw, C. J., in the case of Thayer v. Bastan (19 Pick. 511). He says, "The court are of opinion, that this argument, if pressed to all its consequences, and made the foundation of an inflexible practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court, in the case of The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company (7 Wend. 31). There, as here, it was contended, that the act was unauthorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says, "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature, as well as the law, of corporations, within the last half century, has been in a progress of development, so that it has grown up, from a few rules and maxims, into a code. In the days of Blackstone, the whole subject of corporations, and the laws affecting them, were discussed within the compass of a few pages; now volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this; but we say, that, as new relations from this cause are formed, and new interests created, legal principles of a practical rather than of a technical or theoretical character, must be applied.

And so, in the course of this progress, it has been. It was said by Lord Coke, "that corporations had neither souls nor bodies;" and by somebody else, "that they had no moral sense;" and from thence, or for some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs, nor be liable for torts, with a few exceptions, as we shall see.

Had Lord Coke lived in this age and country, he would have seen, that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs; that they act, not only upon pecuniary concerns, but, as having conscience and motives, to an almost unlimited extent, they are entrusted with the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers regarding the real nature, power, and responsibilities of corporations, to a great extent are exploded in modern times, and it is believed, that now these bodies are brought to the same civil liabilities as natural persons, so far

as this can be done practically, and consistently with their respective charters. And no good reason is discovered why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures, for malfeasance, and even to the loss of corporate life, by the revocation of their charters. And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. Yarborough v. Bank of Eng., 16 East, 6; Beach v. Fulton Bank, 7 Cowen, 486; Foster v. Essex Bank, 17 Mass. 503; Riddle v. Proprietors of Locks and Canals, 7 id. 187; Chestnut Hill Turnpike v. Rutter, 4 Serg. & Rawle, 16; 4 Hammond, 500, 514; 10 Ohio Rep. 159; Dater v. Truy Turnpike Co., 2 Hill, 630; 23 Pick. 139, 2 Bl. Com. 476; Ang. & Ames, 392; 2 Kent Com. 290; 1 Sw. Dig. 75; 15 Ohio Rep. 476; 18 id. 229. And indeed, no actions are now more frequent, in our courts, than such as are brought against corporations, for torts, either in case or trespass. Harner v. New Haven & Northampton Canal Co., 14 Conn. 146, and the cases there cited, and many others since reported. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. Eastern Cauhties Railway Co. v. Brooks, 2 Eng. Law & Equity, 406. And it was decided long ago, that a corporation was liable to an action for a false return to a writ of mandamus, alleged to have been made falsely and maliciously. 16 East, 8; 14 Eng. Com. Law, 159; 3 Mees. & Wels. 244; Ang. & Ames, ch. 10, sec. 9.

In all the cases, wherein it has been holden that corporations may be subjected to civil liabilities for torts, the acts charged as such have been the acts of their constituted authorities—either the directors, or agents, or servants, employed by them. We do not intend here to discuss or decide the frequently suggested question, how far, or when a principal, whether an individual person or a corporation, becomes responsible for the wilful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not admit that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of as vexatious was instituted by the bank, in the name of the bank, and, as should be presumed, in just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different pro-

cedure than is usual, in actions by corporations. The action was brought for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank in its corporate capacity. The bank, by its charter and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. & Ames, ch. 10, sec. 9. No act of agency appears here, which does not appear in all suits brought by corporations, and nothing to show that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine, that principals are not responsible for the wilful misconduct of their agents, as seems to have been sanctioned in the cases of McManus v. Cricket, 1 East, 106; Wright v. Wilcox, 19 Wend. 343; Vanderbilt v. Richmond Turnpike Co., 2 Comstock, 470; but denied by Chief Justice Reeve in his Domestic Relations, 357, we think, has never been applied to such a case as this, but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority—persons whose duty it is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation—the representatives, standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of Barrell v. The Nahant Bank, 2 Met. 163, Shaw, C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says, "We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform as to be regarded as a part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. We think they do not exercise a delegated authority in the sense to which the rule applies to agents and attorneys," &c. The same principle is very distinctly recognized, in the cases of Bank Commissioners v. Bank of Buffalo, 6 Paige's Ch. 502, and Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co., 7 Wend. 31. It has been said, that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act—and this is only in the choice of directors, and no more. Beyond this, they can only be considered as the persons for whose ultimate individual interest the corporation acts. The directors derive all their power

and authority from the charter and laws, and none from the stockholders.

But the fear is expressed, that, by thus considering and treating the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent be true; but the protection of the law in this matter is not to be confined to stockholders; the public and strangers have rights also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of two innocent persons or classes is to suffer, which should it be—that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But, after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort which essentially consists in motive and intention. The claim is, that, as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank, in the usual modes of its action; and still to claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution as a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff cannot, in some legitimate way, prove the malice he has alleged, he cannot recover; but we have no right

to assume it as a legal principle, that it cannot be proved. We do not know that it has ever been adjudged that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges is evidence of malice, and which must, as in this case, be proved; but, would it be endured that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason than that a corporation is only an ideal something, of which malice or intention cannot be predicated? And, if, as we have suggested, the directors are, for all practical purposes, the corporation itself, acting at least as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure that this objection of the defendants was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation felt, when the case of Merrills v. The Tariff Manufacturing Co., 10 Conn. R. 384, was tried at the circuit, and discussed and decided by this court. That was an action against a corporation for a malicious injury, and the sole question in this court was, whether, by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable, in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion that the nonsuit granted by the superior court should be set aside, and a new trial granted.

In this opinion, Waite, J., concurred.

NIMS v. MOUNT HERMON BOYS' SCHOOL.

1893. 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. 467.

Ultra Vires Torts.

KNOWLTON, J.—The defendant is an educational corporation. The plaintiff seeks to recover damages for an injury received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges, the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant, the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds. It says in the first place, that, if it maintained the ferry and hired and paid the ferryman, the business was ultra vires, and therefore it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferry-boat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts as natural persons are. It is no defense to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business. Moore v. Fitchburg Railroad, 4 Gray, 465; Reed v. Home Savings Bank, 130 Mass. 443; Fogg v. Boston & Lowell Railroad, 148 Mass. 513; Philadelphia, Wilmington & Baltimore Railroad v. Quigley, 21 How. 202, 209; Merchants' Bank v. State Bank, 10 Wall. 604; National Bank v. Graham, 100 U. S. 699; Gruber v. Washington & Jamesville Railroad, 92 N. C. 1; Hussey v. Norfolk Southern Railroad, 98 N. C. 34. If a corporation by its officers or agents unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is ultra vires. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferry-boat is that the contract to carry the plaintiff was ultra vires, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

In Bissell v. Michigan Southern & Northern Indiana Railroad,

22 N. Y. 258, the plaintiff founded his action on the negligence of the two defendants while jointly running cars on a railroad in a State to which the charter of neither of them extended, and it was conceded that the defendants were acting ultra vires. The plaintiff recovered, Comstock, C. J., holding in an elaborate opinion that the corporations were liable under their contract, notwithstanding that the contract was ultra vires, and that if they could not be held under their contract they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract called for. Selden, J., in an equally full and elaborate opinion, held that the contract for carriage was invalid, and that there could be no recovery under it, nor for negligence founded upon it; but it was his opinion that, if the contract were set aside, the defendants owed the plaintiff a duty founded on his relation to them as an occupant, with their permission, of a place in their car, and that the improper management of the car was a neglect of that duty which the plaintiff could recover. Clerke, J., agreed with this view, and all but one of the other judges concurred in a decision for the plaintiff, without stating the ground on which they thought the decision should be placed. This case was followed in Buffet v. Troy & Boston Railroad, 40 N. Y. 168, in which it was held that a railroad corporation was liable for negligence of the driver of a stage-coach which it was running without a legal right to do a business of that kind; but the opinion does not show whether the decision is founded on the opinion of Comstock, C. J., given in the former case, or on that of Selden, J. Like decisions have been made under similar facts in Central Railroad & Banking Co. v. Smith, 76 Ala. 572; New York, Lake Erie & Western Railway v. Haring, 18 Vroom, 137; and Hutchinson v. Western & Atlantic Railroad, 6 Heisk. 634.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it either expressly or by implication, is invalid considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the Legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work. Monument National Bank v. Globe Works, 101 Mass. 57; Attorney General v. Tudor Ice Co., 104 Mass. 239; Davis v. Old Colonial Railroad, 131 Mass. 258; Thomas v. Railroad Co., 101 U. S. 71; Leslie v. Lorillard, 110 N. Y. 519; Linkauf v. Lombard, 137 N. Y. 417; East Anglian Railways v. Eastern Counties Railway, 11 C. B. 775, 803. On the other hand, courts have frequently held that, while such contracts considered merely as contracts are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has

been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract, and inducing a change of condition by another party, attempts to avoid the contract by a plea of ultra vires. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong. Leslie v. Lorillard, 110 N. Y. 519; Linkauf v. Lombard, 137 N. Y. 417, 423. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them and leave the other party without remedy, as he might do in a supposable case, where another had put himself at a disadvantage on the faith of a contract with him to commit a crime. Whether in this Commonwealth a contract entered into by a corporation ultra vires, and partly performed, will ever be enforced on equitable grounds, we need not now decide. See McCluer v. Manchester & Lawrence Railroad, 13 Gray, 124; National Pemberton Bank v. Porter, 125 Mass. 333; Attleborough National Bank v. Rogers, 125 Mass. 339; Atlas National Bank v. Savery, 127 Mass. 75-77; Slater Woollen Co. v. Lamb, 143 Mass. 420; Prescott National Bank v. Butler, 157 Mass. 548; National Bank v. Mathews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99; Parish v. Wheeler, 22 N. Y. 494; Oil Creek & Allegheny River Railroad v. Pennsylvania Transportation Co., 83 Penn. St. 160; Bradley v. Ballard, 55 Ill. 413. In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was ultra vires, but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry-boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the county commissioners, under Pub. Sts. c. 55, § 1, to keep the

ferry, but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given to the county of Franklin, with the condition properly to perform the duty of a ferryman, executed in behalf of the defendant by one who was designated as superintendent, and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above the mortgage existing upon it, and that he and the defendant's superintendent, who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry above his wages to the defendant's cashier and paymaster. For the month of April, Deane was paid for his services by the defendant's paymaster out of the defendant's funds. In June, 1890, a new ferry-boat was constructed under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York, monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustees of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be made by a man in his employment. This report was accepted by the trustees and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title "ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it.

There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons conected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received and the expenses of it paid by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treas-

urer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence.

If there was such a ratification, it carried with it the consequences which would have followed an original authority. In Dempsey v. Chambers, 154 Mass. 330, it was held, after much consideration, that ratification of an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in doing the act.

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

HANNON v. SIEGEL-COOPER CO.

1901. 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429.

Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1900, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, J.—The complaint charged that the defendant, a corporation, conducting a department store in the city of New York, represented and advertised itself as carrying on the practice of dentistry in one of its departments; that the plaintiff employed the defendant to render the necessary professional labor in the treatment of her teeth and paid therefor; that the defendant's servant performed said work so carelessly, negligently and unskillfully that plaintiff's jaws and gums were injured, for which malpractice she claimed damages. The answer in substance was a general denial. Plaintiff had a verdict at the Trial Term and the judgment on that verdict has been unanimously affirmed by the Appellate Division.

The Public Health Law by section 164 makes it a misdemeanor for any person to practice or to hold himself out to the public as practicing dentistry in any county in this state without being licensed to practice as such and registered in the office of the clerk of the county, and it would seem that the action of the defendant in assuming to carry on the business of dentistry was illegal and ultra vires. But though it was beyond the corporate powers of

the defendant to engage in the business this does not relieve it from the torts of its servants committed therein (Bissell v. Mich. Southern R. R. Co., 22 N. Y. 258), and the unanimous affirmance of the Appellate Division is conclusive to the effect that it either practiced dentistry or held itself out as practicing dentistry. The only question cognizable by us arises upon the appellant's exception to the following charge of the trial court: "If the defendants in this case made representations to the plaintiff, on which she relied, that they were conducting a dentist business in their store, and if she, because of those representations, hired the workman in the store of the defendants, with no knowledge that the business was conducted by Mr. Hayes individually, you may find the defendants responsible for the acts of the dentist who treated the plaintiff, even though Mr. Hayes, as a matter of fact, was the real owner of that department of the defendant's store." The appellants' counsel does not deny the general doctrine that a person is estopped from denying his liability for the conduct of one whom he holds out as his agent against persons who contract with him on the faith of the apparent agency, but he insists that the doctrine does not apply to the present case, because the action is brought in tort and not on contract. It may very well be that where the duty, the violation of which constitutes the tort sued for, springs from no contract with, nor relation to, the principal, a party would not be estopped from denying that the wrongdoer was his agent, even though he had held him out as such. In such a case the representation of the principal would be no factor in producing the injury complained of. But whenever the tort consists of a violation of a duty which springs from the contract between the parties, the ostensible principal should be liable to the same extent in an action ex delicto as in one ex contractu. It is urged that the representation that the operating dentists were the defendant's servants did not mislead the plaintiff to her injury and, therefore, should not estop the defendant from asserting the truth. There is no force in this claim. If A contracts with the ostensible agent of B for the purchase of goods, he relies not only on the business reputation of B, as to the goods he manufactures or sells, but on the pecuniary responsibility of B to answer for any default in carrying out the contract. So here the plaintiff had a right to rely not only on the presumption that the defendant would employ a skillful dentist as its servant, but also on the fact that if that servant, whether skillful or not, was guilty of any malpractice, she had a responsible party to answer therefor in damages.

The judgment appealed from should be affirmed, with costs.

O'Brien, Bartlett, Martin, Vann and Landon, JJ., concur; Parker, Ch. J., takes no part.

Judgment affirmed.[1]

[1] In the following cases, corporations were held liable for torts committed in the course of an *ultra vires* undertaking. South etc. R. Co. v.

UNITED STATES v. JOHN KELSO CO.

1898. 86 Fed. 304.

Criminal Liability—Violation of Eight Hour Law.

DE HAVEN, J.—On October 9, 1897, there was filed in this court by the United States district attorney for this district, an information charging the defendant, a corporation, with the violation of "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (2 Supp. Rep. St. p. 62). Upon the filing of this information, the court, upon motion of the district attorney directed that a summons be served upon said corporation. The summons stated generally the nature of the charge, and for a more complete statement of such offense referred to the information on file. On the day named in said summons for its appearance, the defendant corporation appeared specially by its attorney, and moved to quash the summons, and to set aside the service thereof, upon grounds hereinafter stated. Upon the argument of this motion, it was claimed in behalf of the defendant: First, that the Act of Congress above referred to does not apply to corporations, because the intention is a necessary element of the crime therein defined, and a corporation as such is incapable of entertaining a criminal intention; second, that, conceding that a corporation may be guilty of a violation of said act, Congress has provided no mode for obtaining jurisdiction of a corporation in a criminal proceeding, and for that reason the summons issued by the court was unauthorized by law, and its service a nullity. It will be seen that the first objection goes directly to the sufficiency of the information, and presents precisely the same question as would a general demurrer, attacking the information on the ground of an alleged failure to charge the defendant with the commission of a public offense. This objection is one which would not ordinarily be considered upon a motion like that now before the court, when the party making the objection refuses to acknowledge the jurisdiction of the court, or to make any other than a special appearance for the purpose of attacking its jurisdiction; but, in view of the conclusion which I have reached upon the second point urged by the defendant, it becomes necessary for me to determine whether the Act of Congress above referred to is applicable to a corporation,

Chappell (1878), 61 Ala. 527; New York etc. R. Co. v. Haring (1885), 47 N. J. Law 137; Bissell v. Michigan etc. R. Co. (1860), 22 N. Y. 258 (per Selden, J.); Fishkill Savings Institution v. National Bank (1880), 80 N. Y. 162; Gruber v. Washington etc. R. Co. (1885), 92 N. Car. 1; Hutchinson v. Western etc. R. Co. (1871), 6 Heisk. (Tenn.) 634; Zinc Carbonate Co. v. First Nat. Bank (1899), 103 Wis. 125, 79 N. W. 229; National Bank v. Graham (1879), 100 U. S. 699, 25 L. ed. 750 ("Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application"); Chesapeake & Ohio R. Co. v. Howard (1900), 178 U. S. 153, 44 L. ed. 1015, 20 Sup. Ct. 880.—Ed.

and whether a corporation can be guilty of the crime of violating the provisions of said act. Section 1 of that act makes it unlawful for a contractor or sub-contractor upon any of the public works of the United States, whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon such public works, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." And section 2 of the act provides "that * * * any contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any public works of the United States * * * who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." It will be observed that by the express language of this statute there must be an intentional violation of its provisions, in order to constitute the offense which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. The case of State v. Great Works M. & M. Co., 20 Me. 41, supports this proposition, and it must be conceded that there are to be found dicta in many other cases to the effect that a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act. In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act should be done is imputed to the corporation itself. State v. Morris E. R. Co., 23 N. J. Law, 360; Reg. v. Great North of England Ry. Co., 58 E. C. L. 315; Com. v. Proprietors of New Bedford Bridge, 2 Gray, 339. See, also, State v. Baltimore & O. R. Co., 15 W. Va. 380. That a corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element is not disputed at this day. Thus

an action for malicious prosecution will lie against a banking corporation. Reed v. Bank, 130 Mass. 434; Goodspeed v. Bank, 22 Conn. 530. An action will lie also against a corporation for a malicious libel. Railroad Co. v. Quigley, 21 How. 202; Maynard v. Insurance Co., 34 Cal. 48. The opinion in the latter case, delivered by Currey, C. J., is an able exposition of the law relating to the liability of corporations for malicious libel, and in the course of which that learned judge, in answer to the contention that corporations are mere legal entities existing only in abstract contemplation, utterly incapable of malevolence, and without power to will good or evil, said:

"The directors are the chosen representatives of the corporation, and constitute, as already observed, to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do any injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."

The rules of evidence in relation to the manner of proving the fact of intention are necessarily the same in a criminal as in a civil case, and the same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law. Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation—as, for instance, a fine. In the act of congress now under consideration it is made an offense for any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer employed upon any of the public works of the United States, to require or permit such laborer to work more than eight hours in any calendar day. A corporation may be a contractor or subcontractor in carrying on public works of the United States, and as such it has the power or capacity to violate this provision of the law. Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit of this statute; and no reason

is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law were capable of the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to congress, unless its language will admit of no other interpretation.

Motion denied.

PEOPLE v. ROCHESTER RAILWAY & LIGHT CO.

1909. 195 N. Y. 102, 88 N. E. 22.

Liability for Manslaughter.

HISCOCK, J.—The respondent has been indicted for the crime of manslaughter in the second degree because, as alleged, it installed certain apparatus in a residence in Rochester in such a grossly improper, unskillful and negligent manner that gases escaped and caused the death of an inmate.

The demurrer to the indictment has presented the question whether a corporation may be thus indicted for manslaughter, under section 193 of the Penal Code.

Before proceeding to the interpretation of this specific provision we shall consider very briefly the general question discussed by the parties whether a corporation is capable of committing in any form such a crime as that of manslaughter.

Some of the earlier writers on the common law held that a corporation could not commit a crime. Blackstone in his Commentaries, Book 1, page 476, stated: "A corporation cannot commit treason or felony, or other crime, in its corporate capacity, though its members may, in their distinct individual capacities." And Lord Chief Justice Holt (Anonymous, 12 Modern, 559) is said to have held that "a corporation is not indictable, but the particular members of it are." In modern times, however, the courts and text writers quite universally have reached an opposite conclusion. A corporation may be indicted either for nonfeasance or misfeasance, the obvious and general limitations upon this liability being in the former case that it shall be capable of doing the act for non-performance of which it is charged, and that in the second case the act for the performance of which it is charged shall not be one of which performance is clearly and totally beyond its authorized powers. (Bishop's New Criminal Law, §§ 421, 422.)

The instances in which it has been held that a corporation might be liable criminally simply because it did or did not perform some act, and where no element of intent was supposed to be involved, are so familiar that any extended reference to them is entirely unnecessary. The latest authority is this state upholding

such liability is found in the case of People v. Woodbury Dermatological Institute (192 N. Y. 455), where it was held that a corporation might be punished criminally for disobeying the statute providing that "any person not a registered physician who shall advertise to practice medicine, shall be guilty of a misdemeanor." There was involved no question of intent, but simply disobedience of a statutory prohibition against doing certain acts.

At time courts have halted somewhat at the suggestion that a corporation could commit a crime whereof the element of intent was an essential ingredient. But this doctrine, again with certain limitations, may now be regarded as established, and there is nothing therein which is either unjust or illogical.

Of course, it has been fully recognized that there are many crimes so involving personal, malicious intent and acts ultra vires that a corporation manifestly could not commit them. (Wharton's Criminal Law [9th ed.], § 91; Morawetz on Private Corporations [2d ed.], § 732 et seq.) But a corporation, generally speaking, is liable in civil proceedings for the conduct of the agents through whom it conducts its business so long as they act within the scope of their authority, real or apparent, and it is but a step further in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf.

Only a few citations need be made of eminent authorities approving and illustrating this rule.

Mr. Bishop in his New Criminal Law, section 417, says: "But within the sphere of its corporate capacity, and to an undefined extent beyond, wherever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations. * * * Some have stumbled on the seeming impossibility of the artificial and soulless being, called a corporation, having an evil mind or criminal intent. * * * But the author explained in another work that since a corporation acts by its officers and agents, their purposes, motives and intent are just as much those of the corporation as are the things done."

In Telegram Newspaper Co. v. Commonwealth (172 Mass. 294), a corporation was held liable for a criminal contempt. In the course of the opinion it was said: "It is contended that a corporation cannot be guilty of a criminal contempt, although it may be fined for what is called a civil contempt. It is said that an intent cannot be imputed to a corporation in criminal proceedings. * * * We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil."

The most recent authority upon this subject is found in the decision of the Supreme Court of the United States in the case of New York Central & Hudson River Railroad Company v.

United States (212 U. S. 481, 492, 494). In that case the railroad company and one of its officials had been convicted of the payment of rebates to a shipper. On the argument of the appeal it was urged that inasmuch as no authority was shown by the board of directors or the stockholders for the criminal acts of the agents of the company in contracting for and giving rebates, such acts should not be lawfully charged against the corporation, or as expressed in the opinion, "that owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case." The court then said: "In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted * * * that at the time mentioned in the indictment the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried. * * * Thus the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises. It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them."

Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in death, and amongst which very probably might be included conduct in substance similar to that here charged against the respondent. But this being so, the question still confronts us whether corporations have been so made liable for the crime of manslaughter as now expressly defined in the section alone relied on by the people, and this question we think must be decisively answered in the negative.

Section 179 of the Penal Code defines homicide as "the killing of one human being by the act, procurement or omission of an-

other." We think that this final word "another" naturally and clearly means a second or additional member of the same kind of class alone referred to by the preceding words, namely, another human being, and that we should not interpret it as appellant asks us to, as meaning another "person," which might then include corporations. It seems to us that it would be a violent strain upon a criminal statute to construe this word as meaning an agency of some kind other than that already mentioned or referred to, and as bridging over a radial transition from human beings to corporations. Therefore we construe this definition of homicide as meaning the killing of one human being by another human being.

Section 180 says that "Homicide is either: 1. Murder; 2. Manslaughter," etc. Section 193 says that: "Such homicide," that is, "the killing of one human being * * * by another," is manslaughter in the second degree when committed "without a design to effect death. * * * 3. By any act, procurement or culpable negligence of any person, which * * * does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree." Thus we have the underlying and fundamental definition of homicide as the killing of one human being by another human being, and out of this basic act thus defined and according to the circumstances which accompany it are established crimes of varying degree, including that of manslaughter, for which the respondent has been indicted. In the definition of these crimes as contained in the sections under considerations (§§ 183-193), we do not discover any evidence of an intent on the part of the legislature to abandon the limitation of its enactments to human beings or to include a corporation as a criminal. Many of these sections could not by any possibility apply to a corporation, and in our opinion subdivision 3 of section 193, relating to manslaughter, manifestly does not. It is true that the term "person" used therein may at times include corporations, but that is not the case here. The surrounding and related sections are not calculated to induce the belief that it has any such meaning, and the classification as a form of homicide and the definition of homicide already quoted forbid it.

The judgment should be affirmed.

Cullen, Ch. J., Gray, Edward T. Bartlett, Werner, Willard Bartlett and Chase, JJ., concur.

Judgment affirmed.[1]

[1] See, also, New York Central &c. R. Co. v. United States, 212 U. S. 481 (rebating). A corporation has been held for the crime of manslaughter, resulting from a wanton lack of life preservers on its steamboat. United States v. Van Schaick (1905), 134 Fed. 592.—Ed.

CHAPTER IX.

EXTRA-TERRITORIAL POWERS OF CORPORATIONS—STATE CONTROL OVER FOREIGN CORPORATIONS.

MERRICK v. VAN SANTVOORD.

1866. 34 N. Y. 208.

Appeal from the affirmance, in the fifth judicial district, of a judgment rendered at the Oswego circuit against both the defendants for $6,846.56.

The action was for damages caused by the negligence of the proprietors of Steamer Cayuga in towing the boat Camden, by which the latter was sunk in the Hudson river, and the bulk of the cargo lost.

The defendant Brainard was one of the proprietors of the Cayuga, and the Steam Navigation Company was another. The latter was a Connecticut corporation, and it was held that, as the business of the corporation was wholly conducted in the State of New York, except the maintenance of its organization by annual elections in the State of Connecticut, it must be deemed to have mitigated to New York, and to have thereby forfeited its charter; and the testator, Abraham Van Santvoord, who was a member, officer and agent of the company, was personally liable for the debts and torts of the corporation.

PORTER, J.—The defendant Van Santvoord was not a party to the contract with the proprietors of the Camden, and he did not navigate the steamboat by which that vessel was towed. He neither owned nor chartered the Cayuga, nor did he take any part, as agent or otherwise, in chartering it. He was held liable on the sole ground that he was a stockholder in the Steam Navigation Company, and that Mr. Redfield, who was the secretary of that company, and who acted in its behalf, united with other parties in chartering the steamer Cayuga, for the use of the Hudson River Towing Association. To connect the defendant with the liability, the court below found it necessary to hold, in substance: 1. That there was such a corporation as the Steam Navigation Company; to the end that he might be bound, as a shareholder, by the corporate acts of its officers. 2. That there was no such corporation; to the end that he might be held responsible as a partner, for debts contracted, and for torts committed by other persons assuming to act in its name.

Mr Van Santvoord was a citizen of this State, and he became a stockholder in the company on the faith of the pledge in its

charter, from the State of Connecticut, that its members should be subject to no individual liability. The corporation has exercised its franchises for more than thirty years, and in that State the pledge has been hitherto observed. No law of New York has imposed such liability on the members of foreign corporations, as a condition to the exercise here of rights derived from other governments, and recognized by the rules of general comity. The charter of the company is not impeached for fraud in its origin. It was granted to citizens of Connecticut; the shares were made transferable; and there were no restrictions of residence, in respect either to the members of the company or the officers they might select for its management, except that they should be stockholders and citizens of the United States. That charter has neither been revoked by the authority which granted it, nor annulled by judicial decree. The company has continued its organization by annual elections in the State of Connecticut. It was under no restriction as to the place where its office should be kept, or as to the waters on which its business should be conducted. It has exercised no powers but those conferred by its charter, and it is charged with no violation of our local statutes. It is held, however, by the court below, that Mr. Van Santvoord was personally liable for the debts of the company, and for the acts of its officers; inasmuch, as it appears, in a suit in which the corporation is not a party, that only a portion of its officers reside in Connecticut; that it holds in that State none but its annual meetings for the election of directors; that the business in which it is practically engaged, is the navigation of the Hudson river, and that its principal office is in the city of New York. The judgment is, in effect, that the company migrated, and thereby forfeited its franchises; that this forfeiture could be collaterally declared, in a suit inter alios before the courts of another State; and that any shareholder can be held personally liable on all contracts made in the name of the company by its officers.

The liability of the Steam Navigation Company to the plaintiffs, in its corporate character, is a necessary result of the facts found at the Special Term; whether it was or was not guilty of the misuser of its franchises imputed to in the court below. We have had occasion to decide, in a recent and leading case, that where an Indiana and Michigan railroad company, each having authority to construct and maintain a road within the limits of its own State, united in the business of transporting passengers on a railroad in Illinois, beyond the limits authorized in the charter of either, both companies are jointly liable for an injury to an Illinois passenger, through the negligence of their common employes. (Bissell v. The Michigan Southern & Northern Indiana R. R. Companies, 22 N. Y. 258.) If the decision of the Supreme Court, in the present case, can be sustained as to the defendant Van Santvoord, it must be upon the anomalous ground that, in the absence of any contract or statute imposing personal liability, the same precise state

of facts, which will uphold a judgment against a foreign corporation, will support one against either of its shareholders.

The only contract ever made by Van Santvoord, which has any bearing on the present issue, was that which he made on becoming a party to the Connecticut charter. That certainly did not make him a partner, either of the defendant Brainard, or of Mr. Redfield, the secretary of the company. He gave no power to either to contract for him, and no consent to be responsible for their tortious acts. His contract with the State of Connecticut was for immunity from personal liability. The plaintiffs insist that the burden is upon him to show how he was ever relieved from the liability of a partner. This is a precise inversion of the rule. The onus is upon the plaintiffs to show that he ever assumed any such liability; or that he became chargeable with it in law, through his own acts or through those of the company. No statute of that State, or of this, has been violated either by him or by the corporation. The fact is found, that his contract was that of a corporator, with immunity from personal responsibility. Even if the charter had been silent, he would not have been liable for the debts of the company, either there or here, unless by force of some statute depriving him of his exemption. (Ex parte Riper, 20 Wend. 616; Seymour v. Sturgess, 26 N. Y. 134.) The boats of the company were not his boats. Its debts were not his debts. In the case of The Bank of Augusta v. Earl, the Chief Justice said: "Whenever a corporation makes a contract, it is the contract of the legal entity of the artificial being created by the charter, and not the contract of the individual members." (13 Peters, 587.) In Connecticut the defendant was clearly entitled to protection. How does it happen that on one side of the State line he owns the property, which on the other belongs to the company, or that by crossing the New York boundary he assumes all the liabilities of the corporation? It is conceded that he was not a partner when the company kept an office in Connecticut. He has done nothing since, and nothing has been done by the corporation, which changed in law their mutual relations. It has hitherto supposed that the members, even of a domestic corporation, could not be charged with personal liability without their consent, except by the law making power; but in the present case it is claimed that, upon considerations of public policy, such liability can be imposed by the courts on the members of a Connecticut corporation, against the stipulations of its charter, and without statutory authority either there or here.

No warrant for such a proposition can be found in our general statutes. We exercise the right, which exists in all sovereignties, to regulate and restrain foreign corporations in doing business here under charters from other governments. We prohibit them from the exercise of certain banking powers. (1 R. S. 712.) We require from insurance companies appropriate guaranties for the security of our own citizens. (Laws of 1851, ch. 95; Laws

of 1857, ch. 30, 548.) We require all foreign corporations doing business in this State to keep their transfer books and lists of shareholders here, subject at all reasonable times to inspection by parties in interest. (Laws of 1842, ch. 197.) We require every such corporation to facilitate proceedings against it in our own courts, by filing, in the office of the secretary of State, a written designation of some resident in each county where its business is conducted, on whom process may be served; and, in the absence of such designation, we authorize service of process on the company, by delivery to any of its resident agents. (Laws of 1855, p. 270.) We subject to attachment and sale on execution, at the instance of creditors in this State, the choses in action held by such companies against our own citizens and domestic corporations. (Laws of 1842, ch. 197.) These various regulations and restrictions imply the validity of the exercise here, of powers granted by other governments; but we have other statutes expressly recognizing the rights of foreign corporations as contracting parties and litigants, except so far as they are limited by the tenor of their own charters, or abridged by the force of our local laws. (2 R. S. 457, §§ 1, 2; Code, § 437.) These acts of the law-making power operate as a recognition, not only of the legal existence of such corporations under charters from other States, but of the rights and immunities conferred on the corporators. Except so far as these are cut down by our own legislation, they are perfect and absolute, until they are revoked or annulled in the State from which they were derived.

The considerations of State policy, which controlled the decision in the court below, seem to us less weighty than they would appear, at first view, on reading the opinions of the learned judges. We think the recognition, in our State, of the rights hitherto conceded in our courts to foreign corporations, is neither injurious to our interests, repugnant to our policy, nor opposed to the spirit of our legislation. Ours is peculiarly a commercial country. We have large inland lakes, which serve as State and national boundaries. We have continental rivers which unite the States they seem to divide; and, at their head waters, the tributaries of two oceans interlock. We have every variety of climate and production. Our agricultural and mineral resources are almost boundless. We have great facilities for internal intercourse, and favorable openings on every side in the various departments of human industry and enterprise. By common consent, all these advantages have been regarded as open to every American citizen; though many of the inland States are untouched by the great natural highway of commerce.

In no other country has so much been achieved, by the association of capital and labor, through corporate organization. It has enabled the many, whose means were limited, to contribute to the accomplishment, and participate in the benefit of great undertakings, which were beyond the compass of individual resources

and enterprise. It has taken, without let or hindrance, the direction to which it was invited by the general law of supply and demand. The same enlightened policy has prevailed in every portion of the country. All have welcomed labor from abroad, and invited the free investment of capital. Hitherto, corporate enterprise has not been trammeled by unfriendly legislation. No jealousy of competition, or rivalry of adverse interest, has been permitted to convert State lines into barriers of obstruction to the free course of general commerce. Its avenues have been open to all.

In this country our material interests are so interwoven that the union of the States is due, in its continuance, if not in its origin, as much to commercial as to political necessity. The citizens of each claim a birthright in the advantages and resources of all. They demand, from their local authorities, such facilities as the law-making power can afford, in the employment of labor and capital. They claim such corporate franchises and immunities as may enable them to compete on equal terms with the citizens of other States. For these, from the structure of our institutions, they naturally look to their own government. They acknowledge a double allegiance in their local and federal relations, which, by general consent, carries with it a correlative community of rights. They may live in an inland State, but they are none the less citizens of a maritime nation; and they may lawfully organize companies at home for traffic on ocean highways.

A corporate charter is in the nature of a commission from the State to its citizens, and their successors in interest, whether at home or abroad. Each government, in the exercise of its own discretion, determines the conditions of its grant. It is free to impose or omit territorial restrictions. It can not enlarge its own jurisdiction, but it can confer general powers, to be exercised within its bounds, or beyond them, wherever the comity of nations is respected. For the purposes of commerce, such a commission is regarded, like a government flag, as a symbol of allegiance and authority; and it is entitled to recognition abroad until it forfeits recognition at home.

Under such commissions, New York has sent forth its citizens from time to time with corporate franchises and immunities, to gather wealth from the coal mines of Pennsylvania, the silver mines of Mexico, and the gold mines of California; to establish lines of inland navigation on the Orinoco and the Amazon; to plant forest trees beyond the Mississippi; to fish in the northern and southern oceans; to found Christian missions in Asia, and to colonize freedmen on the coast of Africa. In many of these cases the franchises were, by the terms of the charter, to be exercised in foreign territory. In 1826, for instance, Churchill C. Cambreling and others were, by a law of New York, constituted a body corporatem under the title of "The United States Mexican Company," organized "for the purpose of purchasing, leasing and

working gold and silver mines in Mexico and South America." (Laws of 1826, 143.) In the act of 1827, incorporating "The New York South American Steamboat Association," it was provided that the annual elections should be held in the city of New York, but there was no requirement that any of the officers should be residents; and the company was authorized, in terms, to navigate its vessels "upon any water or waters not within the jurisdiction of New York." (Laws of 1827, 308.) The Panama Railroad Company was organized, under a charter from this State, to construct and maintain a railway "across the Isthmus of Panama, in the republic of New Grenada." The only act which the charter requires to be done in this State, is the annual election of its officers; and, on the theory maintained by the respondents, every shareholder in that company, wherever found, is individually liable for all the wrongs it commits, and all the debts it contracts. (Laws of 1849, 407.) Other illustrations of our legislative construction of the rules of national comity, will be found in the acts incorporating the "North Carolina Gold Mining Company," the "Orinoco Steam Navigation Company," the "Pacific Mail Steamship Company," the "California Inland Steam Navigation Company," the "African Civilization Society," and the "American Forest Tree Propagation and Land Company." (Laws of 1828, 211; id. 1847, 513; id. 1848, 396; id. 1850, 627; id. 1864, 758; id. 1865, 360.)

The mutable nature of the tenure, in this State, of property invested in foreign corporations, would be strikingly illustrated if the present judgment should be upheld, by the judicial experience of the Steam Navigation Company, which has hitherto been held by our courts to its just responsibilities, and protected in the exercise of its corporate rights. (Miller v. Steam Navigation Company, 6 Seld. 431; Wells v. Same, 4 id. 375; 2 Const. 204; Steam Navigation Company v. Weed, 17 Barb. 378.)

We think the policy of this State is in harmony with that of the country, and that it would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad. Our national commerce is but the aggregate of that of the States, and every needless restriction, by the operation of local laws, is unjust and calamitous to all. We suppose the rules of comity, on which we have heretofore acted, to be generally accepted and approved. We see no reason why a southern State may not grant, to a corporation of its planters, the right to erect mills for the manufacture of their cotton in New England; nor why the legislature of Massachusetts may not authorize a company of Lowell millers to raise cotton in South America, or on the Sea Islands. The State of Illinois touches neither the Atlantic nor the Pacific; but if it should organize a company of its citizens to transport produce on the ocean, with its office in the city of New York, and

its business conducted by managers, elected annually in Chicago, the rights of the corporation would be recognized wherever the obligations of national law are respected.

The rules of comity are subject to local modification by the law making power; but, until so modified, they have the controlling force of legal obligation. The franchises and immunities which they secure, it is the duty of the courts to respect, until the sovereign sees fit to deny them. The rights of a foreign suitor or defendant, so far as they are unabridged by legislation, are as imperative and absolute as those of the citizen. These rules have their place in every system of jurisprudence. As there are certain conservative powers not derived from grant, but inherent in every government because essential to its existence, so there are certain obligations, springing from the necessities of national intercourse, and recognized by all civilized communities in the law of general comity. They have been uniformly acknowledged and enforced by the courts of this State. (Bard v. Poole, 2 Kern. 495; Mutual Benefit Life Insurance Co. v. Davis, id. 569; Mumford v. American Life Insurance & Trust Co. v. Townsend, 24 Barb. 658; New York Floating Derrick Co. v. New Jersey Oil Co., 3 Duer, 648; Morris Canal and Banking Company v. Townsend, 24 Barb. 658; American Life Insurance Co. v. Townsend, 11 Paige, 635; Steam Navigation Co. v. Weed, 17 Barb. 378; New Haven Railroad Co. v. Schuyler, 17 N. Y. 592; 33 id.) Their authority is fortified by repeated adjudications in our federal tribunals. (The King of Spain v. Oliver, 1 Pet. C. C. 276; Society for Propagating the Gospel in Foreign Parts v. Town of Pawlet, 4 Pet. 480; Bank of Augusta v. Earle, 13 id. 519; Runyan v. Costar, 14 id. 122; Tombigbee Railroad Co. v. Kneeland, 4 How. 16.)

The rights of foreign corporations have been protected in the English courts on the same general principle of public law. (The Nabob of Carnatic v. The East India Co., 1 Vesey, 371; The Dutch West India Co. v. Henriquez, 1 Strange, 612; The King of Spain v. Mullett, 2 Bligh's N. S. 3.) We had the benefit of the rule in the suit instituted in Great Britain, in the case of the United States against Smithson's Executors. Indeed, the law of international comity in the interest of commerce, which has so long prevailed in that country, is recognized in a provision of Magna Charta; which elicited from Montesquieu the encomium, that the English have made the protection of foreign merchants one of the articles of their own liberty.

The theory on which the Supreme Court held the defendant Van Santvoord liable was, that he was a member of an absconding corporation; that it had migrated from Connecticut to New York; and that, by such migration, it had lost its corporate character, except for the single purpose of charging its shareholders with personal liability, on the contracts made here by its officers. In these views we cannot concur.

A corporation is an artificial being, and has no dwelling either

in its office, its warehouses, its depots or its ships. Its domicile is the legal jurisdiction of its origin, irrespective of the residence of its officers or the place where its business is transacted. It retains that domicile until it ceases to exist; and its existence continues, within the limits assigned for its duration, so long as it complies with the requirements of its charter, and with the conditions imposed by State laws, maintains its corporate succession by elections in the proper jurisdiction, and continues to exercise its franchises under a grant which has neither been impeached nor revoked.

To support the theory of migration and forfeiture, the respondents rely mainly upon a passing dictum of Chief Justice Taney, in the case of the Bank of Augusta v. Earle, transcribed by Judge Thompson in haec verba, in the subsequent case of Runyan v. Foster (13 Pet. 588; 14 id. 129). We think the effect of this dictum has been misapprehended, and that the true import of the observation of the Chief Justice is, not that a corporation is capable of migration, and of thereby forfeiting its rights, but that in its nature, as an artificial creation of law, it is utterly incapable of migration, and must be deemed to retain its domicile in the jurisdiction from which its being is derived. "It is very true," he said, "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created. It exists only in contemplation of law, and by force of law, and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence; it must dwell in the place of its creation, and cannot emigrate to another sovereignty."

It was a suggestion in answer to the argument that, inasmuch as the corporation could not migrate, it could neither contract nor sue, except in the State of its domicile. He admitted its incapacity to migrate, but held that it did not follow that its existence there would not be recognized elsewhere. It was accordingly adjudged, in that case, that contracts made in the city of Mobile, between citizens of Alabama and a Georgia bank, a Pennsylvania bank and a Louisiana railroad company, respectively, could be enforced under the general law of comity as contracts within the scope of their respective charters, though unauthorized by the State of Alabama. The Chief Justice expressed the opinion that no valid reason can be assigned for refusing to give effect to the contracts of foreign corporations, "when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person, created by the laws of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State." (13 Pet. 519, 598-590.) The concession referred to was reiterated in the same sense by Judge Thompson, and in answer to a similar argument in the case of Runyan v. Costar, in which it was adjudged that a coal company organized in New York, for the purpose of mining coal in

Pennsylvania, could exercise its franchise by purchasing and holding lands in the latter State; and though, by a statute of Pennsylvania, lands so acquired were subject to forfeiture, the title of the company was good so long as the forfeiture was not enforced by the State. (14 Pet. 122, 129.)

The plaintiffs also rely on an incidental observation of Judge Denio, in the case of Bard v. Poole, "that it would be a violation of our sovereignty for a foreign corporation to remove from the country or State where it was created to locate wholly in this State." (2 Kern. 507.) The language was perhaps less guarded and precise than that of Chief Justice Taney, as it was a mere passing disclaimer in stating the general grounds of the judgment; but it doubtless had reference to the incapacity of a mere creature of local law to migrate to another jurisdiction, and, by its own mere act, to acquire there the rights of a domestic corporation. But the dictum of the learned judge, if accepted in a broader sense, would have no application to the present case; where the corporation, from year to year, continued the succession of those charged with its management, by elections held in Connecticut, this being the only particular in which it was required, even by implication from the terms of the charter, to exercise any of its franchises within the limits of that State.

It is true, as the chancellor of New Jersey held, in the case of Hill v. Beach, that when parties in one State engage in a joint enterprise and adopt a partnership name, they can not evade personal liability by incorporating themselves in a similar name, under the general statute of another State; but the ground of the decision was, not that the corporation migrated to New Jersey, but that it never existed in New York, where its inception was utterly void, as a flagrant fraud upon the law.

In this case we think the Supreme Court erred in assuming, that the exercise by the corporation in another State, through officers and agents residing there, of the powers with which it was endowed at home, was an act of corporate migration, even if it was capable of such migration. "It is true," as the court said in the case of Wright v. Bundy, "that corporations cannot migrate from one sovereignty into another, so as to become legal local existences within the latter sovereignty; but it is also true that the migration of the directors of a corporation from one sovereignty into another, does not terminate the existence of such corporation within the sovereignty which created it." (11 Ind. 404.) Its domicile was not controlled by the place where its office was kept, where its books and papers were deposited, or where its business was done. Its powers had no territorial limitation; and it fully complied with the local requirements in its charter, which were limited to its original organization, and the annual election of its managers. The grant of franchises without restriction is equivalent to a specific authority, to exercise them wherever the company might find it convenient or profitable, whether within or

without the limits of the State of Connecticut. (Bank of Augusta v. Earle, 13 Pet. 588; per Taney, Ch. J.)

The decisions of the other States, the course of New York legislation, and the general usages of the country, are all opposed to the theory on which this case was decided. From the centralizing tendencies of commerce, the transferable character of corporate stock, and the necessities of domestic and foreign intercourse, the principal offices of many of our most important corporations in the inland States are kept in our seaboard city. It would be equally disastrous to the citizens of our own and of other States, if judicial innovations were permitted in applying the rules of general comity. Kindred questions have arisen in New England, and there, as here, the decisions of the courts have been uniform. The fact that the books and records of a Florida corporation were kept in the State of Massachusetts, and that its president and other officers resided there, was held not to divest it of its character as a foreign corporation, nor to deprive its trustees of immunity from prosecution for its debts. (Danforth v. Penny and Trustees, 3 Metc. 564.) In a subsequent case, a Rhode Island company, having purchased lands in Massachusetts, by authority of the legislature, claimed to be, in respect to such property, a domestic corporation, and entitled to the benefit of the provisions regulating the taxation of those institutions; but the claim was not sustained. The court held that its character must be determined by the source of its corporate authority. Chief Justice Shaw said: "Its existence, its franchises, powers, capacities, duties and liabilities, are created, fixed, limited and qualified, both in action and time, by the law of the State granting the charter." (13 Gray, 489.)

It is equally clear that a corporate franchise granted by one State, cannot be revoked or annulled by the courts of another, and especially in a proceeding in which the corporation is not a party. In the case of the Silver Lake Bank v. North, it was held, by Chancellor Kent, that the courts of this State would not determine, in a collateral way, a question of misuser by a foreign corporation; and that it was for the State of Pennsylvania, which granted the plaintiff's charter, to revoke or annul it in case of forfeiture. (4 Johns. Ch. 373.) So, in the present case, until the State of Connecticut recalls its grant to the Steam Navigation Company, or until the corporation is dissolved by judicial decree, its continuing organization is presumptive evidence of continuing authority. (Barclay v. Tallman, 4 Edwards, 123; Farmers' Bank of Delaware v. Beaston, 7 Gill. & Johns. 422; Murray v. Vanderbilt, 37 Barb. 147; Bissell v. Michigan Southern & Northern Indiana Railroad Company, 22 N. Y. 268.)

We have examined the questions raised by the appeal, which affect the defendant Brainard, and think the judgment as to him should stand, for the reasons assigned in the court below.

The judgment should, therefore, be affirmed with costs, as to

the defendant Brainard, and as to the defendant Van Santvoord, it should be reversed and a new trial ordered, with costs to abide the event.[1]

PAUL v. STATE OF VIRGINIA.

1868. 8 Wallace (U. S.), 168, 19 L. ed. 357.

Error to the Supreme Court of Appeals of the State of Virginia. The case was thus:

An act of the legislature of Virginia, passed on the 3d of February, 1866, provided that no insurance company, not incorporated under the laws of the State, should carry on its business within the State without previously obtaining a license for that purpose; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed. The bonds to be deposited were to consist of six per cent. bonds of the State, or bonds of individuals, residents of the State, executed for money lent or debts contracted after the passage of the act, bearing not less than six per cent. per annum interest.

A subsequent act passed during the same month declared that no person should, "without a license authorized by law, act as agent for any foreign insurance company," under a penalty of not less than $50 nor exceeding $500 for each offence; and that every person offering to issue, or making any contract or policy of insurance for any company created or incorporated elsewhere than in the State, should be regarded as an agent of a foreign insurance company.

In May, 1866, Samuel Paul, a resident of the State of Virginia, was appointed the agent of several insurance companies, incorporated in the State of New York, to carry on the general business of insurance against fire; and in pursuance of the law of Virginia, he filed with the auditor of public accounts of the State his authority from the companies to act as their agent. He then applied to the proper officer of the district for a license to act as such agent within the State, offering at the time to comply with all the requirements of the statute respecting foreign insurance companies, including a tender of the license tax, excepting the provisions requiring a deposit of bonds with the treasurer of the State, and the production to the officer of the treasurer's receipt. With these provisions neither he nor the companies represented by him complied, and on that ground alone the license was refused. Notwithstanding this refusal he undertook to act in the

[1] See, also, Demarest v. Flack (1891), 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854.—Ed.

State as agent for the New York companies without any license, and offered to issue policies of insurance in their behalf, and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted, and convicted in the Circuit Court of the city of Petersburg, and was sentenced to pay a fine of fifty dollars. On error to the Supreme Court of Appeals of the State, this judgment was affirmed, and the case was brought to this court under the 25th section of the Judiciary Act, the ground of the writ of error being that the judgment below was against a right set up under that clause of the Constitution of the United States,[1] which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" and that clause[2] giving to Congress power "to regulate commerce with foreign nations, and among the several States."

The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the States of the Union other than Virginia. And the business of insurance was then, and still is, a lawful business in Virginia, and might then, and still may, be carried on by all resident citizens of the State, and by insurance companies incorporated by the State, without a deposit of bonds, or a deposit of any kind with any officer of the commonwealth.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court, as follows:

On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States," the same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to

[1] Art. IV, § 2.
[2] Art. I, § 8.

this extent will treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. In the early cases when this question of the right of corporations to litigate in the courts of the United States was considered, it was held that the right depended upon the citizenship of the members of the corporation, and its proper averment in the pleadings. Thus, in the case of The Hope Insurance Company v. Boardman,[3] where the company was described in the declaration as "a company legally incorporated by the legislature of the State of Rhode Island and Providence Plantations, and established at Providence," the judgment was reversed because there was no averment that the members of the corporation were citizens of Rhode Island, the court holding that an aggregate corporation as such was not a citizen within the meaning of the Constitution.

In later cases this ruling was modified, and it was held that the members of a corporation would be presumed to be citizens of the State in which the corporation was created, and where alone it had any legal existence, without any special averment of the place of creation and business of the corporation being sufficient; and that such presumption could not be controverted for the purpose of defeating the jurisdiction of the court.[4]

But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. In Bank of Augusta v. Earle,[5] the question arose whether a bank, incorporated by the laws of Georgia, with a power, among other things, to purchase bills of exchange, could lawfully exercise that power in the State of Alabama; and it was contended, as in the case at bar, that a corporation, composed of citizens of other States, was entitled to the benefit of that provision, and that the court should look beyond the act of incorporation and see who were its members, for the purpose of affording them its protection, if found to be citizens of other States, reference being made to an early decision upon the right of corporations to litigate in the Federal courts in support of the position. But the court, after expressing approval of the decision referred to,[6] observed that the decision was confined in express terms to a question of jurisdiction; that the principle had never been carried further, and that it had never been supposed to extend to contracts made by a corporation, especially in another sovereignty from that of its

[3] 5 Cranch 57.

[4] Louisville Railroad Co. v. Letson, 2 Howard 497; Marshall v. Baltimore & Ohio Railroad Co., 16 id. 314; Covington Drawbridge Co. v. Shephard, 20 id. 233; and Ohio and Mississippi Railroad Co. v. Wheeler, 1 Black. 297.

[5] 13 Peters 536.

[6] Bank of the United States v. Deveaux, 5 Cranch 61.

creation; that if the principle were held to embrace contracts, and the members of a corporation were to be regarded as individuals carrying on business in the corporate name, and therefore entitled to the privileges of citizens, they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner; that the result would be to make the corporation a mere partnership in business with the individual liability of each stockholder for all the debts of the corporation; that the clause of the Constitution could never have intended to give citizens of each State the privileges of citizens of the several States, and at the same time to exempt them from the liabilities attendant upon the exercise of such privileges in those States, that this would be to give the citizens of other States higher and greater privileges than are enjoyed by citizens of the State itself, and would deprive each State of all control over the extent of corporate franchises proper to be granted therein. "It is impossible," continued the court, "upon any sound principle, to give a construction to the article in question. Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State."

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insured to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.[7]

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own

[7] Lemmon v. The People, 20 N. Y. 607.

States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank of Augusta v. Earle, "It must dwell in the place of its creation, and can not migrate to another sovereignty." The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were

even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.

"It is impossible," to repeat the language of this court in Bank of Augusta v. Earle, "upon any sound principle, to give such a construction to the article in question"—a construction which would lead to results like these.

We proceed to the sound objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities

to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

In Nathan v. Louisiana,[8] this court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on." And the opinion shows that, although instruments of commerce, they are the subjects of State regulation, and, inferentially, that they may be subjects of direct State taxation.

"In determining," said the court, "on the nature and effect of a contract, we look to the lex loci where it was made, or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the States have adopted the law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different States. These laws, in various forms and in numerous cases, have been sanctioned by this court." And again: "For the purposes of revenue the Federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the Federal government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal government; and domestic bills or promissory notes are as necessary to the commerce of a State as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress, be a tax on the commerce of a State."

If foreign bills of exchange may thus be the subject of State regulation, much more so may contracts of insurance against loss by fire.

[8] 8 Howard 73.

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be affirmed.[9]

BARROW STEAMSHIP CO. v. KANE.

1897. 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. 526.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

This action was brought in the Circuit Court of the United States for the Southern District of New York against the Barrow Steamship Company, by a passenger on one of its steamships on a voyage from Londonderry, in Ireland, to the city of New York, for an assault upon him by its agents in the port of Londonderry. The certificate of the Circuit Court of Appeals shows that the plaintiff is a citizen and resident of the State of New Jersey; that the defendant is a corporation, organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and a common carrier running a line of steamships from ports in that kingdom to the port of New York, and does business in the State of New York, through a mercantile firm, its regularly appointed agents, and upon whom the summons in this action was served.

It was contended, in behalf of the steamship company, that, being a foreign corporation, no suit could be maintained against it in personam in this country without its consent, express or implied; that by doing business in the State of New York it consented to be sued only as authorized by the statutes of the State; that the jurisdiction of the courts of the United States held within the State depended on the authority given by those statutes; that the statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a non-resident, and for a cause not arising within the State; and therefore that the Circuit Court acquired no jurisdiction of this action brought against a British corporation by a citizen and resident of New Jersey.

The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them.

By the Constitution of the United States, the judicial power, so far as depending upon citizenship of parties, was declared to extend to controversies "between citizens" of a State and foreign "citizens or subjects." And Congress, by the Judiciary Act of 1789, in defining the original jurisdiction of the Circuit Courts of

[9] And see, Stooper v. California, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. 207.—Ed.

the United States, described each party to such a controversy, either as "a citizen" of a State, or as "an alien." Act of September 24, 1789, c. 20, § 11; 1 Stat. 78; Rev. Stat. § 629. Yet the words "citizens" and "aliens," in these provisions of the Constitution and of the Judiciary Act, have always been held by this court to include corporations.

The jurisdiction of the Circuit Court over suits between a citizen of one State and a corporation of another State was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the State by which the corporation had been created; but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated. Bank of United States v. Deveaux, 5 Cranch, 61, 87, 88; Hope Ins. Co. v. Boardman, 5 Cranch, 57; Commercial Bank v. Slocomb, 14 Pet. 60.

But the earlier cases were afterwards overruled; and it has become the settled law of this court that, for the purposes of suing and being sued in the court of the United States, a corporation created by and doing business in a State is, although an artificial person, to be considered as a citizen of the State, as much as a natural person; and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation. Louisville &c. Railroad v. Letson, 2 How. 497, 558; Marshall v. Baltimore & Ohio Railroad, 16 How. 314, 329; Muller v. Dows, 94 U. S. 444; Steamship Co. v. Tugman, 106 U. S. 118; St. Louis & San Francisco Railway v. James, 161 U. S. 545, 555-559.

In Bank of Augusta v. Earle, 13 Pet. 519, decided before the case of United States v. Deveaux, above cited, had been overruled, and while that case was still recognized as authority for the principle that in a question of jurisdiction the court might look to the character of the persons composing a corporation, Chief Justice Taney, in delivering judgment, said that the principle had "never been supposed to extend to contracts made by a corporation, especially in another sovereignty;" but that "whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members." 13 Pet. 586, 587.

In Bank of Augusta v. Earle, it was adjudged that a corporation created by one State, and acting within the scope of its charter, might do business and make contracts in another State when permitted to do so by the laws thereof, and might sue upon such contracts in the courts of that State. As was said in the opinion: "It is sufficient that its existence as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that there it is permitted by the laws of that place to exercise there the powers with which it is endowed." 13 Pet. 589. And it was declared

to be well settled that by the law of comity among nations, prevailing among the several States of the Union, "a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts," except as to contracts repugnant to its own policy. 13 Pet. 592.

The manifest injustice which would ensue, if a foreign corporation, permitted by a State to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens, of the laws of the State, has induced many States to provide by statute that a foreign corporation making contracts within the State shall appoint an agent residing therein, upon whom process may be served in actions upon such contracts. This court has often held that wherever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the State, or, when consistent with the acts of Congress, in the courts of the United States held within the State; but it has never held the existence of such a statute to be essential to the jurisdiction of the Circuit Courts of the United States. Lafayette Ins. Co. v. French, 18 How. 404; Ex parte Schollenberger, 96 U. S. 369; New England Ins. Co. v. Woodworth, 111 U. S. 138, 146; Shaw v. Quincy Mining Co., 145 U. S. 444, 452.

In Lafayette Ins. Co. v. French, the court said: "We limit our decision to the case of a corporation acting in a State foreign to its creation, under a law of that State which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents." But it was cautiously added: "The case of natural persons, or of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion." 18 How. 408, 409.

The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.

Accordingly, in Railroad Co. v. Harris, 12 Wall. 65, the Baltimore & Ohio Railroad Company, a corporation chartered by the State of Maryland, and authorized by the statutes of the State of Virginia to extend its railroad into that State, and also by the act of Congress of March 2, 1831, c. 85, 4 Stat. 476, to extend, construct and use a lateral branch of its railroad into and within the District of Columbia, and to exercise the same powers, rights and privileges, and be subject to the same restrictions in regard thereto, as provided in its charter, was held, by reason of the act of Congress, and of service upon its president in the District of Columbia, to be liable to an action in the District by a passenger for an injury happening in the State of Virginia; although the railroad company was a corporation of the State of Maryland

only, and neither the act of Congress authorizing it to construct and use a branch railroad in the District of Columbia, nor any other act of Congress, had made any provision for bringing suits against foreign corporations, the action having been brought before the passage of the act of February 22, 1867, c. 64, § 11; 14 Stat. 404; Rev. Stat. D. C. § 790. Mr. Justice Swayne, in delivering judgment, said: "If the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results. But turning our attention from this view of the subject, and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit brought, in all respects as if it had been an independent corporation of the same locality." 12 Wall. 83, 84.

In that case, it is to be observed, the cause of action arose, neither in the State of Maryland, where the defendant was incorporated, nor in the District of Columbia, where the action was brought, but in the State of Virginia. The decision, in principle and in effect, recognizes that a corporation of one State, lawfully doing business in another State, and summoned in an action in the latter State by service upon its principal officer therein, is subject to the jurisdiction of the court in which the action is brought.

In England, the right of a foreign corporation doing business in England to sue in the English courts was long ago recognized; and its liability to be subjected to suit in those courts, by service made upon one of its principal officers residing and representing it within the realm, has been fully established by recent decisions. Newby v. Von Oppen, L. R. 7 Q. B. 293; Haggin v. Comptoir d'Escompte de Paris, 23 Q. B. D. 519.

In the courts of several States of the Union, the like view has prevailed. Libbey v. Hidgdon, 9 N. H. 394; March v. Eastern Railroad Co., 40 N. H. 548, 579; Day v. Essex County Bank, 13 Vermont, 97; Moulin v. Trenton Ins. Co., 1 Dutcher (25 N. J. Law), 57; Bushel v. Commonwealth Ins. Co., 15 S. & R. 173; North Missouri Railroad v. Akers, 4 Kansas, 453, 469; Council Bluffs Co. v. Omaha Co., 49 Nebraska, 537. The courts of New York and Massachusetts, indeed, have declined to take jurisdiction of suits against foreign corporations, except so far as it has been expressly conferred by statutes of the State. McQueen v. Middletown Manuf. Co., 16 Johns. 5; Robinson v. Oceanic Steam Navigation Co., 112 N. Y. 315; Desper v. Continental Water

Meter Co., 137 Mass. 252. But the jurisdiction of the Circuit Courts of the United States is not created by, and does not depend upon, the statutes of the several States.

In the Circuit Courts of the United States, there have been conflicting opinions, but the most satisfactory ones are those of Judge Drummond and Judge Lowell in favor of the liability of foreign corporations to be sued. Wilson Packing Co. v. Hunter, 8 Bissell, 429; Hayden v. Androscoggin Mills, 1 Fed. Rep. 93.

In Lafayette Ins. Co. v. French, above cited, this court, speaking by Mr. Justice Curtis, after saying that a corporation created by one State could transact business in another State, only with the consent, express or implied, of the latter State, and that this consent might think fit to impose, defined the limits of its power in this respect by adding, "and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." 18 How. 407.

The object of the provisions of the Constitution and statutes of the United States, in conferring upon the Circuit Courts of the United States jurisdiction of controversies between citizens of different States, or between citizens of one of the States and aliens, was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides.

The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a State. Hyde v. Stone, 20 How. 170, 175; Smyth v. Ames, 169 U. S. 466, 516. It has therefore been decided that a statute, which requires all actions against a county to be brought in the county court, does not prevent the Circuit Court of the United States from taking jurisdiction of such an action; Chief Justice Chase saying that "no statute limitation of suability can defeat a jurisdiction given by the Constitution." Cowles v. Mercer County, 7 Wall. 118, 122; Lincoln County v. Luning, 133 U. S. 529; Chicot County v. Sherwood, 148 U. S. 529. So statutes requiring foreign corporations, as a condition of being permitted to do business within the State, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the State, have been adjudged to be unconstitutional and void. Home Ins. Co. v. Morse, 20 Wall. 445; Barron v. Burnside, 121 U. S. 186; Southern Pacific Co. v. Denton, 146 U. S. 202.

On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one State, brought in a court of the United States held within another State, in which the corporation neither does business, nor has authorized any person to represent it, service upon one of its officers or employes found within the State will

not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes of the judicial decisions of the State. St. Clair v. Cox, 106 U. S. 350; Fitzgerald Co. v. Fitzgerald, 137 U. S. 98, 106; Goldey v. Morning News, 156 U. S. 518. See also Mexican Central Railway v. Pinkney, 149 U. S. 194.

By the existing act of Congress defining the general jurisdiction of the Circuit Courts of the United States, those courts "shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars," "in which there shall be a controversy between citizens of different States," "or a controversy between citizens of a State and foreign States, citizens or subjects;" and, as has been adjudged by this court, the subsequent provisions of the act, as to the district in which suits must be brought, have no application to a suit against an alien or a foreign corporation; but such a person or corporation may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant. Act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, § 1; 24 Stat. 552; 25 Stat. 434; Shaw v. Quincy Mining Co., 145 U. S. 444, 453; In re Hohorst, 150 U. S. 653; Galveston &c. Railway v. Gonzales, 151 U. S. 496, 503; In re Keasbey & Mattison Co., 160 U. S. 221, 229, 230.

The present action was brought by a citizen and resident of the State of New Jersey, in a circuit court of the United States held within the State of New York, against a foreign corporation doing business in the latter State. It was for a personal tort committed abroad, such as would have been actionable if committed in the State of New York, or elsewhere in this country, and an action for which might be maintained in any Circuit Court of the United States which acquired jurisdiction of the defendant. Railroad Co. v. Harris, above cited; Dennick v. Railroad Co., 103 U. S. 11; Huntington v. Attrill, 146 U. S. 657, 670, 675; Stewart v. Baltimore & Ohio Railroad, 168 U. S. 445. The summons was duly served upon the regularly appointed agents of the corporation in New York. In re Hohorst, above cited. The action was within the general jurisdiction conferred by Congress upon the Circuit Courts of the United States. The fact that the legislature of the State of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other States can not deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States. The necessary conclusion is that the Circuit Court had jurisdiction to try the action and to render judgment therein against the defendant, and that the question certified must be answered in the affirmative.[1]

[1] And see the following cases: Goldey v. Morning News (1894), 156

PENN COLLIERIES CO. v. McKEEVER.

1906. 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127.

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 30, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury.

The plaintiff, a foreign corporation organized under the laws of West Virginia, sued for the price of a cargo of coal, which it had sold and delivered to the defendant, in the city of New York. The defense to the suit was that, as the plaintiff was doing business in this state, without having procured from the secretary of state the certificate required by section 15 of the General Corporation Law, it could not maintain any action upon its contracts. The evidence showed that the coal had been sold by an agent of the company in the city of New York, where he had an office and which he made his headquarters, as the company's sales agent for the middle New England district and New Jersey; an agency which included that city within its territory. The cargo of coal sold to the defendant appears to have been the only sale of coal ever made by the plaintiff within this state. The coal was mined in Pennsylvania; it was, originally, sold in New Jersey; it had been rejected by the purchaser in New York and, while there and in the canal boat, had been resold, through a broker, to the defendant. Usually, orders for coal were forwarded to the Pennsylvania office and were filled from there, directly. No books of account, nor bank account, were kept in the city of New York and no coal, or other goods, of the company, were kept in this state; the office there being, solely, for the agent's convenience.

Upon the evidence, the trial judge made these findings of fact, a jury having been waived, that the plaintiff had not procured the statutory certificate; the sale and delivery to the defendant; his promise to pay therefor and his refusal to make payment, and that the plaintiff was not doing business in the state within the meaning of the statute. The judgment recovered by the plaintiff has been affirmed by the Appellate Division, in the first department, by a divided court. The defendant further appeals to this court and insists that the plaintiff was doing business within this state, under the facts disclosed by the evidence, within the purview of the provisions of the General Corporation Law.

U. S. 518, 39 L. ed. 517, 15 Sup. Ct. 559 (service on foreign corporation); Blake v. McClung (1898), 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. 165; Herndon-Carter Co. v. Norris & Co. (1909), 224 U. S. 496. In the last cited decision, Justice Day said (p. 499): "It has frequently been held in this court that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the state of the court's jurisdiction, and service must there be made upon some duly authorized officer or agent."—Ed.

GRAY, J.—I think that the determination below was correct. Section 15 of the General Corporation Law prescribes that, "No foreign stock corporation, other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business," etc. Further, it provides that "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate."

I am, clearly, of the opinion that the statutory provisions were not intended for any such case as this. I think that they should be construed, both upon the fair import of their language, as well as upon a just consideration of the public policy and of the state interests to be promoted, as, simply, preventing foreign corporations from entering the state by agencies and there engaging in the general prosecution of their ordinary business, without first complying with certain requirements of a reasonable nature and evidencing their compliance by obtaining a certificate to the effect.

The policy of our state, as manifested in its laws, is not to impose any unconscionable restrictions upon the transactions of foreign corporations here. Their right to transact business here has always been conceded. Indeed, the effect of the legislation of recent years has been to remove all barriers in their way and to enable them to come here freely; provided they subjected themselves to our laws and exercised no powers not conferred by their charters. That is to say, a foreign corporation may enter our boundaries as freely as may natural persons and it may transact any lawful business here; provided that it takes those preliminary steps prescribed by our statutes, which evidence its corporate nature and purposes and which secure to the state government an effective supervision and control of the business to be carried on. The statute of 1892, only, declared the policy of this state that a foreign stock corporation should not carry on any business therein, which a domestic corporation, of similar nature, could not lawfully conduct. It was intended to place them upon a similar footing. (See Lancaster v. Amsterdam Impr. Co., 140 N. Y. 576; Neuchatel Asphalte Co. v. Mayor, etc., of N. Y., 155 ib. 373.) The rule was early declared that, unless interdicted by the state, a foreign corporation could perform within its boundaries single corporate acts, or conduct its corporate business, when not prohibited by our laws, or when not violative of public policy (Bard v. Poole, 12 N. Y. 495; Hollis v. Drew Theological Seminary, 95 ib. 166), and the enactment of the present General Corporation Law was intended to regulate its existence here, if proposing to conduct a business, by the imposition of reasonable conditions.

But no such narrow policy was intended to be declared by the statute as the prohibition of all corporate transactions by foreign corporations, irrespective of their nature, or of the condition under which they occurred; nor does the language indicate it. To bring into operation the statutory provision, the facts should show more than a solitary, if not accidental, transaction as was the one before us. They should establish that the corporation was conducting a continuous business. To be "doing business in this State" implies corporate continuity of conduct in that respect; such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business. In short, it should appear, as it was intimated in the opinion in People ex rel. Armstrong Cork Co. v. Barker (157 N. Y. 165), that the corporation and its officers intended "to establish a continuous business in the city of New York and not one of a temporary character." In this case there was no circumstance to evidence, in any degree, anything of the kind. In a very recent case it appeared that a foreign corporation, having a manufacturing plant without the state, maintained a salesroom in the city of New York, to which some of its manufactures were consigned for distribution elsewhere, upon sales made at the home office, or for sales in that city, and it was sought to assess it, upon capital employed here, for a business franchise tax. It did not appear that anything was done here by the corporation, beyond the mere maintenance of an office for such a purpose, and the determination turned upon whether the two essential conditions concurred, of "doing business in this State" and of some portion of its capital being employed here. We affirmed a determination made below that the corporation was not assessable and, necessarily, that determination rested upon the insufficiency of the facts to establish that it was "doing business" here. (People ex rel. A. J. Tower Co. v. Wells, 182 N. Y. 553, affg. 98 App. Div. 82.)

I advise the affirmance of the judgment, with costs.

Cullen, Ch. J., Bartlett, Haight, Werner, JJ. (and Vann, J., in result), concur; O'Brien, J., absent.

Judgment affirmed.[1]

[1] In Gaul v. Kiel & Arthe Co. (1910), 199 N. Y. 472, 92 N. E. 1069, the court said, at p. 478:

"It is also contended by the defendant that as it is a foreign corporation and it does not appear affirmatively by the record that it had obtained a license to do business in this state pursuant to section 15 of the General Corporation Law, the contract should be held to be illegal and unenforcible. It is enough to say in answer to this proposition that the statute in question was not enacted for the benefit of foreign corporations. If the defendant has not obtained a license pursuant to such statute it can not now take advantage of its failure to obey such statute to defeat an action brought against it in this state."

See also, Mahar v. Harrington Park Villa Sites (1912), 204 N. Y. 231, 97 N. E. 587, holding that section 15, above referred to, imposes

only on the foreign corporation, which has not complied with its provisions, the penalty of being unable to maintain any action upon a contract made by it, not upon the other party to the contract.

As to construction of section 15 in the Federal courts, see David Lupton's Sons v. Automobile Club of America (1911), 225 U. S. 489, 32 Sup. Ct. 711.

As to what is "doing business" within a state, see International Text-Book Co. v. Pigg (1909), 217 U. S. 91, 30 Sup. Ct. 481.

See also, Warren v. First Nat. Bank (1893), 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746, especially pages 25-27; Alleghany Co. v. Allen (1903), 69 N. J. L. 270, 55 Atl. 724.—Ed.

CHAPTER X.

CAPITAL STOCK: HEREIN ALSO OF THE RIGHTS OF CREDITORS.

BURRALL v. BUSHWICK R. CO.

1878. 75 N. Y. 211.

Nature of Capital Stock.

Appeal from judgment of the General Term of the City Court of Brooklyn, in favor of defendant, entered upon an order reversing an order of Special Term which overruled a demurrer to the complaint, and sustaining such demurrer and directing judgment dismissing the complaint.

The complaint in this action after setting forth the incorporation of defendant, alleged as follows:

"Third. That said defendant by its authorized officers, did on the 28th day of March, 1868, at the city of Brooklyn, duly issue a paper, of which the following is a copy:

"BUSHWICK RAILROAD COMPANY,

"Thompkins Avenue Branch.

"Brooklyn, March 25, 1868.

"This certifies that Charles Foster is entitled to ten (10) shares of the capital stock of the Bushwick Railroad Company, upon surrender of this certificate at the company's office.

"$1,000. F. W. KALBFLEISH,

"President."

"Fourth. That said paper was duly delivered to the said Charles Foster, at or about the date thereof, by the said defendant, and that the same came into the possession of this plaintiff by purchase for value, and that this plaintiff is not the lawful owner and holder of the same.

"Fifth. That this plaintiff, by his duly authorized agent, did, before the commencement of this action, present said certificate at the office of said defendant, in accordance with the terms and requirements thereof, and did demand the issue and delivery to said plaintiff of the stock therein named from said defendant.

"Sixth. That said defendant refused to comply with the terms of said certificate, and refused to issue and deliver the stock without giving any reason therefor."

The judgment demanded was:

"1st. That the defendant be required and adjudged to issue and deliver said stock to this plaintiff in accordance with said certificate and the promise therein contained, and pay to the plaintiff

the interest upon the value of the same, to wit, interest on $1,000 from March 28, 1868.

"2d. In case of a failure on the part of said company so to do, that the plaintiff have judgment against said company for the said sum of $1,000, with interest as aforesaid.

"3d. That this plaintiff have such other and further relief as to the court may seem just, with costs."

Defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

FOLGER, J.—This is an action, in which a judgment is asked against a business corporation, that it issue and deliver ten shares of its capital stock to the plaintiff, in accordance with a certificate set forth in the complaint; and pay to him the interest on the value of the same, to wit: $1,000, from March 28, 1868. It is further asked, that if the corporation fail so to do, the plaintiff may have judgment against it, for $1,000, with interest from the date above named. There is also the prayer for alternative relief.

The defendant has demurred to the complaint, and assigns as cause of demurrer, that it does not state facts sufficient to constitute a cause of action.

It is plain that there is no act averred, on which a cause of action arises, for the payment of interest on the sum of $1,000 from 28th March, 1868; or on any sum, for any length of time. No averment is found, in the allegations of the complaint, that the shares of stock are of any value. True, in the prayer for judgment, it is said, "upon the value of the same, to wit, interest on the sum of $1,000;" but that is not an averment of value. True also, in the copy of the certificate of stock, set forth in the complaint, there are the character and figures "$1,000;" but they do not make an averment of value; nor is there any averment that there was a duty or obligation on the part of the defendant to pay interest; nor is any fact averred, from which such duty or obligation can appear, or be inferred. Nor is there any allegation which will sustain an action to recover $1,000 and interest thereon, in case the defendant fails to issue and deliver the stock; for, as has been said, there is no allegation that the stock was at any time of any value. The complaint and its averments are reduced then to a cause of action to compel the issuing and delivery of shares of stock. If there be a strict interpretation put upon the phrases in the complaint, viz., "shares of capital stock," "stock therein named," "the stock," "said stock;" there is no allegation in the complaint sufficient to sustain an action to compel the issue and delivery of those shares. The phraseology of the complaint has been used in this particular, with an inexact notion of what is the capital stock of a business corporation, and what are the shares of that stock; though it would seem to be a matter that at this day should be well understood. A corporation cannot issue and deliver a share of its capital stock. By the joint action of

the corporation and the subscriber for its stock, he may become the owner of a given number of shares thereof, but not in such sense as that he may take away those shares out of the common corporate fund. The capital stock is that money or property which is put into a single corporate fund by those who, by subscription therefor, become members of the corporate body. That fund becomes the property of the aggregate body only. A share of the capital stock is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation; and ultimately on the dissolution of it, or so much of the fund thus created, as remains unimpaired, and is not liable for debts of the corporation. Such a right may be created as above stated. But such a right, that is, such a share, cannot be issued and delivered by a corporation, continuing in legal existence, and carrying on the business for which it was formed. A demand that it deliver a share of the corporate fund, is to ask of it something which it has not the power to do, and which it will not be compelled to do, by judgment; that is to say, upon the state of facts set up in this complaint. It cannot take from the capital stock, the corporate fund, a part or parts thereof equal in number to the shares or rights therein, claimed by the plaintiff, and hand those parts to him; nor can it, on the facts shown by the complaint, now create the right which those shares represent. Those shares are intangible, and rest in abstract legal contemplation. It has been said that they are not a species of property that can be transferred by delivery, and that the assent of the owner to part with it must be expressed in writing. (Davis v. Bk. of England, 2 Bing. 393; Dunn v. Com. Bank of Buffalo, 11 Barb. 580.) It is not needful that we say in this case that the rule goes to that extent; the saying is cited to point our remark that the share itself can not be issued and delivered as a physical act, which is what the prayer for judgment literally taken asks for. What the corporation can do, and what in some circumstances it is compellable to do, is to issue and deliver the written evidence of the existence of such shares, and of the ownership of them; a paper usually called a stock certificate. It is true that the paper set forth in the complaint, as issued by the defendant, declares that Charles Foster is entitled to ten shares of its capital stock in the surrender of that paper; it is possible that that paper was not meant to be what we have called a stock certificate; but an evidence that Foster had subscribed for capital stock, and paid in the amount, and that he was entitled on the surrender of it to a stock certificate. Even then it is inexact, for by the subscription and payment the shares were created, and he became the owner, and entitled to all the rights attainable thereby, and it did not need that he surrender the paper to become so entitled. In rigidity of interpretation then, the complaint shows no state of facts, which entitled either Foster or the plaintiff to the issue and delivery of ten shares of the capital stock of the defendant, which is the judgment asked

for. We think, however, that it may be safely held for the purposes of this case, that the paper is the evidence of the right of Charles Foster, to ten shares of stock, as we have defined them; and that the averments of the complaint, and the prayer for judgment, were for the issuing and delivery to the plaintiff of some instrument which will be an evidence, and a muniment to him, of an assigned right to those shares. Cases may exist, where the owner of such a right, can compel the corporation in whose capital stock it exists, to issue to him that evidence. And we have seen that the cause of action which the facts of this complaint show, if they show any, is only this. To constitute this cause of action they must show the plaintiff to be, first, the owner of the paper, and of the right which it evidences; and, second, that the defendant has unjustly refused to take from him a surrender of the paper, and issue to him a new certificate.

The only averment of the complaint on the first branch of this statement is that the paper came into the possession of the plaintiff by purchase for value, and that he is now the legal owner and holder of it. The fact that the plaintiff came into the possession of it by purchase (that is, by his own act or agreement), for value, is quite indefinite. He may have purchased of one who had not himself any right to the paper, or to the shares. That averment does not preclude that idea, nor necessarily assert a getting of possession from the first lawful owner, or from any lawful assignee of him. The allegation does not come up to that held sufficiently in Prindle v. Caruthers (15 N. Y. 425), for their property, not possession by purchase, was alleged. It is, however, justified by the other averment, that the plaintiff is now owner and holder. He could not be that, unless it had been assigned to him, by the person named in it, or by someone having lawful title from that person. The averment, though argumentative, is enough to authorize proof of all the fact; and the remedy of the defendant for the informality was by motion. (Brown v. Richardson, 20 N. Y. 472.)

Then as to the other branch of the statement. Either the defendant had some rules, by virtue of its charter, or its by-laws, requiring evidence of the assignment of its receipts for subscriptions to stock, and of its stock certificates, and authority to make transfer of shares upon its books; or it did not. If it did not, if no act was to be done by it, or at its office, then the act of the former owner of the stock, whatever it was, by which the plaintiff became the lawful owner and holder of the stock, was all that he needed to entitle him to the shares, and they are his with all their advantages, without the need of anything being done by the defendant. (Com. Bk. of Buffalo v. Kortright, 22 Wend. 348.) And if it has not required any formalities to be observed, before it will or must recognize and act upon a lawful transfer of title, then the plaintiff being secure in his rights, and having all the evidence thereof which the defendant will exact, cannot compel

an extraordinary act on the part of the defendant for his own more abundant protection. In that view he has no cause of action. On the other hand, if the defendant has with authority so to do, prescribed rules and formalities to be observed by assignees of its stock, before it will recognize their rights, and give them evidence that such rights exist, the complaint has not averred what those rules and formalities are, nor has it in particular or general terms averred a compliance with them. We are not sure that we may not assume that the defendant has prescribed some rules and formalities, which will act as safeguards to itself, to its stockholders, and to the public. Learned judges have said that it is the duty of business corporations so to do, and we may not assume that this one has not done that duty, until the complaint avers that fact. The averment of the complaint is that the plaintiff presented the certificate at the office of the defendant in accordance with the terms and requirements thereof, and did demand from the defendant the issue and delivery to him of the stock therein named; that is, in the meaning which we have given to that allegation, that the defendant take a surrender of the certificate issued to Charles Foster, and issue to the plaintiff a new certificate. Here is no averment that he complied with any rules made by the defendant in such matter. We know how, as a usual thing, a transfer of stock is made. It has been proven many times in the courts, and the process is recited in the reports. An assignment of the stock in writing is made by the former owner of it, with a power of attorney to transfer it on the books of the corporation. Books of transfer are kept for that purpose, and on the production of those papers, the nominated attorney makes the formal transfer, the old certificate is canceled, and a new certificate is issued to the new owner. Yet there is no averment here that the plaintiff produced to the defendant aught but the paper or certificate once held by Foster. Nothing else can on this demurrer be assumed to have been presented. Then the plaintiff showed to the defendant no evidence of an assignment to him, nor any authority to anyone to make transfer to him. He did not then put the defendant in default. His complaint states no cause in that view.

We are of the mind that in any view in which the case can be looked at that the complaint is too meagre in its statement of facts to show a cause of action in the plaintiff. There are some other considerations, which were urged upon us by the respondent, but they need not be considered.

The judgment should be affirmed, and the plaintiff have leave to amend on payment of costs.

All concur except Miller and Earl, JJ., absent at argument.

Judgment accordingly.

COOK v. CITY OF BURLINGTON.

1882. 59 Iowa, 251, 13 N. W. 113, 44 Am. Rep. 679.

Distinction between Shares of Stock and Capital Stock.

The plaintiffs are the executors of the estate of James W. Grimes, deceased. They are residents of the city of Burlington, where the estate is situated. Part of the estate consists of shares of stock in the Dunleith and Dubuque Bridge Co., which is a corporation of that name, incorporated under the general incorporation laws of the State of Iowa, and having its principal place of business in Dubuque county. The corporation owns a bridge across the Mississippi River, from the city of Dubuque, Iowa, to the eastern shore of the river in the State of Illinois, and said bridge is all the tangible property owned by the corporation. The bridge was assessed for taxation at Dubuque, and the taxes were paid The shares of stock in the bridge company held and owned by the estate of Grimes were also assessed for taxation for the same year at the city of Burlington. The plaintiffs claimed that the stock was not liable to taxation, and appealed from the board of equalization of the city of Burlington to the Circuit Court. Upon a trial in the Circuit Court it was held that the assessment of the stock was authorized by law, and plaintiffs appeal.

ROTHROCK, J.—The assessment of the bridge as the property of the corporation was authorized by law. Appeal of The Des Moines Water Company, 48 Iowa, 324. Whether the shares of stock can be legally assessed and taxed as the property of the stockholders for the same year for which the property of the corporation is assessed and taxed was not determined in that case. It was said however, that "the statute provides that the stock of such corporations shall be assessed at its cash value. When assessed and taxed under the statute, stock must be taxed as the property of the respective owners, and there is no provision making the corporation liable therefor."

We have then the question in this case whether the shares of stock may be taxed in addition to the taxation of the property of the corporation.

And we may say, once for all, at the outset, that our views, as expressed in the case just cited, that the statute provides that the stock shall be assessed and taxed, remains unchanged. This conclusion is not founded upon any doubtful construction of the statute, but upon its plain, certain and unequivocal language and meaning. The statute imposing this burden upon the stock is found in section 813 of the Code, and is as follows: "Depreciated bank notes and the stock of corporations and companies shall be assessed at their cash value. * * *"

It is idle to contend in the face of this plain and explicit lan-

guage that the legislature has not required that stock in corporations shall be assessed, and the only question now for determination is, does the legislature have the power to determine that the property of a corporation and the stock shall both be taxed?

Counsel for appellants contend that no such power exists, because it is duplicate or double taxation of the same property, and it is insisted that "this court has over and over again declared that double taxation is forbidden by our Constitution." If this statement were correct, and we should concede that the question here presented were one of duplicate taxation, the case could easily and speedily be disposed of by a prompt reversal. But, while it is true that this court in Tallman v. Butler County, 12 Iowa, 534, said that it "is neither the policy nor the justice of the law to tolerate double taxation," and in U. S. Express Co. v. Ellyson, 28 id. 378, that "double taxation would be so unjust as to excite disfavor of both courts and legislature," and in McGregor's Executors v. Vanpel, 24 id. 436, that mortgages upon real estate should be held to be taxable "unless this will lead to double taxation," yet it never has been held in this State, that what is denominated duplicate taxation is in excess of the legislative power. The most that can be said of these utterances of this court is, that it should be held in disfavor by courts and legislatures. * * *

It must be conceded that the taxation of the property of the corporation and also of the stock bears no resemblance to taxing the same tract of land twice to the same person, nor once to A, and again to B. That would be a double taxation, which we suppose would not be allowable in any State in the Union. It would be a direct discrimination and inequality in the exercise of the taxing power, which would impose a greater burden upon one citizen than upon another upon the same kind of property. But the case at bar is quite different. The corporation is a person distinct from the stockholder. It is true, it is what is denominated an artificial person, and may be said to be ideal and intangible. But that it is a person in law is the first principle learned by the student in opening any book on corporations. Its stockholders are distinct and different persons. They are usually not liable for its debts, and have no right to the enjoyment or possession of its property during the period of its duration or until it be dissolved by some procedure known to the law. The stockholder is entitled to dividends upon his stock, if there be any dividends, and the value of his stock depends upon prospective dividends, and the dividends depend upon the net earnings of the corporation. If the bridge in this case be taxed, the tax must be paid from the income, and this reduces the value of the stock, so that there is no duplicate taxation, so far at least as the tax upon the bridge reduces the value of the stock. * * *

In the case at bar the stockholders paid to the corporation a certain sum of money. The corporation used this money in the

construction of a toll-bridge from which the corporation derived an income. The agreement between the contracting parties is that the corporation is to manage and control the bridge, make the necessary repairs, and pay the taxes assessed against the bridge, and after deducting these legitimate and necessary expenses pay to the stockholder his proportionate share of the net earnings, and upon the dissolution of the corporation the stockholder is to be repaid his money advanced from the property belonging to the dead corporation. Now, suppose this very contract were made with a natural person instead of a corporation, and the stockholder or creditor should make a claim that the obligation held by him was not taxable. There would be no more grounds for such claim under our system of taxation than there would be for the claim that if A loans B $100, which is invested in merchandise, the debt is not taxable because the merchandise is taxable.

These illustrations, it appears to us, demonstrate that if we were to determine that the legislature has no constitutional power to impose this tax upon the stockholder, it would open a door into a sea of trouble in the administration of the revenue laws of the State.

In disposing of this important question we have not reviewed the authorities cited by the respective counsel of the parties. It is sufficient to say that these views are supported by the very great majority of adjudged cases upon this subject. We think the Circuit Court correctly determined that the shares of stock are taxable. * * *

Affirmed.

ADAMS, J.—I concur in the result reached in this case, but not in the ground upon which it is reached. * * * The majority hold that such taxation would not be double taxation in such sense that it is not allowable. Upon this question I do not feel called upon to express any opinion.

PEOPLE ex rel. UNION TRUST CO. v. COLEMAN.

1891. 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762.[1]

Capital—Capital Stock—Shares.

FINCH, J.—The relator has been assessed upon an "actual value" of its capital stock derived entirely from the market value of its shares. These are selling at the large premium of something over five hundred dollars for each share of one hundred dollars, and the assessors have concededly taken that valuation.

[1] The facts sufficiently appear in the opinion. Portion of opinion omitted.—Ed.

or the principal part thereof, as the "actual value" of the company's stock liable to taxation, instead of its own proved and established value. The relator challenges the assessment, and through all the proceeding has persistently raised and pressed the inquiry, not so much as to the mode or manner of ascertaining value, but rather as to what is the precise thing to be valued, whether the capital stock of the company or the capital stock held in shares by the corporators. If these are the same, or, in any just sense, equivalents, either might be valued without substantial error, but if they are not such, we must determine which is to be valued before we can solve the problem of how to value it.

Now, it is certain that the two things are neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and the good will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders they own and hold in different proportions as individuals. The one belongs to the corporation; the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of its capital stock; while the same franchise does enter into and form part, and a very essential part, of the shareholder's capital stock. While the nominal or par value of the capital stock and of the share stock are the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property, or both, which may be counted and valued. It may have in addition a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company's capital stock, and, therefore, is not itself capital stock. The capital cannot be divided and distributed; the surplus may be. But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition. So that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, its franchise; but these three things, several in the ownership of the company are united in the ownership of the shareholders. The share stock covers, embraces, represents all three in their totality, for it is a business photograph of all the corporate possessions and possibilities. A company also may have no surplus, but, on the contrary, a deficiency which works an impairment of its capital stock. Its actual value is then less than its nominal or par value, while yet the share stock, strengthened by hope of the future and the support of earnings, may be worth its par, or

even more. And thus the two things—the company's capital stock and the shareholder's capital stock—are essentially and in every material respect different. They differ in their character, in their elements, in their ownership and in their values. How important and vital the difference is, became evident in the effort by the state authorities to tax the property of the national banks. The effort failed, and yet the share stock in the ownership of individuals was held to be taxable as against them. The corporation and its property were shielded, but the shareholders and their property were taxed.

Now some degree of confusion and trouble have come in because these two different things are denominated alike capital stock, making the expression sometimes ambiguous. It is the important and decisive phrase in the law of 1857, under which the assessment here resisted was made, and requires of us to determine at the outset in which sense it was used. The section reads thus: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll, or shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent. of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value and taxed in the same manner as the other real and personal estate of the county."

There are reasons in abundance for the conclusion that by the phrase "capital stock" the statute means not the share stock, but the capital owned by the corporation; the fund required to be paid in and kept intact as the basis of the business enterprise, and the chief factor in its safety. One ample reason is derived from the fact that the tax is assessed against the corporation and upon its property, and not against the shareholders, and so upon their property. In theory every tax is charged against some person, natural or artificial, resident or non-resident, known or unknown. It is assessed not upon property irrespective of ownership, but against persons in respect to their property (23 N. Y. 215), and effects not merely a lien, but also a personal liability. On the assessment-rolls in this case appeared the name of the relator as the person assessed, and the amount of the tax became a charge against it. Of course, it could only be assessed and taxed in respect to its own property, that which in its corporate character it owned and possessed, and so it follows inevitably that the statute concerns the company's capital stock, that is its real and actual capital, and not in any respect the share stock which it does not own and whose possessors have not been assessed.

Another reason is found in those terms of the statute which include and exclude respectively specific kinds or classes of property in the corporate ownership. Thus the assessment is to be laid not merely upon the capital stock of the corporation, but also upon

its surplus. No such explicit direction was necessary, except upon the assumption that by the words "capital stock" was meant simply "capital," which would not include surplus, and so required that it be subjected by name to the valuation. If the share stock was meant its value would include surplus and make its specification not only needless, but confusing. But while the statute includes surplus by specific mention, it excludes franchise by omitting it. The omission of franchise is emphasized by the careful inclusion of surplus. It is fully and definitely settled that the tax imposed by the statute is not upon franchise. (People v. Comrs. of Taxes, 2 Black's (U. S.) 620.) But if that be so, it is not upon the share stock, for that represents the value of the corporate franchise as a part of the total of the corporate property. And so, both by what it specifically includes and silently excludes, the statute itself informs us that by "capital stock" it means and intends the company's actual capital paid in and possessed, and not at all or in any sense the share stock.

The same thing becomes apparent from a study of the whole line of legislation which culminated in the law of 1857. It was traced in detail upon the argument with great industry and wealth of illustration. We have verified it by traveling over the same track, and without taking pains to reproduce it, may assert the general result which it discloses and select out one or more illustrations. The investigation shows that the word "capital" and the phrase "capital stock" are used interchangeably and synonymously, and where the latter phrase occurs there is almost always something in the statute which stamps and labels it as referring to the actual capital of the company. Thus the law of 1825 (Chap. 262), after providing for the taxation of all persons owning or possessing property, proceeds to declare that corporations shall be deemed persons for the purposes of the act, and requires them to furnish a statement of the amount of "capital" actually paid in; and then, referring to turnpike and bridge companies, requires them to state "the amount of capital stock actually paid in or secured to be paid in." Both clauses refer to the same assets or fund, naming it indiscriminately "capital" and "capital stock." Again, in the law of 1825 (Chap. 254) the assessors, after putting the corporation by name on the assessment-roll, are required to add the amount "of its capital stock paid in or secured to be paid in," and to designate how much of it is in real and how much in personal property, and so no doubt is left that by "capital stock" was meant simply the "capital" possessed in cash or invested in securities or real estate.

The illustrations might be multiplied and fortified by reference to numerous acts relating to the formation or management of manufacturing, railroad, business and telegraph companies in which the two forms of expression are used indiscriminately and as convertible terms; but I think quite enough has been said to require unhesitating assent to the proposition that under the law of 1857,

the thing to be taxed is the capital of the company and not the shares of the stockholders.

Indeed, I should feel bound to apologize for arguing what seems to me so simple and plain a proposition, were it not for the fact that it has been largely ignored by assessors and not always clearly kept in mind by the courts, and but for the further fact that the right to adopt as the taxable valuation the value of the shares, totally disregarding the value of the company's capital, has been asserted in this case, maintained by the courts below, and claimed to be fully justified by very much which we ourselves have decided or said.

(The learned judge proceeded to examine the earlier cases in detail.)

And so I think the authorities either fairly permit or fully justify the conclusions which I have reached and which may be stated with reasonable accuracy thus: First, the subject of valuation and assessment is never the share stock, but always the company's capital and surplus. Second, such capital and surplus must be assessed at its own value, and when that is correctly known and ascertained, no other value can be substituted for it. Third, where its amount and value are undisclosed and unknown the assessors may consider the market value of the share stock and the general condition of the company as indicative of surplus or deficiency and of the probable amount of either. Fourth, they may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof.

If these conclusions are correct it will follow that the assessment complained of should be canceled. The corporation presented to the assessors a sworn statement of its assets and liabilities. If it be true, there was nothing subject to assessment. But its truth is not questioned, and there is not the least reason to doubt it. The assessors did not doubt it: they merely deemed it immaterial, and so testified when examined. In other words, knowing with certainty the value of one thing, they claimed the right to affix to it the larger value of a different thing. Authorized only to tax against the company its capital and surplus, they assumed the right practically to tax it for the share stock held by individuals. They have not in terms claimed that the share stock is the subject of taxation, nor has the counsel who represented them on the argument, but both have maintained and defended what is the exact and complete equivalent. The right asserted is a discretion in the assessors at their free will to assess corporations upon and at the value of their capital and surplus, or upon and at the value of the share stock independently of established facts and whenever they please. The law gives them no such discretion. How it has been exercised and how destructively to the rights of taxpayers may be seen by comparing the action in

this case with that in one of the cases which we have reviewed. Where the share stock was selling at ninety, and so below par, the assessors refused to take that value and went to the company's books in search of a larger one, which they found and adopted. Here, where the actual value of capital and surplus is established so that they frankly admit the fact, they calmly disregard it and fly to the larger value of the share stock. The statute has given them no such right. They are not lawless rovers, wandering among corporations at will, but regular officers bound by discipline and controlled by the law, and whose discretion exists within fixed and definite limits. * * *

It follows that the judgment and order of the General and the Special Term should be reversed and the assessment against the relator vacated and canceled, without costs.

All concur, except Peckham, J., not voting.

Judgment reversed.

SAWYER v. HOAG.

SUPREME COURT OF THE UNITED STATES.

1873. 17 Wall. 610, 21 L. ed. 731.

The Trust Fund Theory—Nature of Capital Stock.

The Lumberman's Insurance Company of Chicago was found to be insolvent after the disastrous fire of October, 1871, and in June, 1872, a petition was filed under which it was declared bankrupt, and the appellee appointed assignee. The appellant was a stockholder in the company to the extent of fifty shares of $100 each. Among the effects of the company which came to the hands of the assignee was a note of appellant for $4,250; and when payment was demanded of him, he produced and offered to set off against this demand the certificate of an adjusted loss given by the company to one Hayes for $5,000, which had been assigned by Hayes to appellant. This certificate was given to Hayes and purchased by appellant at thirty-three per cent. of its par value on the same day, namely, January 25, 1872, after the insolvency of the company was well known, but before any proceedings in bankruptcy had been commenced. Upon the refusal of the assignee to consent to this set-off, the appellant filed the present bill in the district court to enforce the set-off in which he alleged, among other things, that the note given by him to the Insurance company was for money loaned.

The assignee in his answer denied that the note was for money loaned, and averred that it was in fact for a balance due by appellant for his stock subscription which had never been paid, and insisted that such balances constitute a trust fund for the benefit

of all creditors of the insolvent corporation, which cannot be made the subject of a set-off against an ordinary debt due by the company to any one of its creditors. After the general replication, the case was submitted to the district court on an agreed statement of facts. The district court decreed against the complainant, from which he appealed to the circuit court, which affirmed the decree below, and from that decree it is brought by appeal to this court.

MR. JUSTICE MILLER: The first and most important question to be decided is, whether the indebtedness of the appellant to the Insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of $100,000, with $10,000 paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: he gave to the company his check for the full amount of his subscription, namely, $5,000. He took the check of the company for $4,250, being the amount of his subscription less the fifteen per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at seven per cent. per annum. The appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than seven per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so. And, in any controversy which might or could grow out of the matter between the insurance company and the appellant, we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights and credits, where the bankrupt could not have sustained the action, and to set aside as void, transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessities of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely: Burke v. Smith, 16 Wall. 390, and in New Albany v. Burke, 11 Wall. 96. Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad company having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court by affirming the right of the corporation to deal with the debt due it for stock, as with any other debt, would have ended the case without further inquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate inquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.

In the case before us the assignee of the bankrupt, in the interest of the creditors has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry, we are of opinion that, as to these creditors, there was no valid payment of this stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust found to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred installments properly secured.

It is said by the appellant's counsel that, conceding this, it is still a debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes and, therefore, the proper subject of set-off under the 20th section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided,* that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true that, by the power of the legislature, there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers, dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair toward such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.

Affirmed.

HOSPES v. NORTHWESTERN MANUFACTURING & CAR CO.

1892. 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. 637.

The Trust Fund Theory—Modern View—Bonus Stock.

MITCHELL, J.: This appeal is from an order overruling a demurrer to the so-called "supplemental complaint" of the Minnesota Thresher Manufacturing Company. The Northwestern Manufacturing & Car Company was a manufacturing corporation organized in May, 1882. Upon the complaint of a judgment creditor (Hospes & Co.), after return of execution unsatisfied, judgment was rendered in May, 1884, sequestrating all its property, things in action, and effects, and appointing a receiver of the same. This receivership still continues, the affairs of the corporation being not yet fully administered; but it appears that it is hopelessly insolvent, and that all the assets that have come into the hands of the receiver will not be sufficient to pay any considerable part of the debts. The Minnesota Thresher Manufacturing Company, a corporation organized in November, 1884, as creditor, became a party to the sequestration proceeding, and proved its claims against the insolvent corporation. In October, 1889, in behalf of itself and all other creditors who have exhibited their claims, it filed this complaint against certain stockholders (these appellants) of the car company in pursuance of an order of court allowing it to do so, and requiring those thus impleaded to appear and answer the complaint. The object is to recover from these stockholders the amount of certain stock held by them, but alleged never to have been paid for. What was said in Meagher's Case, 48 Minn. 158, is equally applicable here as to the right to enforce such a liability in the sequestration proceeding upon the petition or complaint of creditors who have become parties to it. There is nothing in this practice inconsistent with what was decided in Thresher Co. v. Langdon, 44 Minn. 37, 46 N. W. Rep. 310. The complaint is not the commencement of an independent action by creditors in their own behalf antagonistic to the rights of the receiver, but is filed in the sequestration proceeding itself, and in aid of it.

The principal question in the case is whether the complaint states facts showing that the thresher company, as creditor, is entitled to the relief prayed for; or in other words, states a cause of action. Briefly stated, the allegations of the complaint are that on May 10, 1882, Seymour, Sabin & Co. owned property of the value of several million dollars, and a business then supposed to be profitable. That, in order to continue and enlarge this business, the parties interested in Seymour, Sabin & Co., with others, organized the car company, to which was sold the greater part of

the assets of Seymour, Sabin & Co. at a valuation of $2,267,000, in payment of which there were issued to Seymour, Sabin & Co. shares of the preferred stock of the car company of the par value of $2,267,000, it being then and there agreed by both parties that this stock was in full payment of the property thus purchased. It is further alleged that the stockholders of Seymour, Sabin & Co., and the other persons who had agreed to become stockholders in the car company, were then desirous of issuing to themselves, and obtaining for their own benefit, a large amount of common stock of the car company, "without paying therefore, and without incurring any liability thereon or to pay therefor;" and for that purpose, and "in order to evade and set at naught the laws of this state," they caused Seymour, Sabin & Co. to subscribe for and agree to take common stock of the car company of the par value of $1,500,000. That Seymour, Sabin & Co. thereupon subscribed for that amount of the common stock, but never paid therefor any consideration whatever, either in money or property. That thereafter these persons caused this stock to be issued to D. M. Sabin as trustee, to be by him distributed among them. That it was so distributed without receipt by him or the car company from any one of any consideration whatever, but was given by the car company and received by these parties entirely "gratuitously." The car company was, at this time, free from debt, but afterwards became indebted to various persons for about $3,000,000. The thresher company, incorporated after the insolvency and receivership of the car company, for the purpose of securing possession of its assets, property, and business, and therewith engaging in and continuing the same kind of manufacturing, prior to October 27, 1887, purchased and became the owner of unsecured claims against the car company, "bona fide, and for a valuable consideration," to the aggregate amount of $1,703,000. As creditor, standing on the purchase of these debts, which were contracted after the issue of this "bonus" stock, the thresher company files this complaint to recover the par value of the stock as never having been paid for. The complaint does not allege what the consideration of these debts was, nor to whom originally owing, nor what the intervener paid for them, nor whether any of the original creditors trusted the car company on the faith of the bonus stock having been paid for. Neither does it allege that either the thresher company or its assignors were ignorant of the bonus issue of stock, nor that they or any of them were deceived or damaged in fact by such issue, nor that the bonus stock was of any value. Neither is there any traversable allegation of any actual fraud or intent to deceive or injure creditors. A desire to get something without paying for it, and actually getting it, is not fraudulent or unlawful if the donor consents, and no one else is injured by it; and the general allegation that it was done "in order to evade and set at naught the laws of the state" of itself amounts to nothing but a mere conclusion of law. As a

creditors' bill, in the ordinary sense, the complaint is manifestly insufficient. The thresher company, however, plants itself upon the so-called "trust fund" doctrine that the capital stock of a corporation is a trust fund for the payment of its debts; its contention being that such a "bonus" issue of stock creates, in case of the subsequent insolvency of the corporation, a liability on part of the stockholder in favor of creditors to pay for it, notwithstanding his contract with the corporation to the contrary.

This "trust fund" doctrine, commonly called the "American doctrine," has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in Wood v. Dummer, 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two-thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding bill-holders. Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders—a proposition that is sound upon the plainest principles of common honesty. In Fogg v. Blair, 133 U. S. 541, 10 Sup. Ct. Rep. 338, it is said that this is all the doctrine means. The expression used in Wood v. Dummer has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the cestui que trust, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further. This is well illustrated and clearly announced in the case of Graham v. La Crosse & M. R. Co., 102 U. S. 148. That was a creditors' suit to reach a piece of real estate on the ground that it had been conveyed by the corporation fraudulently for a wholly inadequate consideration. The trust-fund doctrine was invoked by a subsequent creditor, and it was claimed that, as the trust had been violated, the deed should be set aside.

If the premise was correct that the corporation held it in trust for creditors, the conclusion was inevitable; but the court denied the premise, saying that a corporation is in law as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same; and that there is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors any more than a like disposal by an individual; that the same principles of law apply to each. That the phrase that "the capital of a corporation is a trust fund for the payment of its creditors" is misleading, if not inaccurate, is illustrated by the character of the actions that are frequently mistakenly instituted on the strength of it. For example, in the case of Wabash etc. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. Rep. 1081, two roads had been consolidated, the new company acquiring the property of the old ones. A creditor of one of the old companies, on the strength of the "trust-fund" doctrine, claimed a lien on its property in the hands of the new corporation. If this property was impressed with a trust in favor of creditors in the hands of the old company, it would logically follow that it would continue so in the hands of the new one. But the court denied the relief, and, in giving its construction of the "trust-fund" doctrine, said: "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void." This is probably what is meant when it is said in some cases, as in Clark v. Bever, 139 U. S. 110, 11 Sup. Ct. Rep. 468, that the capital of a corporation is a trust fund sub modo. If so, no one will dispute it. But it means very little, for the same thing could be truthfully said of the property of an individual or a partnership. And obviously it would make no difference whether the disposition of the corporate property is to a stranger or to a stockholder, except that, of course, the latter could not be an innocent purchaser.

There is also much confusion in regard to what the "trust-fund" doctrine applies. Some cases seem to hold that unpaid subscribed capital is a trust fund, while other assets are not—that is, so long as the subscription is unpaid, it is held in trust by the corporation, but, when once paid in, it ceases to be a trust fund; while other cases hold that, paid or unpaid, it is all a trust fund. The first seems to be the rule laid down in Sawyer v. Hoag, 17 Wall. 610, in which the "trust-fund" doctrine was first squarely announced by that court with all the vigor and force characteristic

of the great jurist who wrote the opinion. In that case a stockholder in an insurance company had given his note, as the court found the fact to be, for 85 per cent. of his subscription to the stock of the company. After the company had become bankrupt, and the stockholder knew the fact, he bought up a claim against the company for one-third its face, and in a suit by the assignee in bankruptcy on his note set up this claim as an offset. That this would have been a fraud on the bankrupt act, and at least a moral fraud on policyholders, is quite apparent without invoking the "trust-fund" doctrine; and, if the note for unpaid stock was a trust fund, there could have been no offset, whether the company was solvent or insolvent. In the opinion it is said that, "if the subscription had been paid by the note or otherwise, the note ceased thereby to be a trust fund to which creditors can look, and becomes ordinary assets, with which directors may deal as they choose." But in Upton v. Tribilcock, 91 U. S. 45, it is stated: "The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away." While in Sanger v. Upton, id. 56, it is said: "When debts are incurred a contract arises with the creditors that it [the capital] shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied." And in the same connection it is distinctly stated that there is no difference between assets paid in and subscriptions; that "unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." This language is quoted and approved in County of Morgan v. Allen, 103 U. S. 498, 508. It would seem clear that this is the correct statement of the law. The capital (not the mere share certificates) means all the assets, however invested. If a subscriber gives his note for his stock, that note is no more and no less a trust fund than the money would have been if he had paid cash down. Capital cannot change from a trust to not a trust by a mere change of form. It is either all a trust or all not a trust, and the "trust-fund" rule, whatever that be, must apply to all alike, and in the same way. If the assets of a corporation are given back to stockholders, the result is the same as if the shares had been issued wholly or partly as a bonus. The latter is merely a short cut to the same result. So with dividends paid out of the capital, voluntary conveyances, stock paid in over-valued property; all are forms of one and the same thing, all reaching the same result (a disposition of corporate assets), which may or may not be a fraud on creditors, depending on circumstances. This much being once settled, the solution of the question when a subsequent creditor can insist on payment of

stock issued as paid up, but not in fact paid for, or not paid for at par, becomes, as we shall presently see, comparatively simple.

Another proposition which we think must be sound is that creditors cannot recover on the ground of contract when the corporation could not. Their right to recover in such cases must rest on the ground that the acts of the stockholders with reference to the corporate capital constitutes a fraud on their rights. We have here a case where the contract between the corporation and the takers of the shares was specific that the shares should not be paid for. Therefore, unlike many of the cases cited, there is no ground for implying a promise to pay for them. The parties have explicitly agreed that there shall be no such implication by agreeing that the stock shall not be paid for. In such a case the creditors undoubtedly may have rights superior to the corporation, but these rights cannot rest on the implication that the shareholder agreed to do something directly contrary to his real agreement, but must be based on tort or fraud, actual or presumed. In England, since the act of 1867, there is an implied contract created by statute that "every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for every one would be advised of its provisions, and could conduct himself accordingly. And in view of the fact that "watered" and "bonus" stock is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the legislature, and not for the courts. We have no such statute; and, even if the law of 1873, under which the car company was organized, impliedly forbids the issue of stock not paid for, the result might be that such issue would be void as ultra vires, and might be canceled, but such a prohibition would not of itself be sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock.

It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of "bonus" stock pay for it contrary to his actual contract with the corporation. Thus no such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock. First Nat. Bank v. Gustin Min. Co., 42 Minn. 327, 44 N. W. Rep. 198; Coit v. Amalgamating Co., 119 U. S. 347, 7 Sup. Ct. Rep. 231; Handley v. Stutz, 139 U. S. 435, 11 Sup. Ct. Rep. 530. It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the "bonus" stock was issued, for a man cannot be defrauded by what which he knows when he acts. First Nat. Bank v. Gustin etc. Min. Co., supra. It has also been held not to exist where stock has

been issued and turned out at its full market value to pay corporate debts. Clark v. Bever, supra. The same has been held to be the case where an active corporation, whose original capital has been impaired for the purpose of recuperating itself issues new stock, and sells it on the market for the best price obtainable, but for less than par (Handley v. Stutz, supra); although it is difficult to perceive, in the absence of a statute authorizing such a thing (of which every one dealing with the corporations is bound to take notice), any difference between the original stock of a new corporation and additional stock issued by a "going concern." It is difficult, if not impossible, to explain or reconcile these cases upon the "trust-fund" doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of "bonus" stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the "trust-fund" doctrine has involved it; and we think that, even when the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule.

It is urged, however, that, if fraud be the basis of the stockholders' liability in such cases, the creditor should affirmatively allege that he believed that the bonus stock had been paid for, and represented so much actual capital, and that he gave credit to the incorporation on the faith of it; and it is also argued that, while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and that in pleadings no presumptions of fact are indulged in. This position

is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon, the amount of its professed and supposed capital, and every one who deals with it does so upon the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital, and in a majority of cases knows nothing about the shares of stock held by any particular stockholder, or, if so, what was paid for them. Hence, in a suit by such creditor against the holders of "bonus" stock, he could not truthfully allege, and could not affirmatively prove, that he believed that the defendant's stock had been paid for, and that he gave the corporation credit on the faith of it, although, as a matter of fact, he actually gave the credit on the faith of the financial standing of the corporation, which was based upon its apparent and professed amount of capital. The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; and that, if the fact was that he dealt with the corporation with knowledge of the arrangement by which the "bonus" stock was issued, this is a matter of defense. Gogebic Inv. Co. v. Iron Chief Min. Co., 78 Wis. 427, 47 N. W. Rep. 726. Counsel cites Fogg v. Blair, supra, to the proposition that the complaint should have stated that this stock had some value; but that case is not in point, for the plaintiff there was a prior creditor; and as his debt could not have been contracted on the faith of stock not then issued, he could only maintain his action, if at all, by alleging that the corporation parted with something of value.

In one respect, however, we think the complaint is clearly insufficient. The thresher company is here asking the interposition of the court to aid in enforcing an equity in favor of creditors against the stockholders by declaring them liable to pay for this stock contrary to their actual contract with the corporation. While the proceeding is not, strictly speaking, an equitable action, yet the relief asked is equitable in its nature. Under such circumstances, it was incumbent upon the thresher company to show its own equities, and that it was in a position to demand such relief. It was not the original creditor of the car company, but the assignee of the original creditors. By that purchase it, of course, succeeded to whatever strictly legal rights its assignors had; but it is not rights of that kind which it is here seeking to enforce. Under such circumstances, we think it was incumbent upon it to state what it paid for the claims, or at least to show that it paid a sub-

stantial, and not a mere nominal, consideration. The only allegation is that it paid "a valuable consideration." This might have been only one dollar. It appears that it bought the claims after the car company had become insolvent, and its affairs were in the hands of a receiver; also that the indebtedness of that company amounted to about $3,000,000, and that there were not corporate assets enough to pay any considerable part of it. The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insolvent corporation. If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for. It would say to them, "We will not create and enforce an equity for the benefit of any such speculation." Counsel for respondent suggests that the thresher company is but an organization of the original creditors, who formed it, and pooled their claims, so as to save something out of the wreck of the car company; but nothing of the kind is alleged. On this ground the demurrer should have been sustained.

In view of further proceedings it may be proper to say that in our opinion there is nothing in the position that the right of recovery against the stockholders was barred by the statute of limitation. The argument in support of the proposition all rests upon the false premise that the cause of action accrued in May, 1882, when the bonus stock was issued. The corporation never had any cause of action against these defendants. As between them and the company, the agreement for the issue of the stock was valid. The creditors are not here seeking to enforce a right of action, acquired through or from the corporation, but one that accrued directly to themselves, or for their benefit, and that did not accrue at least until the corporation became insolvent, in May, 1884.

Counsel for the St. Paul Trust Company stated that, if the court should reverse the order appealed from on any of the grounds urged by the other appellants, it would not be necessary for us to consider any of the assignments of error peculiar to his appeal; but, as we reverse upon a ground that may be remedied by amendment, we deem it proper to say that, in our opinion, the claim against the Kittson estate is a "contingent" claim, within the meaning of Gen. St. 1878, c. 53.

Order reversed.

CHAPTER XI.

STOCK SUBSCRIPTIONS.

BRYANT'S POND STEAM-MILL CO. v. FELT.

1895. 87 Maine, 234, 32 Atl. 888, 33 L. R. A. 593, 47 Am. St. 323.

Nature of Subscription Contract.

WALTON, J. * * * The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two parties to make a contract. A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties, only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. As said in one of our own decisions, it is a mere nudum pactum—a promise without a promisee—a contractor without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is effected, and his promise has been accepted, then we have all the elements of a valid contract: competent parties; mutuality of duties and obligations; a valid consideration, the promise of one party being a sufficient consideration for the promise of the other; a promise as well as a promisor; a contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting, and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted, it becomes binding. Till accepted, it remains revocable. * * *

In Hudson Real Estate Co. v. Tower, 156 Mass. 82 (1892), the action was founded on a subscription to the capital stock of an unorganized corporation, and the defense was based on an alleged withdrawal of the subscription. The right to withdraw was controverted. The court held that at the time when the defendant signed the subscription paper declared on, it was not a contract, for want of a contracting party on the other side; that which such a subscription may become a contract after the corporation has been organized, still, until the organization is effected, and the subscription is accepted, it is a mere proposition or offer, which may be withdrawn, like any other unaccepted proposition or offer.

It is urged by the counsel for the plaintiff corporation that such subscriptions create binding and enforceable contracts between the subscribers themselves, and are therefore irrevocable, except with the consent of all the subscribers; and some of the authorities cited by him seem to sustain that view. But we find, on examination, that such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon. Reason and the weight of authority are opposed to such a view. Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves. But we are not now speaking of such subscriptions; or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding. We are now speaking only of subscriptions to the capital stock of proposed business corporations. With regard to such subscriptions, we regard it as settled law that they do not become binding upon the subscribers till the corporations have been organized and the subscriptions accepted; and that, till then, the subscribers have a right to revoke their subscriptions. * * *

Judgment for defendant.[1]

NORWICH LOCK MFG. CO. v. HOCKADAY.

1893. 89 Va. 557, 16 S. E. 877.

Effect of Change in Corporate Enterprise Upon Liability of Subscriber.

Error to judgment of the hustings court for the city of Roanoke, rendered March 14, 1892, on a motion for judgment for money on contract, wherein the Norwich Lock Manufacturing Company, of Roanoke, Va., was plaintiff, and J. R. Hockaday was defendant. The judgment being adverse to the plaintiff com-

[1] See also, Athol Music Hall Co. v. Carey (1875), 116 Mass. 471. Compare Avon Springs Sanitarium Co. v. Weed (1907), 119 App. Div. (N. Y.) 560, 105 N. Y. S. 1106, reversed on dissenting opinion below in 189 N. Y. 557.—Ed.

pany it obtained a writ of error to this court. Opinion states the case.

FAUNTLEROY, J., delivered the opinion of the court.

The record discloses that about February 1, 1891, a paper headed "A New and Important Industry for Roanoke" was circulated for signatures. It proceeds: "It is proposed to organize a company for the purpose of manufacturing locks, bolts, and all house hardware, and other articles of a similar character. The capital stock of the company will be from $350,000 to $400,000. An existing plant can be purchased at a proper valuation, and can be moved immediately to Roanoke. It would, at Roanoke, have a decided advantage over its present location. There can be no question that securing this manufacturing plant for Roanoke will be the greatest step," etc.

The conclusion was: "We * * * hereby subscribe the amount set opposite our names, respectively, to the capital stock of the company to be formed in accordance with the provisions of the foregoing prospectus." * * * To this prospectus, or subscription list, is subscribed the name of "J. R. Hockaday and others" (opposite), $1,500.

The entire amount subscribed to this paper was less than the proposed minimum of capital stock, and no company has been formed in accordance with the provisions of the aforesaid prospectus. Two months and more later, a paper, dated April 25, 1891, was circulated for signatures, headed like the first, and proceeding: "An agreement has been made with a hardware manufactory in the North to sell its plant, etc. The stockholders of the company in the North have subscribed $200,000 to the company that is to be located on the property of the Roanoke Development Company, and the Roanoke Development Company has subscribed $75,000. The remaining $75,000 must be subscribed in order to secure the industry. The R. D. Company agree to donate a suitable site for the industry, for which full paid-up stock shall be issued, which stock the R. D. Co. agrees to donate to the company."

This prospectus paper concludes: "We, the undersigned, each, in consideration of the subscriptions of the others hereto, and the above agreement by the Roanoke Development Company, hereby subscribe the amount set opposite our names, respectively, to the capital stock of the company to be formed in accordance with the provisions of the foregoing prospectus," etc. The name of J. R. Hockaday, or "J. R. Hockaday and others," is not among the names of the subscribers to the capital stock under this subscription list or prospectus; and the fact in the record is that J. R. Hockaday was approached and asked to subscribe under this second prospectus, and he positively and pointedly refused to subscribe, saying that it was a different contract and scheme from the first. Under this second prospectus the lock manufacturing

plant was not to be located in or at Roanoke City (as it expressly was in the first prospectus), but to be put beyond the city limits, on the opposite side of the river, and on the lands of the Roanoke Development Company, in the county of Roanoke, where its principal office was to be located. The charter under which the plaintiff company was organized was granted by the judge of the circuit court of Roanoke county May 21, 1891, upon the presentation and provisions of a paper dated May 11, 1891, and signed by Arthur C. Denniston, Edw. C. Pechin, Arthington Gilpin, S. W. Jamison and P. L. Terry, purporting to be their agreement to become a corporation by the name of the "Norwich Lock Manufacturing Company, of Roanoke, Virginia," for the purpose of manufacturing, dealing in, and selling locks, etc., and other articles of house hardware, and all other articles composed of iron, wood and other substances; of erecting and conducting all buildings and structures, and the machinery and appliances and fixtures incident thereto; of acquiring, holding and selling iron and other metals, wood and other substances; of acquiring and disposing of mineral and other lands in fee, timber and timber rights, water and water-power and privileges, etc., as may be convenient for the business of the company; of erecting houses, etc., for the purposes of its business; of making and using all roads, etc., with power to borrow money, and create, issue and sell or dispose of its bonds, and to secure the same by deed of trust, etc. The minimum capital to be $350,000, the maximum $500,000. The county of Roanoke to be the place where the principal office of the company is to be kept.

The Norwich Lock Manufacturing Company, the plaintiff in this suit, which was organized, under the foregoing charter, August 4, 1891, was not formed in accordance with the provisions of the prospectus or subscription paper on which the defendant, Hockaday, subscribed, but differs therefrom, radically and materially, in essential general object and purpose, as well as in special details, powers, and provisions.

The location, which was, by the subscription paper which the defendant, Hockaday, signed, in February, 1891, to be immediately placed in the city of Roanoke, is by the charter, and terms and agreement with the Roanoke Development Company, to be on the lands of that company, lying extensively on the opposite side of the Roanoke river, outside of the limits of Roanoke City, and in the county of Roanoke. The maximum capital stock, which was to be $400,000, is, by the prospectus which Hockaday expressly refused to sign or to recognize, and by the charter under which the plaintiff company long subsequently organized, put at $500,000. And the purposes and powers of the company, as set forth in the prospectus and the charter under which they organized, are wholly and essentially different, embracing almost any and every industrial and speculative enterprise, whilst those specified and embraced in the prospectus or subscription signed by the defendant,

Hockaday, and others, are, carefully and guardedly, expressly limited to the "purpose of manufacturing locks, bolts, and all house hardware, and other articles of a similar character."

The subscription list which J. R. Hockaday and others signed in February, 1891, shows that the total amount of stock subscribed for, up to the day of the trial, was less, by $20,900, than the minimum capital stated in the prospectus or subscription contract signed by "Hockaday and others." There is no evidence in the record that the defendant, Hockaday, ever signed any but the subscription paper circulated in February, 1891; that he ever attended or heard of any meeting of stockholders, or paid any part of his conditional subscription, or expressly or impliedly promised to do so, or knew of or in any way acquiesced in the wide and material variances between the charter and the paper which he had signed; while it is explicitly in evidence that he refused to sign, or in any way recognize, the paper which was substituted therefor, and sued upon in this case.

After the evidence was all in, the court, on motion of the defendant, instructed the jury "that the contract of subscription signed by the defendant, and proven in this case, is conditional upon the due organization of a company under and by virtue of said contract, and in accordance with the provisions thereof; and that the Norwich Lock Manufacturing Company, of Roanoke, chartered by the Hon. Henry E. Blair, judge of the circuit court of Roanoke county, Virginia, and introduced in evidence, is not such a company as is contemplated by and provided for in said contract. That the contract of subscription by the defendant proven in this case is a conditional one—conditioned upon the organization of a company under and in accordance with the provisions of the said contract; and if they believe, from the evidence, that the plaintiff company was not organized under said contract and in accordance therewith, they must find for the defendant."

The jury did find for the defendant, and the court refused to set the verdict aside, and entered judgment accordingly.

Upon the facts in the case we can conceive of no instructions more proper, and less calculated to mislead the jury, than those given in this case. It is indisputably the province and the duty of the court to construe and instruct the jury as to the legal effect of all written instruments which are the subject of the controversy and the bases of the suit; and the court only exercised its legitimate function in comparing the subscription paper and the charter of the company under which they organized, and telling the jury that the latter was not, in legal effect, in accordance with the provisions of the former; that the plaintiff, Norwich Lock Manufacturing Company, was not such a company, nor the company, contemplated by and provided for in the subscription contract signed by the defendant. The charter, and the prospectus under which they organized, and to which the defendant positively refused to accede or consent, differ from the mere subscription list

signed by the defendant, as to the location, the maximum capital, and the objects and scope of the enterprise; and the company proposed to be formed, to whose capital stock he conditionally subscribed, was never formed.

There is no question in this case of amendments to the charter, whether material or immaterial. The prospectus to which the defendant subscribed his name, conditionally, was substituted by another and a radically different prospectus (to which he refused to subscribe), and by agreement and arrangement between parties with whom he had no privity; and the substitution and changes made in the schemes and scope of the enterprise were made before the charter was granted or applied for. If, after one has signed a contract agreeing to form a corporation for a named purpose, such contract is changed in any way, before the incorporation, without such subscriber's consent, he is not bound, because the company formed is not the company he subscribed to. 1 Lawson R. R. & P., sec. 441; Dorris v. Sweeney, 60 N. Y. 463; Dutchess, etc., v. Moffett, 58 N. Y. 397; Southern Hotel Co. v. Newman, 30 Mo. 118; Richmond Fac. Asso. v. Clarke, 61 Maine, 351; Mohan v. Wood, 44 Cal. 462.

In 1 Lawson R. R. and P., section 435, p. 777, it is said: "One who signs a mere subscription paper, agreeing to take a number of shares in a corporation to be formed, is not liable therefor after the formation of the company," where the company is formed not in accordance with the provisions of the subscription paper. "One who signed, with others, a subscription paper, promising to take and pay for shares in a joint-stock association to build a hotel, most of which subscribers were afterwards incorporated, but the defendant was not one of them, is not bound, by his subscription, to pay for his shares to the corporation, there being no privity of contract." Machias Hotel Company v. Coyle, 58 Am. Dec. 712; Mount Sterling Coal-Yard Company v. Little, 16 Bush. 429.

As before said, there is no question in this case of amendments to charter; but, even after a corporation has been organized under its charter, its charter cannot be materially amended, to bind a stockholder, without his consent. To vary the route of a railroad, shortening the line, allowing business to be commenced before the full capital stock is subscribed, are instances of material changes which will release a stockholder. See note 1, sec. 500, p. 518, Cook on Corporations. To superadd a new and different business to the original undertaking will work a dissolution of the contract. Clearwater v. Meredith, 1 Wall. 40.

In Fry's Executor v. Lexington & Co., 2 Metcalf (Ky.), 314, the court said: "Each stockholder has a right to insist on the prosecution of the particular objects of the charter." The stockholder may say: "I have agreed to become interested, and have contracted, in view of the profits expected, and the perils and losses incident to that description of business; but I have not

agreed that those to be intrusted with the capital I contributed shall have power to use it in a business of a different character, and attended with hazards of a different description." Marietta, etc., R. R. Co. v. Elliott, 10 Ohio St. Rep. 57 (1859); Ashton v. Burbank, 2 Dill. 435 (1873).

There is no evidence, or even a contention, that the defendant ever signed any subscription paper but the prospectus or subscription list No. 1, in February, 1891, which was abandoned and substituted by the prospectus and agreement dated May 11, 1891; that he ever attended or heard of any meeting of stockholders, or paid any part of his alleged subscription, or expressly or impliedly promised to do so, or in any way acquiesced in the variances between the charter and the paper he had signed; but there is undenied evidence that he positively refused to sign the paper which was substituted therefor. And the record plainly shows that there was in evidence before the jury the all-sufficient defense against the plaintiff's claim—viz., that, up to the trial, the plaintiff company had failed to obtain subscriptions to the extent of even its minimum of capital stock; and, therefore, it could not lawfully hold the defendant liable for his mere conditional subscription, even though the scheme and scope of the business proposed in the first prospectus had not been radically and essentially changed and enlarged by the second and substituted prospectus, to which defendant was not a party or privy. Cook on Corp., sec. 176, says: "It is an implied part of a contract of subscription that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed." He cannot be even liable to assessment unless and until the proposed capital stock of the company has been fully subscribed, unless there is a contrary provision in the article, or in the general law under which the corporation is formed. 1 Lawson R. R. and P., sec. 439, p. 733; Morawetz on Corp., sec. 259.

The rule of the Code of 1887, sec. 3484, applied to the evidence certified in this record, requires that the verdict of the jury, which is fully warranted by the facts and the law, and the judgment of the court thereon, should be affirmed.

Judgment affirmed.

CALIFORNIA SOUTHERN HOTEL CO. v. CALLENDER.

1892. 94 Cal. 120, 29 Pac. 859, 28 Am. St. 99.

Subscription to Stock—Conditional Subscription—Waiver—Issuance of Certificate—Calls.

VANCLIEF, C.: The plaintiff is a California corporation, to whose capital stock the defendant subscribed $5,000 before its organization, that being 50 shares of the 1,000 shares into which

the capital stock of $100,000 was divided. After having paid $2,000 of this subscription, the defendant refused to pay any part of the remainder, and this action was brought to recover from him the remaining $3,000. The cause was tried by the court, and judgment was given in favor of the plaintiff for the sum demanded. The defendant appeals from the judgment on the judgment roll, without bill of exceptions, and contends that upon the findings of fact the judgment should have been given for the defendant. The following is a copy of the written agreement to and upon which defendant subscribed for the stock: "We, the undersigned, do hereby agree to and with each other that we will organize and form a corporation, under the laws of the state of California, for the purpose of erecting, building, and owning an hotel building in the city of San Luis Obispo, county of San Luis Obispo, state of California, and for the purpose of purchasing and owning all such real and personal property as may be necessary to be used in connection with said hotel building; and we agree that the capital stock of said corporation shall be one hundred thousand ($100,000) dollars, divided into one thousand (1,000) shares, at the par value of one hundred dollars each; and we agree to and with each other that we do respectively subscribe for the number of shares of the stock of said corporation as are set after our respective names, and that we will pay for the same the said par value thereof at such times and in such manner as may be determined by the board of directors of the said corporation, to be hereafter chosen. And we further agree that whenever seventy thousand ($70,000) dollars of said capital stock has been subscribed for, a meeting shall be called for the purpose of electing a board of directors, and taking such steps as are required by law to form the said corporation, and that at such meeting the owners of a majority of said subscribed stock shall constitute a quorum, and are authorized to elect said board of directors, and transact any business necessary to fully complete the organization of the said corporation. That the number of directors and the term of said corporation shall be determined at such meeting." Here follows the list of subscribers, among whom is the defendant for "fifty shares—$5,000." These subscriptions amounted to 772 shares. Among them was one of the Pacific Coast Steamship Company and Pacific Coast Railway Company for 100 shares, payable in freightage. This subscription purports to have been made through the agency of Goodall, Perkins & Co. Another of the subscriptions is by Edwin Goodall for 125 shares, partly payable in a block of land, if accepted by the company, estimated at $7,500, and the balance of $5,000 in cash. The court finds that Goodall, Perkins & Co. were not authorized to subscribe for the steamship and railway companies, but that the subscriptions of these companies, and also that of Edwin Goodall, entered into the computation, and constituted a part of the 772 shares subscribed before the organization of the corporation. The court further

found that the corporation was organized on August 17, 1887, and that the articles of incorporation included as subscribers the name of the Pacific Coast Steamship Company for 100 shares, amounting to $10,000, and that of Edwin Goodall for 125 shares, amounting to $12,500, without conditions; and further found "that at the preliminary meeting of stockholders, held for the purpose of considering whether or not the incorporation aforesaid should be organized and formed, defendant was not present, and did not vote for the shares subscribed for by him as aforesaid, and did not acquiesce in or agree that the incorporation should be formed on the subscription aforesaid. * * * That Edwin Goodall, for himself and for the Pacific Coast Steamship Company, united in the call for the meeting of the stockholders last aforesaid, and each were represented at said meeting to the full amount of the stock subscribed for by them as aforesaid by Edwin Goodall, and he voted and acted at said meeting for the full amount of the stock subscribed for by them, viz., 225 shares of the value of $22,500; and each has ever since the incorporation of the plaintiff been, and now is, a stockholder in said corporation for the full value and amount of the stock aforesaid subscribed by him." And further that the subscriptions of the steamship company and Goodall were accepted and acted upon by plaintiff, and have been fully paid to the company. And further found that "defendant has at all times recognized the validity of the corporation aforesaid by paying $2,000 of said original subscription of $5,000, and not otherwise, and has never dissented from or protested against any of its acts. That defendant has, since said corporation was formed, acquiesced in the building of the hotel mentioned in said agreement, and furnishing the same, and the incurring of debts and expenditures of money therefor, by paying said $2,000 of said subscription to said corporation, and not otherwise. * * * That a large indebtedness has been incurred by plaintiff, and large sums of money expended, relying upon the subscriptions aforesaid." And further found (under the head of "conclusions of law") that the defendant "has waved any defense he might otherwise have had to said subscriptions by reason of the manner of plaintiff's incorporation." The findings show that calls were made upon the subscribers, including the defendant, as follows: November 16, 1887, 30 per cent., payable November 25; March 17, 1888, 20 per cent., payable March 25; May 23, 1888, 20 per cent., payable June 1; 20 per cent., payable June 15; and 20 per cent., payable July 1.

1. The first and principal point made by appellant is that the corporation was organized before there was a valid subscription of $70,000 of the capital stock, contrary to the agreement subscribed by defendant, inasmuch as Goodall, Perkins & Co. subscribed for the steamship company and railway company without authority, and, in part, conditionally. It appears, however, that these subscriptions were changed before the corporation was or-

ganized, the railway company being dropped, and the subscription of the steamship company being substituted for that of both of these companies, and for the full amount thereof, and the subscription of the steamship company and that of Goodall being made unconditional, and so entered in the articles of incorporation. It is also found by the court that Goodall, for himself and for the steamship company, united in the call for the meeting of the subscribers for the purpose of considering the propriety of organizing the corporation that Goodall represented all their stock at the meeting; that he signed and acknowledged the articles of incorporation; and that the steamship company and Goodall paid all the calls upon all the stock subscribed by them. It is not expressly found, nor, it seems to me, by necessary implication, that Goodall was not authorized by the steamship company to join in the call for the meeting, to make the change in the subscription, and to represent the steamship company in the organization of the corporation; but only that the original subscription by Goodall, Perkins & Co., for the two companies was without authority. If Goodall was authorized by the steamship company to represent it in all these matters, the corporation was properly organized, according to the subscription agreement, and the defendant has no ground of complaint. As, however, the findings are not quite clear upon this point, and as I think the judgment should be affirmed on another ground, which does not involve any doubtful question of construction of the findings, the decision of the case need not rest upon this point.

2. The court found that the defendant had "waived any defense he might otherwise have had to said subscription by reason of the manner of plaintiff's incorporation." Says Mr. Cook, in his book on Stock, Stockholders and Corporation Law (section 181): "A subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express or implied from the acts or declarations of the subscriber." Again, at section 186, the same author says: "Where the subscriber made his contract of subscription previous to, and in anticipation of the incorporation and does not, by his subsequent acts, acquiesce in the mode of incorporation, he may set up that the corporation has not been incorporated, and that he is not liable." At section 198 he says: "A subscriber to stock in a corporation may waive any defense he may have to the subscription. The waiver may be express, or it may be by implication from the acts and declarations of the subscriber. Thus a payment of a call with full knowledge of the defense, is held to be a waiver; and any act indicating a clear intent to abide by or accept or pass over an objection which the subscriber might make will be held to be a waiver." See authorities cited in notes to above quotation. Thompson, Liab. Stockh., § 120; Taylor, Corp., § 519; and Railroad Co. v. Johnson, 64 Amer. Dec. 307. In Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. Rep. 244,

Mr. Justice Mitchell, speaking for the court, said: "Whether there has been a waiver is a question of fact. It may be proved by various species of evidence, by declarations, by acts, or by forbearance to act." Other authorities say it is a mixed question of law and fact, but that each case must depend upon its own peculiar circumstances and surroundings. "It is a question of intention, and a fact to be determined by the triers of fact" (Okey v. Insurance Co., 29 Mo. App. 111; Ehrlich v. Insurance Co., 88 Mo. 249; Drake v. Insurance Co., 3 Grant, Cas. 325; Witherell v. Insurance Co., 49 Me. 200); "and, though the waiver must be intentional, and clearly proven, the sufficiency of the evidence relating thereto is for the jury." Insurance Co. v. Schollenberger, 44 Pa. St. 259. The only question of law that can be involved in the question of waiver must relate to the legal definition of the word. For example, a jury might be properly instructed as matter of law that a waiver must be voluntary, and that it implies a knowledge of the right, claim, or thing waived; yet whether it was voluntary, and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury. In this case the court found the ultimate fact that defendant had waived any right he may have had to object to the organization of the corporation. This finding implies the defendant's knowledge of the right waived and that this waiver was voluntary, since these attributes are included in the legal definition of a waiver. Nor is this conclusion affected by the fact that the court also found certain probative facts, the only tendency of which was to prove the waiver. That defendant recognized the validity of the corporation, and acquiesced in the building of the hotel, etc., "not otherwise" than by paying the first two calls on his subscription, and never dissenting or protesting against any of the acts of the corporation, are in no degree inconsistent with the waiver found, as they do not tend to prove that the waiver was involuntary, or without defendant's knowledge of his alleged right. Conceding, therefore, that the probative facts (unnecessarily) found are insufficient to prove a waiver, yet, as the record contains no part of the evidence it must be presumed that there was sufficient evidence to justify the finding of a waiver.

3. It is contended that this action cannot be maintained "on the theory that defendant is a stockholder, and, as such, liable to the corporation for assessments," for the alleged reason that it does not appear "that the corporation ever awarded any stock to defendant, or entered his name on its stock book, or anything to show that defendant was a stockholder." It is alleged in the complaint, and expressly found by the court, that defendant was the owner of 50 shares of stock at all the times when the calls were made. It was not necessary to defendant's ownership of the stock that a certificate for the stock should have been issued to him (Mitchell v. Beckman, 64 Cal. 121, 28 Pac. Rep. 110, and

authorities there cited); nor was the corporation bound to issue such certificate until the subscription price was fully paid; nor was it necessary to a recovery on the contract of subscription that the directors of the corporation should have levied assessments upon the stock in the mode prescribed by the Civil Code. By the contract of subscription the defendant agreed to pay upon the call of the board of directors, viz., "at such time and in such manner as may be determined by the board of directors of the said corporation, to be hereafter chosen;" and the action was properly brought upon this contract. West v. Crawford, 80 Cal. 27, 21 Pac. Rep. 1123; Water Co. v. Herberger, 82 Cal. 600, 23 Pac. Rep. 134; Ang. & A. Corp. § 549. I think the judgment should be affirmed.

We concur: Fitzgerald, C.; Belcher, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

MINNEAPOLIS THRESHING MACHINE CO. v. DAVIS.

1889. 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. 701.

Subscriptions—Secret Conditions.

MITCHELL, J.: This was an action to recover installments due on subscriptions to stock of the plaintiff. The facts fully appear from the findings of the court in connection with Exhibits A and B attached to the complaint. Those material for present purposes are, that a scheme having been started to organize a manufacturing corporation with $250,000 capital, whose works should be located at Junction City, near Minneapolis, and one McDonald having proposed that if the citizens of Minneapolis would subscribe $190,000 to the capital stock he would subscribe the remaining $60,000, one Janney, a promoter, but not a subscriber to the stock of the proposed corporation, acting as a voluntary solicitor, having with him the subscription paper (Exhibits A and B) about April 1, 1887, proceeded to canvass for subscriptions to the stock of the proposed corporation on the terms and conditions embodied in the paper. He first applied to defendant, who subscribed $5,000 of stock. Afterwards, and about the same date, other citizens respectively subscribed to the stock, on the same paper, to the aggregate amount, including defendant's subscription of $190,000, of which over $65,000 has been paid in to plaintiff. Thereupon McDonald, in accordance with his proposition, subscribed the remaining $60,000 which he has paid up in full. All the conditions expressed in the written subscription having been fully performed and complied with, the proposed corporation was afterwards, about April 25, 1887, or-

ganized, and these subscriptions to its stock delivered over to it. The corporation, acting in good faith upon such subscriptions, including that of defendant, expended large sums of money in locating and constructing its works, and entered into large contracts, and incurred liabilities to the amount of over $75,000. During all this time the corporation had no notice or knowledge of any condition being attached to defendant's subscription other than those expressed in the subscription paper itself. Neither is it found or claimed that any of the other subscribers to the stock had any such notice or knowledge. Defendant was not present at the organization of the corporation, and never attended or took part in any of its meetings, and had no notice or knowledge that the subscription paper had been transferred or delivered over to the plaintiff, or that plaintiff relied on it, until about November, 1887, just prior to the commencement of this action.

Upon the trial the defendant was permitted, against plaintiff's objection and exception, to testify that he signed or subscribed to the stock only upon the express oral condition and agreement then had between him and Janney that the latter should retain in his possession said agreement with his name signed thereto, and not deliver it to any one, or use it in any way, until certain four persons should subscribe to the stock, each in the sum of $5,000; that Janney took the agreement from defendant on that express condition and understanding, and not otherwise; that none of these four persons ever did subscribe to the stock of the plaintiff; and that defendant never authorized Janney or any one to deliver said agreement to any one except upon the condition referred to. The court found the facts to be in accordance with the testimony, and upon that ground found as a conclusion of law that defendant never became a subscriber to the plaintiff's stock. The competency of this evidence is the sole question in this case. Under the elementary rule of evidence that a written agreement cannot be varied or added to by parol, it is not competent for a subscriber to stock to allege that he is but a conditional subscriber. The condition must be inserted in the writing to be effectual. This rule applies with special force to a case like the present, where to allow the defendant now to set up a secret parol arrangement by which he may be released, while his fellow-subscribers continue to be bound, would be a fraud, not only upon them, but upon the corporation which has been organized on the faith of these subscriptions and upon its creditors. The defendant of course does not attempt to controvert so elementary a rule as the one suggested, but contends that the effect of this evidence was not to vary or contradict the terms of the writing, but to prove that there was never any delivery of it, and hence that there never was any contract at all, delivery being prerequisite to the very existence of a contract. His claim is that the subscription paper was given to and received by Janney merely as an escrow, or as in the nature of an escrow, only to be delivered or

used upon the performance of certain conditions precedent, and that until they were performed there could be no valid delivery.

In determining this question it becomes important to consider the nature of a subscription to the stock of a proposed corporation, and the relation of the different parties to each other, under the facts of this case. A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character: *First.* It is a contract between the subscribers themselves to become stockholders without further act on their part immediately upon the formation of the corporation. As such a contract it is binding and irrevocable from the date of the subscription (at least in the absence of fraud or mistake), unless canceled by consent of all the subscribers before acceptance by the corporation. *Second.* It is also in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation. 1 Mor. Priv. Corp. § 47 et seq.; Red Wing Hotel Co. v. Frederick, 26 Minn. 112, 1 N. W. Rep. 827. Janney, the promoter who solicited and obtained the subscriptions, occupied the position of agent for the subscribers as a body, to hold the subscriptions until the corporation was formed in accordance with the terms and conditions expressed in the agreement, and then turn it over to the company without any further act of delivery on part of the subscribers. The corporation would then become the party to enforce the rights of the whole body of subscribers. It follows, then, that, considering the subscription as a contract between the subscribers, a delivery to Janney by a subscriber was a complete and valid delivery, so that his subscription became eo instanti a binding contract. The case stands precisely as a case where a contract is delivered by the obligor to the obligee. It cannot therefore be treated as a case where a writing has been delivered to a third party in escrow. The defendant, however, attempts to bring the case within the rule of Westman v. Crumweide, 30 Minn. 313, 15 N. W. Rep. 255, in which this court held that parol evidence was admissible to show that a note delivered by the maker to the payee was not intended to be operative as a contract from its delivery, but only upon the happening of some contingency, though not expressed by its terms; that is, that the delivery was only in the nature of an escrow. We so held upon what seemed the great weight of authority, although the doctrine, even to the extent it was applied in that case, is a somewhat dangerous one. The distinction between proving by parol that the delivery of a contract was conditional, and that the contract itself contained a condition not expressed in the writing, is one founded more on refinement of logic than upon sound practical grounds. It endangers the salutary rule that written contracts shall not be varied by parol. Said Erle, J., in Pym v. Campbell, 6 El. & Bl. 370, in sustaining such a defense, "I grant the risk that such a defense may be set

up without ground, and I agree that a jury should therefore look on such a defense with suspicion." And in all the cases where such a defense has been sustained, so far as we can discover, they have been cases strictly between the original parties, and where no one has changed his situation in reliance upon the contract and in ignorance of the secret oral condition attached to the delivery, and hence no question of equitable estoppel arose. Many of the cases have been careful to expressly limit the rule to such cases. Benton v. Martin, 52 N. Y. 570; Sweet v. Stevens, 7 R. I. 375.

Conceding the rule of Westman v. Krumweide, supra, to its full extent, there are certain well recognized doctrines of the law of equitable estoppel which render it inapplicable to the facts of the present case. This subscription agreement was not intended to be the sole contract of defendant. It was designed to be also signed by other parties, and from its very nature defendant must have known this. Each succeeding subscriber executed it more or less upon the faith of the subscriptions of others preceding his. The paper purports on its face to be a completed contract, containing all the terms and conditions which the subscribers intended it should. When this agreement was presented to others for subscription defendant had not only signed it in this form, but he had also done what, under the facts, constituted, to all outward appearances at least, a complete and valid delivery. He had placed it in the proper channel according to the ordinary and usual course of procedure for passing it over to the corporation when organized, and clothed Janney with all the indicia of authority to hold and use it for that purpose without any other or further act on his part, untrammeled by any condition other than those expressed in the writing. In reliance upon this, others have not only subscribed to the stock, but have since paid in a large share of it. The corporation has been organized and engaged in business, expending large sums of money, and contracting large liabilities, all upon the strength of these subscriptions to its stock, and in entire ignorance of this secret oral condition which defendant now claims to have attached to the delivery. To permit defendant to relieve himself from liability on any such ground under this state of facts would be a fraud on others who have subscribed and paid for stock, upon the corporation, which has been organized and incurred liabilities in reliance upon the subscriptions, and on creditors who have trusted it. The familiar principle of equitable estoppel by conduct applies, viz.: Where a person, by his words or conduct, wilfully causes another to believe in the existence of a certain state of facts, and induces him to act on that belief so as to alter his own previous condition, he is estopped from denying the truth of such facts to the prejudice of the other.

We have examined all of the numerous cases cited by defendant's counsel, and fail to find one which, in our judgment, is

analogous in its facts, or the law of which will cover the present case. The two which at first sight might seem most strongly in his favor are Beloit and Madison R. Co. v. Palmer, 19 Wis. 574, and Ottawa, etc., R. Co. v. Hall, 1 Bradw. 612. But an examination of those cases will show that in neither did nor could any question of estoppel arise, and in both the court held that the person to whom the instrument was delivered after signature was a stranger to it, so that it was strictly a delivery in escrow to a third party. Cases are cited where a surety signed a bond or non-negotiable note, and delivered it to the principal obligor upon condition that it should not be delivered to the obligee until some other person signed it, and where, without such signature, the principal obligor delivered it to the obligee, and yet the courts held that the surety was not liable, although the obligee had no notice of the condition. Such cases seem usually to proceed upon the theory that a delivery to the principal obligor under such circumstances is a mere delivery in escrow to a stranger; the term "stranger," in the law of escrows, being used in opposition merely to the party to whom the contract runs. It may well be doubted whether in such cases where the instrument is complete on its face the courts have not sometimes ignored the law of equitable estoppel. No such defense would be allowed in the case of negotiable paper, and it is not clear why the distinction should be drawn on that line. The doctrine of estoppel rests upon totally different grounds, and operates independently of negotiability, being founded upon principles of equity. But whether the cases referred to be right or wrong, we do not see that they are in point here. Our conclusion is that the court erred in admitting the evidence objected to, and for that reason a new trial must be awarded. Order reversed.

CHAPTER XII.

THE RIGHTS OF MEMBERSHIP.

VENNER v. CHICAGO CITY RAILWAY CO.

1910. 246 Illinois 170, 92 N. E. 643.

Right to Inspection of Corporate Books.

Appeal from the Appellate Court for the First District, heard in that court on appeal from the Superior Court of Cook County; the Hon. Ben M. Smith, Judge, presiding.

Mr. CHIEF JUSTICE VICKERS delivered the opinion of the court:

Clarence H. Venner filed a petition for mandamus against the Chicago City Railway Company and its president and secretary to compel the defendants to permit him to examine the books, records and accounts of the company which were under the control of the president and secretary thereof. A demurrer having been sustained to the petition an amended petition was filed, alleging that Venner acquired certain shares of stock of the Chicago City Railway Company in the year 1905, which he held at the time the petition was filed. He alleged that he had made frequent applications to the company for the privilege of examining its books and that he had been denied such right. The amended petition contains other averments which were intended to support the application for mandamus on common-law grounds. In the view that we have of this controversy it will not be necessary to determine the sufficiency of the petition under the common law, and therefore not necessary to set out those averments in the petition. A demurrer interposed to the answer filed by defendants was carried back and sustained to the amended petition. The petitioner elected to abide by his amended petition, and it was dismissed and judgment rendered against petitioner for costs. The Appellate Court for the First District affirmed the judgment below, and the cause has been brought to this court by petitioner on a certificate of importance.

Section 13 of chapter 32 of Hurd's Revised Statutes of 1909 provides as follows: "It shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this State, correct books of account of all its business, and every stockholder in such corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records and books of account of the

corporation." This section of the statute is a part of our general act concerning corporations for pecuniary profit, which was approved April 18, 1872, and went into force July 1, 1872.

The Chicago City Railway Company was incorporated under a special public act of the legislature, which was approved February 14, 1859, and by its terms went into force from and after its passage. The act of 1859 created certain persons therein named a body corporate, by the name of "The Chicago City Railway Company," and authorized the said corporation to "construct, maintain and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side-tracks and appendages, in the city of Chicago, and in, on, over and along said street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south or west division of the city of Chicago, as the said council of said city have authorized said corporators or any of them, or shall authorize said corporators so to do." The capital stock of the said corporation was fixed at $100,000, with power to increase from time to time at the pleasure of said corporation, and it was provided by section 4 of said act that "all the corporate powers of said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint. * * * They [the board of directors] may also adopt such by-laws, rules and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this State."

There is nothing in the act of 1859 in relation to the keeping of books by the corporation or the inspection thereof by the stockholders, and no express declaration in said act that the corporation thereby chartered should be subject to laws that might thereafter be passed by the legislature. Under the situation thus presented appellant contends that he has a statutory right, under section 13 of the general Corporation act, to inspect the books of the company. Appellees deny that the Chicago City Railway Company is subject to section 13, and insist that appellant's right to the inspection of its books exists only under the common law and must be exercised in accordance therewith.

There is a well recognized distinction between the right of a stockholder to inspect the books and papers of a corporation under the common law and an unlimited right given by statute. Under the former the examination can only be compelled where the stockholder asks it in good faith and for reasons connected with his rights as a stockholder. (Heminway v. Heminway, 58 Conn. 443; Sage v. Lake Shore Railroad Co., 70 N. Y. 220; Phoenix Iron Co. v. Commonwealth, 113 Pa. St. 563; Stone v. Kellogg, 165 Ill. 192.) Where the right is conferred by statute in absolute terms, the purpose or motive of the stockholder in making the demand for an inspection is not material and he cannot be required to state his reasons therefor. (Thompson on Corporations,

2d. ed. sec. 4516.) The weight of American authority is to the effect that where the right is statutory the stockholder need not aver or show the object of his inspection, and it is no defense under a statute granting the absolute right to inspection to allege improper purposes or that the petitioner desires the information for the purpose of injuring the business of the corporation. A clear legal right given by a statute cannot be defeated by showing an improper motive. If this were so, the stockholder would be driven from a certain definite right given him by the statute, to the realm of uncertainty and speculation. (Thompson on Corporations, supra; Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156.) Leaving out of view entirely the sufficiency of the petition under the common law it must be conceded that it is sufficient under the statute, and it follows that if section 13 of the general Corporation law applies to the Chicago City Railway Company, the court erred in sustaining the demurrer to and dismissing the amended petition. * * *

(The learned judge *held* that section 13 of the general Corporation law did apply to the Chicago City Railway Company.)

From what has been said it follows that the court erred in sustaining the demurrer to the petition.

The judgments of the Appellate and Superior Courts are reversed and the cause is remanded to the Superior Court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.[1]

STOKES v. CONTINENTAL TRUST CO.

1906. 186 N. Y. 285, 78 N. E. 1090.

Right to Subscribe to New Stock.

Appeal from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 4, 1905, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial.

This action was brought by a stockholder to compel his cor-

[1] *Contra*, Peo. ex rel. Britton v. Amer. Press Assn. (1912), 148 App. Div. (N. Y.) 651, 133 N. Y. S. 216 (two justices dissenting).

Compare, In re Steinway (1899), 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461n, a case arising at common law.

"It does not follow that the courts will compel the inspection of the bank's books under all circumstances. In issuing the writ of mandamus the court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes or to gratify idle curiosity or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes." *Per* Mr. Justice Day in Guthrie v. Harkness (1905), 199 U. S. 148, at p. 156, 26 Sup. Ct. 4, 50 L. ed. 130.—Ed.

poration to issue to him at par such a proportion of an increase made in its capital stock as the number of shares held by him before such increase bore to the number of all the shares originally issued, and in case such additional shares could not be delivered to him for his damages in the premises.

The defendant is a domestic banking corporation in the city of New York, organized in 1890, with a capital stock of $500,000, consisting of 5,000 shares of the par value of $100 each. The plaintiff was one of the original stockholders and still owns all the stock issued to him at the date of organization, together with enough more acquired since to make 221 shares in all. On the 29th of January, 1902, the defendant had a surplus of $1,048,450.94, which made the book value of the stock at that time $309.69 per share. On the 2d of January, 1902, Blair & Company, a strong and influential firm of private bankers in the city of New York, made the following proposition to the defendant: "If your stockholders at the special meeting to be called for January 29, 1902, vote to increase your capital stock from $500,000 to $1,000,000 you may deliver the additional stock to us as soon as issued at $450 per share ($100 par value) for ourselves and our associates, it being understood that we may nominate ten of the 21 trustees to be elected at the adjourned annual meeting of stockholders."

The directors of the defendant promptly met and duly authorized a special meeting of the stockholders to be called to meet on January 29, 1902, for the purpose of voting upon the proposed increase of stock and the acceptance of the offer to purchase the same. Upon due notice a meeting of the stockholders was held accordingly, more than a majority attending either in person or by proxy. A resolution to increase the stock was adopted by the vote of 4,197 shares, all that were cast. Thereupon the plaintiff demanded from the defendant the right to subscribe for 221 shares of the new stock at par, and offered to pay immediately for the same, which demand was refused. A resolution directing a sale to Blair & Company at $450 a share was then adopted by a vote of 3,596 shares to 241. The plaintiff voted for the first resolution but against the last, and before the adoption of the latter he protested against the proposed sale of his proportionate share of the stock and again demanded the right to subscribe and pay for the same, but the demand was refused.

On the 30th of January, 1902, the stock was increased, and on the same day was sold to Blair & Company at the price named. Although the plaintiff formally renewed his demand for 221 shares of the new stock at par and tendered payment therefor, it was refused upon the ground that the stock had already been issued to Blair & Company. Owing in part to the offer of Blair & Company, which had become known to the public, the market price of the stock had increased from $450 a share in September, 1901,

to $550 in January, 1902, and at the time of the trial, in April, 1904, it was worth $700 per share.

Prior to the special meeting of the stockholders, by authority of the board of directors a circular letter was sent to each stockholder, including the plaintiff, giving notice of the proposition made by Blair & Company and recommending that it be accepted. Thereupon the plaintiff notified the defendant that he wished to subscribe for his proportionate share of the new stock, if issued, and at no time did he waive his right to subscribe for the same. Before the special meeting, he had not been definitely notified by the defendant that he could not receive his proportionate part of the increase, but was informed that his proposition would "be taken under consideration."

After finding these facts in substance, the trial court found, as conclusions of law, that the plaintiff had the right to subscribe for such proportion of the increase, as his holdings bore to all the stock before the increase was made; that the stockholders, directors and officers of the defendant had no power to deprive him of that right, and that he was entitled to recover the difference between the market value of 221 shares on the 30th of January, 1902, and the par value thereof, or the sum of $99,450, together with interest from said date. The judgment entered accordingly was reversed by the Appellate Division, and the plaintiff appealed to this court, giving the usual stipulation for judgment absolute in case the order of reversal should be affirmed. * * *

VANN, J.—No exception worthy of notice appears in the record, except those filed to the conclusions of law found by the trial judge. If those conclusions are supported by the facts found, the Appellate Division had no power to reverse the judgment rendered by the Special Term on questions of law only, as, from the silence of the record, it must be presumed was done. (Code Civ. Pro. § 1338.) If the facts found did not warrant the legal conclusions of the trial court the order of reversal was right and should be affirmed. Thus the question presented for decision is whether according to the facts found the plaintiff had the legal right to subscribe for and take the same number of shares of the new stock that he held of the old.

The subject is not regulated by statute and the question presented has never been directly passed upon by this court, and only to a limited extent has it been considered by courts in this state. (Miller v. Illinois Central R. R. Co., 24 Barb. 312; Matter of Wheeler, 2 Abb. Pr. (N. S.) 361; Currie v. White, 45 N. Y. 822.)

In the first case cited judgment was rendered by a divided vote of the General Term in the first district. The court held that the plaintiff was entitled to no relief because he did not own any shares when the new stock was issued, but only an option, and that he could not claim to be an actual holder until he had exer-

cised his right of election. The court further said, however, that if he was the owner of shares at the time of the new issue he had no absolute right as such owner to a distributive allotment of the new stock.

Matter of Wheeler was decided by Judge Mason at Special Term, and although the point was not directly involved, the learned judge said: "As I understand the law all these old stockholders had a right to share in the issuing of this new stock in proportion to the amount of stock held by them. And if none of the stock was to be apportioned to the old stockholders, they had certainly the right to have the new stock sold at public sale, and to the highest bidder, that they might share in the gains arising from the sale. In short, the old stockholders, as this was good stock and above par, had a property in the new stock, or a right at least to be secured the profits to be derived from a fair sale of it if they did not wish to purchase it themselves; and they have been deprived of this by the course which these directors have taken with this new stock by transferring or issuing it to themselves and others in a manner not authorized by law."

In Currie v. White the point was not directly involved, but Judge Folger, referring to the rights acquired under a certain contract, said: "One of these rights was to take new shares upon any legitimate increase of the capital stock, which right attaches to the old shares, not as a profit or income, but as inherent in the shares in their very creation," citing Atkins v. Albree (12 Allen, 359); Brander v. Brander (4 Ves. 800, and notes, Sumner ed.). While this was said in a dissenting opinion, Judge Rapallo, who spoke for the court, concurred, saying, "As to the claim for the additional stock, I concur in the conclusions of my learned brother Folger." The fair implication from both opinions is that if the plaintiff had preserved his rights, he would have been entitled to the new stock.

In other jurisdictions the decisions support the claim of the plaintiff with the exception of Ohio Insurance Co. v. Nunnemacher (15 Ind. 294), which turned on the language of the charter. The leading authority is Gray v. Portland Bank, decided in 1807 and reported in 3 Mass. 364. In that case a verdict was found for the plaintiff, subject, by the agreement of the parties, to the opinion of the court upon the evidence in the case whether the plaintiff was entitled to recover, and, if so, as to the measure of damages. The court held that stockholders who held old stock had a right to subscribe for and take new stock in proportion to their respective shares. As the corporation refused this right to the plaintiff he was permitted to recover the excess of the market value above the par value, with interest. In the course of its argument the court said: "A share in the stock or trust when only the least sum has been paid in is a share in the power of increasing it when the trustee determines or rather when the cestuis que trustent agree upon employing a greater

sum. * * * A vote to increase the capital stock, if it was not the creation of a new and disjointed capital, was in its nature an agreement among the stockholders to enlarge their shares in the amount or in the number to the extent required to effect that increase. * * * If from the progress of the institution and the expense incurred in it any advance upon the additional shares might be obtained in the market, this advance upon the shares relinquished belonged to the whole, and was not to be disposed of at the will of a majority of the stockholders to the partial benefit of some and exclusion of others."

This decision has stood unquestioned for nearly a hundred years and has been followed generally by courts of the highest standing. It is the foundation of the rule upon the subject that prevails, almost without exception, throughout the entire country.

In Way v. American Grease Company (60 N. J. Eq. 263, 269), the head note fairly expresses the decision as follows: "Directors of a corporation, which is fully organized and in the active conduct of its business, are bound to afford to existing stockholders an opportunity to subscribe for any new shares of its capital, in proportion to their holdings, before disposing of such new shares in any other way."

In Eidman v. Bowman (58 Ill. 444, 447), it was said: "When this corporation was organized, the charter and all of its franchises and privileges vested in the shareholders and the directors became their trustees for its management. The right to the remainder of the stock, when it should be issued, vested in the original stockholders, in proportion to the amount each held of the original stock, if they would pay for it, and was as fully theirs as was the stock already held and for which they had paid."

In Dousman v. Wisconsin, etc. Co. (40 Wis. 418, 421), it was held that a court of equity would compel a corporation to issue to every stockholder his proportion of new stock on the ground that "he has a right to maintain his proportionate interest in the corporation, certainly as long as there is sufficient stock remaining undisposed of by the corporation."

In Jones v. Morrison (31 Minn. 140, 152), it was said: "When the proposition that a corporation is trustee of the corporate property for the benefit of the stockholders in proportion to the stock held by them is admitted (and we find no well considered case which denies it), it covers as well the power to issue new stock as any other franchise or property which may be of value, held by the corporation. The value of that power, where it has actual value, is given to it by the property acquired and the business built up with the money paid by the subsisting stockholders. It happens not infrequently that corporations, instead of distributing their profits in the way of dividends to stockholders, accumulate them till a large surplus is on hand. No one would deny that, in such case, each stockholder has an interest in the surplus which the courts will protect. No one would claim that the offi-

cers, directors or majority of the stockholders, without the consent of all, could give away the surplus, or devote it to any other than the general purposes of the corporation. But when new stock is issued, each share of it has an interest in the surplus equal to that pertaining to each share of the original stock. And if the corporation, either through the officers, directors or majority of the stockholders, may dispose of the new stock to whomsoever it will, at whatever price it may fix, then it has the power to diminish the value of each share of old stock by letting in other parties to an equal interest in the surplus and in the good will or value of the established business."

In Real Estate Trust Co. v. Bird (90 Md. 229, 245), the court said: "There can be no doubt that the general rule is that when the capital stock of a corporation is increased by the issue of new shares, authorized by the charter, the holders of the original stock are entitled to the new stock in the proportion that the number of shares held by them bears to the whole number before the increase."

In all these cases, as well as many others, Gray v. Portland Bank (supra), is followed without criticism or question. In some cases the same result is reached without citing that case. Thus in Jones v. Concord & Montreal R. R. Co. (67 N. H. 119), it was declared, as stated in the head note, that "an issue of new shares of stock in an increase of the capital of a corporation is a partial division of the common property, which can be taken from the original shareholders only by their consent or by legal process."

So in Bank of Montgomery v. Reese (26 Pa. St. 143, 146; 31 id. 78), the court said: "Morgan L. Reese, as one of the stockholders of the Bank of Montgomery, was entitled to a portion of the unsold capital stock. His right was as valid as that of a tenant in common of real estate to his purpart on a partition. The corporation was a trustee for the stockholders, but in disregard of the duties of the trust in distributing this stock it deprived Mr. Reese of the number of shares to which he was entitled. He has established his right in this action." The question of power was broadly presented and decided.

In another case in the same state, Morris v. Stevens (178 Pa. St. 563, 578), Mr. Chief Justice Sterrett used the following language: "In general, the present holders of stock have a primary right to subscribe in proportion to their holdings for any new issue. The stockholders themselves certainly may determine otherwise and order a sale to the public and payment of the proceeds into the treasury. But this is exceptional and the exercise of a reserved power which should not be permitted unless there is a clear intent of the stockholders to do so." (See, also, Cunningham's Appeal, 108 Pa. St. 546; Reading Trust Co. v. Reading Iron Works, 137 Pa. St. 282; De La Cuesta v. Ins. Co., 136 Pa. St. 62; Humboldt Driving Park Assoc. v. Stevens, 34 Neb. 528, 534; Hart v. St. Charles Street R. R. Co., 30 La. Ann. 758;

State v. Smith, 48 Vt. 290; Atkins v. Albree, 94 Mass. 359; Hammond v. Edison Illuminating Co., 131 Mich. 79; Knapp v. Publishers George Knapp & Co., 127 Mo. 53; Baltimore City Pass. R. Co. v. Hambleton, 77 Md. 341; Jones v. C. & M. R. R. Co., 67 N. H. 119; id. 234.)

The elementary writers are very clear and emphatic in laying down the same rule. (The learned judge here referred to 2 Beach on Private Corporations, sec. 473; 1 Cook on Corporations (4th ed.) 286; 10 Cyc. 543; 26 Am. & Eng. Encyc. (2d ed.) 947; 2 Thompson's Commentaries, sec. 2094; Angell & Ames on Corporations, 430; Morawetz on Corporations, sec. 455.)

If the right claimed by the plaintiff was a right of property belonging to him as a stockholder he could not be deprived of it by the joint action of the other stockholders and of all the directors and officers of the corporation.

What is the nature of the right acquired by a stockholder through the ownership of shares of stock? What rights can he assert against the will of a majority of the stockholders and all the officers and directors? While he does not own and cannot dispose of any specific property of the corporation, yet he and his associates own the corporation itself, its charter, franchises and all rights conferred thereby, including the right to increase the stock. He has an inherent right to his proportionate share of any dividend declared, or of any surplus arising upon dissolution, and he can prevent waste or misappropriation of the property of the corporation by those in control. Finally, he has the right to vote for directors and upon all propositions subject by law to the control of the stockholders, and this is his supreme right and main protection. Stockholders have no direct voice in transacting the corporate business, but through their right to vote they can select those to whom the law intrusts the power of management and control.

A corporation is somewhat like a partnership, if one were possible, conducted wholly by agents where the copartners have power to appoint the agents, but are not responsible for their acts. The power to manage its affair resides in the directors, who are its agents, but the power to elect directors resides in the stockholders. This right to vote for directors and upon propositions to increase the stock or mortgage the assets, is about all the power the stockholder has. So long as the management is honest, within the corporate powers and involves no waste, the stockholders cannot interfere, even if the administration is feeble and unsatisfactory, but must correct such evils through their power to elect other directors. Hence, the power of the individual stockholder to vote in proportion to the number of his shares, is vital and cannot be cut off or curtailed by the action of all the other stockholders even with the cooperation of the directors and officers.

In the case before us the new stock came into existence through the exercise of a right belonging wholly to the stockholders. As

the right to increase the stock belonged to them, the stock when increased belonged to them also, as it was issued for money and not for property or for some purpose other than the sale thereof for money. By the increase of stock the voting power of the plaintiff was reduced one-half, and while he consented to the increase he did not consent to the disposition of the new stock by a sale thereof to Blair & Company at less than its market value, nor by sale to any person in any way except by an allotment to the stockholders. The increase and sale involved the transfer of rights belonging to the stockholders as part of their investment. The issue of new stock and the sale thereof to Blair & Company was not only a transfer to them of one-half the voting power of the old stockholders, but also of an equitable right to one-half the surplus which belonged to them. In other words, it was a partial division of the property of the old stockholders. The right to increase stock is not an asset of the corporation any more than the original stock when it was issued pursuant to subscription. The ownership of stock is in the nature of an inherent but indirect power to control the corporation. The stock when issued ready for delivery does not belong to the corporation in the way that it holds its real and personal property, with power to sell the same, but is held by it with no power of alienation in trust for the stockholders, who are the beneficial owners and become the legal owners upon paying therefor. The corporation has no rights hostile to those of the stockholders, but is the trustee for all including the minority. The new stock issued by the defendant under the permission of the statute did not belong to it, but was held by it the same as the original stock when first issued was held in trust for the stockholders. It has the same voting power as the old, share for share. The stockholders decided to enlarge their holdings, not by increasing the amount of each share, but by increasing the number of shares. The new stock belonged to the stockholders as an inherent right by virtue of their being stockholders, to be shared in proportion upon paying its par value or the value per share fixed by vote of a majority of the stockholders, or ascertained by a sale at public auction. While the corporation could not compel the plaintiff to take new shares at any price, since they were issued for money and not for property, it could not lawfully dispose of those shares without giving him a chance to get his proportion at the same price that outsiders got theirs. He had an inchoate right to one share of the new stock for each share owned by him of the old stock, provided he was ready to pay the price fixed by the stockholders. If so situated that he could not take it himself, he was entitled to sell the right to one who could, as is frequently done. Even this gives an advantage to capital, but capital necessarily has some advantage. Of course, there is a distinction when the new stock is issued in payment for property, but that is not this case. The stock in question was issued to be sold for money and was sold for

money only. A majority of the stockholders, as part of their power to increase the stock, may attach reasonable conditions to the disposition thereof, such as the requirement that every old stockholder electing to take new stock shall pay a fixed price therefor, not less than par, however, owing to the limitation of the statute. They may also provide for a sale in parcels or bulk at public auction, when every stockholder can bid the same as strangers. They cannot, however, dispose of it to strangers against the protest of any stockholder who insists that he has a right to his proportion. Otherwise the majority could deprive the minority of their proportionate power in the election of directors and of their proportionate right to share in the surplus, each of which is an inherent, pre-emptive and vested right of property. It is inviolable and can neither be taken away nor lessened without consent, or a waiver implying consent. The plaintiff had power, before the increase of stock, to vote on 221 shares of stock, out of a total of 5,000, at any meeting held by the stockholders for any purpose. By the action of the majority, taken against his will and protest, he now has only one-half the voting power that he had before, because the number of shares has been doubled while he still owns but 221. This touches him as a stockholder in such a way as to deprive him of a right of property. Blair & Company acquired virtual control, while he and the other stockholders lost it. We are not discussing equities, but legal rights, for this is an action at law, and the plaintiff was deprived of a strictly legal right. If the result gives him an advantage over other stockholders, it is because he stood upon his legal rights, while they did not. The question is what were his legal rights, not what his profits may be under the sale to Blair & Company, but what it might have been if the new stock had been issued to him in proportion to his holding of the old. The other stockholders could give their property to Blair & Company, but they could not give his.

A share of stock is a share in the power to increase the stock, and belongs to the stockholders the same as the stock itself. When that power is exercised, the new stock belongs to the old stockholders in proportion to their holding of old stock, subject to compliance with the lawful terms upon which it is issued. When the new stock is issued in payment for property purchased by the corporation, the stockholders' right is merged in the purchase and they have an advantage in the increase of the property of the corporation in proportion to the increase of stock. When the new stock is issued for money, while the stockholders may provide that it be sold at auction or fix the price at which it is to be sold, each stockholder is entitled to his proportion of the proceeds of the sale at auction, after he has had a right to bid at the sale, or to his proportion of the new stock at the price fixed by the stockholders.

We are thus led to lay down the rule that a stockholder has an

inherent right to a proportionate share of new stock issued for money only and not to purchase property for the purposes of the corporation or to effect a consolidation, and while he can waive that right, he cannot be deprived of it without his consent except when the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. This rule is just to all and tends to prevent the tyranny of majorities which needs restraint, as well as virtual attempts to blackmail by small minorities which should be prevented.

The remaining question is whether the plaintiff waived his rights by failing to do what he ought to have done, or by doing something he ought not to have done. He demanded his share of the new stock at par, instead of at the price fixed by the stockholders, for the authorization to sell at $450 a share was virtually fixing the price of the stock. He did more than this, however, for he not only voted against the proposition to sell to Blair & Company at $450, but as the court expressly found, he "protested against the proposed sale of his proportionate share of the stock and again demanded the right to subscribe and pay for the same which demands were again refused," and "the resolution was carried notwithstanding such protest and demands." Thus he protested against the sale of his share before the price was fixed, for the same resolution fixed the price and directed the sale, which was promptly carried into effect. If he had not attended the meeting, called upon due notice to do precisely what was done, perhaps he would have waived his rights, but he attended the meeting and before the price was fixed demanded the right to subscribe for 221 shares at par and offered to pay for the same immediately. It is true that after the price was fixed he did not offer to take his share at that price, but he did not acquiesce in the sale of his proportion to Blair & Company, and unless he acquiesced the sale as to him was without right. He was under no obligation to put the corporation in default by making a demand. The ordinary doctrine of demand, tender and refusal has no application to this case. The plaintiff had made no contract. He had not promised to do anything. No duty of performance rested upon him. He had an absolute right to the new stock in proportion to his holding of the old and he gave notice that he wanted it. It was his property and could not be disposed of without his consent. He did not consent. He protested in due time, and the sale was made in defiance of his protest. While in connection with his protest he demanded the right to subscribe at par, that demand was entirely proper when made, because the price had not then been fixed. After the price was fixed it was the duty of the defendant to offer him his proportion at that price, for it had notice that he had not acquiesced in the proposed sale of his share, but wanted it himself. The directors

were under the legal obligation to give him an opportunity to purchase at the price fixed before they could sell his property to a third party, even with the approval of a large majority of the stockholders. If he had remained silent and had made no request or protest he would have waived his rights, but after he had given notice that he wanted his part and had protested against the sale thereof, the defendant was bound to offer it to him at the price fixed by the stockholders. By selling to strangers without thus offering to sell to him, the defendant wrongfully deprived him of his property and is liable for such damages as he actually sustained.

The learned trial court, however, did not measure the damages according to law. The plaintiff was not entitled to the difference between the par value of the new stock and the market value thereof, for the stockholders had the right to fix the price at which the stock should be sold. They fixed the price at $450 a share, and for the failure of the defendant to offer the plaintiff his share at that price we hold it liable in damages. His actual loss, therefore, is $100 per share, or the difference between $450, the price that he would have been obliged to pay had he been permitted to purchase, and the market value on the day of sale, which was $550. This conclusion requires a reversal of the judgment rendered by the Appellate Division and a modification of that rendered by the trial court.

The order appealed from should be reversed and the judgment of the trial court modified by reducing the damages from the sum of $99,450, with interest from January 30, 1902, to the sum of $22,100, with interest from that date, and by striking out the extra allowance of costs, and as thus modified the judgment of the trial court is affirmed, without costs in this court or in the Appellate Division to either party.

HAIGHT, J. (dissenting).—I agree that the rule that we should adopt is that a stockholder in a corporation has an inherent right to purchase a proportionate share of new stock issued for money only, and not to purchase property necessary for the purposes of the corporation or to effect a consolidation. While he can waive that right he cannot be deprived of it without his consent, except by sale at a fixed price at or above par, in which he may buy at that price in proportion to his holding or in some other equitable way that will enable him to protect his interest by acting on his own judgment and using his own resources. I, however, differ with Judge Vann as to his conclusions as to the rights of the plaintiff herein. Under the findings of the trial court the plaintiff demanded that his share of the new stock should be issued to him at par, or $100 per share, instead of $450 per share, the price offered by Blair & Company and the price fixed at the stockholders' meeting at which the new stock was authorized to be sold. This demand was made after the passage

of the resolution authorizing the increase of the capital stock of the defendant company and before the passage of the resolution authorizing a sale of the new stock to Blair & Company at the price specified. After the passage of the second resolution he objected to the sale of his proportionate share of the new stock to Blair & Company and again demanded that it be issued to him, and the following day he made a legal tender for the amount of his portion of the new stock at $100 per share. There is no finding of fact or evidence in the record showing that he was ever ready or willing to pay $450 per share for the stock. He knew that Blair & Company represented Marshall Field and others at Chicago, great dry goods merchants, and that they had made a written offer to purchase the new stock of the company provided the stockholders would authorize an increase of its capital stock from five hundred thousand to a million dollars. He knew that the trustees of the company had called a special meeting of the stockholders for the purpose of considering the offer so made by Blair & Company. He knew that the increased capitalization proposed was for the purpose of enlarging the business of the company and bringing into its management the gentlemen referred to. There is no pretense that any of the stockholders would have voted for an increase of the capital stock otherwise than for the purpose of accepting the offer of Blair & Company. All were evidently desirous of interesting the gentlemen referred to in the company, and by securing their business and deposits increase the earnings of the company. This the trustees carefully considered, and in their notice calling the special meeting of the stockholders distinctly recommended the acceptance of the offer. What, then, was the legal effect of the plaintiff's demand and tender? To my mind it was simply an attempt to make something out of his associates, to get for $100 per share the stock which Blair & Company had offered to purchase for $450 per share; and that it was the equivalent of a refusal to pay $450 per share, and its effect is to waive his right to procure the stock by paying that amount. An acceptance of his offer would have been most unjust to the remaining stockholders. It would not only have deprived them of the additional sum of $350 per share, which had been offered for the stock, but it would have defeated the object and purpose for which the meeting was called, for it was well understood that Blair & Company would not accept less than the whole issue of the new stock. But this is not all. It appears that prior to the offer of Blair & Company the stock of the company had never been sold above $450 per share; that thereafter the stock rapidly advanced until the day of the completion of the sale on the 30th of January, when its market value was $550 per share; but this, under the stipulation of facts, was caused by the rumor and subsequent announcement and consummation of the proposition for the increase of the stock and the sale of such increase to Blair & Company and their associates. It is now proposed to give the

plaintiff as damages such increase in the market value of the stock, even though such value was based upon the understanding that Blair & Company were to become stockholders in the corporation, which the acceptance of plaintiff's offer would have prevented. This, to my mind, should not be done. I, therefore, favor an affirmance.

Cullen, Ch. J., Werner and Hiscock, JJ., concur with Vann, J.; Willard Bartlett, J., concurs with Haight, J.; O'Brien, J., absent.

Ordered accordingly.

KING v. PATERSON AND HUDSON RIVER R. CO.

1861. 29 N. J. L. 504.

Right to Dividends.

In error to the Supreme Court.

The opinion of the court was delivered by the Chancellor.—The action is brought to recover the amount of two dividends, declared in January and July, 1857, upon two hundred shares of the capital stock of the corporation owned by the plaintiffs. The dividends were made payable at the branch office of the Ohio Life Insurance and Trust Company, in the city of New York, the trust company being appointed registers of the railroad company to transfer stock and to pay dividends. Notice of the dividends and of the time and place of payment was published in a newspaper printed and published in the city of New York. The money to pay the dividends was deposited by the defendants in the office of the trust company, before the day of payment of each of said dividends, ready to be paid to the plaintiffs on their application. The money was left in the hands of the trust company until the 24th of August, 1857, when the company failed, and the money was lost.

After a dividend is declared, all community of interest in relation to such dividend, as between the stockholders themselves and between the stockholders and the corporation, is at an end. The right of a party to whom the dividend is payable is recognized as a separate and independent right, which may be enforced as against the corporation. Davis v. The Bank of England, 5 Barn. & Cress. 185; Coles v. The Bank of England, 10 Ad. & E. 437; Carlisle v. South Eastern Railway Co., 6 English Rail. Cas. 685; 1 Shelf. on Rail. 205.

This principle was fully recognized in Le Roy v. The Globe Insurance Co., 2 Edw. Ch. R. 657, although the precise character of the relation subsisting between the stockholder and the corporation in respect to the dividend was not clearly defined. In the opinion of the Vice Chancellor, if payment of the dividends declared is withheld by a solvent corporation, payment may be

enforced at the instance of the stockholders by mandamus, by suit at law on behalf of individual stockholders for the payment of the money, or by bill in equity to obtain possession of the money as a trust fund, which the corporation were bound to distribute, and over which they had no other control. In that case, the company being insolvent, it was held that the money appropriated and set apart for distribution among the stockholders by way of dividend became a trust fund in the hands of the corporation, to which the stockholders, as individuals, had acquired vested rights, and that they consequently were entitled to the fund in preference to the creditors of the corporation.

In Kane v. Bloodgood, 7 Johns. C. R. 90, Chancellor Kent held that an action at law for money had and received would lie by a stockholder against a corporation for the recovery of a dividend, and that it was not such an express trust as would take the case out of the statute of limitations.

The true principle is, that the dividend, from the time that it is declared, becomes a debt due from the corporation to the individual stockholder, for the recovery of which, after demand of payment, an action at law may be maintained. State v. Balt. and Ohio Railway, 6 Gill, 363; Phil., Wil. and Balt. Railway v. Crowell, 28 Penn. St. Rep. 329; Ohio City v. Cleveland and Toledo Railway, 6 Ohio St. Rep. 329.

Like any other debt, it may be set off against the debt of the stockholder to the corporation. Bates v. New York Insurance Co., 3 Johns. Cas. 238; 12 Serg. & R. 77.

It may be, by banking corporations, sometimes carried to the general account of the stockholder with the corporation, and is thus applied in adjusting balances between the parties or in satisfying the claims of the corporation against the stockholder. They thus act in the character not of trustees, but of debtors. The fund is dealt with not as a trust fund, but as money due. And why should it not be so regarded? What principle is violated? Does not sound policy require that the relation between the stockholder and the corporation in relation to the dividend should be simply that of debtor and creditor; that the stockholder should have his remedy at law, and that the corporation should be permitted to apply it by way of set-off to satisfy demands against the stockholder?

Why is the case distinguishable in principle from that of a stockholder who is also a depositor? The dividend and the deposit are alike debts due from the corporation to the stockholder. Both are in the keeping and under the control of the corporation with the assent and concurrence of the stockholder. It has been repeatedly decided that an action lies for a deposit by a depositor against a corporation after demand. The fact that he is a member of the corporation cannot vary the principle. Downes v. The Phoenix Bank of Charlestown, 6 Hill, 297; Watson v. The Phoenix Bank, 8 Metc. 217.

In a limited sense, the deposit and the dividend in the hands of the corporation are alike trusts. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee. Kane v. Bloodgood, 7 J. C. R. 110; Scott v. Surman, Willes, 404. In this limited sense, and in no other, the corporation is a trustee of the dividend unpaid to the stockholder.

The debt is strictly demandable and to be paid at the office of the corporation. Admitting the right of the corporation to make it payable elsewhere, it must be done at the risk of the corporation. The debtor has no right, without the consent of the creditor, express or implied, to intrust a third party with the fund for the purposes of payment. The trust company with whom the funds were deposited for payment was the agent of the corporation, not of the stockholders; of the debtor, not of the creditor. If the agent prove faithless, or the fund is lost in his hands, the loss must fall upon the owner. The deposit was made in the name of the corporation, and was subject to their control. There is nothing in the special verdict that shows a consent, express or implied, on the part of the plaintiffs to their funds being intrusted to, or deposited with, the Ohio Life and Trust Company.

Strong considerations in support of this conclusion may, perhaps, as was urged upon the argument, be derived from the peculiar provisions of the charter of the railroad company, as well as from the policy of the law, which would deny to a corporation, within this state, the right to deposit moneys due to its creditors in the hands of a foreign corporation. But the decision is designedly based upon the sole ground, that after a dividend is declared, it becomes a debt due from the corporation to the stockholder as an individual, and that the selection of an agent for the payment of that debt by the debtor without the concurrence of the creditor must be at the risk of the debtor alone. The fund remains the property of the corporation until payment is made. If a loss is sustained, it falls upon the owner.

The judgment must be affirmed.

For affirmance.—The Chancellor, the Chief Justice, and Judges Brown, Combs, Cornelison, Kennedy, Risley, Swain, and Wood.

For reversal.—None.[1]

[1] As to stock dividend, see, Williams v. Western Union Telegraph Co., 93 N. Y. 162.

As to right between life tenant and remainderman to stock dividend, see, Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. 1057; Earp's Appeal, 28 Pa. St. 368; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230.—Ed.

HAWES v. OAKLAND.

1881. 104 U. S. 450, 26 L. ed. 827.[1]

Stockholder's Representative Suit.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a decree in chancery dismissing the complainant's bill, wherein he, a citizen of New York, alleges that he is a stockholder in the Contra Costa Water-works Company, a California corporation, and that he files it on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the suit.

The defendants are the city of Oakland, the Contra Costa Water-works Company, and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook, and John W. Coleman, trustees and directors of the company.

The foundation of the complaint is that the city of Oakland claims at the hands of the company water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only entitled to receive water free of charge in cases of fire or other great necessity; that the company comply with this demand, to the great loss and injury of the company, to the diminution of the dividends which should come to him and other stockholders, and to the decrease in the value of their stock. The allegation of his attempt to get the directors to correct this evil will be given in the language of the bill.

He says that "on the tenth day of July, 1878, he applied to the president and board of directors or trustees of said water company, and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation; but said board of directors and trustees have wholly declined to take any proceedings whatever in the premises, and threatened to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all municipal purposes as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said water company and your orator and the other stockholders thereof have suffered, and will, by a continuance of said acts, hereafter suffer, great loss and damage."

To this bill the water-works company and the directors failed

[1] See, Mozley v. Alston (1847), 1 Ph. 790. *Cf.* Bagshaw v. Eastern &c. R. Co. (1849), 7 Hare 114, 129; MacDougall v. Gardiner (1875), L. R. 1 Ch. Div. 13, 25; Alexander v. Automatic Tel. Co. L. R. (1900), 2 Ch. Div. 56, 69, rev'g. (1899), 2 Ch. Div. 302.—Ed.

to make answer; and the city of Oakland filed a demurrer, which was sustained by the court and the bill dismissed. The complainant appealed.

Two grounds of demurrer were set out and relied on in the court below, and are urged upon us on this appeal. They are:

1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body.

2. That by a sound construction of the law under which the company is organized the city of Oakland is entitled to receive, free of compensation, all the water which the bill charges it with so using.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States.

Since the decision of this court in Dodge v. Woolsey (18 How. 331), the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of resorting to the State courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of an-

other State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for a hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction.

That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the beneficent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted; and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed. These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this.

This corporation, like others, is created a body politic, and corporate, that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do.

Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue or be sued in their corporate name in regard to all of these transactions. The parties who deal with them understand this, and that they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation.

The principle involved in the case of Dodge v. Woolsey permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that corporation and the other party, each being entirely capable of asserting its own rights.

This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholder, who may

be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country.

(The learned justice proceeded to consider Foss v. Harbottle, 2 Hare, 461, and Mozley v. Alston, 1 Ph. 790.)

These cases have been referred to again and again in the English courts as leading cases on the subject to which they relate, and always with approval.

In Gray v. Lewis, decided in 1873, Sir W. M. James, L. J., said: "I am of opinion that the only person, if you may call it a person, having a right to complain was the incorporated society called Charles Lafitte & Co. In its corporate character it was liable to be sued and was entitled to sue; and if the company sued in its corporate character, the defendant might allege a release or a compromise by the company in its corporate character—a defense which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in Mozley v. Alston and Foss v. Harbottle, to which, as I understand, the only exception is where the corporate body has got into the hands of directors, and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overpowered by them, as in Atwood v. Merryweather, where Vice-Chancellor Wood sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain proper authority from the corporate body itself in a public meeting assembled." Law Rep. 8 Ch. App. 1035.

But perhaps the best assertion of the rule and of the exceptions to it are found in the opinion of the court by the same learned justice in McDougall v. Gardiner, in 1875, 1 Ch. D. 13. "I am of opinion," he says, "that this demurrer ought to be allowed. I think it is of the utmost importance in all these controversies that the rule which is well known in this court as the rule in Mozley v. Alston, and Lord v. Copper Miner's Company, and Foss v. Harbottle, should always be adhered to; that is to say, that nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent; unless there is something ultra vires on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to deter-

mine it, but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company,—there may be claims against directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done."

The cases in the English courts are numerous, but the foregoing citations give the spirit of them correctly.

In this country the cases outside of the Federal courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud or a breach of trust, or are proceeding ultra vires. Marsh v. Eastern Railroad Co., 40 N. H. 548; Peabody v. Flint, 6 Allen (Mass.), 52. In Brewer v. Boston Theater (104 Mass. 378), the general doctrine and its limitations are very well stated. See also Hersey v. Veazie, 24 Me. 9; and Samuel v. Holladay, 1 Woolw. 400.

The case of Dodge v. Woolsey, decided in this court in 1855, is, however, the leading case on the subject in this country.

And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration with a full reference to the decisions then made in the courts of England. The suit—a bill in chancery—was brought in the Circuit Court for the District of Ohio, by Woolsey, a stockholder of the Commercial Bank of Cleveland, and a citizen of Connecticut, against that bank, its managing directors, and Dodge, tax collector of the county in which the bank was situated, citizens of Ohio. The bill alleged that Dodge had levied upon property of the bank to make collection of a tax, which, by the Constitution of the State of Ohio, the bank was bound to pay; that in that respect the Constitution, then recently adopted, impaired the obligation of the contract of the State with the bank, contained in its charter. It appeared in the case that Woolsey had, by letter directed to the board of directors, requested them to institute proceedings to prevent the collection of this tax; but the board, by a resolution, declined to take any such action, while expressing their opinion that the tax was illegal. In the opinion of the court, reciting the circumstances which justified its interposition at the suit of the stockholder, the allegation of the bill is adverted to, that if the taxes are enforced it will annul the contract with the State concerning taxation, and that the *tax is so onerous upon*

the bank that it will compel a suspension and final cessation of its business. The following extract from Angell & Ames on Corporations is cited with approval: "Though the result of the authorities clearly is that in a corporation, when acting within the scope of, and in obedience to, the provisions of its constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the act of incorporation the will of the majority cannot make the act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors." And the court adds: "It is obvious from this rule that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

A very large part of the opinion is devoted to the consideration of the high function of this court in construing the Constitution of the United States, and it is impossible not to see the influence on the mind of the writer of that opinion of the fact that the only question on the merits of the case was one which peculiarly belonged to the Federal judiciary, and especially to this court to decide; namely, whether the Constitution of the State of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank.

As the law then stood there was no means by which the bank, being a citizen of the same State with Dodge, the tax collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States.

That difficulty no longer exists, for by the act of March 3, 1875, c. 137 (18 Stat., pt. 3, p. 470), all suits arising under the Constitution or laws of the United States may be brought originally in the Circuit Courts of the United States without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank, in Dodge v. Woolsey, could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose.

And this same statute, while enlarging the jurisdiction of the Circuit Courts in cases fairly within the constitutional grant of power to the Federal judiciary, strikes a blow, by its fifth section, at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares, if at any time in the progress of a case, either originally commenced in a Circuit Court, or removed there from a State court, it shall appear to said court "that such suit does not really and

substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed."

It is believed that a rigid enforcement of this statute by the Circuit Courts would relieve them of many cases which have no proper place on their dockets.

This examination of Dodge v. Woolsey satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes.

He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit.

It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court.

He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or to obtain their action. But within five days after his application to the directors this bill is filed. There is no allegation of fraud or of acts ultra vires, or of destruction of property, or of irremediable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance; namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California may take this view of it, and be content to abide by the action of their directors.

If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividends is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was prop-

erly sustained, and the bill dismissed, because the appellant shows no standing in a court of equity—no right in himself to prosecute this suit.

Decree affirmed.[2]

RABE v. DUNLAP.

1893. 51 N. J. Eq. 40, 25 Atl. 959.

Rights of Stockholders—Relief Against Ultra Vires Acts—Laches.

VAN FLEET, V. C.: This is an application for an injunction. The application is resisted on the ground that the complainants have, by their laches, lost all right to either temporary or permanent relief; the contention being that they are not entitled to an injunction now, nor can any relief be given to them on final hearing. The only question, however, before the court at this time, is whether or not an injunction should issue. The facts to be considered in deciding this question are almost entirely free from dispute.

The particular property which the complainants ask to have protected is shares of stock issued to them by the Lake Hopatcong Land & Improvement Company, a corporation organized under the laws of this state in August, 1885, with a capital of $50,000, divided into 500 shares of $100 each. Only 249 of the 500 shares appear to have been issued, and of these one of the complainants holds 5 shares, and the other 6. The principal purposes for which the corporation was organized were to buy

[2] Following the decision in the principal case, the Supreme Court of the United States, on Jan. 23, 1882, promulgated Equity Rule No. 94 (see Preface, IX, of 104 U. S.), which constitutes the basis of the new Equity Rule No. 27, promulgated Nov. 4, 1912, viz.—

"27.—*Stockholder's Bill.*—Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."

See, also, Detroit v. Dean (1882), 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. 560 (approving the principal case); Corbus v. Alaska &c. Min. Co. (1902), 187 U. S. 455, 23 Sup. Ct. 157, 47 L. ed. 256; Delaware & Hudson Co. v. Albany &c. R. Co. (1909), 213 U. S. 435, 29 Sup. Ct. 540, 53 L. ed. 862.—Ed.

and sell land, and erect buildings, on and about Lake Hopatcong. Some of the persons interested in this corporation, organized three others—one on the 15th day of January, 1886, called the Lake Hopatcong Hotel Company, the purposes of which were to buy land, and erect hotels, cottages and other appropriate structures thereon, and to carry on the business of an innkeeper; another on the 29th day of June, 1886, called the Lake Hopatcong Transportation & Steamboat Company, the purpose of which was to carry on the business of transporting passengers and merchandise for hire; and the third, on the 14th day of March, 1887, called the Hotel Breslin Villa Company, the purposes of which were to buy land, and erect hotels and other buildings thereon, and lease and sell the same. On the 17th day of April, 1888, a statute was passed, making it lawful for two or more corporations organized under the general laws of this state, and formed "for all or any of the following purposes: The improvement and sale of lands; the construction, maintenance and operation of hotels, and carrying on the business of an innkeeper; and the transportation of merchandise and passengers upon land and water"—to consolidate and merge their corporate rights, franchises, powers, and privileges into a single corporation, so that all the property, rights, franchises, and privileges by law vested in the several corporations should, by the consolidation, be transferred to and vested in the corporation created by the consolidation. P. L. 1888, p. 441. This statute took effect immediately. It prescribes with particularity the "conditions and restrictions" to be performed and observed in consolidating two or more corporations. For the purposes of this discussion, it is unnecessary to state what these conditions and restrictions are, further than to say that no consolidation can be made until all of the corporations proposing to consolidate have entered into an agreement, under the corporate seals, prescribing the terms and conditions of the consolidation, and the mode of carrying the same into effect, nor until the agreement so made has been submitted to the stockholders of each of the corporations separately, at a meeting called for that purpose, and has been sanctioned and approved by a majority of the shares present at such meeting.

Almost immediately after the enactment of this statute the four corporations just described consolidated under its authority. The corporation so created is called the Breslin Hotel & Land Company. The agreement to consolidate was made by the four corporations on the 4th day of May, 1888, and was sanctioned and approved by their respective stockholders, in the manner prescribed by the statute, at a meeting held on the 31st day of the same month. Of the 249 shares issued by the corporation in which the complainants held stock, 184 were represented at the meeting of the stockholders of that corporation, and voted in favor of consolidation. The complainants did not attend the meeting, nor was their stock represented there, though it is

admitted that they had notice of the meeting, and its object, and also knew that a committee appointed by the four corporations to consider the expediency of amalgamation had made a report as early as February, 1888, in favor of consolidation. It is undisputed that the consolidation agreement conforms in all respects to the requirements of the statute, and also that every act which the statute requires to be done in order to make such an agreement valid and effectual was done in this case. The agreement, together with the sanction and approval of the stockholders, was filed in the office of the secretary of state on the 13th day of September, 1888. By force of the statute, such filing made the consolidation complete, and transformed the four distinct corporate entities into one. The property of the four corporations was thereupon conveyed to the new corporation, the Breslin Hotel & Land Company. The consolidation agreement provided that the stockholders of the corporation in which the complainants held stock should have the right to exchange their stock, share for share, for the preferred stock of the new corporation. Such preferred stock entitled its holder to a preferential dividend of six per cent. annually. The complainants were notified by a written notice that they had a right to exchange their stock for preferred stock of the new corporation, and also that a stockholders' meeting for the election of directors of the new corporation would be held in Hoboken on the 10th day of October, 1888. They paid no attention to the notice. The new corporation was on the day appointed organized, and proceeded at once to make contracts and incur obligations, and to carry on the various enterprises and ventures which the four corporations had previously conducted separately. Between the 10th day of October, 1888, and the 21st day of October, 1889, the defendant, Robert Dunlap, loaned and advanced to the new corporation over $22,000. He also, on the 25th day of November, 1889, indorsed for its accommodation a note for $10,000, and another of the same amount on the 13th day of December, 1889, both of which he has since been compelled to pay. To secure Mr. Dunlap for what was due to him for moneys loaned and advanced, and also to protect him against the liability he had incurred in indorsing the two notes, the new corporation executed four mortgages to him on the 27th day of December, 1889—two on its real estate and the other two on its chattels. Some of the land so conveyed in pledge is land which prior to the consolidation belonged to the corporation in which the complainants hold stock, and which after the consolidation was conveyed to the new corporation in performance of the consolidation agreement. On the date when these mortgages were executed it is not disputed that there was over $24,000 due to Mr. Dunlap for loans and advances to the new corporation. Nor is it disputed that there is now a further sum of over $18,000 due to him for money paid for the new corporation, in discharging the liability he incurred in indorsing the two notes.

In March, 1892, a suit was brought in this court by Mr. Dunlap to foreclose his mortgages. No defense was made. A decree pro confesso has been entered, and a reference ordered; and the case, in respect to the matters referred, is now pending before the master. After the order of reference was made one of the complainants in this suit was allowed to intervene in that, with the right to make any defense which either of the defendants could have made.

It is at this point in the history of the new corporation that the complainants for the first time, ask for judicial protection of their rights; and the relief they now seek is of the most destructive kind to every right and interest standing opposed to their interests. They ask to have the new corporation ripped up from bottom to top, and that everything which it has done affecting their rights may be undone. Stated in detail, what they ask is this: That the new corporation may be declared to have been void from the beginning; that the deed by which the property of the corporation in which they are interested was conveyed to the new corporation may be declared to be a nullity, and that the property conveyed by it may be restored to the grantor, or to a trustee to be appointed for that purpose; that the new corporation may be required to account for all property of their corporation which it has disposed of; that the mortgages of the defendant may be decreed to be no lien on the land which their corporation conveyed to the new corporation, and that he may, in addition, be commanded and required to execute a release, releasing such land from the operation of his mortgages; and that in the meantime, and as preliminary to the principal relief sought, the further prosecution of his foreclosure suit in this court may be stayed or restrained.

That the conveyance by the complainants' corporation of all of its property to the new corporation, for the purpose of appropriating it to new and different purposes from those for which the grantor corporation held it, was without power or right, and a plain misappropriation of the property, as against non-assenting stockholders, is a proposition that was not disputed on the argument. It cannot be. It is incontestable. The stockholders of a corporation have an indisputable right to have the property of the corporation applied and used exclusively for the purposes specified in its charter, and any attempt by its managers to appropriate it to any other purpose is a usurpation of power, and a violation of the rights of the stockholders. No rule of law is better settled than that which declares that a corporation created by statute, either special or general, can exercise no power, and has no rights, except such as are granted by express words or fair implication; and in the construction of such grants the rule is well settled that it must be held that what is fairly implied is as much granted as what is clearly expressed. By the charter of the complainants' corporation, its managers are given no power

whatever to carry on the business of an innkeeper or that of a common carrier, or to embark the property of the corporation in such or like enterprises. They are radically different from, and wholly foreign to, the purposes specified in its charter. The complainants were not deprived of their stock, or any of their rights, by the statute of 1888. It is beyond the power of the legislature to take away or destroy a vested right. Private property may be taken for public use on just compensation, but the use here was in no sense a public use. The only effect which can, in my judgment, be given to this statute in this case, is to hold that it made the new corporation a valid corporation as to those who should deal with it, and as against assenting stockholders, but it is left to the rights of the nonassenting stockholders in full vigor, and unimpaired. There can be no doubt, therefore, that had the complainants applied for an injunction promptly, and while it was in the power of the court to extend protection to them without doing wrong or injustice to others, it would have been granted. A corporation holds its property as the trustee of its stockholders, and they, like any other cestui que trust, have a right to have the trust property judiciously and honestly managed, and preserved from waste and misappropriation. But stockholders to be entitled to the summary interference of the court in cases where they seek protection against acts which are merely in excess of the power of the corporation, and are not prohibited by law, must be diligent. They must apply so recently after the doing of the act of which they complain that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person. The principle which must control the action of a court of equity in cases where the defense is laches was laid down by Lord Camden, many years ago, in these words: "Nothing can call forth the activity of a court of equity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in equity." Smith v. Clay, reported in a note to Delorainc v. Browne, 3 Brown, Ch. 639, 2 Amb. 645. This principle as it is applied to stockholders who are tardy in seeking protection against acts ultra vires of the corporation, was expressed by Sir John Romilly, master of the rolls, in Gregory v. Patchett, 33 Beav. 595, 602, in this form: "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is ultra vires of the company to which they belong; watching the result,—if it be favorable and profitable to themselves, to abide by it, and insist on its validity; but, if it prove unfavorable and disastrous, then to institute proceedings to set it aside." And Lord Justice Turner's statement of the rule is equally pertinent to the case in hand. In Great Western Ry. Co. v. Oxford, W. & W. Ry. Co., 3 De

Gex. M. & G. 341, 359, he said: "Where the summary interference of this court is invoked, in cases of this nature, it must be invoked promptly. Parties who have lain by and permitted a large expenditure to be made, in contravention of the rights for which they contend, cannot call upon the court for its summary interference. The jurisdiction to interfere is purely equitable, and it must be governed by equitable principles. One of the first of those principles is that parties coming into equity must do equity, and this principle more than reaches to cases of this description. If parties cannot come into equity without submitting to do equity a fortiori they cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity being done." The cases in which this principle as it is applied to stockholders, has been discussed, are numerous. The doctrine they establish is that where an act is done openly, and especially on notice, and without evil intent, though clearly in excess of the power of the corporation, a non-assenting stockholder will not be allowed to pause to speculate upon the chances—to wait until he can see whether such act is likely to result in profit or loss—but, to be entitled to the summary interference of the court, he must ask for it promptly, and before the act of which he complains has become the foundation of rights or equities which must be destroyed, or greatly impaired, if the act be nullified or undone. Or, stated with greater brevity, and in its simple essence, the rule is this: If he wants protection against the consequences of an ultra vires act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others. Kent v. Mining Co., 78 N. Y. 159; Shelden Hat-Blocking Co. v. Eickemeyer Hat-Blocking Mach. Co., 90 N. Y. 607; Watts' Appeal, 78 Pa. St. 370; Kitchen v. Railroad Co., 69 Mo. 224; Taylor v. Railroad Co., 4 Woods, 575, 13 Fed. Rep. 152; Graham v. Railroad Co., 2 Macn. & G. 146.

This principle must control the decision of the present application. No argument is required to show its pertinency. When the leading facts of the case are recalled, it applies itself. Whether the complainants remained inactive, to speculate upon the chances, intending to abide by the consolidation if it resulted in benefit, and, if not, to try to undo it, it is manifest that they acted precisely as they would have done if such had been their intention. Although they were fully informed of each step in the consolidation scheme, from its inception to its completion, and also of the fact that the new corporation had been organized, and was actively engaged in the prosecution of the several enterprises which had previously been carried on by the four corporations separately, yet for over three years they remained passive and inactive, and did nothing; and it is not until the new corporation has become insolvent, and all of its property is about to be sold to pay mortgages which were made and accepted

while they were apparently assenting to the amalgamation, and all its consequences, that they seek to have the consolidation broken up, and the property of the corporation in which they are interested restored to it. They laid by until the new venture proved disastrous, and then, for the first time, they ask the court to undo what for over three years they had, by their inaction and delay, been apparently assenting to. Acquiescence or tacit assent, in such cases, was defined by Judge Folger in Kent v. Mining Co., supra, to mean neglect to promptly and actively condemn the unauthorized act by suit. More than a year elapsed between the formation of the new corporation and the execution of the four mortgages to the defendant. If the validity of the new corporation had been promptly challenged by suit, it is almost absolutely certain that the debts secured by those mortgages would not have been contracted. Neither the mortgages or the debts would have then existed. As it is, those mortgages are unquestionably good and valid as against the assenting stockholders. It is probable that 237 out of the 249 shares have assented. It is certain that 184 have. In this situation of affairs it is obvious, to arrest the defendant's foreclosure suit will prevent him at least for the present, from enforcing that part of his security which is good beyond question; and this must be done, if done at all, to protect the complainants in the enjoyment of a right small in both extent and value, compared with that of the defendant, and which it is not at all certain they have not irretrievably lost by their laches. The complainants, in my judgment, occupy the position described by Lord Justice Turner when he said: "Suitors cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity being done." The complainants' application will be denied, with costs.

CONTINENTAL SECURITIES CO v. BELMONT.

1912. 206 N. Y. 7, 99 N. E. 138.

Stockholders' Suit.

Action by the Continental Securities Company and Clarence H. Venner, stockholders in the Interborough Rapid Transit Company, on behalf of themselves and of other stockholders similarly situated, and on behalf of the company, against August Belmont and others, impleaded with the Interborough Rapid Transit Company. From an order of the Appellate Division, affirming an order denying a motion by certain of the defendants for judgment upon the pleadings, defendants, other than the Interborough Rapid Transit Company, appeal by permission.

CHASE, J.—This is a representative action derived from the Interborough Rapid Transit Company. It is brought in behalf of the plaintiffs and all others similarly interested, as stockholders of said company, against the directors of said company and said company to require said individual defendants to account to said company for fifteen thousand shares of its capital stock, alleged to have been issued fraudulently and illegally, and without any valid or adequate consideration therefor, but upon an alleged consideration that was a pretense and subterfuge and intended to cover a gift or bonus to the defendants Belmont and Luttgen, and their nominees, and also to require said individual defendants to account for the dividends which have been paid on said stock. It is alleged that by reason of the facts set forth in the complaint the defendant corporation has suffered damage to an amount exceeding $4,500,000. Each of the defendants answered the complaint, and, after the answers were interposed, a motion was made for judgment upon the pleadings dismissing the complaint pursuant to section 547 of the Code of Civil Procedure, which motion was denied. An appeal was taken therefrom to the Appellate Division, where the order denying said motion was unanimously affirmed. Leave was granted by the Appellate Division to the defendants, other than the defendant company, to appeal to this court, and the following questions were certified:

"(1) Does the complaint state a cause of action?

"(2) Was the motion of the defendants for judgment against the plaintiffs on the pleadings rightfully denied?"

As the opinion will not discuss the complaint generally, but only in connection with the objections that are made to it by the appellants in this court, it is unnecessary to state its provisions except as required in considering such objections.

It appears from the complaint that each of the plaintiffs purchased his stock subsequently to the transactions complained of in the complaint. This court in the recent case of Pollitz v. Gould, 202 N. Y. 11, 94 N. E. 1088, has definitely determined that a stockholder may bring an action in behalf of the corporation for the benefit of himself and all other stockholders to set aside as fraudulent an improper transaction consummated at the expense of the corporation before he acquired his stock.

It is alleged that the 15,000 shares of stock were issued pursuant to a resolution unanimously adopted by the directors of said company, of which the following is a copy, viz.: "Resolved that this company do purchase of August Belmont & Company one thousand nine hundred and seventy-five (1,975) shares of the capital stock of the Pelham Park Railroad Company of the par value of twenty-five dollars ($25) per share; one thousand nine hundred and thirty-five (1,935) shares of the capital stock of the City Island Railroad Company of the par value of twenty-five dollars ($25) per share; and twenty-seven thousand five hundred dollars ($27,500) in the first mortgage bonds of the Pelham Park

Railroad Company, for the sum of one million five hundred thousand dollars ($1,500,000) to be paid by the issue and delivery of fifteen thousand (15,000) shares of the par value of one hundred dollars ($100) each in the full-paid non-assessable capital stock of this company, to such persons and in such amounts as the said August Belmont & Company may direct; which said sum is also to cover full compensation to the said August Belmont & Company for their services in procuring the assignment of the contract between John B. McDonald and the city of New York aforesaid, the sale to this company of the stock of the Rapid Transit Subway Construction Company and the subscriptions to the remainder of the capital stock of this company." It is further alleged that the statement in said resolution in substance that said 15,000 shares of stock was to be issued and delivered in part to cover full compensation for certain alleged services rendered by the defendants Belmont and Luttgen was a pretense and subterfuge designed and intended to cover up the real transaction which was (except as to the actual cost of said stock and bonds of said railroad companies, namely, $32,185.97) a gift or bonus to said defendants Belmont and Luttgen and their nominees of said stock in the defendant company.

The appellants assert that the complaint is fatally defective because it does not offer to return the stock and bonds described in said resolution. The action is not brought for a rescission of the contract with August Belmont & Co., but for an accounting. The plaintiffs are not in possession of said stocks and bonds, and as individual stockholders are unable through no fault of theirs to return them. The plaintiffs do not bring this action because their rights have been directly violated or because the cause of action is theirs, or because they are entitled to the relief sought. They are permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. Pomeroy's Equity Jurisprudence, § 1095. The court in the action can preserve and adjust the equities of the parties to it. Thompson on Corporations (2d ed.), § 4568; 2 Mechem on Corporations, § 1179; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593; s. c. 149 N. Y. 346, 44 N. E. 150; Pritz v. Jones, 117 App. Div. 643, 102 N. Y. Supp. 549; Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441. The actual value of said stocks and bonds can be found in the action, and, if equity requires it, the defendant corporation can be directed to return such stocks and bonds to said August Belmont & Co.

It was not necessary for the plaintiffs to allege in the complaint that their predecessors in title did not assent to or acquiesce in the alleged fraudulent issue of said 15,000 shares of stock. It is not necessary to negative such assent or acquiescence in a fraud, unless it is otherwise to be presumed from the delay in bringing the action or generally from the allegations of the complaint. If it exists, it is a matter of defense. Sage v. Culver, 147 N. Y.

241, 41 N. E. 513; Pollitz v. Gould, supra. If the rule were otherwise, the objection to the complaint would not avail the defendants in this case because the allegations of the complaint amount to a negative of any assent by the plaintiffs or their predecessors in title to the transactions alleged in the complaint.

It is also claimed by the appellants that it does not appear from the complaint that the defendant corporation and its board of directors were requested to bring suit to recover said fifteen thousand shares of stock or the value thereof, or that said corporation or said board of directors neglected or refused to bring such action. It appears from the complaint that on the 12th day of March, 1910, the plaintiff corporation, then being the owner of the stock now owned by the two plaintiffs, delivered to the defendant corporation and to its officers and directors a written communication directed to said defendant corporation and its president and directors, calling attention to the fact of the issue and delivery of said 15,000 shares of capital stock for a grossly inadequate and illegal consideration, and requesting and demanding that suit be brought in behalf of the corporation and in good faith prosecuted against the incorporators of said company and members of its board of directors during the year 1902 and said firm of August Belmont & Co. to recover the damages suffered by reason of the action of the said incorporators and directors.

Said written communication also stated and provided as follows: "We hereby offer to properly indemnify the Interborough Rapid Transit Company against any damage or costs it may sustain as a result of bringing and prosecuting such suit. A copy of this letter is mailed to each director of the Interborough Rapid Transit Company. Unless within ten days from date you advise us that the request and demand herein will be complied with we shall conclude that you refuse." Thereafter the plaintiffs waited until May 4, 1910, when, no action having been commenced and no response having been made to said written communication, this action was commenced.

Upon the facts so alleged the plaintiffs treated the defendant corporation and its board of directors as having refused and neglected to bring such action and the allegations relating thereto are sufficient to sustain the complaint. Kavanaugh v. Commonwealth Trust Co., 103 App. Div. 95, 92 N. Y. Supp. 543.

On this appeal as on the motion at the Special Term and on the hearing of the appeal in the Appellate Division the allegations of the complaint are taken as true.

It is conceded that an action in equity cannot be maintained by the plaintiffs as individual stockholders for themselves and all others similarly interested, unless it is necessary because of the neglect and refusal of the corporate body to act.

It is necessary, therefore, in an action by the plaintiffs to set forth two things: First, a cause of action in favor of the corporation with the same detail of facts as would be proper in case

the corporation itself had brought the action; second, the facts which entitle the plaintiff to maintain the action in place of the corporation. Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121, 73 N. E. 562; O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082. It is not seriously contended that the complaint does not state a good cause of action in favor of the defendant corporation. It is insisted by the defendants that it was necessary for the plaintiffs, in addition to alleging a demand upon the defendant corporation and its board of directors to bring the action and their neglect and refusal to do so, to allege that they had given notice of the alleged fraud to the body of stockholders of the defendant corporation, and had demanded of said stockholders that some action be taken by them to redress the wrong, and that such body of stockholders had neglected and refused to take any action relating thereto. The cause of action belongs to the corporate body and not to the plaintiffs and other stockholders individually, nor to the body of stockholders collectively.

The board of directors represents the corporate body. It is provided by statute in this state that the affairs of every corporation shall be managed by its board of directors. General Corporation Law (Consol. Laws 1909, c. 23), § 34. The directors are not ordinary agents in the immediate control of the stockholders. The directors hold their office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of such duty. The corporation is the owner of the property, but the directors in the performance of their duty possess it and act in every way as if they owned it. People ex rel. Manice v. Powell, 201 N. Y. 194, 94 N. E. 634. They are trustees clothed with the power of controlling the property and managing the affairs of a corporation without let or hindrance. As to third persons they are its agents, but as to the corporation itself equity holds them liable as trustees. 2 Pomeroy's Equity Jurisprudence, §§ 1061, 1073, 1088, 1097; People ex rel. Manice v. Powell, supra.

The claim of the appellants that the body of stockholders has some immediate or direct authority to act for the corporation or to control the board of directors in the matters set forth in the complaint is based upon an erroneous conception of the duties and powers of the body of stockholders in this state.

As a general rule, stockholders cannot act in relation to the ordinary business of a corporation. The body of stockholders have certain authority conferred by statute which must be exercised to enable the corporation to act in specific cases, but except for certain authority conferred by statute, which is mainly permissive or confirmatory, such as consenting to the mortgage, lease, or sale of real property of the corporation, they have no express power given by statute. They are not by any statute in this state given general power of initiative in corporate affairs. Any action

by them relating to the details of the corporate business is necessarily in the form of an assent, request, or recommendation. Recommendations by a body of stockholders can only be enforced through the board of directors, and indirectly by the authority of the stockholders to change the personnel of the directors at a meeting for the election of directors. Such action may or may not result in securing adequate, corporate action with reference to illegal or fraudulent acts. For reasons wholly apart from the matter in dispute, the stockholders may not desire to change a majority of the persons comprising its board of directors. Some of the reasons why the power vested in stockholders to elect directors is inadequate as a remedy for specific fraudulent acts are stated by Cook in his work on Stock and Stockholders, § 740, in which he says: "There has been considerable discussion as to whether the stockholder in addition to his request to the corporate officers to institute the suit should not also be required to attempt to induce the stockholders in meeting assembled to take action by directing the directors to bring suit, or by refusing to re-elect them at the next election. The facts, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit, that the remedy of refusing to re-elect them involves delay, and the assumption that a minority of the stockholders can by the election control such a suit, that irreparable injury or the vesting of great financial interests may occur in the meantime, and that laches may arise as a bar to the stockholder's suit, have settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholders' meeting." Although it is said that the authority of stockholders in the management of business corporations is exhausted when they elect the directors (Thompson on Corporations [2d Ed.], § 1178), nevertheless it is generally recognized that certain acts of boards of directors that are legal, but voidable, can be ratified and confirmed by a majority of the body of stockholders as the ultimate parties in interest and thus make them binding upon the corporation. Morawetz on Corporations (2d Ed.), §§ 625, 626. Such recognized authority in stockholders to ratify and confirm the acts of boards of directors is confined to acts voidable by reason of irregularities in the make-up of the board or otherwise or by reason of the directors or some of them being personally interested in the subject-matter of the contract or act, or for some other similar reason which makes the action of the directors voidable. No such authority exists in case of an act of the board of directors which is prohibited by law or which is against public policy. Kent v. Quicksilver Mining Co., 78 N. Y. 159.

In any case where action is taken by stockholders confirming and ratifying a fraud and misapplication of the funds of the corporation by the directors or others the action is binding only by way of estoppel upon such stockholders as vote in favor of such

approval. Morawetz on Corporations (2d Ed.), § 625. The distinction between acts that can and those that cannot be confirmed and ratified is shown in the report of two frequently cited English decisions, namely, Foss v. Harbottle, 2 Hare, 461, and Bagshaw v. Eastern Union Railway Co., 7 Hare, 114. The former of these cases was limited to the approval of a legal but voidable act. In the Bagshaw Case, where the directors of a corporation had misapplied or were about to misapply certain moneys of the corporation, the court say: "No majority of the shareholders, however large, could sanction the misapplication of this portion of the capital. A single dissenting voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful. This appears to me to take it out of the case of Foss v. Harbottle, to which I was referred. That case does not, I apprehend, upon this point, go further than this: That if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains."

It is the governing body or bodies of a corporation with power to enforce a remedy to whom complaining stockholders must go with their demand for relief. The governing body of corporations in this state, as we have seen, is the board of directors. A complaining stockholder must go to such board for relief before he can bring an action, unless it clearly appears by the complaint that such application is useless. If the subject-matter of the stockholder's complaint is for any reason within the immediate control, direction, or power of confirmation of the body of stockholders, it should be brought to the attention of such stockholders for action, before an action is commenced by a stockholder unless it clearly appears by the complaint that such application is useless. The decision reported in Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, and other similar decisions in the federal and state courts are not in conflict with the decision about to be rendered herein. In such cases, as in this case, it is asserted that an application to the body of stockholders is unnecessary when it is unreasonable to require it. If the body of stockholders has no adequate power or authority to remedy the wrong asserted by the individual stockholders, it is unreasonable and unnecessary to require an application to it to redress the wrong before bringing a representative action. See opinion of Carr, J., in the Appellate Division herein (Sup.), 134 N. Y. Supp. 635. See, also, Delaware & H. Co. v. Albany & S. R. R. Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862. In this case, where the plaintiff alleges fraud and a substantial misappropriation of 15,000 shares of the stock of the corporation through a nominal purchase of property

and the payment of a pretended claim for services, application to the body of stockholders was not necessary.

It is claimed by the respondents that the complaint discloses such a state of facts as would dispense with the necessity of making any demand either upon the corporation, its board of directors, or the body of stockholders before bringing an action to recover for the company the value of the 15,000 shares of stock alleged to have been illegally and fraudulently issued to the individual defendants.

We have not considered the allegations of the complaint with reference to such claim of the respondents.

The order should be affirmed, with costs, and each of the questions certified answered in the affirmative.

Cullen, C. J., and Gray, Haight, Vann, Werner, and Willard Bartlett, JJ., concur.

Order affirmed.[1]

[1] *Cf.* Sage v. Culver (1895), 147 N. Y. 241, 41 N. E. 513.

"As a general rule courts have nothing to do with the internal management of business corporations. Whatever may lawfully be done by the directors or stockholders, acting through majorities prescribed by law, must of necessity be submitted to by the minority, for corporations can be conducted upon no other basis. All questions within the scope of the corporate powers which relate to the policy of administration, to the expediency of proposed measures, or to the consideration of contracts, provided it is not so grossly inadequate as to be evidence of fraud, are beyond the province of the courts. The minority directors or stockholders can not come into court upon allegations of a want of judgment or lack of efficiency on the part of the majority and change the course of administration. Corporate elections furnish the only remedy for internal dissensions, as the majority must rule so long as it keeps within the powers conferred by the charter.

"To these general rules, however, there are some exceptions, and the most important is that founded on fraud. While courts can not compel directors or stockholders, proceeding by the vote of a majority, to act wisely, they can compel them to act honestly, or undo their work if they act otherwise. Where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts interfere and remedy the wrong. Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action by the corporation, or, if it refuses to act, by a stockholder in its stead for the benefit of all the injured stockholders." Vann, J., in Flynn v. Brooklyn City R. Co. (1899), 158 N. Y. 493, at pp. 507-8, 53 N. E. 520.

See, also, Niles v. N. Y. Central &c. R. Co. (1903), 176 N. Y. 119, 68 N. E. 142; Jacobson v. Brooklyn Lumber Co. (1906), 184 N. Y. 152, 76 N. E. 1075; Continental Ins. Co. v. N. Y. &c. R. Co. (1907), 187 N. Y. 225, 79 N. E. 1026; Pollitz v. Wabash R. Co. (1912), 150 App. Div. (N. Y.) 715, 135 N. Y. S. 785, modified (1912), 207 N. Y. 113, 100 N. E. 721.

NOTE ON STOCKHOLDERS' DERIVATIVE SUITS.

In a stockholder's suit, the corporation is a necessary party defendant. Davenport v. Dows (1873), 18 Wall. (U. S.) 626, 21 L. ed. 938.

The misconducting directors must also be parties. Edwards v. Bay State Gas. Co. (1898), 91 Fed. 942.

The corporation, although the real plaintiff, is not regarded as such for the purposes of jurisdiction of the United States courts. Doctor v. Harrington (1904), 196 U. S. 579, at pp. 587-589, 25 Sup. Ct. 355, 49 L. ed. 606.

The plaintiff must make out a cause of action in favor of the corporation, where suing in a representative capacity. Waters v. Waters & Co. (1911), 201 N. Y. 184, 94 N. E. 602.

The plaintiff must sue on behalf of himself and all other stockholders, as representative of their aggregate rights. McAfee v. Zettler (1897), 103 Ga. 579, 30 S. E. 268.—Ed.

CHAPTER XIII.

TRANSFER OF SHARES.

LUND v. WHEATON ROLLER MILL CO.

1893. 50 Minn. 36, 52 N. W. 268, 36 Am. St. 623.

Sale of Stock—Necessity for Transfer on the Books of the Corporation—Attachment.

DICKINSON, J.: The defendant, the Wheaton Roller Mill Company, is a corporation created under the Gen. St. of 1878, c. 34, title 2. In June, 1890, one Howell owned and held 40 shares of the stock of the corporation, certificates for which had been issued to him. At that time he in good faith and for a valuable consideration sold and assigned such stock to the intervener, the Grant County Bank, but no entry of such transfer was made in the books of the mill company.

In November, in the same year, in an action prosecuted by the plaintiffs against Howell—who appeared on the books of the corporation as being still the owner of the stock—the stock was levied upon by virtue of a writ of attachment. The plaintiffs then had no knowledge that the stock had been transferred by Howell. Afterwards the plaintiffs recovered judgment in the action against Howell, and under execution issued thereon, in December, 1890, the stock was levied on and sold, the plaintiffs being the purchasers. The plaintiffs had notice of the intervener's claim when the levy was made under the execution. The sole question to which attention will be directed is whether by force of the statute the sale and assignment of the stock to the bank by Howell was not ineffectual as to attaching creditors of the assignor, by reason of the fact that no entry of the transfer had been made on the books of the corporation.

The statute referred to is § 8, t. 1, c. 34, Gen. St. 1878, which by force of section 110 of the same chapter (section 46, c. 34, G. St. 1866) is made applicable with respect to corporations organized under title 2. It is in terms as follows: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so far as to show the names of the persons by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer. * * * The books of the company shall be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books or a correct copy thereof,

so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same."

It is also provided by § 114, c. 34, Gen. St. 1878 (§ 49, c. 34, Gen. St. 1866), that "the stock of any such corporation shall be deemed personal property, and be transferable only on the books of such corporation, in such form as the directors prescribe. * * *"

The law cannot be said to be generally settled and uniform as to whether an unregistered sale and transfer of stock, which either by statute or charter is declared to be transferable only on the books of the corporation, is effectual to pass the property as against subsequent attaching creditors of the vendor. The decisions are contradictory. But we do not feel ourselves at liberty to now treat the question as a new one in this state. As early as May, 1879, in the case of Baldwin v. Canfield, 26 Minn. 43, 1 N. W. Rep. 261, it was held that an unregistered transfer of stock in pledge to secure indebtedness of the pledgor was effectual. This decision was cited and followed in Joslin v. St. Paul Distilling Co., 44 Minn. 183, 47 N. W. Rep. 337. The court in Baldwin v. Canfield, referring to the above-cited § 49, ch. 39, Gen. St. 1866, said: "Provisions of this kind are intended solely for the protection and benefit of the corporation; they do not incapacitate a shareholder from transferring his stock without any entry upon the corporation books. [Citing authorities.] Except as against the corporation, the owner and holder of shares of stock may, as an incident of this right of property, transfer the same as any other personal property of which he is the owner." It is true that the court made no reference to section 8 of that chapter, which by a force of section 46, Gen. St. 1866, became a part of the law concerning corporations created under title 2. An examination of the briefs in that case shows that the latter section was not referred to, and it seems probable that the attention of the court was not directed to it. When the structure of the statute is observed, it will be seen that both counsel and court might naturally fail to discover the applicability to title 2 of this section 8, found in title 1, and relating to a subject specifically treated of in section 49, title 2. However that may be, and even if a consideration of the provisions of section 8 might possibly have led to a different conclusion as to the validity of the pledge, that decision, made nearly 13 years ago, and hitherto unquestioned, should now be deemed decisive of the question. It has probably been generally so regarded, and it is believed that transfers of stocks in pledge and by sale have been extensively made, without having the transaction entered on the books of the corporations. The rule of stare decisis should deter us from now declaring the statute law to be different from what it has heretofore been pronounced to be. We therefore follow former decisions, without entering upon a consideration of the construction which might be given to section 8 of the statute if the question

were a new one. In deciding the case in this way, we would not be understood as expressing the opinion that a proper construction of the statute would lead to a different conclusion. The tendency of many decisions is in accordance with the rule heretofore announced in this court, and now followed. See Robinson v. Bank, 94 N. Y. 637; McNeil v. Bank, 46 N. Y. 325, 331, and cases cited; Finney's Appeal, 59 Pa. St. 398; Turnpike Co. v. Gerhab (Pa. Sup.), 13 Atl. Rep. 90; Bank v. McElrath, 13 N. J. Eq. 24; Hunderdon Co. Bank v. Nassau Bank, 17 N. J. Eq. 497; Thurber v. Crumb, 86 Ky. 408, 6 S. W. Rep. 145; Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. Rep. 369; Cook, Stocks, § 487.

Judgment affirmed.

EAST BIRMINGHAM LAND CO. v. DENNIS.

1888. 85 Ala. 565, 5 So. 317, 2 L. R. A. 836, 7 Am. St. 73.

Fraudulent Transfer of Shares—Innocent Purchaser.

SOMERVILLE, J.: We concur in the conclusion reached by the judge of the city court, that the appellee, Dennis, complainant in the bill, is the owner of the ten shares of stock which are the subject of litigation in the present suit. The testimony satisfactorily proves that the certificate of stock, indorsed in blank by Dearborn, who was the owner on the books of the defendant corporation, was the property of the appellee, and was taken or stolen from his possession without any negligence on his part whatever, several months before it was purchased by the defendant Mudd, who innocently bought and paid value for it some time in March, 1888.

The only question is whether Mudd, who paid full value for this stock, without notice of the complainant's claim to it, acquired a title superior to that of complainant.

The established rule is that no person can ordinarily be deprived of his ownership of property save by his own consent or his negligence. The only exception to this rule is the case of a bona fide purchaser for value of negotiable paper. We have no reference, of course, to the taking of property for public uses by judicial condemnation, which may be done without the owner's consent.

It cannot be contended, with any degree of plausibility, that, under the facts of this case, the complainant was guilty of negligence or the want of ordinary care in the custody of the certificate. He kept it in a box in the vault of a banking-house, whence it was abstracted by some unknown person, apparently without any fault on his part.

Nor does any question arise involving the rights of a subse-

quent bona fide purchaser of stock from one shown to be the owner on the corporate books, who has already made a prior unregistered transfer of it to another purchaser. All such transfers made by the true owner, and not registered on the books of the corporation within fifteen days, are declared by statute to be "void as to bona fide creditors or purchasers without notice." Code 1886, § 1671, Fisher v. Jones, 82 Ala. 117, 3 So. Rep. 13. If the defendant Mudd had claimed by a subsequent purchase from Dearborn, the owner of the stock on the corporate books, this question would arise. But he does not so claim, his title being derived through the complainant Dennis, himself, by two or more intermediate transferees, the first of whom was a fraudulent holder without title. Whether Mudd's title to the stock, therefore, is superior to that of Dennis, depends on whether a certificate of stock, indorsed in blank by the owner, is to be treated as a negotiable paper. The rule is well settled that a bona fide purchaser of negotiable bill, bond, or note, although he buys from a thief, acquires a good title, if he pays value for it, without notice of the infirmity of his vendor's title. The authorities are clear in support of the view that a certificate of corporate shares of stock, in the ordinary form, is not negotiable paper; and that a purchaser of such certificate, although indorsed in blank by the owner, where no question arises under the registration laws, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner, or his authority to make the sale. This question arose and was decided by the New York Court of Appeals in Mechanic's Bank v. Railroad Co., 13 N. Y. 599 (1856). It was there held that such a certificate does not partake of the character of a negotiable instrument, and that a bona fide assignee, with full power to transfer the stock, takes the certificate subject to the equities which existed against his assignor. Such certificates, said Comstock, J., "contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer or order of the party to whom they are given." They were said to be in some respects like a bill of lading or warehouse receipt, being "the representative of property existing under certain conditions, and the documentary evidence of title thereto." The most that can be said is that all such instruments possess a sort of quasi negotiability, dependent on the custom of merchants and the convenience of trade. They are not, in the matter of transferability, protected strictly as negotiable paper.

In Shaw v. Spencer, 100 Mass. 382, it was also decided that a certificate of corporate stock, transferred in blank on its back, was clearly not a negotiable instrument. "No commercial usage," it was said, "could give to such an instrument the attribute of negotiability. However many intermediate hands it may pass through, whoever would obtain a new certificate in his own name

must fill out the blanks * * * so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares." The case of Sewall v. Water-Power Co., 4 Allen, 282, decided by the same court a few years before, is referred to as a precedent in support of this conclusion.

The precise point in the present case was also decided in Barstow v. Mining Co., 64 Cal. 388, 1 Pac. Rep. 349, where it was expressly held that a bona fide purchaser of stock standing on the company's books in the name of the former owner, regularly indorsed by him, and stolen from the present owner without his fault, gets no title. The decision was based on the fact that such certificates are not negotiable instruments, but simply muniments of title, and evidences of the holder's right to a given share in the property and franchises of the corporation. It was observed, in regard to the matter of negligence, as follows: "But if the purchaser from one who has not the title, and has no authority to sell, relies for his protection on the negligence of the true owner, he must show that such negligence was the proximate cause of the deceit."

The same principle was applied to bills of lading in Gurney v. Behrend, 3 El. & Bl. 622, decided by the English Queen's Bench, where an instrument of that kind, indorsed in blank by the consignor, and sent by him to his correspondent, had been misappropriated. The correspondent, without authority, fraudulently transferred the bill for value, and it was held by Lord Campbell that, for the want of the element of negotiability in the paper, the title to the goods was unaffected by the transaction.

The doctrine of Barstow v. Mining Co., supra, is well supported by authority, and, in our judgment, announces a correct principle of law, and we fully approve it. Willey v. Sargent, 14 Amer. Dec., note, p. 427, and cases there cited; Cook, Stocks, §§ 7, 10, 192, 368, 437; 2 Daniel, Neg. Inst. (3d Ed.), § 1708g. It harmonizes entirely with the declaration of our statute that shares of stock in private corporations are "personal property, transferable on the books of the corporation" in accordance with the rules and regulations of the corporation. Code 1886, § 1669; Campbell v. Woodstock Iron Co., 83 Ala. 451, 3 So. Rep. 369.

There is a class of cases, not to be confounded with the one in hand, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustees to deal with such stock to a limited extent, and transfers it by exceeding his powers, or in breach of his trust. In such cases it has often been held that the true owner, having conferred on the holder by contract all the external indicia of title, and an apparently unlimited power of disposition over the stock, "is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner." 2 Daniel, Neg. Inst. (3d ed.), § 1708g; McNeil v. Bank, 46 N. Y. 325; Turnpike Co. v.

Ferree, 17 N. J. Eq. 117; Prall v. Tilt, 28 N. J. Eq. 479; Bank v. Livingston, 74 N. Y. 223. These cases rest on the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver than a stranger who has been negligent in trusting no one. Allen v. Maury, 66 Ala. 10.

It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stock-brokers to the contrary. No usage is good which conflicts with an established principle of law, any more than one which contravenes or nullifies the express stipulations of a contract. Dickinson v. Gay, 83 Am. Dec. 656, note 664; Railroad Co. v. Johnson, 75 Ala. 576; Lehman v. Marshall, 47 Ala. 362.

The decree of the court below is in accordance with these views, and must be affirmed.

McNEIL v. TENTH NATIONAL BANK.

1871. 46 N. Y. 325, 7 Am. Rep. 341.

Fraudulent Transfer by Pledgee—Estoppel.

RAPALLO, J.: The pledge of the plaintiff's shares by his brokers, for a larger sum than the amount of their lien thereon, was a clear violation of their duty, and excess of their actual power. And if the effect of the transaction was merely to transfer to the appellant, through Fred. Butterfield, Jacobs & Co., the title or interest of Goodyear Brothers and Durant in the shares, the judgment appealed from was right.

It must be conceded that, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance. Pickering v. Busk, 15 East, 38; Gregg v. Wells, 10 Adol. & El. 90; Saltus v. Everett, 20 Wend. 268, 284; Mowrey v. Walsh, 8 Cow. 238; Root v. French, 13 Wend. 570.

The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power

of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took bona fide through the brokers.

Simply intrusting the possession of a chattel to another as depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. Ballard v. Burgett, 40 N. Y. R. 314. "The mere possession of chattels, by whatever means acquired, *if there be no other evidence of property or authority to sell from the true owner,* will not enable the possessor to give a good title." Per Denio, J., in Covill v. Hill, 4 Denio, 323.

But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle, from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power.

In the present case, the plaintiff delivered to and left with his brokers the certificate of the shares, having indorsed thereon the form of an assignment, expressed to be made "for value received," and an irrevocable power to make all necessary transfers. The name of the transferee and attorney, and the date were left blank. This document was signed by the plaintiff, and its effect must be now considered.

It is said in some English cases, that blank assignments of shares in corporations are irregular and invalid; but that opinion is expressed in cases where the shares could only be transferred by deed under seal, duly attested, and is placed upon the ground that a deed cannot be executed in blank.

Without referring to the American doctrine on that subject, it is sufficient to say that no such formality was requisite in this case It was only necessary to a valid transfer as between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignment and power has been repeatedly shown and sanctioned in cases which have come before our courts. Such was established to be the common practice in the city of New York, in the case of The New York and New Haven Railroad Company v. Schuyler, 43 N. Y. 41, and the rights of parties claiming under such instruments were fully recognized in that case. And in the case of Kortright v. The Commercial

Bank of Buffalo, 20 Wend. 91, and 22 Wend. 348, the same usage was established as existing in New York and other States, and it was expressly held that even in the absence of such usage a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and that a party to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature.

It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. Angell and Ames on Corporations (8th ed.), § 354; Bank of Utica v. Smalley, 2 Cow. 770; Gilbert v. Manchester Co., 11 Wend. 627; Kortright v. Commercial Bank of Buffalo, 22 Wend. 362; N. Y. and N. H. R. R. Co. v. Schuyler, 34 N. Y. 80.

In the case of Kortright v. Com. Bank, Chancellor Walworth, in a dissenting opinion, strenuously maintained, in conformity with his previous decision in Stebbins v. Phoenix Ins. Co., 3 Paige, 356, that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares; and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained. 22 Wend. 352, 353, 355. But his view was overruled by the majority of the court. The action was at law in assumpsit, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, the legal title to the shares will pass by delivery of the certificate and power. See 20 Wend. 362.

This was reasserted in this court in the New Haven Railroad Case, 34 N. Y. 80, notwithstanding what was said in the Mechanics' Bank Case, 13 id. 625.

"By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a bona fide purchaser (34 N. Y. 80); but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less per-

fect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights. (Id.) He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

The holder of such a certificate and power possesses all the external indicia of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner.

Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy toward persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that, by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact "substituted his trust in the honesty of his brokers, for the control which the law gave him over his own property," and that the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers, from whom the brokers were thereby enabled to obtain their money?

These principles, in substance, were applied in the case of Kortright v. The Commercial Bank. But it is sought to distinguish that case from this; and it is argued, that there the certificate was intrusted to an agent, with authority from his principal to borrow money upon it for the benefit of his principal, and that he simply exceeded his authority by borrowing more than he was authorized to borrow, and absconding with the excess.

The facts were, that the certificate indorsed by Barker, the owner of the shares, was sent by him, together with his note for $10,000, to Bartow, the cashier of a bank in Albany, to obtain a loan of $10,000. Bartow, through an agent in New York, negotiated a loan there, upon the certificate for $25,000, and absconded. Barker admitted having received the $10,000.

Whether the $10,000 were to be, or were, borrowed by Bartow for Barker, or advanced by Bartow or his bank, does not clearly appear; and the opinions delivered in the case differ upon the point whether Bartow received the certificate as agent or pledgee.

But, assuming that he received it as agent, the ground which lies at the foundation of the decision is, that the possession of the certificate and blank power gave him an apparent right of control over the stock; that, if the holder of the certificate and power was exhibited to the money dealing public as having the competent right of pledge, disposal and transfer vested in him, by means of all the usual and well-known evidences of such right, the private understanding of Barker and Bartow could not affect the rights of those who, if misled, were misled by Barker's own acts.

It is true that Senator Verplanck, in his prevailing opinion, cites authorities on the subject of a deviation by an agent from secret instructions, and treats the case as belonging to that class; but he also rests upon the more general principles above stated, and cites the well-known case of Pickering v. Busk, 15 East, 38, where the owner had allowed a broker to be invested with the indicia of a legal title to goods, by a transfer of them into his own name on the wharfinger's books.

The principles of agency are, however, applicable to this case. In disposing of a pledge, the pledgee acts under a power from the pledgor. The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded. Story on Bailments (7th ed.), § 311, note 2; Wasson v. Smith, 2 B. & Ald. 439. The pledgee in selling, is bound to protect the interests of the pledgor, and, as to the surplus, represents the pledgor exclusively. Now, for what purpose was the apparent ownership and power of disposition of this stock vested in the brokers? Surely for the purpose of enabling them, effectually and summarily, to execute this power under certain conditions. If the power was absolute on its face, or if the whole legal title was by the instrument apparently vested in the pledgee, and the condition was secret, wherein does the case differ in principle from one of ordinary agency?

I am at loss to conceive on what principle it can be claimed, that an apparent naked authority is more effectual to bind the party giving it, than an apparent ownership as well as authority.

In the case of Jarvis v. Rogers, 13 Mass. 105, the shares were transferable by indorsement of the certificates. The shareholder indorsed his certificates and pledged them for a debt. The debtor's friend, by his authority, and with his funds, paid the debt and took up the certificates, and the debtor allowed them to remain thus indorsed, in his hands, but not for any specific purpose. This friend afterward pledged them for his own debt, to a party who advanced thereon in good faith. It was decided that the latter could hold them against the true owner.

The court, after distinguishing the case from one of mere bailment, says that after the plaintiff had put his name on the back of the certificates, and allowed them to go into the market with

that transferable quality about them, it did not lie in the mouth of him who offered them to the world in that shape, to deny the effect of his own words and actions.

This decision was adhered to, and repeated in Jarvis v. Rogers, 15 Mass. 389, and recognizes substantially the same doctrine as Kortright v. The Com'l Bank, omitting the element of excess by an agent, of authority actually given, which is supposed to have governed that case.

Fatman v. Loback, 1 Duer, 354, is a case precisely in point, and I see no ground upon which the conclusions of the learned court in that case can be successfully assailed. The case of McCready v. Ramsey, 6 Duer, 574, which is cited as overruling Fatman v. Loback, has no such effect. The question in 6 Duer was between the assignee of the shares and the *corporation,* and it was held that the lien of the corporation on the stock for unpaid subscription, was protected where the transfer was not made on the books, a position fully recognized in this opinion, and in the cases I have cited. Moreover, in the case in 6 Duer, the general act under which the corporation was formed, provided that transferees of shares should take subject to the liabilities of prior shareholders.

In the case of Ex parte Swan, 7 C. B. N. S. 400; Swan v. The North British Australasian Co., 7 Hurl. & Nor. 603, and Same v. Same, 2 Hurl. & Coltman, 175, some of these questions received a most elaborate discussion, and there was a strong array of judicial opinions sustaining the validity of transfers of stock, unauthorized in point of fact on the ground that by mere negligence, and unintentionally, the true owner had enabled another to deliver an apparently valid title to the stock, and thus deceive third parties.

In that case, the plaintiff had intrusted to a broker ten deeds of transfer, executed in blank, for the purpose of transferring certain shares. The broker used only eight of them for the purpose intended, and feloniously filled up and used the others as transfers of other shares, belonging to the same party, forged the name of a subscribing witness, and stole the certificates of the shares from the plaintiff's box, of which the plaintiff kept the key. He then sold the shares to bona fide purchasers. He was convicted of the larceny.

In a contest by the owner to get back the shares, the Common Bench was, after two arguments, equally divided upon the question whether the owner was not estopped from reclaiming the shares, by reason of his negligence in intrusting the blank transfers to the broker, though they were intended for other shares. The case was taken to the Court of Exchequer, and that court was equally divided upon the same question. It was then taken to the Exchequer Chamber, where it was finally disposed of, principally on the ground, that to estop the owner, his negligence must be the proximate cause of the deceit. That here it

was too remote, as the blank deeds of transfer were intended for other shares, and the broker had to commit forgery to make them available, and a separate felony to obtain possession of the certificates.

In the case at bar none of these difficulties exist. The assignment and power were intended for these identical shares; they, as well as the certificate, were voluntarily intrusted by the plaintiff to the brokers, and the latter were thus invested with the apparent ownership and right of disposal, not merely by the negligence of the true owner, but by his voluntary act, and for the very purpose of attesting to the world their title and power, in case the contingency should arise, in which, according to the understanding between them and the plaintiff, they would be justified in resorting to the stock for their own indemnity.

Two cases have been cited on the part of the respondent which require notice, viz.: Covell v. The Tradesmen's Bank, 1 Paige, 131, and Bush, Administrator, v. Lathrop, 22 N. Y. 535.

In Covell v. The Tradesmen's Bank, the complainant, being the owner of a sealed note for $2,425, payable to himself, indorsed it and pledged it to M. for a loan of $1,000. M. indorsed it and pledged it to the bank, defendant, as security for an antecedent debt of $1,000 and a fresh advance of $1,425. The complainant's debt to M. having been paid, he filed his bill against the bank and M. to obtain a surrender of the note.

The chancellor disposed of the case on the ground that the sealed note, being a mere chose in action, was not assignable in law. That the assignee of a chose in action, which must be sued in the name of the assignor, obtains only an equitable interest, the legal title remaining in the assignor; and that the interest of such assignee, being only equitable, was not protected against the prior equity and legal right of the original owner. Thus applying to the assignee of a chose in action the doctrine which he afterward, in the case of Kortright v. The Commercial Bank, unsuccessfully sought to apply to the transferee, by assignment and power, of shares of stock in a corporation.

He refers to the decision of Chancellor Kent, in Murray v. Lylburn, 2 Johns. Ch., 443, to the effect that the assignee of a chose in action takes subject only to the equities of the debtor, and not subject to latent equities of a third person against the assignor, and points out that the case of Redfern v. Ferrier, 1 Dow's Par. R. 50, cited by Chancellor Kent, was decided, not on the ground that the assignee of a chose in action was protected against a latent equity in a third person, but that a share in a joint-stock company was not a chose in action; that the assignee had, according to the law of Scotland, the legal title to the shares, and that the equities of the parties being equal, the court would not divest him of his legal right.

In Bush, Administrator, v. Lathrop, 22 N. Y. 535, the plaintiff's intestate, being the assignee of a bond and mortgage for

$1,400, pledged them to Preston to secure $268.20, and delivered them to the pledgee with a note for the amount, and an assignment of the bond and mortgage, absolute on its face, but expressing a consideration of only $268.20, the mortgage being good for its full amount. Preston gave back a receipt, agreeing to redeem the bond and mortgage on payment of the note.

Preston afterward assigned the bond and mortgage to Smith & Norton, who in turn assigned to the defendant for $1,488, advanced by him in good faith. The plaintiff brought his action, to obtain a retransfer of the bond and mortgage on payment of the $268.20, with interest.

Denio, J., in delivering the opinion of the court, reviews the decision of Chancellor Kent, in Murray v. Lylburn, and other cases, on the subject of latent equities, disapproving of the doctrine of Chancellor Kent, and coming to the conclusion, that an assignment of a chose in action takes but an equitable interest, notwithstanding the provisions of the Code which authorize him to sue in his own name. That all the assignees of the bond and mortgage in question, subsequent to the original obligee, must be regarded as holding merely equitable interests, and that, as between parties so circumstanced, priority of time confers a preferable right, 22 N. Y. R. 547, 548, following, substantially, the opinion of Chancellor Walworth in Covell v. The Tradesmen's Bank, which he cites.

He concedes that this doctrine forms a serious impediment to his negotiation of choses in action, and alludes to the difference of opinion which may exist as to the policy of encouraging their negotiation, and to the period when it was thought so impolitic, that courts of law would not recognize the rights of assignees. But in no part of his learned and exhaustive opinion does he seek to apply its doctrine to shares in corporations, or other personal property, the legal title to which is capable of being transferred by assignment, and the free transmission of which, from hand to hand, is essential to the prosperity of a commercial people.

The question of estoppel does not seem to have been considered in that case; and perhaps it would have been inappropriate, inasmuch as the assignment upon which the estoppel could have been predicated, if at all, expressed a consideration of only $268.20 for a good mortgage of $1,400; a circumstance calculated to excite inquiry. But it is sufficient for all present purposes to say, that the reasoning upon which the decision in that case is founded, is totally inapplicable to this.

I have reviewed the authorities at much more length than usual, by reason of the difference of opinion expressed in the late Court of Appeals in this case, and for the purpose of meeting the positions, so ably maintained in the opinions, in favor of the respondent, delivered in the court below, and in the late court, on the former hearing.

My conclusion is that the Tenth National Bank must, on the facts found, be deemed to have advanced bona fide on the credit of the shares, and of the assignment and power executed by the plaintiff, and is entitled to hold the stock for the full amount so advanced and remaining unpaid, after exhausting the other securities received for the same advance.

The points relative to the stamp and subscribing witness were fully answered in the opinions delivered on the first argument, and do not appear to have been the subject of dissent. I do not deem it necessary again to discuss them here.

The judgment of the General Term, and that entered on the report of the referee, should be modified, so as to allow the plaintiff to redeem, on payment of the balance due to the Tenth National Bank, on its advance of June 19, 1868, and the costs of the action.

All concur except Allen and Folger, JJ., not voting.

Judgment modified.[1]

[1] See, also, Knox v. Eden Musee Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. 700; First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139 (unlawful pledge of stock certificate by trustee); Shattuck v. American Cement Co., 205 Pa. St. 197, 54 Atl. 785, 97 Am. St. 735; Dollar Savings Fund & Trust Co. v. Pittsburg Plate Glass Co., 213 Pa. St. 307, 62 Atl. 916 (forgery of signature of transfer agent); Farmers' Bk. v. Diebold Safe & Lock Co., 66 Ohio St. 367, 64 N. E. 518; and the new Uniform Sales Act.—Ed.

CHAPTER XIV.

CORPORATE MEETINGS AND ELECTIONS.

NORTH-WEST TRANSPORTATION CO., LIM., v. BEATTY.

1887. L. R. 12 Appeal Cas. 589.

SIR RICHARD BAGGALLAY: The action in which this appeal has been brought was commenced on the 31st of May, 1883, in the Chancery Division of the High Court of Justice of Ontario. The plaintiff, Henry Beatty, is a shareholder in the North-West Transportation Company, Limited, and he sues on behalf of himself and all other shareholders in the company, except those who are defendants. The defendants are the company and five shareholders, who, at the commencement of the action, were directors of the company. The claim in the action is to set aside a sale made to the company by James Hughes Beatty, one of the directors, of a steamer called the United Empire, of which previously to such sale he was sole owner.

The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.

On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a particular interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect, and this rule is as applicable to the case of one of several directors as to a managing or sole director. Any such dealing or engagement may, however, be affirmed or adopted by the company, provided such affirmance or adoption is not brought about by unfair or improper means, and is not illegal or fraudulent or oppressive towards those shareholders who oppose it.

The material facts of the case are not now in dispute.

The company was incorporated under the provisions of the Canada Joint Stock Companies Letters Patent Act of 1869. By its charter, dated the 5th of March, 1877, it was authorized to

carry on business in the province of Ontario, and to construct, acquire, and maintain steam, sailing, and other vessels for the conveyance of passengers and goods over navigable waters within or bordering upon the Dominion of Canada, to and from any foreign ports, with power, amongst other things, to sell, charter or dispose of any of such vessels, and to make contracts with any person or corporation whatever.

By secs. 16, 18, and 22 of the Act of 1869, it was provided that the affairs of every company incorporated under its provisions should be managed by a board of directors, the major part of whom should at all times be residents in Canada, and subjects of Her Majesty, and that the directors should have power to make for the company any description of contract into which the company might by law enter, and from time to time to make bye-laws not contrary to law, but every bye-law so made, unless in the meantime confirmed at a general meeting duly called for that purpose, should only have force until the next annual meeting of the company, and, in default of confirmation thereat, should, at and from that time only, cease to have force; and the powers conferred upon the directors by section 22 were made subject to a proviso that one-fourth part in value of the shareholders of the company should at all times have the right to call a special meeting for the transaction of any business specified in such written requisition and notice as they might issue to that effect.

By bye-laws, made in March, 1877, and duly confirmed, it was provided that the affairs of the company should be managed by a board of five directors; that the qualification for a director should be the holding of five shares in the company; that every shareholder should have as many votes as he had shares in the company; that the annual meetings should be held on the first Wednesday in February in each year, and that at such meetings the directors should be annually elected, retiring directors being eligible for re-election.

The company commenced business shortly after its incorporation, and acquired for its purposes a fleet of several steamers. In the autumn of 1882, one of its steamers, the Asia, was lost, and another, the Sovereign, was deemed unsuitable for the company's business. At this time the steamer United Empire was in process of building for the defendant, James Hughes Beatty, and was approaching completion; the contract for her construction had been entered into in December, 1880, and she was in fact completed on the 20th of May, 1883, a few days before the commencement of the action. The acquisition of the United Empire by the company had been suggested to the directors and had been the subject of consideration by them and others interested in the company as early as the close of the year 1881; the loss of the Asia led to the matter being further considered, and the sale to the company was brought about in the following manner:

The annual meeting for the year 1883 was held on the 7th of

February, and, at such meeting, the defendants were elected directors for the ensuing year; at the same meeting a discussion took place as to the suggested purchase of the United Empire, and it was resolved that a special meeting of the shareholders should be held on the 16th for the purpose of having submitted to them a bye-law for the purchase of the steamer United Empire, and also to consider the advisability of selling the steamer Sovereign.

At a meeting of the directors, held on the 10th of February, 1883, and at which all the directors except the defendant, William Beatty, were present, it was resolved that a bye-law, which was read to the meeting, for the purchase of the United Empire should pass. It is unnecessary to refer in detail to the terms in which this bye-law was expressed; it is sufficient to state that, after reciting an agreement between the company and the defendant, James Hughes Beatty, that the company should buy and the defendant should sell the steamer United Empire for the sum of $125,000, to be in part paid in cash and in part secured, as therein mentioned, it was enacted that the company should purchase the steamer from the defendant upon those terms, with various directions for giving effect to the terms of the contract.

The agreement recited in the bye-law was executed at the same meeting.

At a meeting of shareholders, held, as arranged, on the 16th of February, 1883, the bye-law which had been enacted by the directors was read by the secretary, and, after being modified in its terms, with respect to the price, was adopted by a majority of votes.

The United Empire, on her completion, was delivered to the company, and has ever since been employed in the ordinary business of the company.

It is proved by uncontradicted evidence, and is indeed now substantially admitted, that at the date of the purchase the acquisition of another steamer to supply the place of the Asia was essential to the efficient conduct of the company's business; that the United Empire was well adapted for that purpose; that it was not within the power of the company to acquire any other steamer equally well adapted for its business; and that the price agreed to be paid for the steamer was not excessive or unreasonable.

Had there been no material facts in the case other than those above stated, there would have been in the opinion of their Lordships, no reason for setting aside the sale of the steamer; it would have been immaterial to consider whether the contract for the purchase of the United Empire should be regarded as one entered into by the directors and confirmed by the shareholders, or as one entirely emanating from the shareholders; in either view of the case, the transaction was one which, if carried out in a regular way, was within the powers of the company; in the

former view, any defect arising from the fiduciary relationship of the defendant, James Hughes Beatty, to the company would be remedied by the resolution of the shareholders, on the 16th of February, and, in the latter, the fact of the defendant being a director would not deprive him of his right to vote, as a shareholder, in support of any resolution which he might deem favourable to his own interests.

There is, however, a further element of consideration, arising from the following facts, which have been relied upon in the arguments on behalf of the plaintiff, as evidencing that the resolution of the 16th of February was brought about by an unfair and improper means.

It appears that at the commencement of the year 1833, 595 of the 600 shares into which the capital of the company was divided were held by seven living shareholders, and five belonged to the estate of a deceased shareholder; that of the seven living shareholders—

The defendant, J. H. Beatty, held 200 shares.
The plaintiff 120 shares.
S. Neelon (then a director) 101 shares.
F. S. Hankey 71 shares.
The defendant, J. D. Beatty, 59 shares.
J. C. Graham 39 shares.
The defendant, W. Beatty, 5 shares.

It further appears that the defendant J. H. Beatty, purchased the 101 shares of S. Neelon, and that they were transferred to him on the last day of January, 1883, the number of shares held by the defendant being raised to 301, an actual majority of all the shares in the company; that on the morning of the 7th of February, before the annual meeting of that day, the defendant, J. H. Beatty, transferred five of his shares to the defendant Rose, and the like number to the defendant Laird, whereby they respectively became qualified to be elected directors, and that on the same day they were elected directors.

The defendants Rose and Laird deny, and their denial is unimpeached, that there was any agreement or understanding between them or either of them and the defendant, J. H. Beatty, that they would support his views in respect of the sale of his steamer to the company; they both, however, admit that, previously to the transfers of the shares to them, they considered that the purchase of the steamer would be beneficial to the company, that they accepted the transfer with the view of becoming directors, and that the defendant was well aware of the opinions and views entertained by them.

By the transfers to the defendants Rose and Laird, the number of shares held by the defendant, J. H. Beatty, was reduced to 291, but the united voting power of the three last named defendants was such that they could command a majority at any meeting of the shareholders.

Though there was a discussion at the annual meeting on the 7th of February, as to the expediency of purchasing the steamer, the resolution directing a bye-law to be prepared appears to have been passed without any division.

At the meeting of directors of the 10th, the same three defendants were in a position to carry any resolution or to pass any bye-law upon which they were agreed.

At the shareholders' meeting of the 16th the voting was as follows:

For the confirmation of the bye-laws:

	Votes
The defendant, J. H. Beatty	291
The defendant, J. E. Rose	5
The defendant, R. Laird	5
The defendant, William Beatty	5
Total	306

Against the confirmation:

	Votes
John C. Graham	39
F. L. Hankey	71
The plaintiff	120
The defendant, John D. Beatty	59
Total	289

It follows that the majority of votes in favor of the confirmation of the bye-law was due to the votes of the defendant, J. H. Beatty.

These last-mentioned facts were stated by the plaintiff in his claim in the action, and he not only insisted that the defendant, J. H. Beatty, was in such fiduciary relation to the company that it was not competent for him, under any circumstances, to enter into the contract for the sale of his steamer to the company, but he made various charges of fraud and collusion against the defendant directors, other than the defendant, J. D. Beatty, who was also secretary of the company.

These charges of fraud and collusion were abandoned at the trial of the action, but the facts before referred to were pressed upon the judges, before whom, in succession, the action came, and afforded to those judges who were of opinion that the sale would be set aside the substantial grounds for their decisions.

The action first came on to be heard before the Chancellor of Ontario, who, on the 6th of May, 1884, ordered the sale to be set aside, with the usual consequential directions. All charges of fraud and collusion being discarded, the Chancellor treated the question as one of "purely equitable law," and held that the threefold character of director, shareholder, and vendor, sus-

tained by the defendant, J. H. Beatty, involved a conflict between duty and interest, and that, being so circumstanced, he could not be permitted, in the conduct of the company's affairs, to exercise the balance of power which he possessed, to the possible prejudice of the other shareholders.

The defendants appealed to the order of the Chancellor, and, on the 7th day of April, 1885, the Court of Appeals of Ontario allowed the appeal, and ordered that the plaintiff's bill should be dismissed, with costs. In the opinion of the members of that court, the resolution to purchase the steamer was a pure question of internal management, and the shareholders had a perfect right, either to ratify the act of the directors, or to treat the matter as an original offer to themselves, and to assent to and complete the purchase.

From the order of the Court of Appeals the plaintiff appealed to the Supreme Court of Canada, and on the 9th of April, 1886, the Supreme Court reversed the order of the Court of Appeals, and affirmed that of the Chancellor. It appears to have been the opinion of the judges of the Supreme Court that the case turned entirely on the fiduciary character of the defendant, J. H. Beatty, as a director; that, if the acts or transactions of an interested director were to be confirmed by the shareholders, it should be by an exercise of the impartial, independent, and intelligent judgment of disinterested shareholders and not by the votes of the interested director, who ought never to have departed from his duty; that the course pursued by the defendant, J. H. Beatty, was an oppressive proceeding on his part, and that consequently, the vote of the shareholders, at the meeting of the 16th of February, 1883, was ineffectual to confirm the bye-law which had been enacted by the directors. The nature of the transaction itself does not appear to have been taken into consideration by the judges in their decision of the case.

From this decision of the Supreme Court of Canada the appeal has been brought with which their Lordships have now to deal. The question involved is doubtless novel in its circumstances, and the decision important in its consequences; it would be very undesirable even to appear to relax the rules relating to dealings between trustees and their beneficiaries; on the other hand, great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders, voting in that character at general meetings, were to be examined, and their votes practically nullified, if they also stood in some fiduciary relation to the company.

It is clear upon the authorities that the contract entered into by the directors on the 10th of February could not have been enforced against the company at the instance of the defendant, J. H. Beatty, but it is equally clear that it was within the competency of the shareholders at the meeting of the 16th to adopt or reject it. In form and in terms they adopted it by a majority

of votes, and the vote of the majority must prevail, unless the adoption was brought about by unfair or improper means.

The only unfairness or impropriety which, consistently with the admitted and established facts, could be suggested, arises out of the fact that the defendant, J. H. Beatty, possessed a voting power as a shareholder which enabled him, and those who thought with him, to adopt the bye-law, and thereby either to ratify and adopt a voidable contract, into which he, as a director, and co-directors had entered, or to make a similar contract, which latter seems to have been what was intended to be done by the resolution passed on the 7th of February.

It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to shew that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the company itself.

But the constitution of the company enabled the defendant, J. H. Beatty, to acquire this voting power; there was no limit upon the number of shares which a shareholder might hold and for every share so held he was entitled to a vote; the charter itself recognized the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of the United Empire was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail; to reject the votes of the defendant upon the question of the adoption of the bye-law would be to give effect to the views of the minority, and to disregard those of the majority.

The judges of the Supreme Court appear to have regarded the exercise by the defendant, J. H. Beatty, of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law; their Lordships are unable to adopt this view; in their opinion the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views expressed by him in the Court of Appeals, that the matter might have been conducted in a manner less likely to give rise to objection.

Their Lordships will humbly advise Her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that court with costs; the respondent must bear the costs of the present appeal.

BJORNGAARD v. GOODHUE COUNTY BANK.[1]

1892. 59 Minn. 483, 52 N. W. 48.

Right to Vote at Stockholders' Meeting—Personal Interest in Matter Under Consideration.

GILFILLAN, C. J.: The defendant bank is a banking corporation. The defendants, Sheldon, Perkins, Featherstone, Brooks, Boxrud and William, and Frederick Busch, and the plaintiff Hoyt, were at the times hereinafter mentioned, and now are, its directors. The director defendants were and are stockholders owning a large majority of the stock. The plaintiffs are stockholders. The defendant stockholders owned a lot and building. At a directors' meeting on July 7, 1890, all the directors being present, it was resolved, all the directors except Hoyt, who protested, voting in the affirmative, that the corporation purchase at a price specified, said lot and building, and on July 11, the owners executed a conveyance to the bank. The action is brought to set aside the transaction, and to prevent the funds of the bank being used to complete the purchase, and also to prevent a ratification by the stockholders, a meeting of whom had been called for the purpose, or, rather, to prevent such a ratification by the votes of defendants. There is no doubt that, within the rule in Rothwell v. Robinson, 39 Minn. 1, 38 N. W. Rep. 772, the plaintiffs may bring such an action without first applying to the corporate authorities to bring it. The directors against whom complaint is made, are not only a majority of the directors, but they own a majority of the stock, so that any application either to the board of directors or to the body of stockholders to bring the action would be equivalent to asking the alleged wrongdoers to bring suit in the name of the corporation against themselves. The law does not require of the minority stockholders to do so absurd a thing as a condition of seeking relief against the wrongful acts of the directors and majority stockholders. The court below de-

[1] "A contract entered into by a corporation, by the authority or direction of its trustees with themselves, and for their benefit, or a transfer of its property by the authority to the trustees to themselves may be set aside, in case it injures any public interest or the private interest of any shareholder or creditor, even though the contract or transfer was executed in good faith by the trustees. Duncomb v. Railroad Co., 84 N. Y. 190. But this rule is not broad enough to condemn as void on the ground of public policy all contracts and transfers executed by a purely private business corporation with or to its trustees in good faith, in case no public or private interest is harmed thereby. Such contracts are not void, but voidable at the election of those who are affected by the fraud." Skinner v. Smith, 134 N. Y. 240, per Follett, C. J., citing Oil Co. v. Marbury, 91 U. S. 587; Thomas v. Railroad Co., 109 U. S. 522; Risley v. Railroad Co., 62 N. Y. 240; Barnes v. Brown, 80 N. Y. 527; Munson v. Railroad Co., 103 N. Y. 58; Barr v. Railroad Co., 125 N. Y. 263.—Ed.

cided the case in favor of the defendants on the proposition that, although the act of the board of directors was voidable, it was not ultra vires, and was capable of ratification; and where a majority of the stockholders have power to ratify the unauthorized act of the directors, courts will not interfere. We see no reason to think this purchase was ultra vires—that the corporation had not power to make it. And, that being so, it may be conceded that the board of directors had authority to make a purchase for the corporation. And it is undoubtedly true that, where a corporation has power to do a certain thing, though the authority to do it is not in the directors, the stockholders may ratify their act, if they assume to do it on behalf of the corporation. But this transaction is not voidable because ultra vires—because there was no authority in the directors to purchase; but it is voidable under the rule that one having authority from another to purchase or sell for him cannot purchase from nor sell to himself. To do so is in law a fraud. The rule is absolute, and the matter of fraud in fact is immaterial. The party for whom the purchase or sale is made need not allege nor prove fraud or injury, but may disaffirm without taking any risk. The rule is inflexible, in order to prevent fraud on the part of one holding a fiduciary relation, by making it impossible for him to profit by it, thus removing temptation from his way. This court has steadily adhered to and applied the rule since it first enunciated it in Baldwin v. Allison, 4 Minn. 25 (Gil. 11). But in all cases of the kind the principal may, with full knowledge of the facts, ratify what has been done. The act of the defendant directors was a violation of this rule, and the purchase was not binding on the corporation until ratified. The question is therefore presented under the allegation and relief asked in the complaint, had the defendants a right to vote as stockholders at the stockholders' meeting called for the purpose upon the question of ratification? While stockholders in a corporation owe the duty of good faith to each other in the management of the affairs of the corporation they do not stand to each other in a fiduciary relation within the rule we have stated. They are not trustees nor agents for each other in the matter of voting upon any proposition that may come before a meeting of the stockholders. In voting, each must be guided by his own judgment as to what is for the best interest of the corporation. The fact that he may have a personal interest, separate from the others or from that of the corporation in the matter to be voted upon, does not affect his right to vote. It is not to be understood that the majority stockholders may use their power of voting for the purpose of defrauding the minority. It was said in Gamble v. Queens Co. Water Co., 123 N. Y. 91, 25 N. E. Rep. 201, in which the right of a stockholder in such a case to vote was affirmed: "In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority

shareholders." And in Transportation Co. v. Beatty, L. R. 12 App. Cas. 589, in which the same thing was held, it was said, in effect, that in such case the ratification must not be brought about by unfair or improper means, nor be illegal or fraudulent or oppressive towards those shareholders who oppose it. A rule excluding stockholders from the right to vote merely because they might be personally interested to vote in a particular way, contrary to the interests of the other stockholders, would be likely to lead to great confusion. The rule laid down in the two cases cited is sufficient to secure the exercise of the good faith which one stockholder owes to the others.

Judgment affirmed.

PIERCE v. THE COMMONWEALTH.

104 Pa. St. 150.

Cumulative Voting.

This was a quo warranto, allowed by the Court of Common Pleas of Mercer County, to the Commonwealth of Pennsylvania, ex relatione Wallace Pierce, James B. Pierce, Frank Pierce and James L. Deeter, directed to Jonas J. Pierce, Enoch Filer, Joseph Forkner, B. H. Henderson, John Phillips and H. C. Blossom, requiring them to show by what authority they exercised the office of directors of the Sharpsville Railroad Company.

The respondent filed an answer which was, on motion, allowed to be regarded solely as a plea, and the relators having filed a replication thereto, the venue was removed to Venango county and the case tried before Taylor, P. J., and a jury, when the facts appeared as follows:

The Sharpsville Railroad Company was a railroad corporation, incorporated March 6, 1876, under the act of April 4, 1868 (P. L. 62), and subject to the provisions of the Act of February 19, 1849, entitled an "Act regulating railroad companies" (P. L. 79). Its capital stock consisted of 7,000 shares, all of which had been issued before January 8, 1883. On that day the company held an election for a president and six directors. It was admitted that there was no irregularity about the election, that it was properly called and at the proper time. At the election 6,433 shares of the total 7,000 were voted for directors; of these 3,396 were for the respondents and 3,037 were cumulated and distributed among the four relators, making the actual votes cast as follows:

Jonas J. Pierce	3,396	H. C. Blossom	3,396
Enoch Filer	3,396	Wallace Pierce	4,557.
B. H. Henderson	3,396	Frank Pierce	4,556.
Joseph Forkner	3,396	James B. Pierce	4,555.
John Phillips	3,396	James L. Deeter	4,552.

It was testified that none of the votes for the relators were cast until after those for the respondents; nor was any offer to vote made by those voting for the relators until all the stock of the respondents had been polled.

There was evidence that some of the stock that was voted for the relators, amounting to two hundred shares, had been hypothecated and assigned in blank. All the votes cast for the relators were folded up and indorsed with the name of the voter and the number of shares voted. These ballots had been prepared previous to the election by one of the relators who had the plan ready for some time. It was testified that he had said: "The Erie gentlemen did not expect that I would play this trick on them. They didn't think I had sealed these votes up and put them away in my safe two weeks before the election, and I didn't let anybody know it." It was denied, however, that this language had been used. Prior to the counting of the votes, no one claimed the right to cumulate his vote.

The votes cast on the cumulative system were not counted by the judges of election, and the respondents were accordingly declared elected.

The respondents asked the court to charge: "That stockholders of railroad companies constructed for general public use have no legal right to cumulate their votes at any corporate election held by said stockholders, and if such corporations are included in the provisions of section 4 of article 16 of the Constitution of Pennsylvania, the legislature has not passed any law for carrying into effect the provisions of said article, so far as relates to such corporations."

The court answered this point in the negative and charged, inter alia, as follows:

"There is no controversy but that the respondents voted open ballots. If the evidence is believed, it was discovered after the votes were polled for the first time, that the relators had with unanimity voted a cumulative ballot, that is, they voted for four persons only, thus cumulating their votes upon four persons. Now, the whole number of votes for the plaintiff as cumulated amounted to four thousand five hundred and fifty-seven (4,557), that deducting two hundred shares, which were hypothecated, and which the respondents allege the relators were not legally entitled to vote, upon deducting these two hundred shares which had been hypothecated, and there still would be a majority, if you believe the evidence, in favor of the Pierces, as follows: Wallace Pierce, 4,357; Frank Pierce, 4,356; Jas. B. Pierce, 4,355, and James L. Deeter, 4,352. That is the amount of the cumulative vote upon these four candidates for the office of directors.

"We instruct you, in our opinion, that either party at this election, or any one of either party, had the right to cumulative voting. That is, any one or more could cumulate his vote upon one or as many candidates as he or they saw fit. The ballot was in

proper form, and we can see no impropriety in it. The only matter under the law, or which seems to have been required by the law, was that there should be upon the back of the ballot the name of the party voting, and the number of shares he claimed to have the right to vote upon. Under this Constitution we say to you, these relators had the right to cumulate their votes upon one or more of the candidates as they saw fit. We cannot legislate—we can only execute the laws as we understand them.

"There is no general rule of law but will work hardships in particular cases, but the remedy is with the legislature or constitutional convention; not with us. If there be an evil whereby a minority has acquired control of this railroad, the remedy is not with us. We simply execute the law as we find it.

"Now, gentlemen, as to whether there was any fraud in the conducting of that election. As has been well remarked by counsel, fraud vitiates everything, renders null and void all acts, and a court of justice is the last place on earth where it ought to find shelter. But fraud is never presumed—it must be proven. It is proven in the same manner any other fact is proven; that is, the jury must be satisfied from the weight of evidence that there was fraud perpetrated. The counsel, it seems, have deemed this question of so little importance upon either side, that they have not addressed you upon it. We say to you that, in our opinion [mere secrecy in the conduct of these gentlemen upon either side by withholding from the other party, whom they intended to vote for, or that they intended to cumulate their votes, does not amount to fraud]."

Verdict for the relators, and judgment of ouster thereon against the respondents, whereupon the respondents took this writ, assigning for error, inter alia, the refusal of respondents' point above noted, and so much of the general charge as is included in brackets.

The opinion of the court was delivered October 22, 1883, by Gordon, J.

About the correctness of the ruling of the learned judge of the court below in this case we have no doubt. It seems to have been admitted, in the outstart of this trial, that the election of the 8th of January, 1883, was properly called, was held at the proper time, and was conducted in an orderly and regular manner. Nor is there any doubt but that the relators received the highest number of votes cast for directors at that election. It is said, however, that this result was brought about by the cumulation of the votes of the relators upon four out of the six candidates proposed for election. But this they certainly had a right to do, or we fail correctly to read the Constitution of 1874: "In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candi-

dates, as he may prefer." Article 16, section 4. This section to us seems very plain and unambiguous. If there are six directors to be elected, the single shareholder has six votes, and contrary to the old rule, he may cast those six votes for a single one of the candidates, or he may distribute them to two or more of such candidates as he may think proper. He may cast two ballots for each of three of the proposed directors, three for two, or two for one, and one each for four others, or finally, he may cast one vote for each of the six candidates. Now, as this Sharpsville Railroad Company was incorporated since the adoption of the new Constitution, it is necessarily subjected thereto, and must be governed by its provisions. But the provision above cited vested in the relators, as stockholders, the absolute right to vote as they did, and if, as a consequence of the exercise of such right, their candidates had the highest number of votes cast at that election, they are the rightful directors of the corporation. But it is said this provision is but directory, and it cannot go into effect without some legislative action directing the manner of its exercise. To this proposition we cannot assent. There is no alteration required in the mode of conducting corporate elections; each company continues to use that method prescribed by its charter, and the constitutional right is one that belongs solely and exclusively to the individual shareholder. He may exercise it or not, as to him may seem proper; but whether he does so exercise such right or not, the ordinary manner of conducting the corporate election is in no wise interfered with. Legislative action is, therefore, uncalled for; it would be useless to alter the present mode of election, and with the right itself the General Assembly cannot meddle. Again, it is urged, that from the heading of this section, it is obviously intended to apply only to private corporations, and therefore it applies not to the case in hand. To the first part of this proposition we assent, but dissent as to the second part. Railroad and canal companies are private corporations. This we have decided in point twice within the last two years; once in the case of Timlow v. The Philadelphia & Reading Railroad Company, 3 Ont. 284, and again in the case of the Pittsburgh & Lake Erie Railroad Company v. Bruce, 6 Ont. 23. If, however, these are not enough for the establishment of the point in issue, we may cite Pierce on Railroads, p. 1; Morawetz on Private Corporations, § 2, and Redfield on the Law of Railways, vol. 1, 52-3. The last named author cites many books for the position assumed, which anyone curious about such matters may consult for himself. So in the case of the Trustees of the Presbyterian Society v. The Auburn & Rochester Railroad Co., 3 Hill, 567, it is said that a railroad company is not public, nor does it stand in the place of the public. It is but a private corporation over whose rails the public may travel if they choose to ride in its cars. Indeed, we regard it as a misnomer to attach even the name "quasi public corporation" to a

railroad company, for it has none of the features of such corporations, if we except its qualified right of eminent domain, and this it has because of the right reserved to the public to use its way for travel and transportation. Its officers are not public officers, and its business transactions are as private as those of a banking house. Its road may be called a quasi public highway, but the company itself is a private corporation and nothing more. We have, therefore, no hesitation in saying that it is embraced by the provisions of the 4th section of article 16 of the constitution.

Finally, we have the allegation of fraud, in this, that the relators did not give the respondents notice in advance, that they were going to cumulate their votes on four candidates. But as this was simply the exercise of a constitutional right, of which the respondents were presumed to be as well informed as the relators, and as the Constitution placed its exercise entirely within the volition of the individual stockholder, we do not see who has the right to restrain that volition by the imposition of any condition whatever, or to compel the voter to say in advance whether he will or will not use that privilege. Up to the very moment of voting he has the positive right to exercise his own will in this matter, and to us that sounds like a strange allegation which charges the plaintiffs with fraud upon the ground simply that they did that only which the supreme law of the State authorized them to do, that is, quietly and according to their own will, distribute their votes upon four candidates instead of six. With the learned judge of the court below, we must agree, that in this there has been no wrong committed upon the respondents.

Judgment affirmed.

CHAPTER XV.

DIRECTORS, OFFICERS AND AGENTS—THE MANAGEMENT OF CORPORATIONS.

RAILWAY CO. v. ALLERTON.

1873. 18 Wallace (U. S.), 233, 21 L. ed. 902.

Powers of Directors—Increase of Capital.

Appeal from the Circuit Court of the Northern District of Illinois; the case being thus:

The Chicago City Railway Company was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from $1,250,000 to $1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows:

"No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock-dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days' public notice in such manner as may be provided by law."

He also relied on an act of the legislature of Illinois passed March 26, 1872, to execute and carry out the above provisions of the constitution, by which, amongst other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders' meeting.

The railway company, in its answer, relied upon its charter, granted February 14, 1859, the third and fourth sections of which were as follows:

"Section 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"Section 4. All the corporate powers of said corporation shall

be vested in and exercised by a board of directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horsepower. The court below decreed in favor of the complainant and the company took the present appeal.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are saisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and can not, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and objects. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders would be to make them members

of an association in which they never consented to become such. It would change the relative influence, control, and profit of each member. If the directors alone could do it, they always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder pro rata, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concerns.

These conclusions flow naturally from the character of such associations. Of course, the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made, would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed.[1]

NORTH HUDSON MUTUAL BUILDING & LOAN ASSN. v. CHILDS.

1892. 82 Wis. 460, 52 N. W. 600, 33 Am. St. 57.

Liabilities of Directors for Negligence and Misfeasance.

PINNEY, J.: 1. The corporation plaintiff has a remedy against its directors and officers for negligence, fraud, breaches of trust, or for acts done in excess of their authority, and the case against

[1] See, also, Commercial Nat. Bank v. Weinhard, 192 U. S. 243, 48 L. ed. 425, 24 Sup. Ct. 253.—Ed.

each is distinct, depending upon the evidence against him, unless two or more have joined or participated in the wrongful act, in which case, all participants may be joined in the suit. And where the act is illegal, or in violation of some positive law, the authorities indicate that there is no right of contribution where one only is sued and charged; and therefore it is held in many cases that it is not necessary to make all the directors parties who have more or less joined in the act complained of. Thomp. Liab. Off. in notes 352, 353, 411, and cases cited. A different rule is maintained in the modern cases in England and America, in cases where the wrongful act is the result of negligence or gross misjudgment, and is not, in and of itself, illegal, or a violation of some positive law, as will be shown hereafter; and there exists high authority in such cases for holding that, in all cases where contribution would be allowed in equity, there those who are liable to contribute are necessary parties to a suit in equity to obtain redress for the loss which the corporation has suffered. The remedy of the corporation for the wrong done is either at law or in equity, according to the nature of the case. Hence, in every such case as the present, it is important to determine at the outset whether the action shall be or is a legal or equitable one, and, if the latter, whether the necessary parties are before the court, to enable it to make a proper and complete determination of the controversy. This action has been treated throughout by the plaintiff and by the circuit court as a legal action, both in the demand for judgment and in the course taken at the trial, a trial by jury having been waived, and the court ruling that no evidence of liability was competent that did not equally affect both defendants; and, after judgment by the remission of damages for the periods mentioned, on the ground that for these sums the defendants were not jointly liable, though this fact was either overlooked or was not regarded in the decision of the case.

2. The complaint is not entirely definite and clear in the allegations upon which the liability of the defendants is rested, but groups together grounds, not entirely congruous, when stated in the same cause of action, as the charge against them is gross neglect, mismanagement, and inattention of the defendants "to the duties of their said offices," and they are, to some extent, at least, attempted to be charged for negligence or misconduct in their respective offices of president and treasurer, and also as members of the board of directors, the by-laws making them ex officio such. Some of the acts as to which negligence and misconduct are predicated lie wholly outside the scope of the duties of either one or both the president and treasurer. In the main, the gravaman of the case seems to be that the defendants have exceeded their respective powers as such president and treasurer in dealing with the property and property rights of the plaintiff, and have usurped the powers of the board of directors in these respects and it is expressly charged in the 7th, 9th, 10th, 11th,

12th, 13th, and 14th "causes of action" (so designated) that they did the acts complained of "without the knowledge, consent, and approval of the board of directors;" and the last of these causes of action, grouping the plaintiff's losses in one aggregate sum of $22,000, charges "that between the 1st of March, 1882, and the 1st of September, 1887, the plaintiff, through the gross neglect, mismanagement, and inattention of the defendants to the duties of their said offices, has lost in dues, interest, and charges on stocks and loans, and on loans made by defendants, and in the wrongful cancellation of stock by the defendants, and paying thereon more than the holders thereof were entitled to receive and be paid by said corporation, and without the knowledge, consent, or authority of the board of directors of said corporation, and without the knowledge, consent, or authority of the stockholders thereof, to the amount of $22,000." The first five "causes of action" (so designated) proceed entirely upon the ground of gross neglect and mismanagement of the defendants, and there are items also in the other causes of action based on that ground. The circuit court based the finding against the defendants on the ground "of gross negligence and usurpation of authority not given them by the by-laws but reserved to the board of directors." These different allegations thus blended in the several so-called "causes of action," which are in fact but enumerations of items of liability under what is really but one general count, require different answers and different evidence to meet them, creating difficulties of procedure which can be best dealt with and overcome in an equitable action. We think that the case made by the pleadings and proofs is not one where an adequate and proper remedy by legal action can be obtained, but the action must be treated as an equitable one; and that the circuit court erred in dealing with it on any other basis. As a recovery in a legal action, the judgment must stand or fall on the liability of the defendants as president and treasurer, for no recovery can be had at law against a minority of the board of directors for misconduct or negligence, inasmuch as they can act only when lawfully assembled, and their duties as such are devolved on them as a board, and not individually. Insurance Co. v. Jenkins, 3 Wend. 134; Gaffney v. Colvill, 6 Hill, 572, 573.

3. Much argument was had upon the rule of liability of corporate officers in cases such as this, presenting for consideration some questions in respect to which a considerable difference of opinion has prevailed. The liability of officers to the corporation for damages caused by negligent or unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority or neglects his duty to the damage of his principal. It seems to be now universally agreed that, no matter whether the act is prohibited by the charter or by-laws, the liability is on the ground of violation of authority or neglect of

duty. Thomp. Liab. Off. 357; Briggs v. Spaulding, 141 U. S. 146, 11 Sup. Ct. Rep. 924. There can be no doubt that, if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they will be required to make good the loss out of their private estates. Thomp. Liab. Off. 375; Discount Co. v. Brown, L. R., 8 Eq. 381; Flitcroft's Case, 21 Ch. Div. 519; Insurance Co. v. Jenkins, 3 Wend. 130—and many other authorities to this effect were cited by the respondent's counsel. This is the rule where the disposition made of money or property of the corporation is one either not within the lawful power of the corporation, or, if within the power of the corporation, is not within the power or authority of the particular officer or officers. Where the ground of liability is for nonfeasance, negligence, or misjudgment in respect to matters within the scope of the proper powers of the officer, he will be held responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of business. In respect to directors, or those acting ex officio as such, the rule of liability has been the subject of much discussion in the recent case of Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. Rep. 924, in which, although there was a strong dissent, the rule may be regarded as settled, in the federal courts, at least, and in the courts of several of the states, as there laid down, and to the effect that directors, although often called "trustees," are not such in any technical sense, but that they are mandataries, the relation between them and the corporation being rather that of principal and agent, but under circumstances they may be treated as occupying, in consequence of the powers conferred on them, the position of trustees to cestuis que trustent; that the degree of care required of them depends upon the subject to which it is to be applied, and each case is to be determined upon its own circumstances; that, as they render their services gratuitously, they are not to be held to the degree of responsibility of bailees for hire, or expected to devote their whole time and attention to their duties; that they are not, in the absence of any element of positive misfeasance, and solely on the ground of passive negligence, to be held liable, unless their negligence is gross, or they are fairly subject to the imputation of a want of good faith. It is to be remembered that they have the same interests to protect and subserve as other stockholders, and self-interest naturally prompts them to look after their own, and the degree of care they are bound to exercise is that which ordinarily prudent and diligent men would exercise under similar circumstances in respect to a like gratuitous employment, regard being had to the

usages of business and the circumstances of each particular case; that they are not liable, in the absence of fraud or intentional breach of trust, for negligence, mistakes of judgment and bad management in making investments on doubtful or insufficient security. Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions. Thomp. Liab. Off. 357; Beach, Corp. § 249. These views are sustained in Briggs v. Spaulding, supra; Spering's Appeal, 71 Pa. St. 1; Association v. Coriell, 34 N. J. Eq. 383, 392; Swentzel v. Bank (Pa. Sup.), 23 Atl. Rep. 413; In re Dean Coal Min. Co., 10 Ch. Div. 450; Ackerman v. Halsey, 37 N. J. Eq. 363; Hun v. Cary, 82 N. Y. 65; In re Denham, 25 Ch. Div. 752; Watt's Appeal, 78 Pa. St. 391. These views are applicable, we think, to the case of all officers serving and acting within the scope of their authority gratuitously, or practically so. The rule of liability in case of service for reward is well understood, and need not be repeated. It has been thought best to indicate the rules we think applicable to the liability of directors and other officers of corporations, as these questions were fully discussed at the argument, and in view of the probable importance of these questions in the future disposition of this cause.

The finding of the circuit court that no directors' meetings were held within the period mentioned, and that the business of the corporation, consisting of issuing stock, making loans, accepting prepayment of loans, and in fact all the business of the corporation, was transacted without any direction of the board of directors by the defendants and Harvey, the secretary, since deceased, is, we think, sustained by the evidence, although stoutly denied by the defendants. There is not only no record of any such meetings, but those who are said to have been directors during the period all deny attending any such meetings or transacting any such business, and the defendants themselves are wholly unable to name a single director who was present at any such meeting. While the absence of a record of proceedings, due to the negligence of the secretary, would not defeat the action of the directors, we are satisfied no such meetings were held, and that the alleged want of authority in respect to many matters transacted by the defendants, or one of them, and Harvey, was not supplied at any of the stockholders' meetings, and, unless ratified subsequently, they were without requisite authority. During a period of about five years the regularly chosen directors of the corporation wholly abdicated their functions as such, and gave no attention whatever to their duties, and left everything connected with the affairs of the corporation to the management of the president, secretary, and treasurer, by virtue of their several offices, and, beyond this, to take their own unheeded course. At the annual

meetings of stockholders, officers and directors were regularly elected, and reports were made by the secretary and treasurer, but the directors elected utterly neglected their duties as before. The death of Harvey caused investigation, when the entire absence of proper entries on the ledger and record during all this period was discovered, as well as the fact that there was a shortage in the funds of the corporation. The defendants during all this time had proceeded to discharge the duties of their respective offices, and looked after and conducted the affairs of the corporation in connection with Harvey, the secretary, in entire good faith, not deriving any improper personal gain or profit, and without improperly appropriating to themselves any of its property or funds. They may have made mistakes and misjudged as to their powers and duties. They were not guilty of intentional wrong. The defendant Denniston, the treasurer, whose functions were purely ministerial, and extended only to receiving the moneys of the plaintiff and paying them out, and to the safe-keeping of its securities, and keeping a correct account, has accounted for and paid over every cent he received, and yet he was charged by the circuit court with losses of the corporation by the judgment in this case to the amount of over $21,000. We are unable to see how the defendants are to be thus charged as ex officio members of the board. They were not technically directors, and neither of them had it in his power to call a meeting of the board. They could act as ex officio members only at a meeting regularly convened, and no meetings were held. Directors cannot act in any other manner. Cook, Corp. § 592, and cases in note. This is so well settled that citations of authority would be superfluous. Stated monthly meetings of the board were required to be held on the next Tuesday after the monthly stockholders' meetings, but the directors came not. Special meetings might be called on the written request of two directors, but no such request appears to have been made, and none are willing to own, now that misfortune has overtaken the company, that he ever acted as a director during the period in question. All have been eager to take the benefits, whatever they were, of the management of the defendants, and accept their share of the money disbursed in paying off the first series of stock at a figure amounting to nearly $8,000 more than was due on it, as it is now claimed. None but the president, treasurer, and secretary appear to have been willing to give the affairs of the corporation any particular attention. And at least five of the directors are understood to have received, and still hold, their shares of this amount, and now all appear to be demanding that these defendants shall put back that amount of money from their own funds into the treasury of the plaintiff to make good the alleged loss on this and other accounts, arising out of their attempt to manage the affairs of the plaintiff without the aid or authority of the board of directors. Such a claim, when well founded in law, ought to be established by entirely

satisfactory evidence. Regarding the case now presented by the record as one where a recovery must depend upon the liability of the defendants disconnected with their ex officio membership of the board, it is plain that Childs and Denniston, in their respective capacities as president and treasurer, are not responsible for the nonfeasance, negligence, or misfeasance of Harvey, as secretary; nor is either of these liable for the nonfeasance, negligence, or misfeasance of the other in his official relations to the plaintiff. Their liability is several and separate. They cannot be held jointly liable for any act in excess of the authority of either, or both of them, without proof of joint participation, to be proved in each instance, and not presumed; and here we have neither finding nor proof of improper combination or intentional wrong. If Childs and Harvey, as president and secretary, exceeded their powers in any given instance to the loss or damage of the plaintiff, Denniston is not chargeable with it, without proof that he intermeddled with it and in excess of his authority. If Denniston and Harvey, as treasurer and secretary, exceeded their powers in any case to the loss or damage of the plaintiff, Childs is not liable without proof that he intermeddled or participated in the wrong. While these rules are obviously correct, and so clearly so that citation of authority is not needed to vindicate them, in view of the finding and the evidence upon which it was based we have felt it proper to state them at length, and with some particularity, as bearing upon the correctness of the judgment of the circuit court. * * *

5. The extent of loss or damages the plaintiff had sustained formed a very important part of the controversy, and upon this branch of the case we regret to say that we are without the assistance and benefit of an examination and determination of the circuit court. As early as September, 1887, the plaintiff employed a Mr. Somers, of St. Paul, as an expert accountant, who had had considerable experience in the management of the affairs of building associations, to examine the books and papers of the plaintiff, ascertain its financial condition, the extent of its losses, and how they had been occasioned. His examination extended from February, 1882, to September, 1887. He made a report upon these matters, which was put in evidence on the trial, or the substance of it, and this report, with a set of books compiled by him, and his testimony, constitute almost the entire basis on which the finding against the defendants for $21,407.05 rests. This report was adopted as an entirety by the circuit court, and the question of the extent of loss or damages, as well as legal questions in respect to liability, were, in effect, determined by the hired expert of the plaintiff, instead of the court; and we have been urged to accept it here in like manner as final and conclusive. If we were willing to do so, and should accordingly affirm this judgment, it would transpire that the plaintiff's expert had practically decided this important cause in both courts on several

vital and important questions of law as well as fact. We cannot suppose that the circuit court, if it had examined the report, would have rendered the judgment found in the record. It was not the duty of the defendant Denniston, as treasurer, to collect the first five items in the foregoing statement, amounting to nearly $3,000; nor was it the duty of Childs, as president, so far as we are able to understand it. The treasurer is only "to receive all moneys as soon as paid into the association." The secretary has custody of the accounts, books, and papers of the corporation, except deeds, bonds, mortgages, etc., kept by the treasurer, and is, it would seem, the executive manager of the financial business of the corporation. The testimony to show that any loss had been actually sustained while these defendants were in office is too vague and uncertain to justify the rendition of a judgment for these amounts. Mere proof of failure to collect these items is far from showing that they were lost. Besides, as to many of them, their collection might have been enforced by forfeiture and sale of the stock. These defendants did not possess that power. It was lodged with the board of directors, and in some instances at least the security for loans is security for fines, dues and interest. The collection of these items was a part of the business of the corporation in charge of its board of directors, and they might devolve it on the secretary, if it was not one of the duties of his office, as we understand it was. It is quite as consistent with the evidence that these losses, if such there were, occurred after the defendants resigned as before.

There is nothing in the by-laws nor in the evidence to show that it was the duty of the treasurer to do anything in relation to issuing stock beyond caring for the money paid for it after it was "paid into the association." His duties were purely ministerial, and he had nothing to do, as treasurer, with determining or computing the amount to be paid on the issue of stock, nor is there any testimony showing or tending to show that he ever assumed to interfere with any such matter. It was error, therefore, to include in a judgment against him the sum of $112.06 for losses on shares issued for too little money. Nor is there, so far as we can discover, any proof tending to show that this loss was the fault of the president, whose duty it is to sign stock certificates.

There is embraced in the judgment items to the amount of about $6,800 for losses by cancellation of loans on the ground that there was not money enough paid on them to satisfy them. These items appear, from Mr. Somers' testimony, to have been arrived at by ascertaining the amount of securities canceled each year during the period in question, and by deducting therefrom the amount that "appears to have been paid on that account as per secretary's report," and the difference is charged up as a loss for which the defendants are held liable. The secretary's report

is not competent evidence against these defendants to charge them with this supposed loss. It is not evidence that no more was paid to him than he reported. Which of these defendants, if either, attended to the matter of settling up the loans upon which the alleged losses occurred, we are unable to ascertain from the evidence; and if in some cases Denniston did, and in others Childs, we have no data upon which to ascertain the amount for which either ought to be charged. An exhibit annexed to the bill of exceptions would seem to show that in some instances releases of mortgage loans were executed and acknowledged by Childs as president, and in some cases by Denniston as treasurer, but in all cases by Harvey as secretary. If loss occurred as charged, the evidence is not sufficient to show it, much less to show what sum should be charged to Childs, and what to Denniston. It seems to have been assumed throughout that, if either Childs, Harvey or Denniston exceeded his authority as an officer, and loss ensued, the other two would necessarily be liable for it by reason of the assumption by the one of authority lodged only in the board of directors. Each of these parties, in the absence of participation of one or both the others, would alone be liable for exceeding his authority.

The testimony as to items amounting to $3,500, or thereabouts, for losses by reason of money having been paid for cancellation of stock in excess of its value seems to rest upon some method of ascertaining its supposed value adopted by Somers, which we do not fully understand; and the same is true as to cancellation of loans. He seems to have adopted some rule differing from the by-law of the company on that subject. He testified that the different parts of the rule, which is quite obscure, "don't hang together." But, in view of the result at which we have arrived, it is not necessary to carefully examine this matter.

6. Stock was issued by the corporation in five series: First series, March 28, 1877, 500 shares; second series, March, 1879, 172 shares; third series, March, 1880, 76 shares; fourth series, March, 1883, 116 shares; and fifth series, February, 1886, 125 shares. It was generally supposed that the first series had matured so as to be payable at twice its nominal value in September, 1885, and the officers, Childs, Denniston and Harvey, proceeded to make quite a large loan of the First National Bank of Hudson to raise money to pay off that series accordingly, and pledged to the bank a large amount of the plaintiff's securities; the defendant Denniston indorsing the note given for the loan. There was a general understanding that the first series was to be paid off, and the stockholders were anxious and ready to receive their money. Payments were accordingly made by the treasurer on orders drawn by Harvey, as secretary, and signed by Childs, from time to time, until Harvey's death in March, 1887, no one making any objections, or supposing, so far as the evidence shows, that there was any apprehension of any shortage in the funds of

the corporation, or any irregularity in the management of its affairs. The defendants, up to this time, supposed Harvey had kept the books and records properly. Investigation ensued, and suit was brought against the bank by the plaintiff to recover its securities pledged for the loan. In the meantime a board of directors and other officers had been chosen, and the corporation had been rehabilitated and restored to its normal action, and payments had been ordered to be made, and were in fact paid, on this loan. The plaintiff was unsuccessful in its suit against the bank, and it finally paid the loan. The new board had voted to pay six per cent. interest in May, 1887, on all unpaid claims under the first series of stock, and directed the issue of orders to pay some of the claimants under this series, on the basis that it had matured in September, 1885, and as late as January 11, 1888, two orders were directed to be issued for the payment of some shares on the same basis. The question had been mooted in the previous summer and fall whether the first series had matured, and whether the shortage in the funds was not caused by paying off that series at much more than its actual value. The result was that as early, probably, as September, 1887, and soon as Somers had made his report, the plaintiff set up the claim that at the time the first series of stock was paid off it was in fact worth only $1.49, instead of $2, as had been supposed, basing the claim on such report. The item included in the judgment on this account is a large one, and is sustained only by the report or opinion of Mr. Somers, and the argument made upon the data furnished by his report and the evidence tends strongly to show that the stock was worth much more than the estimate made by him. The accuracy and justice of his report as a basis of judicial action against these defendants have been found so seriously at fault, and as they were not made the subject of judicial examination and consideration in the circuit court, as it ought to have been, we cannot accept and act on his conclusions in respect to the claim that the first series of stock was worth only $1.49 when paid off. It is not within our province or duty to enter upon this inquiry until it has been examined and passed on by the circuit court.

We think that, inasmuch as the action was treated as a legal, and not an equitable, one, by the circuit court, and as the correctness of the report or statement of the expert, Somers, was not judicially investigated and passed on, there was practically a mistrial of the action, and that the judgment should be reversed on that ground, if for no other reason. "A trial is the judicial examination of the issues between the parties." Rev. St. § 2842. As the judgment of the circuit court must be reversed for the errors already noticed, we think it is but justice to both parties to order a new trial, and to direct that the cause be referred upon all the issues therein, upon the proofs already taken and such as may be produced hereafter, to some attorney

being a competent accountant, to report special findings upon all the issues, and to take and state an account of the transactions in question, and report the same to the court, to the end that such judgment may be rendered thereon as shall be just and proper. The action must be regarded as an equitable one, and other necessary or proper parties may be brought in, if it be deemed necessary by the plaintiff or by the court, in order to secure a just and proper determination of the entire controversy. If it shall be thought proper to amend the pleadings so as to charge these defendants in equity as ex-officio members of the board of directors, it may be that all the directors during the period in question will be necessary parties (Sherman v. Parish, 53 N. Y. 483), on the ground that the defendants, if chargeable as such, are entitled to have contribution of and from such directors. (Nickerson v. Wheeler, 118 Mass. 295; Baynard v. Woolley, 20 Beav. 584; Ashhurst v. Mason, L. R., 20 Eq. 225, 236.) There are authorities which take a contrary view, and, as these questions, thus suggested, were not argued at the hearing, we do not express any opinion in respect to them. The question whether the corporation plaintiff has not so far taken and enjoyed the benefits of the transactions complained of, and ratified them, that it has lost the right to complain of them, was ably and vigorously pressed upon our attention, but we express no opinion on this point, as additional evidence may be produced materially affecting the rights of the parties in respect to it. The judgment of the circuit court is reversed, and the cause is remanded for a new trial, and for further proceeding in accordance with the opinion of this court.[1]

HUN v. CARY.

1880. 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546.

Directors' Duty of Diligence and Prudence.

EARL, J.—This action was brought by the receiver of the Central Savings Bank of the city of New York against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and cestui que trust. The trustees are bound to observe the

[1] See, Briggs v. Spalding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. 924; Childs v. White, 158 App. Div. (N. Y.) 1, 142 N. Y. S. 732 (1913).—Ed.

limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a wilful wrong, it is not doubted that they may be held for all the damage they cause to the bank of its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, but such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them —the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—crassa negligentia—not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subject to which it is to be applied. (First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278.) What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation, or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according

to this classification. If gross negligence be taken according to its ordinary meaning—as something nearly approaching fraud or bad faith—I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people, who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully holding such a proposition. It is true that authorities are found which hold that trustees are liable only for crassa negligentia, which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case. In Scott v. De Peyster (1 Edw. Ch. 513, 543)—a case most cited—the learned Vice Chancellor said: "I think the question in all such cases should and must necessarily be, whether they (directors) have omitted that care which men of common prudence take of their own concerns. To require more would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only—which is very little short of fraud itself." In Spering's Appeal (71 Penn. St. 11), Judge Sharswood said: "They (directors) can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are, therefore, bound to apply ordinary skill and diligence, but no more." In Hodges v. New England Screw Co. (1 R. L. 312), Jenckes, J., said: "The sole question is whether the directors have or have not bestowed proper diligence. They are liable only for ordinary care; such care as prudent men take in their own affairs." And in the same case, Ames, J., said: "They should not, therefore, be liable for innocent mistakes, unintentional negligence, honest errors of judgment, but only for wilful fraud or neglect, and want of ordinary knowledge and care." The same case came again under consideration in 3 R. I. 9, and Green, Ch. J., said: "We think a board of directors, acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake." In the case of The Liquidators of the Western Bank v. Douglas (11 Session Cases [3d series], 112 [Scotch]), it is said: "Whatever the duties (of directors) are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such

a duty, the want of reasonable and ordinary fidelity and care, will impose liability for loss thereby occasioned." In The Charitable Corporation v. Sutton (2 Atkyns, 405), Lord Chancellor Hardwicke said, that a person who accepted the office of director of a corporation "is obliged to execute it with fidelity and reasonable diligence," although he acts without compensation. In Litchfield v. White (3 Sandf. 545), Sandford, J., said: "In general, a trustee is bound to manage and employ the trust property for the benefit of the cestui que trust with the care and diligence of a provident owner. Consequently he is liable for every loss sustained by reason of his negligence, want of caution, or mistake, as well as positive misconduct."

In Spering's Appeal, Judge Sharswood said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. (Story on Bailments, § 182.) Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

Enough has now been said to show what measure of diligence, skill and prudence the law exacts from managers and directors of corporations; and we are now prepared to examine the facts of this case, for the purpose of seeing if these trustees fell short of this measure in the matters alleged in the complaint.

This bank was incorporated by the act, chapter 467, of the Laws of 1867, and it commenced business in the spring of that year, in a hired building, on the east side of Third avenue, in the

city of New York. It remained there for several years, and then removed to the west side of the avenue, between Forty-fifth and Forty-sixth streets, where it occupied hired rooms until near the time of its failure in the fall of 1875. During the whole time the deposits averaged only about $70,000. In 1867, the income of the bank was $942.12, and the expenses, including amounts paid for safe, fixtures, charter, current expenses and interest to depositors, were $5,571.34. In 1868, the income was $5,471.43, and the expenses, including interest to depositors, $5,719.43. In 1869, the income was $3,918.27, and the expense and interest paid $5,346.05. In 1870, the income was $5,784.09, and expenses and interest $7,040.22. In 1871, the income was $13,551.14, which included a bonus of $4,000, or $6,000 obtained upon the purchase of a mortgage of $40,000, which mortgage was again sold in 1874 at a discount of $2,000, and the expenses, including interest paid, were $9,124.05. In 1872 the income was $5,100.51, and the expenses, including interest paid, were $7,212.49. Down to the 1st day of January, 1873, therefore, the total expenses, including interest paid, were $5,046 more than the income. To this sum should be added $2,000 deducted on the sale of the large mortgage in 1874, which was purchased at the large discount in 1871, as above mentioned, and yet entered in the assets at its face. From this apparent deficiency should be deducted the value of the safe and furniture of the bank, from which the receiver subsequently realized $500. At the same date, the amount due to over one thousand depositors was about $70,000, and the assets of the bank consisted of about $13,000 in cash and the balance mostly of mortgages upon real estate.

While the bank was in this condition, with a lease of the rooms then occupied by it expiring May 1, 1874, the project of purchasing a lot and erecting a banking-house thereon began to be talked of among the trustees. The only reason put on record in the minutes of the meetings held by the trustees for procuring a new banking-house was to better the financial condition of the bank. In February, 1873, at a meeting of the trustees, a committee was appointed "on site for new building;" and in March the committee entered into contract for the purchase of a plot of land, consisting of four lots, on the corner of Forty-eighth street and Third avenue, for the sum of $74,500, of which $1,000 was to be paid down, $9,000 on the first day of May then next, and $64,000 to be secured by a mortgage, payable on or before May 1, 1875, with interest from May 1, 1873, at seven per cent.; and there was an agreement that payment of the principal sum secured by the mortgage might be extended to May 1, 1877, provided a building should, without unavoidable delay, be erected upon the corner lot, worth not less than $25,000. This contract was reported by the committee to the trustees, at a meeting held April 7. On the 1st day of May, 1873, the real estate was conveyed and the cash payment was made, and four separate mort-

gages were executed to secure the balance, one upon each lot. The mortgage upon the lot upon which the bank building was afterward erected was for $30,500. At the same time the bank became obligated to build upon that lot a building covering its whole front, 25 feet, and 60 feet deep, and not less than five stories high, and have the same inclosed by the first day of November then next. Upon that lot the bank proceeded, in the spring of 1875, to erect a building covering the whole front, and 76 feet deep, and five stories high, at an expense of about $27,000. And the building was nearly completed when the receiver of the bank was appointed, in November of that year. The three lots not needed for the building were disposed of, as we may assume, without any loss, leaving the corner lot used for the building to cost the bank $29,250; and we may assume that that was the fair value of the lot. This case may then be treated as if these trustees had purchased the corner lot at $29,250, and bound themselves to erect thereon a building costing $27,000. When the receiver was appointed, that lot and building, and other assets which produced less than $1,000, constituted the whole property of the bank; and subsequently the lot and building were swept away by a mortgage foreclosure, and this action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated, in the lot upon which the building was erected.

At the time of the lot, the bank was substantially insolvent. If it had gone into liquidation, its assets would have fallen several thousand dollars short of discharging its liabilities, and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning, either because it lacked public confidence, or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand about $13,000 in cash, of which $10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for $40,000, which had been purchased at a large discount, and we may infer that it was not very saleable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than $2,500, and yet it was not sold until 1874. In this condition of things the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking-house. Whether, under the circumstances, the purchase was such as the trustees, in the exercise of ordinary prudence, skill and care, could make; or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill, and care, were questions for the jury. It is not disputed that, under the charter of this bank, as amended in 1868 (chap. 294),

it had the power to purchase a lot for a banking-house "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing to do, to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or if those rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim upon the trial that the rooms they then occupied were not safe. That may have been a good reason for making them more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable, however, that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice, to inspire confidence, attract attention, and thus draw deposits. It was intended as a sort of advertisement of the bank, a very expensive one, indeed. Savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculations or money-making in a business sense. They are simply to take the deposits, usually small, which are offered, aggregate them, and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It was not proper for these trustees—or at least the jury may have found that it was not—to take the money then on deposit and invest it in a banking-house, merely for the purpose of drawing other deposits. In making this investment, the interests of the depositors, whose money was taken, can scarcely be said to have been consulted.

It was not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank.

We conclude, therefore, that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case

of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

This case was moved for trial at a Circuit Court, and before the jury was impaneled, the defendants claimed that the case was improperly in the circuit, and that it could be tried at Special Term; and the court ordered that the trial proceed, and at the close of the evidence, the defendants moved that the complaint be dismissed, on the ground that the action was not a proper one to be tried before a jury, and should be tried before the equity branch of the court. The motion was denied, and these rulings are now alleged for error. The receiver in this case represents the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank. (In re German Mining Co., 27 Eng. Law & Eq. 158; Belknap v. Davis, 19 Me. 455; Bedford R. R. Co. v. Bowser, 48 Penn. St. 29; Butts v. Wood, 38 Barb. 181; Austen v. Daniels, 4 Den. 299; O. & M. R. R. Co. v. McPherson, 35 Mo. 13); and for any misfeasance, or non-feasance, causing damage to the bank, they were responsible to it, upon the same principal that any agent is for like cause responsible to his principal. It has never been doubted that a principal may sue his agent in an action at law for any damages caused by culpable misfeasance or non-feasance in the business of the agency. The only relief claimed in this complaint was a money judgment, and we think it was properly tried as an action at law. No equitable rights were to be adjusted, and there was no occasion to appeal to an equitable forum.

Treating this, therefore, as an action at law, it follows also that the objection taken that other trustees should have been joined as defendants cannot prevail. In actions ex delicto, the plaintiff may sue one, some or all of the wrongdoers. (Liquidators of the Western Bank v. Douglas, 22 Session Cases [2d series], 475 [Scotch]; Barbour on Parties, 203.)

The defendants Hoffman and Gearty filed petitions for their discharge in bankruptcy after the commencement of this action, and were discharged before judgment, and they alleged such discharge as a defense to the action. The trial judge and the General Term held that the discharge furnished no defense, and we are of the same opinion. This claim was purely for unliquidated damages occasioned by a tort. Such a claim was not provable in bankruptcy, and, therefore, was not discharged. (U. S. Rev. Stat. [2d ed.], §§ 5115, 5119, 5067 to 5071; Zinn v. Ritterman, 2 Abb. [N. S.] 261; Kellogg v. Schuyler, 2 Den. 73; Crouch v. Gridley, 6 Hill, 250; In re Wiggers, 2 Biss. 71; In re Clough, 2 Ben. 508; In re Sidle, 2 Bank. Reg. 77.)

I conclude, therefore, that the judgment appealed from should be affirmed.

The appeal by the plaintiff from the order of the General Term,

granting a new trial as to defendant Smith, must, for reasons stated on the argument, be dismissed, with costs.

All concur.

Judgment affirmed and appeal from order dismissed.

TWIN-LICK OIL CO. v. MARBURY.

1875. 91 U. S. 587, 23 L. ed. 328.

Directors' Duty of Loyalty—Loan to Corporation.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant here, complainant below, was a corporation organized under the laws of West Virginia, engaged in the business of raising and selling petroleum. It became very much embarrassed in the early part of 1867, and borrowed from the defendant the sum of $2,000, for which a note was given, secured by a deed of trust, conveying all the property, rights, and franchises of the corporation to William Thomas, to secure the payment of said note, with the usual power of sale in default of payment. The property was sold under the deed of trust; was bought in by defendant's agent for his benefit, and conveyed to him in the summer of the same year. The defendant was, at the time of these transactions, a stockholder and director in the company; and the bill in this case was filed in April, 1871, four years after, to have a decree that defendant holds as trustee for complainant, and for an accounting as to the time he had control of the property. It charges that defendant has abused his trust relation to the company, to take advantage of its difficulties, and buy in at a sacrifice its valuable property and franchises; that, concealing his knowledge that the lease of the ground on which the company operated included a well, working profitably, and by promises to individual shareholders that he would purchase in the property for the joint benefit of the whole, he obtained an unjust advantage, and in other ways violated his duty as an officer charged with a fiduciary relation to the company. As to all this, which is denied in the answer, and as to which much testimony is taken, it is sufficient to say that we are satisfied that the defendant loaned the money to the corporation in good faith, and honestly to assist it in its business in an hour of extreme embarrassment, and took just such security as any other man would have taken; that when his money became due, and there was no apparent probability of the company paying it at any time, the property was sold by the trustee, and bought in by defendant at a fair and open sale, and at a reasonable price; that, in short, there was neither actual fraud nor oppression, no advantage was taken of defendant's position as director, or of any matter known to him at the time of the sale, affecting the value of the property, which was not as well known to others interested as it was to himself;

and that the sale and purchase was the only mode left to defendant to make his money.

The first question which arises in this state of the facts is, whether defendant's purchase was absolutely void.

That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others. Koehler v. Black River Falls Iron Co., 2 Black, 715; Drury v. Cross, 7 Wall. 299; Luxemburg R. R. Co. v. Maquay, 25 Beav. 586; The Cumberland Co. v. Sherman, 30 Barb. 553; 16 Md. 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this is the general rule: for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale.

The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

There are in such a transaction three distinct parties whose interest is affected by it; namely, the lender, the corporation, and the stockholders of the corporation.

The directors are the officers or agents of the corporation, and represent the interests of that abstract legal entity, and of those who own the shares of its stock. One of the objects of creating a corporation by law is to enable it to make contracts; and these contracts may be made with its stockholders, as well as with others. In some classes of corporations, as in mutual insurance companies, the main object of the act of incorporation is to enable the company to make contracts with its stockholders, or with persons who become stockholders by the very act of making the contract of insurance. It is very true, that as a stockholder, in mak-

ing a contract of any kind with the corporation of which he is a member, is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, he is properly held to a larger measure of candor and good faith than if he were not a stockholder. So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness. All this falls far short, however, of holding that no such contract can be made which will be valid; and we entertain no doubt that the defendant in this case could make a loan of money to the company; and as we have already said that the evidence shows it to have been an honest transaction for the benefit of the corporation and its shareholders, both in the rate of interest and in the security taken, we think it was valid originally, whether liable to be avoided afterwards by the company or not.

If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted, and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money. We think the sale was a fair one. The company was hopelessly involved beside the debt to defendant. The well was exhausted, to all appearance. The machinery was of little use for any other purpose, and would not pay transportation. Most of the stockholders who now promote this suit refused to pay assessments on their shares to aid the company. Nothing was left to the defendant but to buy it in, as no one would bid the amount of his debt.

The next question to be decided is, whether, under the circum-

stances of this case, the complainant had a right to avoid this sale at the time this suit was brought.

(The learned justice answered this question in the negative "because plaintiff comes too late with the offer to avoid the sale.")

Decree affirmed.

CHAPTER XVI.

THE COMMON-LAW LIABILITY OF STOCKHOLDERS.

HANDLEY v. STUTZ.

1890. 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. 530.

Liability on Stock Issued Below Par.

This was a bill in equity, filed by Sebastian Stutz, of Pittsburg, Pa., by certain other persons composing the firm of Ragon Brothers, of Evansville, Indiana, and by others composing the firm of Louis Stix & Co., of Cincinnati, Ohio, on behalf of themselves and such other creditors of the Clifton Coal Company as should come in and contribute to the expense of a suit, against the Clifton Coal Company and certain of its stockholders, to compel an assessment upon certain shares of stock held by the individual defendants, and payment of the same as a trust fund for the satisfaction of the debts of the company. The bill averred in substance that the Clifton Coal Company was incorporated under the laws of the State of Kentucky, in July, 1883, with power to purchase, lease and operate coal mines in the State of Kentucky, a copy of the articles of incorporation being annexed to the bill; that by said articles the capital stock of such corporation was fixed at $120,000, divided into shares of $100 each, with power to increase the same to $200,000, by a majority vote of the stockholders; that all the stock was then taken and paid for by the subscribers in some manner agreed upon between them; that, pursuant to the authority contained in the articles of incorporation, the stockholders, all of them being present and voting, "at a meeting duly held for the purpose in May, 1886, unanimously resolved and ordered that the capital stock of said company be, and in fact was then increased to $200,000 in shares of $100 each, being an increase of 800 shares of stock of said company;" that of the 800 shares then created, the defendant Handley subscribed for 86¾ shares, two of the other defendants for 15 shares each, and two others for 75 shares each, certificates of which were issued by the company, and delivered to and received by, said subscribers as they were respectively entitled; but that neither one of them ever paid to the company any part of the said shares, and they each, respectively, owe the said company the full par value of the shares of the said capital stock subscribed for and issued to them.

The bill also averred that on December 30, 1886, it having been previously resolved to issue bonds to the amount of $50,000, and

to secure the payment thereof by a mortgage upon its property, and said mortgage having been executed to trustees and recorded, a contract was executed and delivered to the company by certain others of the defendants, whose names were subscribed thereto, in the following terms: "We, the undersigned, subscribe for the amount set opposite our names respectively, to bonds of the Clifton Coal Company, aggregating $50,000. It is agreed that $50,000 capital stock be distributed pro rata among the subscribers to the above bonds;" that several of the defendants subscribed to this contract, and agreed to take bonds in different amounts; that said subscribers paid the coal company for the bonds, and that with the money thus received, to the extent of $30,000, the company paid its debts to certain of its officers and managers, who had become liable by indorsement for the company, and that nothing was or ever has been paid for or upon any of the shares of capital stock thus subscribed for, and to be distributed among them; that is to say, $50,000 of said capital stock, equivalent to 500 shares thereof, was in fact subscribed for and distributed among certain of the defendants, to whom in May, 1887, there were issued and received by them respectively certificates for shares.

The bill further averred that the plaintiffs were judgment creditors of the company, by judgments obtained in the courts of Kentucky; that their debts were created before all of the capital stock of said company was paid in; and that all of said $80,000 increase of the capital stock, and each and all of the amounts due to the company for any part of its capital stock, constituted a trust fund for their benefit, which they were entitled to have administered in a court of equity to the satisfaction of their said debts, the company being insolvent.

It further appeared from the testimony that the company was organized soon after its articles of incorporation were filed; that its chief office was at Mannington, Kentucky; and that it began business at once and made large outlays and expenditures for machinery, buildings, materials and labor. In the early part of the year 1886, the company was led to believe that its coal would coke, and therefore its products could be profitably extended from grate and steam purposes to iron-making coke. To embark in the manufacture of coke, however, money was needed, and a meeting of the stockholders was held March 31, 1886, at which a resolution was passed, reciting that $50,000 was needed with which to erect coke ovens, buildings, improvements, etc., to further develop the property; and it was unanimously resolved to issue $50,000 of bonds of the company, in sums of $1,000 each, due thirty years from April 1, with 6 per cent. interest, and secured by trust mortgage upon the property of the company, and the president was authorized to dispose of such bonds as in his discretion seemed best. The mortgage was executed to the designated trustee and recorded. It was found, however, that the bonds could not be sold, and to meet the demands upon the

company for money, it borrowed a large amount upon its notes, indorsed by its directors and stockholders and to secure the lenders and indorsers, the $50,000 of bonds were deposited in two banks in Nashville, Tennessee, as additional collateral security for the loans. Finding that no one would purchase the bonds, and being advised that in order to effect their sale it would be better to add an equal amount of stock to the bonds, and propose to the purchasers of such bonds to give as a gratuity $1,000 of stock with each $1,000 bond, a meeting of the stockholders of the company was held at Nashville, May 31, 1886, at which all the stockholders were present in person or by proxy, although without any call or previous notice and "it was unanimously resolved that the capital stock of the company be increased to $200,000, as authorized by the charter." This resolution was not then entered upon the records of the corporation, but was formulated in the shape of a pencil memorandum, and adopted unanimously, although no vote appeared to have been taken, and no formal record was made of the meeting until the summer of 1888. No notice of such change in the amount of its capital stock was recorded or published, as required by the laws of Kentucky. The subscribers to the bonds subsequently executed the agreement set forth in the bill, and bonds to the amount of $45,000 were delivered to the subscribers with equal amounts of certificates of "paid-up" stock, the receipts reciting that it "was issued with bonds for same amount, as per agreement." The certificates on their face recited that the shares of stock were fully paid up "and were non-assessable," or language to that effect. Five thousand dollars of the bonds were left in one of the national banks at Nashville as collateral security for a loan to the company, no one having subscribed for them. The remaining $30,000 shares of increased stock, which were not needed to secure the subscribers to the bonds, appeared to have been distributed pro rata among the old stockholders. In the latter part of 1887, and in the early part of the following year, plaintiff obtained judgments against the company, which were unsatisfied, and in September, 1887, by an order of the Circuit Court of Hopkins County, Kentucky, the entire property of the company was placed in the hands of a receiver, and its operation stopped.

On February 8, 1889, this bill was filed against the coal company and the holders of this increased stock, to compel payment therefor, and to recover the amounts of the judgments against the company. The court dismissed the bill as to three of the defendants not served with process, and as to the rest held them liable to all the creditors of the company whose debts originated after the alleged increase of stock, and fixed May, 1886, as the date of such increase. As to debts contracted prior to that date, they were excluded because, as between the company and the stockholders, the latter held such stock properly, and without liability to the company and all creditors who dealt with the com-

pany prior to such increase, and not upon the faith of such stock, had no equity to demand more than the company itself could. Five of the defendants against whom decrees were rendered in excess of $5,000 appealed to this court, and the circuit court suspended the execution of the decree as to those who could not appeal until this court should determine the rights of the appellants.

The opinion of the circuit court is reported in 41 Fed. Rep. 531.

MR. JUSTICE BROWN delivered the opinion of the court:

* * *

So far as the question of liability to the proposed assessments is concerned, these defendants, with respect to their relations to this corporation, are divisible into two distinct classes: *First,* those of the original stockholders who received the $30,000 increased stock as a gift; *second,* those who subscribed to the $50,000 bonds, and received an equal amount of stock as a bonus or inducement to make the subscription.

With regard to the first class, namely, the original stockholders, who voted for this increase of shares, and then distributed among themselves 300 of those shares, without the shadow of right or consideration, it is difficult to see why they could not be called upon to respond for their value. The only claim made upon their behalf is that they never agreed to contribute or pay for the same; that the stock was expressly declared to be "fully paid" and "free from all claims or demands upon the part of the company;" that there was no evidence that the creditors of the company knew of, or relied upon, this increase, in their dealings with the company; and that they had a right to return and surrender the same, which they offered to do. There is no reason to suppose that these stockholders did not act in good faith, and in the belief that they were entitled to this stock. The fact that they did not subscribe for it or agree to take it until the receipt of the certificates is immaterial, as the acceptance of the certificates is sufficient evidence of an agreement to pay their par value. Sanger v. Upton, 91 U. S. 56, 64; Chubb v. Upton, 95 U. S. 665; Brigham v. Mead, 10 Allen, 245.

Ever since the case of Sawyer v. Hoag, 84 U. S. (17 Wall.) 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, 91 U. S. 56; Webster v. Upton, 91 U. S. 65; Chubb v. Upton, 95

U. S. 665; Pullman v. Upton, 96 U. S. 328; Morgan County v. Allen, 103 U. S. 498; Hawkins v. Glenn, 131 U. S. 319; Graham v. LaCrosse & M. R. Co., 102 U. S. 148, 161; Richardson v. Green, 133 U. S. 30.

It is simply in affirmative of this general principle that section 14, chapter 56, of the General Statutes of Kentucky declares that nothing in the Act conferring corporate franchises, or permitting the organization of corporations, "shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on stock owned by them." If the corporation has no right, as against creditors, to sell or dispose of this stock with an agreement that no further assessment shall be made upon it, much less has it the right to give it away, or distribute it among shareholders, without receiving a fair equivalent therefor, and thereby induce the public to deal with it upon the credit of such shares, as representing the assets of the corporation. Upton Mutual L. Ins. Co. v. Free Stone Mfg. Co., 97 Ill. 537. The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent to which it fails to represent such value, it is either a deception and fraud upon the public, or an evidence that the original value of the corporate property has become depreciated. The market value of such shares rises with an increase in the value of the corporate assets, and falls in case of loss or misfortune, whereby the value of such assets is impaired. And the increase of value of such stock is taken to represent either an appreciation in value of the company's property beyond the par value of the original shares, or so much money paid to the corporation as is represented by such shares. If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be "watered," except the caprice of the stockholders. While an agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, it has been uniformly held by this court not to be binding upon its creditors.

Somewhat different considerations apply to those who subscribed for the bonds of the company, with the understanding that they were to receive an amount of stock equal to the bonds as an additional inducement to their subscription. The facts connected with this transaction are substantially as follows: Some three years after the company was organized it became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success, owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the

coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig-iron. To embark in this, however, money was needed, and as the stock of the company was not worth more than fifty cents on the dollar, it was evident this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of $50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and acting upon the suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased 800 shares, 500 of which should be turned over to the subscribers to the bonds, as a bonus or an additional consideration. The evidence is uncontradicted that the bonds could not have been negotiated without the stock; that they were both sold as whole; that the transaction was in good faith, and, considering the risk that was taken by the subscribers, the price paid for the stock and bonds was fair and reasonable. The directors appear to have done all in their power to obtain the best possible terms, and there is no imputation of unfair dealing on the part of anyone connected with the transaction. At that time the mines and property of the company were in good condition, and the prospects of success were fair.

The case then resolves itself into the question whether an active corporation, or, as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point. In the Upton Cases arising out of the failure of the Great Western Insurance Company, in Hatch v. Dana, 101 U. S. 205, and in Hawkins v. Glenn, 131 U. S. 319, the defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not as in this case, to purchase property or to raise money, to add to the plant and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In Morgan County v. Allen, 103 U. S. 498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can

never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is bona fide, and not a mere cover for "watering" the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an alleged increase. * * *

A case nearer in point is that of Clark v. Bever, 139 U. S. 96, decided at the present term of this court. In this case, a railroad company, of which defendant's intestate was president and stockholder, had a settlement with a construction company, of which defendant's intestate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it thirty-five hundred shares of its stock at 20 cents on the dollar, and the same were accepted in full satisfaction of the debt. The stock was not worth anything in the market, and was issued directly to the defendant's intestate. No other payment than the 20 per cent. was ever made on account of this stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim upon the theory that he was liable for the actual par value of such stock, whatever may have been its market value at the time it was received. It was held he could not recover. "Of course under this view," said Mr. Justice Harlan, in delivering the opinion of the court, "everyone having claim against the railway company—even laborers and employes—who could get nothing except stock in payment of their demands,

became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although, at the time it was sought to make them liable, the corporation had ceased to exist, and its stock had ceased to exist, and its stock had remained, as it was when taken, absolutely worthless. * * * To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value—there being no statute forbidding such a transaction—without subjecting the creditor, surrendering its debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts or to borrow money secured by mortgage upon the corporate property."

So in Fogg v. Blair, 139 U. S. 118, also decided at the present term, it was held to be competent for a railroad, exercising good faith, to use its bonds or stocks in payment for the construction of its road, although it could not, as against creditors or stockholders, issue its stock as fully paid without getting some fair or reasonable equivalent for it. It was there said: "What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them." It appeared in that case that full and adequate compensation for the work done had been paid by the company in its mortgage bonds, and, as the bill contained no allegation whatever as to the real or market value of such stock, it was held that the contractors receiving this stock were not liable to creditors for its par value. It was added: "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit on the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court—assuming such facts to be true—to say that the contract between him and the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized." It would seem to follow from this that if the stock had been of some value, that value, however much less than par, would have been the limit of the holder's liability.

In Morrow v. Nashville I. S. Co., 87 Tenn. 262, the Supreme Court of Tennessee held that a contract with a subscriber to stock of a corporation, that for every share subscribed he should receive bonds to an equal amount, secured by mortgage on the company's plant, is void as against creditors, and also between the subscriber and the corporation. But the court drew distinction between such a case and sales of or subscription to the stock

of an organized and going corporation. It said: "The necessities of the business of an organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal the par value of either. In such cases, the question of fraud aside, the purchaser would only be held for his contract price." This case from Tennessee puts as an illustration the exact case with which we are now dealing.

The liability of a subscriber for the par value of increased stock taken by him may depend somewhat on the circumstances under which, and the purpose for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained. Stein v. Howard, 65 Cal. 616. As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stocks and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company. Our conclusion upon this branch of the case disposes of it as to those who were held liable by virtue of their subscription to the bonds.

We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. First Nat. Bank of Deadwood v. Gustin Minerva Con. Min. Co., 42 Minn. 327; 2 Morawetz on Corporations, §§ 832, 833; Coit v. North Carolina Gold Amalgamating Co., 14 Fed. Rep. 12. We also agree with him that creditors, who became such after the increase was voted in May, 1886, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been contracted. The circuit judge

found in this connection that the "complainants had no knowledge or notice of the subscription paper of December 30, 1880, under which $45,000 of the new stock was distributed to those who subscribed for bonds, nor of the distribution among the old stockholders of $30,000 of said increased stock; nor does it affirmatively appear that they or either of them dealt with and trusted the company upon the faith of that increased stock; but the fact that the capital stock had been increased to $200,000 was made public and was generally known." The real question in this connection is—when may it be presumed creditors trusted the corporation upon the faith of the increased stock? Obviously, when such increase was ordered. That is a fact to which publicity would naturally be given; the creditors could not be expected to know when and by whom such stock would be taken. It is true they assume the risk of the stock not being taken at all, but the moment shares are taken, they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment, not only of future, but of existing creditors. It is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock, would in case like this, where the creditors and stockholders are both numerous, lead into inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties. * * *

It results that the decree of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

MR. CHIEF JUSTICE FULLER, with whom concurring MR. JUSTICE LAMAR, dissenting:

I dissent from the conclusion of the court in respect of the stock received by the subscribers to the bonds. That stock was not paid for in money or money's worth, or issued in payment of debts due from the company, or purchased at sale upon the market. It was a mere bonus, thrown in with the bonds as furnishing the inducement to the bond subscription, of larger control over the corporation, and of possible gain without expenditure. Becoming secured creditors through the bonds, the subscribers increased their power through the stock. In my view, there was no actual payment for the stock, and to treat it as paid up is to sanction an arrangement to relieve those who could reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure, of the enterprise.

When the capital stock of a corporation has become impaired, or the business in which it has engaged has proven so unre-

munerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk.

My brother Lamar concurs with me in this dissent.

COIT v. GOLD AMALGAMATING CO.

1886. 119 U. S. 343, 30 L. ed. 420.

Shares Issued in Consideration of Property.

MR. JUSTICE FIELD: The defendant, the North Carolina Gold Amalgamating Company, was incorporated under the laws of North Carolina on the 30th of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing and assaying ores and metals, with the power to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the company for $5,489, recovered in the Court of Common Pleas of Philadelphia, on the 18th of May, 1879, upon its two drafts, one dated June 1, 1874, and the other August 15, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them, alleging that he had frequently applied to the officers of the company to institute a suit for that purpose, but that under various pretenses they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at $100,000, divided into 1,000 shares of $100 each, with power to increase it from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might be paid "in such installments, in such manner and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss or damages, or be responsible beyond the assets of the company.

Previously to the charter the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a corporation. Upon obtaining the charter the capital stock was paid by the property of the former association, which was estimated to be of the value of $100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property, and the average estimate amount-

ed to $137,500. This sum they reduced to $100,000, inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money, in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the installments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full-paid stock is issued for property received there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. Boynton v. Hatch, 47 N. Y. 225; Van Cott v. Van Brunt, 82 N. Y. 535; Carr v. LeFevre, 27 Pa. St. 413.

But the allegation of intentional and fraudulent overvaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the corporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction.

In May, 1874, the company increased its stock, as it was authorized to do by its charter, to $1,000,000, or 10,000 shares of $100 each. This increase was made pursuant to an agreement with one Howes, by which the company was to give him 2,000 shares of the increased stock for certain lands purchased from him. Of the balance of the increased shares 4,000 were divided

among the holders of the original stock upon the return and delivery to the company of the original certificates—they thus receiving four shares of the increased capital stock for one of the original shares returned. The other 4,000 shares were retained by the company. The land purchased was subject to three mortgages, of which the plaintiff held the third; and the agreement was that, under the first mortgage, a sale should be made of the property, and that mortgages for a like amount should be given to the parties according to their several and respective amounts, and in their respective positions and priorities.

The plaintiff was to be placed by the company, after the release of his mortgage, in the same position. Accordingly, he made a deed to it of all his interest and title under the mortgage held by him, the trustee joining with him, in which deed the agreement was recited. The company thereupon gave him its mortgage upon the same and other property, which was payable in installments. The plaintiff also received at the same time an accepted draft of Howes' on the company for $1,000. When the first installment on the mortgage became due, the company being unable to pay it, he took its draft for the amount, $3,000, payable in December following. It is upon these drafts that the judgment was recovered in the Court of Common Pleas of Philadelphia, which is the foundation of the present suit. It is in evidence that the plaintiff was fully aware, at the time, of the increase in the stock of the company, and of its object. Six months afterwards the increase was canceled, the outstanding shares were called in, and the capital stock reduced to its original limit of $100,000. Nothing was done after the increase to enlarge the liabilities of the company. The draft of Howes was passed to the plaintiff and received by him at the time the agreement was carried out upon which the increase of the stock was made, and the draft for $3,000 was for an installment upon the mortgage then executed. The plaintiff had placed no reliance upon the supposed paid-up capital of the company on the increased shares, and therefore has no cause of complaint by reason of their subsequent recall. Had a new indebtedness been created by the company after the issue of the stock and before its recall, a different question would have arisen. The creditor in that case, relying on the faith of the stock being fully paid, might have insisted upon its full payment. But no such new indebtedness was created, and we think, therefore, that the stockholders cannot be called upon, at the suit of the plaintiff, to pay in the amount of the stock, which, though issued, was soon afterwards recalled and canceled.

Judgment affirmed.[1]

[1] See, also, State Trust Co. v. Turner, 111 Iowa 664, 82 N. W. 1029, 53 L. R. A. 136, for able discussion of the "true-value rule" and the "good-faith rule." Compare Rathbone v. Ayer, 121 App. Div. (N. Y.) 355, 105 N. Y. S. 1041, revd. on dissenting opinion, 196 N. Y. 503.—Ed.

SOUTHWORTH v. MORGAN.

1912. 205 N. Y. 293, 98 N. E. 490.

Issue of Shares for Less Than Par.

COLLIN, J.—The plaintiff, trustee of the bankrupt corporation, Remington Automobile & Motor Company, seeks to recover from the defendant a sum unpaid, upon a subscription by the defendant for two shares of the capital stock of the corporation.

The trial court found as facts: The bankrupt was organized in 1900 under the laws of New Jersey. Its authorized capital stock was $250,000, divided into 2,500 shares of the par value of $100 each. Soon after its incorporation, the board of directors adopted a resolution as follows: "Resolved, that for the purpose of securing a local interest in the Remington Automobile & Motor Company on the part of the citizens of Ilion (N. Y.) that 200 shares of the stock be issued, to be sold at $25 per share, and that the proceeds of such sale be placed in the treasury, to be used for regular expenses." Thereafter, in pursuance of the resolution, the general manager and secretary of the corporation presented to the defendant a writing, which contained the agreements that the plant of the corporation was to be located and its business to be carried on at Ilion, and that the defendant would purchase two nonassessable shares of the capital stock of the corporation at $25 for each share and no more would ever have to be paid upon them. The defendant signed the agreement and purchased the two shares of stock upon the distinct understanding and agreement made between the defendant and the general manager and secretary of the corporation that $25 per share fully paid for the stock. He paid $50 for the two shares of stock at the time he received them. The corporation located its plant at Utica, N. Y., and not at Ilion. In December, 1902, the company was adjudged a bankrupt, and in April, 1906, the United States District Court granted an order directing a call or assessment upon the defendant and others of $75 per share to meet the deficiency in the assets of said corporation to meet the obligations of its creditors, said assessments to be paid on or before July 1, 1906, and the defendant was duly served with a copy of said order. The court found as a conclusion of law that the plaintiff was entitled to recover the sum of $150, a conclusion which the facts found do not support.

The liability of the defendant is to be determined by the law of the state of New Jersey. That state, through its laws, gave the corporation its existence, powers, liabilities, and the limits within which it was free to act, and a citizen of this state, who became a shareholder in it, entered into contract relations, the extent and obligation of which depended upon the laws, in so far as they do not violate a statute or the settled public policy of this state. Lowry v. Inman, 46 N. Y. 119; Hancock National Bank

v. Ellis, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414; Molson's Bank v. Boardman, 47 Hun, 135.

The relevant laws of New Jersey are not disclosed or laid before us by the printed record; nor do the findings make known the provisions of the charter of the bankrupt other than that stated relating to the authorized capital stock. We are confined to the case as the record presents it. The laws of other states are facts which must be alleged and proved and of which we cannot take judicial notice either in their language or their interpretation. Genet v. Del. & Hud. Canal Co., 163 N. Y. 173, 177, 57 N. E. 297; Hancock National Bank v. Ellis, 166 Mass. 414, 44 N. E. 345, 55 Am. St. Rep. 414.

In the absence of those facts, we must presume that the common law of New Jersey is the same as the common law of New York. Ruse v. Mut. Benefit Life Ins. Co., 23 N. Y. 516, 522.

It is urged by the respondent, at this point, that the order of the United States District Court directing the assessment of the shares of the defendant conclusively determined the validity and the amount of the assessment. It is true that the regularity and validity of the proceeding in that court and its conclusions cannot be attacked in this action; but the existence or nonexistence of an obligation on the part of the defendant to pay the assessment was not within the subject-matter of which that court took jurisdiction. To enable the plaintiff to enforce the liability of the delinquent shareholders to the extent only which the deficiency in the corporate assets required and to effect parity of contribution between them, it was necessary that an account of the assets and debts, of the entire amount of the capital remaining unpaid upon the issued shares, and the part of the face value of his shares unpaid by each stockholder, should be taken, and the aggregate assessment required equitably rated by the court, and it is upon those issues that its order is beyond attack in this action. Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725. In the former case the court, speaking of an analogous order of a court of Illinois, said: "But the order was not, and did not purport to be, a judgment against anyone. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract." 162 U. S., page 337, 16 Sup. Ct., page 813, 40 L. Ed. 986. The respondent does not contend that the charter provision dividing the authorized capital stock into shares "of the par value of $100 each" prohibited the creation of an actual share or interest upon a consideration less than $100, or secure to the creditors or their representative the right of collecting upon each share, as the discharge of

the corporate debts demands, the difference between the consideration and $100.

Inasmuch as no statute of the state of New Jersey, nor provision of the charter of the corporation relative to the liability of the defendant, was proven, we turn to the common law, remarking parenthetically, however, that we have not been referred to and have not found any domestic statute which prescribes, as a condition to the exercise here of the rights derived from the state of New Jersey that the shareholders shall be liable to the creditors or their representative up to the nominal value of their stock, and there is therefore no statutory, as there is no charter, prohibition against the issuance of the shares of the capital stock for less than their par value as named in the charter, and no statutory mandate that the shares shall be deemed issued and held subject to the payment of such value. Nor do the principles of the common law of this state work such results. In Christensen v. Eno, 106 N. Y. 97, 102, 12 N. E. 648, 650 (60 Am. Rep. 429), the action was brought by a judgment creditor of an insolvent corporation organized under the laws of Illinois to recover 40 per cent. of the authorized par value of $100 each of 25 shares of the stock of the company issued to but unsubscribed for by the defendant, upon which the 40 per cent. was not paid, but, as a gratuity, was credited as paid, when the stock was issued. Judge Andrews, writing for this court, which reversed the judgment in favor of the plaintiff, said (citing authorities): "But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract." The principles which determined our judgment in that case were reaffirmed in Christensen v. Colby, 110 N. Y. 660, 18 N. E. 480.

In the case at bar, no statute supports the alleged liability of the defendant, and the express agreement between the corporation and the defendant was that the defendant should pay 25 per cent. of the nominal value of the shares and no more. The respondent contends, however, and therein he has been successful in the courts below, that the creditors of the corporation represented by the plaintiff have the right to compel the payment of the unpaid 75 per cent. because the capital stock is a trust fund for the security of the creditors, and that a liability in their favor to the extent of the unpaid part of the nominal value of the actual shares exists and can be enforced. Such contention availed the plaintiff in the Christensen Case until it reached this court, the General Term saying therein that the practical effect of the transaction was to take out of the assets, to which the creditors were

entitled, the 40 per cent. indorsed as paid upon the stock, when in fact it was not paid. It is strenuously urged that this case is not controlled by the principles which decided the Christensen Case, for the reason that the defendant subscribed for the two shares of the capital stock, while in the Christensen Case the stock certificate was merely issued to and accepted by the defendant. The subscription, as expressed in the agreement between the defendant and the corporation, has been completely fulfilled by the payment in full of the sum it bound him to contribute and therewith his liability to the corporation or the creditors terminated, unless there issued from the trust fund doctrine, through implication, a contract which, in the paramountcy given it by the fact that it was the irresistible product of the law, nullified the expressed stipulation that $25 was the whole sum to be paid upon each share, and substituted in its place the requirement that, as to the creditors, there should be paid $100, or so much thereof as the satisfaction of their demands made necessary. That doctrine has not such potency. Its peculiar vigor is that, contrary to the common law of England, it secures to the creditors of insolvent corporations or their representatives the right of enforcing subscriptions for shares of which the corporation has deprived itself by release or defeasance. It declares that the capital stock of a corporation is a substitute for the personal liability which subsists in individual or partnership undertakings, and is a fund set apart as a security for the payment of the corporate debts. The capital or capital stock which it thus segregates is not the capital stock authorized or named in the charter of the corporation. If it were, the members would be bound by the doctrine to contribute on account of it the sum within its named value needed to pay the debts of the insolvent corporation. The statement in the charter does not create a security for the creditors. It creates authorized or potential capital stock and shares which, transferred into actual shares through the acquisition of subscribing members and their payments, produces the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the business is undertaken and the assets or fund contemplated by the trust fund doctrine which the directors or stockholders may not lawfully diminish by appropriating or squandering it or giving it away. And as there is not a fund or security in the nominal or potential shares, there is none in the excess of the nominal value over the subscribed value of the shares. The subscription agreements, as they are enforceable through their express provisions or implication or statutory conditions, are the sources and the measure of the duty of the subscribers. Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; Burrall v. Bushwick Railroad Co., 75 N. Y. 211. The doctrine further declares that unpaid subscriptions are a part of the capital and that a subscriber cannot be discharged to the injury of creditors by arrangement or

device to which creditors do not give their assent and by which he is to pay less than his subscription. Stoddard v. Lum, 159 N. Y. 265, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541; Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585; Hazard v. Wight, 201 N. Y. 399, 94 N. E. 855. The doctrine does not create or nullify subscriptions. It lays hold of the assets of an insolvent corporation, and in doing that it compels subscribers to fulfill their legal obligations and perform their legal duties; but it does not beget those duties or obligations; it does not make unlawful or invalid a subscription which, apart from it, was valid and lawful. The question with it is: Has the subscriber fully performed the subscription agreement as it in fact and in law exists? And an affirmative finding renders it inapplicable and inoperative. In the case at bar there were not statutory conditions upon which the shares might be owned. The agreement between the defendant and the corporation expressed with completeness the obligations and liability of the defendant for his shares. He has fulfilled the obligation and thereby destroyed the liability. The trust fund doctrine is inapplicable, and the findings of fact do not constitute a cause of action.

We have not considered or determined either the manner or the extent in which a statute of New Jersey, inimical to the express agreement of the corporation and the defendant, would through implication affect it, or the effect of the statement of the corporation that it would locate its plant and carry on its business at Ilion, because the record submitted to us does not present those questions.

The judgment should be reversed, and a new trial granted; costs to abide the event.

Haight, Vann, Willard Bartlett, Hiscock, and Chase, JJ., concur.

CULLEN, C. J.—I concur on the sole ground that, as shown in the opinion of Collin, J., the question involved in the appeal is settled by the authority of the previous decisions of this court. Were it an original one, I should reach a contrary conclusion.

Judgment reversed, etc.

CHAPTER XVII.

THE CONSTITUTIONAL AND STATUTORY LIABILITY OF STOCKHOLDERS.

FIRST NATIONAL BANK v. GUSTIN MINERVA CONSOLIDATED MINING CO.

1890. 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. 510.

Liability of Non-resident Stockholders.

MITCHELL, J.: This action was brought upon a debt of the defendant company, a corporation organized under the laws of Dakota territory, and against the other defendants, citizens of this state, as stockholders, to obtain judgment against the company for the amount of the debt, and against the other defendants for the respective amounts alleged to be due and unpaid on the stock held by them, so far as necessary to satisfy the judgment against the corporation. To dispose of certain preliminary questions raised by the defendants, it may be stated at the outset that it is elementary law that, where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all of the laws of the state under which the corporation is organized and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in this state, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear, upon both principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction a contract validly entered into. The remedy, however, does not enter into the contract itself; and for this reason the individual liability of shareholders can only be enforced by the remedies provided by the laws of the *forum*. Hence the question of the liability of the defendant shareholders must be determined by the laws of Dakota, and that of remedy by the laws of Minnesota.

That the remedy resorted to by plaintiff in this case is a proper one is well settled. Merchants' Nat. Bank v. Bailey Mfg. Co., 34 Minn. 323 (25 N. W. Rep. 639). Upon the trial the judge considered it to be one triable by the court, but, on his own motion, submitted a specific question of fact to a jury; but subsequently, considering the verdict as immaterial, he proceeded without re-

gard to it, and found the facts upon all the issues in the case. As neither party claims anything from this special finding of the jury, and as there is no exception which raises the question whether the action was triable by the court or by a jury, the whole case is reduced to the single question whether the conclusions of law are justified by the findings of fact.

Section 413 of the Civil Code of Dakota provides that "each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him." This is but declaratory of the common law.

The findings of fact, so far as here material, are, in substance, as follows: Prior to November 13, 1886, there had been organized, and were at that date in existence, under the laws of Dakota, two mining corporations, viz., the Gustin Belt Gold Mining Company, and the Minerva Mining Company, of the latter of which the plaintiff, a national banking association of Deadwood, Dak., was a creditor. On the date named the defendant corporation was organized for the purpose and with intention of consolidating the other two companies, acquiring their property, and with the property so acquired carrying on a general mining business. "At the time of the organization of the defendant company, and as the scheme on which the same was based, it was agreed by the parties so incorporating, and by those representing and having authority to act for the two existing companies, that all the mines and mining property of such two corporations should, upon its organization, be transferred and conveyed to the new, or defendant company, and constitute its entire capital stock and resources for the prosecution of its enterprise, and be represented in such organization by a nominal capital stock of $2,500,000, divided into 250,000 shares, of $10 each, which should all be deemed and held as represented by the properties so conveyed to it; that 50,000 of said shares should be issued to the former shareholders of each of the two old companies, and the remaining 150,000 shares belong to and constitute the working capital of the new corporation, and be sold under its authority, and on such terms as it should direct; and the proceeds of such sales constitute a fund to pay off the debts on the properties, and develop the mines thereon, and be used generally in the prosecution of the business of the new corporation, for the benefit of all its stockholders. That it was never expected or intended by such corporation, or by those to whom its stock was issued, that any subscription to the capital stock of the new company should ever be made, or that any capital stock should ever be taken, or any capital subscribed for or paid in, except by conveyance to it of the mining properties referred to, and the sale of the stock reserved for its working capital, in open market, for such sum as could be obtained therefor." This scheme was carried into effect by the conveyance to the new or defendant corporation of the properties

of the two old corporations, and the issue to their stockholders, according to their respective holdings, of 100,000 shares of the stock of the new company (called in the findings "Old Company Stock") as paid-up stock, and by placing the remaining 150,000 in charge of the board of directors, to be by them sold in the open market for such price per share (not less than 50 cents) as could be obtained therefor. The mining properties of the two old companies conveyed to the new company were not worth to exceed $50,000 cost, and were at the time of this scheme of consolidation considered and estimated as of the aggregate value of $100,000. The new and defendant company assumed payment of the indebtedness of the Minerva Mining Company to the plaintiff, which consented to a novation of its debt, accepting the notes of the defendant company in place of those of the old Minerva Company. *This is the claim upon which this action is brought.* The court also finds "that the payees in said notes named, and the general managing officer of the plaintiff, well knew, at the time of the execution of said notes and of their indorsement and delivery to the plaintiff, all the facts hereinbefore stated, relating to the organization of the defendant corporation and the understanding and plan of its organization, and so dealt with the defendant knowing such matters, and were parties to and interested in the original scheme of the incorporation of the defendant company as in the findings set forth." This must be construed as meaning that the "general managing officer" referred to is the person who transacted the business with the defendant company in taking these notes, and of the benefit of whose action in that regard the plaintiff has availed itself. Notice to him must be deemed notice to the plaintiff.

Returning, now, to the subsequent management of the affairs of the defendant company, the board of directors, pursuant to the scheme of organization, offered for sale in the open market the 150,000 shares remaining in the treasury, as fully paid-up stock, and some of it was bought as such by the other defendants in good faith, for a price exceeding its fair market value (but not exceeding one dollar per share), believing it to be fully paid-up stock. This is called in the findings "Treasury Stock." The holders of the old company stock also placed their stock in the market, some of which the defendants also bought, under like circumstances and in the same belief. In March, 1887, the board of directors, pursuant to a resolution adopted by them, distributed pro rata among the individual shareholders all the stock remaining unsold in the treasury. Of this the individual defendants received their respective shares, for which they paid nothing. This is called in the findings "Pro rate Stock." The court also finds that none of such defendants ever contracted, promised, or in any manner agreed, or intended to contract, promise, or agree, to pay, on account of such stock, any other or different or greater sum or consideration, unless the law would impose or imply such prom-

ise, contract, or agreement from the foregoing facts. The holdings of the defendants consist, in part, of old company stock, in part of treasury stock, and in part of pro rate stock.

The contention of the plaintiff is that the defendant shareholders are individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they have actually paid therefor, viz., nine dollars per share on the old company and treasury stock, for which they paid in value only one dollar per share, and ten dollars per share on the pro rate stock, for which they paid nothing. If these stockholders were indebted to the corporation for unpaid instalments on stock, this debt would be an asset of the corporation which, in case it became insolvent, any creditor might always enforce for the purpose of satisfying his claim. But it is very clear from the facts that the defendant company has no claim against the defendant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold, or given away, as fully paid stock, is entirely valid. But the plaintiff bases its claim upon the familiar doctrine that the capital stock of a corporation is a trust fund for the benefit of its creditors, and that, if shares are not in fact paid up, an arrangement between the corporation and the shareholders that they shall be deemed paid up, although valid between the company and the stockholder, will be ineffectual as to creditors, and that equity will hold the shareholder liable for the amount not in fact paid on his stock, to the extent necessary to satisfy the demands of creditors. We waive consideration of the question (which may, at least, admit of doubt) whether plaintiff's complaint is sufficient to entitle it to such relief. See Phelan v. Hazard, 5 Dill. 45; Cook, Stocks, § 47; Scovill v. Thayer, 105 U. S. 143.

The general proposition advanced by plaintiff cannot be controverted, but the principle upon which this trust in favor of creditors rest, and is administered must not be overlooked. The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist the rule itself ceases to apply. This trust does not arise absolutely in every case, in favor of every and any creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than that it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those

creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. For example, to distribute the capital among the shareholders without provision for paying corporate debts would be a fraud on existing creditors, as well as on such subsequent creditors as deal with the corporation in reliance upon the assumption that its professed capital remains intact. An illustration of this kind is to be found in the very first case in which what is now called the "American doctrine" was announced by Justice Story. We refer to the case of Wood v. Dummer, 3 Mason, 308, where a banking association distributed three-fourths of its capital among its shareholders without providing for the payment of bill-holders, and the court impressed a trust in their favor upon the capital in the hands of the shareholders. So, again, where corporations have organized and engaged in business with a certain amount of ostensible and professed paid-up capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called "paid-up," and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital. To this class belong many of the cases cited by plaintiff, as, for example, Sawyer v. Hoag, 17 Wall. 610; Wetherbee v. Baker, 35 N. J. Eq. 501.

While the courts have not always had occasion to state the limitations upon the doctrine that "the capital is a trust fund for the benefit of creditors," yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders, it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors. If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than

the corporation itself could claim as part of its assets. Coit v. Gold Amalgamating Co., 14 Fed. Rep. 12; same case, 119 U. S. 343 (7 Sup. Ct. Rep. 231). This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors.

These views effectually dispose of the question of the liability of the defendants, at least on account of their old company and treasury stock. We think it also logically follows from what we have said that the defendants are not liable to the plaintiff upon their "pro rate" stock as for unpaid stock subscriptions. This stock had not been issued when plaintiff's debt was contracted. It could not have dealt with the company on the faith of any capital represented by these shares. In fact, it knew that no such capital had been paid in, unless the mining properties of the two old companies can be considered as represented in part by them; and the value of these properties remained the same, and they were equally available to creditors, whether represented by 100,000 shares or 250,000 shares of stock. Under such circumstances, the plaintiff has no equitable right to insist on the contribution of a greater amount of capital by the holders of these shares than the corporation itself could insist on. 2 Mor. Priv. Corp., §§ 832, 833.

Judgment affirmed.

UMSTED v. BUSKIRK.

1866. 17 Ohio St. 113.

Enforcement of Statutory Liabilities—Parties.

WHITE, J.: The original petition in this case is in the nature of a bill in equity, and if filed by a judgment creditor of an insolvent corporation, to obtain satisfaction of his judgment, by the enforcement of the statutory liability of the several stockholders, and of the liability of one of them on an unpaid stock subscription.

No objection is made on the ground of a defect of parties, and for aught that appears in the record, the plaintiff is the only creditor, and the defendants the only stockholders of the corporation.

The only ground assigned for the demurrer is, that the petition does not contain facts sufficient to constitute a cause of action.

The corporation of which the defendants are stockholders, was organized under the act of May 1, 1852; and the liability of the stockholders in question, is provided for in section 78, which, as originally passed, is as follows:

"The stockholders of any railroad, turnpike, or plank-road, magnetic telegraph, or bridge company, shall be deemed and held liable to an amount equal to their capital stock subscribed, in addition to said stock, for the *purpose of securing the creditors* of such company." 50 Ohio L. 296; 3 Curwen's Stat. 1897.

The subsequent amendment of April 17, 1854, did not alter the section in respect to railroad companies. 1 S. & C. Stat. 310; 4 Curwen's Stat. 2582.

The counsel of the defendant in error claims to support the judgment below on the ground that it was not the intention of the legislature "to make the stockholders in railroad companies *individually liable to the creditors of the company;*" but that as stockholders they are subject to be assessed pro rata by the corporation to the extent of this statutory liability.

This claim was made in Wright et al. v. McCormack et al. (decided at the present term), and overruled. It was held in that case that this liability of stockholders was a security provided by law for the exclusive benefit of the creditors, over which the corporate authorities had no control.

If the corporation has the right to enforce this liability by assessments, it can exhaust it to discharge a present indebtedness, and continue in business with no other security to its future creditors than its corporate liability.

This would neither be in accordance with the design of the constitutional provision, nor of the statute. The intention, doubtless, was to provide an ultimate security to which the creditors might resort on the failure and insolvency of the corporation.

Nor will it follow, as counsel suppose, from the denial of the right to the corporation of enforcing this liability, that it may be enforced against part of the stockholders, at the election of the creditor, without the right on their part to call on their co-stockholders for contribution.

The liability on the part of the stockholders is several in its nature, but the right arising out of this liability is intended for the common and equal benefit of all the creditors. The suit of a creditor under this statute should, in our opinion, be for the benefit of all the creditors; and the stockholders, whose liability is sought to be enforced, have the right to insist on their co-stockholders being made parties for the purposes of a general account, and to enforce from them contribution in proportion to their shares of stock.

The right of contribution grows out of the organic relation existing among the stockholders, as between them and the creditors, each stockholder is severally liable to all the creditors; as

between themselves, each stockholder is bound to pay in proportion to his stock.

The corporation ought to have been made a party, but the omission was not made an objection, and the demurrer was sustained, and the action dismissed, on the sole ground of the petition not showing a cause of action against the defendants.

The omission to make the corporation a party is, therefore, no objection to the reversal of the judgment.

The judgment sustaining the demurrer and dismissing the action is reversed, and the cause remanded for further proceedings.

HUNTINGTON v. ATTRILL.

1892. 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. 224.

Enforcement of Penal Liability.

MR. JUSTICE GRAY: This was a bill in equity, filed March 21, 1888, in the circuit court of Baltimore city, by Collis P. Huntington, a resident of New York, against the Equitable Gas Light Company of Baltimore, a corporation of Maryland, and against Henry Y. Attrill, his wife and three daughters, all residents of Canada, to set aside a transfer of stock in that company, made by him for their benefit and in fraud of his creditors, and to charge that stock with the payment of a judgment recovered by the plaintiff against him in the state of New York upon his liability as a director in a New York corporation, under the statute of New York of 1875, c. 611, the material provisions of which are copied in the margin.[1] The bill alleged that on June 15, 1866,

[1] Sec. 21. If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.

Sec. 37. In limited liability companies, all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed. . . . The capital stock of every such limited liability company shall be paid in, one-half thereof within one year and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved. The directors of every such company, within thirty days after payment of the last instalment of the capital stock, shall make a certificate stating the amount of the capital so paid in, which certificate shall be signed and sworn to by the president and a majority of the directors; and they shall, within the said thirty days, record the same in the office of the secretary of state, and of the county in which the principal business office of such corporation is situated.

the plaintiff recovered, in the supreme court of the state of New York, in an action brought by him against Attrill on March 21, 1883, a judgment for the sum of $100,240, which had not been paid, secured or satisfied; and that the cause of action on which that judgment was recovered was as follows: On February 29, 1880, the Rockaway Beach Improvement Company, limited, of which Attrill was an incorporator and a director, became a corporation under the law of New York, with a capital stock of $700,000. On June 15, 1880, the plaintiff lent that company the sum of $100,000, to be repaid on demand. On February 26, 1880, Attrill was elected one of the directors of the company and accepted the office, and continued to act as a director until after January 29, 1881. On June 30, 1880, Attrill, as a director of the company, signed and made oath to, and caused to be recorded, as required by the law of New York, a certificate, which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in, and by making such false certificate became liable, by the law of New York, for all the debts of the company contracted before January 29, 1881, including its debt to the plaintiff. On March 8, 1882, by proceedings in a court of New York, the corporation was declared to be insolvent and to have been so since July, 1880, and was dissolved. A duly exemplified copy of the record of that judgment was annexed to and made part of the bill.

The bill also alleged that "at the time of its dissolution as aforesaid, the said company was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the state of New York all the stockholders of the company were liable to pay all its debts, each to the amount of the stock held by him, and the defendant, Henry Y. Attrill, was liable at said date and on April 14, 1882, as such stockholder, to the amount of $340,000, the amount of stock held by him, and was on both dates also severally and directly liable as a director, having signed the false report above mentioned, for all the debts of said company contracted between February 26, 1880, and January 29, 1881, which debts aggregate more than the whole value of the property owned by said Attrill."

The bill further alleged that Attrill was in March, 1882, and had ever since remained individually liable in a large amount over and above the debts for which he was liable as a stockholder and director in the company, and that he was insolvent, and had secreted and concealed all his property for the purpose of defrauding his creditors.

The bill then alleged that in April, 1882, Attrill acquired a large amount of stock in the Equitable Gas Light Company, of Balti-

Sec. 38. The dissolution for any cause whatever of any corporation created as aforesaid shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution.

more, and forthwith transferred into his own name as trustee for his wife 1,000 shares of such stock, and as trustee for each of his three daughters, 250 shares of the same, without valuable consideration, and with intent to delay, hinder and defraud his creditors, and especially with the intent to delay, hinder and defraud this plaintiff of his lawful suits, damages, debts and demands against Attrill, arising out of the cause of action on which the aforesaid judgment was recovered, and out of the plaintiff's claim against him as a stockholder; that the plaintiff in June, 1880, and ever since was domiciled and resident in the state of New York; and that from February, 1880, to December 6, 1884, Attrill was domiciled and resident in that state; and that his transfers of stock in the gas company were made in the city of New York, where the principal office of the company then was, and where all its transfers of stock were made; and that those transfers were, by the laws of New York, as well as by those of Maryland, fraudulent and void as against the creditors of Attrill, including the creditors of the Rockaway Company, and were fraudulent and void as against the plaintiff.

The bill further, by distinct allegations, averred that those transfers, unless set aside and annulled by a court of equity, would deprive the plaintiff of all his rights and interests of every sort therein, to which he was entitled as a creditor of Attrill at the time when those fraudulent transfers were made; and "that the said fraudulent transfers were wholly without legal consideration, were fraudulent and void, and should be set aside by a court of equity."

The bill prayed that the transfer of shares in the gas company be declared fraudulent and void and executed for the purpose of defrauding the plaintiff out of his claim as existing creditor; that the certificates of those shares in the name of Attrill, as trustee, be ordered to be brought into court and cancelled; and that the shares "be decreed to be subject to the claim of this plaintiff on the judgment aforesaid," and to be sold by a trustee appointed by the court and new certificates issued by the gas company to the purchasers, and for further relief.

One of the daughters demurred to the bill because it showed that the plaintiff's claim was for the recovery of a penalty against Attrill arising under a statute of the state of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the state of Maryland.

By a stipulation of counsel, filed in the cause, it was agreed that, for the purpose of the demurrer, the bill should be treated as embodying the New York statute of June 31, 1875, and that the Rockaway Beach Improvement Company, limited, was incorporated under the provisions of that statute.

The circuit court of Baltimore city overruled the demurrer. On appeal to the Court of Appeals of the state of Maryland the order was reversed and the bill dismissed. 70 Maryland, 191.

The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation making a false certificate of its condition was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment for doing of any of the forbidden acts, and was, therefore, in view of the decisions in that state and in Maryland, a penalty which could not be enforced in the state of Maryland; and that the judgment obtained in New York for this penalty, while it "merged the original cause of action so that a suit cannot be again maintained upon it," and "is also conclusive evidence of its existence in the form and under the circumstances stated in the pleadings," yet did not change the nature of the transaction, but, within the decision of this court in Wisconsin v. Pelican Ins. Co., 127 U. S. 265, was in it "essential nature and real foundation" the same as the original cause of action, and therefore, a suit could not be maintained upon such a judgment beyond the limits of the state in which it was rendered. pp. 193-198.

The court then took up the clause of the bill above quoted, in which it was sought to charge Attrill as originally liable under the statute of New York, both as a stockholder and as a director; and observing that "this liability is asserted to exist independently of the judgment," summarily disposed of it, upon the grounds that it could not attach to him as a stockholder, because he had not been sued, as required by the New York statute, within two years after the plaintiff's debt became due; nor as a director, because "the judgment against Attrill for having made the false report certainly merges all right of action against him on this account;" but that, if he was liable at the time and on the grounds "mentioned in this clause of the bill," this liability was barred by the statute of limitations of Maryland, pp. 198, 199.

Having thus decided against the plaintiff's claim under his judgment upon the single ground that it was for a penalty under the statute of New York, and, therefore, could not be enforced in Maryland, and against any original liability under the statute, for various reasons, the opinion concluded: "Upon the whole, it appears to us that the complainant has no cause of action, which he can maintain in this state." p. 199.

Judge Stone, with whom Judge McSherry concurred, dissented from the opinion of the court, upon the ground that it did not give due effect to the act of congress, passed in pursuance of the Constitution of the United States, and providing that the records of judgments rendered by a court of any State shall have such faith and credit given to them in every court within the United

States as they have by law or usage in the courts of the State whence they are taken. Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905. He began his opinion by saying: "I look upon the principal point as a Federal question, and am governed in my views more by my understanding of the decisions of the Supreme Court of the United States than by the decisions of the state courts." And he concluded thus: "I think the Supreme Court, in 127 U. S., meant to confine the operation of the rule that no country will execute the penal laws of another to such laws as are properly classed as criminal. It is not very easy to give any brief definition of a criminal law. It may, perhaps, be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and which the State alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizen to claim damages for its nonperformance, are not criminal. If all the laws of the latter description are held penal in the sense of criminal, that clause in the Constitution which relates to records and judgments is of comparatively little value. There is a large and constantly increasing number of cases that may in one sense be termed penal, but can in no sense be classed as criminal. Examples of these may be found in suits for damages for negligence in causing death, for double damages for the injury to stock where railroads have neglected the state laws for fencing in their tracks, and the liability of officers of corporations for the debts of the company, by reason of their neglect of a plain duty imposed by statute. I cannot think that judgments on such claims are not within the protection given by the Constitution of the United States. I, therefore, think the order in this case should be affirmed." pp. 200-205.

A writ of error was sued out by the plaintiff and allowed by the Chief Justice of the Court of Appeals of Maryland upon the ground "that the said Court of Appeals is the highest court of law or equity in the State of Maryland in which a decision in the said suit could be had; that in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner under said Constitution and statutes; and that in said suit there is drawn in question the validity of a statute of and an authority exercised under the United States, and the decision is against the validity of such statute and of such authority."

It thus appears that the judgment recovered in New York was made the foremost ground of the bill, was fully discussed and distinctly passed upon by the majority of the Court of Appeals of Maryland, and was the only subject of the dissenting opinion; and that the court, without considering whether the validity of the transfers impeached as fraudulent was to be governed by the

law of New York or by the law of Maryland, and without a suggestion that those transfers, alleged to have been made by Attrill with intent to delay, hinder and defraud all his creditors, were not voidable by subsequent, as well as by existing creditors, or that they could not be avoided by the plaintiff claiming under the judgment recovered by him against Attrill after those transfers were made, declined to maintain his right to do so by virtue of that judgment, simply because the judgment had, as the court held, been recovered in another State in an action for a penalty.

The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this court has jurisdiction on this writ of error. Green v. Van Buskirk, 5 Wall. 307, 311; Crapo v. Kelly, 16 Wall. 610, 619; Dupasseur v. Rochereau, 21 Wall. 130, 134; Crescent City Co. v. Butchers' Union, 120 U. S. 141, 146, 147; Cole v. Cunningham, 133 U. S. 107; Carpenter v. Strange, 141 U. S. 87, 103.

In order to determine this question it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law, stated by Chief Justice Marshall in the fewest possible words: "The courts of no country execute the penal laws of another." The Antelope, 10 Wheaton, 66, 123. In interpreting this maxim there is danger of being mislead by the different shades of meaning allowed to the word "penal" in our language.

In the municipal law of England and America the words "penal" and "penalty" have been used in various senses. Strictly and primarily they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. United States v. Reisinger, 128 U. S. 398, 402; United States v. Chouteau, 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum," or "penalty" of a bond. In the words of Chief Justice Marshall: "In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party." Taylor v. Sandiford, 7 Wheat. 13, 17.

Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

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The provision of the statute of New York, now in question, making the officers of a corporation who sign and record a false certificate of the amount of its capital stock, liable for all its debts is in no sense a criminal or quasi criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers, and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund until that fund has been duly created, and the individual liability of the officers takes the place of the fund in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it can not be enforced in a foreign state or country.

The decisions of a Court of Appeals of New York, so far as they have been brought to our notice, fall short of holding that the liability imposed upon the officers of the corporation by such statutes is a punishment or penalty which cannot be enforced in another State.

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It is true that the courts of some States, including Maryland, have declined to enforce a similar liability imposed by the statute of another State. But in each of these cases it appears to have been assumed to be a sufficient ground for that conclusion, that the liability was not founded in contract, but was in the nature of a penalty imposed by statute, and no reasons were given for considering the statute a penal law in the strict, primary and international sense. Derrickson v. Smith, 3 Dutcher (27 N. J. Law), 166; Halsey v. McLean, 12 Allen, 438; First National Bank v. Price, 33 Maryland, 487.

It is also true that in Steam Engine Co. v. Hubbard, 101 U. S.

188, 192, Mr. Justice Clifford referred to those cases by way of argument. But in that case, as well as in Chase v. Curtis, 113 U. S. 452, the only point adjudged was that such statutes were so far penal that they must be construed strictly, and in both cases jurisdiction was assumed by the Circuit Court of the United States, and not doubted by this court, which could hardly have been if the statute had been deemed penal within the maxim of international law. In Flash v. Conn., 109 U. S. 371, the liability sought to be enforced under the statute of New York was the liability of a stockholder arising upon contract, and no question was presented as to the nature of the liability of officers.

But in Hornor v. Henning, 93 U. S. 228, this court declined to consider a similar liability of officers of a corporation in the District of Columbia as a penalty. See also Neal v. Moultrie, 12 Georgia, 104; Cady v. Sandford, 53 Vermont, 632, 639, 640; Nickerson v. Wheeler, 118 Mass. 295, 298; Post v. Toledo, etc., Railroad, 144 Mass. 341, 345; Wolverton v. Taylor, 132 Illinois, 197; Morawetz on Corporations (2d ed.), § 908.

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In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the States in which it is passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect a punishment of an offense against the public, or a grant of a civil right to a private person.

In this country the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. Burgess v. Seligman, 107 U. S. 20, 33. Texas & Pacific Railway v. Cox, 145 U. S. 593, 605, above cited. If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. New York Ins. Co. v. Hendren, 92 U. S. 286; Roth v. Ehman, 107 U. S. 319. But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error.

The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it. This was directly adjudged in Wisconsin v. Pelican Ins. Co., above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense. The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision, but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. New Orleans Waterworks v. Louisiana Sugar Co., 125 U. S. 18, 38. So if the state court, in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.

Whether the Court of Appeals of Maryland gave full faith and credit to the judgment recovered by this plaintiff in New York depends upon the true construction of the provision of the Constitution and of the act of Congress upon that subject.

The provision of the Constitution is as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." Art. 4, sec. 1.

This clause of the Constitution, like the less perfect provision on the subject in the articles of Confederation, as observed by Mr. Justice Story, "was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them," and had three distinct objects: First, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other State; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated. Story on the Constitution, §§ 1307, 1308.

Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect

thereof by enacting that "the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Rev. Stat. § 905, re-enacting Act of May 26, 1790, c. 11, 1 Stat. 122. * * *

The judgment rendered by a court of the State of New York, now in question is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York, was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money and a debt of record, on which an action would lie, as on any other civil judgment inter partes. The Court of Appeals of Maryland, therefore, in deciding this case against the plaintiff upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit and effect to which it was entitled under the Constitution and laws of the United States.

CHAPTER XVIII.

INSOLVENCY AND DISSOLUTION.

BOSTON GLASS MANUFACTORY v. LANGDON.

1834. 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

Methods of Dissolution.

Assumpsit on a promissory note given by the defendant to the plaintiffs. The defendant pleads in abatement, that at the time of the purchase of the writ there was not, and now is not, any such corporation established by law, called the Boston Glass Manufactory, as in and by the writ is supposed. The plaintiffs reply that there was and is such a corporation; and tender an issue; which is joined.

At the trial, before Morton, J., the plaintiffs offered in evidence their act of incorporation, and showed their organization under it in 1811.

The records of the corporation were introduced by the plaintiffs, and were used and relied upon by both parties.

The defendant then introduced an indenture, dated the 27th of May, 1827, assigning all the property of the corporation to certain persons, in trust to pay, pro rata, such creditors as should become parties to the indenture. This instrument contained covenants, that the assignees might use the name of the corporation in the collection of the debts, and in the disposition of the property assigned; that the corporation would not hinder or obstruct them in the performance of these functions; and that it would make any further conveyances and assurances which might become necessary, and perform any other and further acts which might be required to enable the assignees fully to execute their trust. No provision was made for a release to the corporation by the creditors, nor for paying over to the corporation the surplus, if any, of the property assigned. The defendant also referred to all the records subsequent to 1817, and contended that the assignment of the property of the corporation, and the omission to hold annual meetings, to choose directors, and to transact business, as appears by the records and books of the corporation, supported the issue on her part and entitled her to a verdict.

But the jury were instructed, that the evidence was competent to prove the establishment and continuance of the corporation down to the present time.

The plaintiffs then claimed to have the damages assessed by the jury, if they found a verdict in their favor, and offered in evi-

dence the note declared on. This was objected to by the defendant, because the note had been assigned. But the objection was overruled.

The defendant then offered to prove that the note was without consideration. This evidence was objected to and was excluded.

The jury found a verdict for the plaintiffs for the whole amount of the note and interest.

The defendant excepted to the decisions and instructions of the judge; and for the reasons above appearing, moved for a new trial.

MORTON, J., delivered the opinion of the court. The non-existence or death of the plaintiff may properly be pleaded in abatement. 1 Chitty's Pl. 482; Story's Pl. 24. But whether, as it entirely and perpetually destroys the plaintiff's right to recover, it may not also be pleaded in bar, it is not necessary to determine. Proprietors of Monumoi v. Rogers, 1 Mass. R. 159; First Parish in Sutton v. Cole, 3 Pick. 245. Whether the plea conclude in abatement or bar, the issue being found against the defendant, the judgment must be peremptory. The established rule is, that in dilatory pleas, when the issue is found against the defendant on matters of fact, the judgment must be in chief. Gould's Pl. 300; Howe's Pract. 215.

The principal question for our consideration is, whether judgment shall be rendered on the verdict. The defendant's counsel contends that the evidence introduced will not support the verdict, but that the verdict is against the evidence and the law and should be set aside.

The point which has been determined by the jury, though necessary to be submitted to them with proper instructions, is quite as much a matter of law as of fact; and we the more readily enter into the examination of it.

The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on corporations describe four methods in which they may be dissolved. It is said that private corporations may lose their legal existence by the act of the legislature; by the death of all the members; by a forfeiture of their franchises; and by a surrender of their charters: 2 Kyd on Corp. 447; 1 Bl. Comm. 485; 2 Kent's Comm. (1st ed.) 245; Angell & Ames on Corp. 501; Oakes v. Hill, 14 Pick. 442. No other mode of dissolution is anywhere mentioned or alluded to.

1. In England, where the parliament is said to be omnipotent and where in fact there is no constitutional restraint upon their action, but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the legislature. But if they possess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legis-

lative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it cannot go, it has become a question of some difficulty to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiff's charter, it will not be useful further to discuss this branch of the subject.

2. As all the original stockholders are not deceased, the corporation cannot be dissolved for the want of members to sustain and exercise the corporate powers. Besides, this mode of dissolution cannot apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation as long as it may exist.

3. Although a corporation may forfeit its charter by an abuse or misuser of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal. 2 Kent's Comm. (1st ed.) 249; Corporation of Colchester v. Seaber, 3 Burr. 1866; Smith's Case, 4 Mod. 53. Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to this effect be passed, they will continue their corporate existence. The King v. Amery, 2 T. R. 515.

4. Charters are in many respects compacts between the government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal solemn act of the corporation; and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act, would be a dangerous power, and one which cannot be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect. The instrument of assignment was not so intended, and cannot be so construed. All its provisions look to the continuance of the corporation. It contains covenants that the assignees may use the corporate name for the collection of the debts and the disposition of the property assigned; that the

corporation will not hinder or obstruct them in the performance of these functions; that it will make any further conveyances and assurances which may become necessary, and will do and perform any other and further acts which may be required to enable the assignees fully to execute their trust. The instrument which covenants for future acts, cannot be construed to take away all power of action.

The omission to choose directors clearly does not show a dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers and the want of power to elect them, would not be fatal to its existence. It has a potentiality which might, by proper authority, be called into action, without affecting the identity of the corporate body. Colchester v. Seaber, 3 Burr. 1870.

But here, in fact, was no lack of officers. Although no directors had been chosen for several years, yet, by the by-laws of the corporations, the directors, though chosen for one year, were to continue in office till others were chosen in their stead.

The damages were properly assessed by the jury. The defendant having elected to try her case upon a plea in abatement, must submit to the legal consequences of that form of trial. Perhaps the court might have assessed the damages as in case of default. But most obviously the better course was to submit the subject to a jury. In doing this the defendant could not be allowed to go into the whole defense as upon the general issue. The rule adopted at the trial was the correct one.

Judgment according to verdict.[1]

TOMLINSON v. BRICKLAYERS' UNION.

1882. 87 Ind. 308.

Forfeiture of Charter.

HOWK, J.: The only question presented for decision by the record of this cause and the error assigned thereon is this: Does the complaint of the appellants, the plaintiffs below, state facts sufficient to constitute a cause of action? In their complaint the

[1] It is generally held that a surrender must be accepted. *Contra*, Savage v. Walshe (1855), 26 Ala. 619; Merchants' & Planters' Line v. Waganer (1882), 71 Ala. 581. And see State ex rel. Chilhowee v. Woolen Mills Co. (1905), 115 Tenn. 266, 89 S. W. 741, 2 L. R. A. (N. S.) 493, 112 Am. St. 825, where a majority of the stockholders voted by formal resolution to surrender the charter; there was no acceptance, but it was *held* that the surrender was sufficient to justify a suit under a section of the Tennessee code providing for a dissolution by judicial decree in case of the surrender of corporate rights.

As to the effect of the death of all the members, see State v. Trustees of Vincennes University (1854), 5 Ind. 77; McGinty v. Athol Reservoir

appellants alleged, in substance, that on or about the 28th day of August, 1867, they and others formed a voluntary association, known as and named "The Bricklayers' Union of Indianapolis;" that the objects of the association were to unite all practical bricklayers, so as to secure concert of action in whatever tended to their interests, and to afford pecuniary aid to the members thereof, when disabled from sickness, accident or misfortune; that immediately upon the organization of the association a code of by-laws and constitution were adopted, fixing the amount of dues, fines and assessments payable by each member of the association; that from 1867 to April, 1879, some five hundred or more members joined the association, among whom were the appellants, and each and all paid their money in dues, fines and assessments, which money was placed in one general fund, until, in April, 1879, the same amounted to the sum of about eight thousand dollars, belonging to said members as a joint and general fund for the benefit of each and all of them; that after the association had been duly incorporated the appellants and many others, for whose benefit the appellants sued, to the number of five hundred, made and adopted the by-laws and constitution governing the association; that since such organization, and before, the appellants, each and all, and about four hundred others, whose names could not be given, because they were in books of which the appellee had control, contributed different amounts, and the same were under the control of the association, in trust for the appellants and the other members of the association, in which they all had a general interest; that the association continued until about April, 1879, when a few of its members, twenty in number, without the knowledge, consent or approval, or the legal right so to do, unlawfully, wrongfully and secretly abandoned and pretended to dissolve the said corporation, and pretended to form a new association, to be known as "The Bricklayers' Union No. 1, of Indiana," the appellee, and as soon as the pretended new organization was formed they secretly, unlawfully and wrongfully converted the said fund of the appellants and other members of the old association to the use of the appellee, and the same was then in their or its possession; and the appellee, although often requested, refused to pay the same to the appellants and the other members of the old association, and refused to allow the appellants and other members of the first organization to participate in the new organization, and refused them all rights of property therein, and claimed that the appellants and those for whom they sued were not members thereof, and claimed the said fund as their own, and refused the appellants any and all benefits there-

Co. (1892), 155 Mass. 183, 29 N. E. 510; Harris v. Mississippi Valley &c. R. Co. (1875), 51 Miss. 602, esp. p. 610; Philips v. Wickham (1829), 1 Paige Ch. (N. Y.) 590 (loss of an integral part of the corporation); Lehigh Bridge Co. v. Lehigh Coal & Navigation Co. (1833), 4 Rawle (19 Pa.) 9 (suspension distinguished from extinction of franchise).—Ed.

from; that at the time of said conversion and pretended dissolution, and the formation of the pretended new organization, the appellants and many others, for whom they sued, were members in good standing of the old association; and that the defendants had also unlawfully converted all the lodge furniture and personal property, of the value of three hundred dollars, without right and wrongfully to their own use, and then had possession thereof.

The appellants further alleged that the appellee had forfeited its charter and corporate right by refusing to allow them to participate in the new organization; and in this, that less than a quorum had pretended to transact business; and in this, that its president had allowed money to be drawn contrary to its constitution; and in this, that the recording secretary had failed to keep a correct record of the transactions of each meeting, and to make a quarterly report of such transactions, and to deliver to his successors the books, records and property of the appellee; and in this, that its financial secretary had failed to discharge his duties and been allowed to continue in office; and in this, that its members were allowed to remain in good standing without paying dues, etc.; and in this, that its treasurer had failed to discharge his duties; and in this, that its trustees had converted the above described property of the old association to the exclusive use of appellee; and in this, that it had used the money for other and different purposes than that specified in its constitution; and in dissolving the union contrary to the terms of its constitution. Wherefore, etc.

We are of the opinion that the appellee's demurrer, for the want of facts, was correctly sustained to the appellant's complaint. Conceding all the facts stated in the complaint to be true as alleged, they constitute no cause of action in favor of the appellants and against the appellee. It will be seen that the wrong conversion of the money and property of the first corporation is alleged to have been committed by its twenty seceding members, who were not made parties to this action. The complaint fails to show the appellee's liability for this wrongful conversion to the plaintiff's in this action. It is not alleged that the old corporation was dissolved in any legal manner, and it cannot be said, we think, that the secession of twenty members would or ought to work the dissolution of a corporation having five hundred members. If the old corporation is still a legal entity, and it must be presumed to be such, at least until the contrary is shown, the right of action for the wrongful conversion of its money and property would be in such old corporation, and not in any of its members, however numerous they were, for the money and property of a corporation belong to it, and not to its individual members. It follows, therefore, that the complaint does not state a cause of action in favor of the appellants for the wrongful conversion of the money and property described therein.

It seems to us, also, that the allegations of the complaint in re-

lation to the forfeiture of appellee's charter do not constitute a cause of action in favor of the appellants. If it were true that the appellee and its officers and members had violated every section of its by-laws and constitution, it is certain, we think, that such violation would not give the appellants any right of action or legal cause of complaint against the appellee, for it was not shown that the appellants were members of the appellee corporation.

We have found no error in the record. The judgment is affirmed, with costs.

STATE v. MINNESOTA THRESHER MANUFACTURING CO.

1889. 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

Manufacturing and Other Business—"Franchises" and "Powers" —Remedy for Ultra Vires Acts.

MITCHELL, J.: * * * The corporation of Seymour, Sabin & Co., organized under Gen. St. 1878, title 2, c. 34, had been engaged for some years in the business of manufacturing, lumbering, and merchandising. In May, 1882, the Northwestern Manufacturing & Car Company was organized as a manufacturing corporation, under Laws 1873, Gen. St. 1878, Ch. 34, §§ 120, 143, with a professed paid-up capital stock of about $4,500,000, viz., about $3,000,000 preferred stock, and $1,500,000 common stock. It was organized with a view of buying out and continuing the manufacturing business of Seymour, Sabin & Co. Upon its organization it purchased the manufacturing plant and the assets of that company, of the alleged value of $2,617,000, including over $1,250,000 of bills receivable, commonly known as "machine notes," and a large amount of "undivided profits" and "contracts," whatever that may mean. For these assets the car company issued and paid to Seymour, Sabin & Co. $2,617,000 of its preferred stock, and $1,500,000 of its common stock, the latter as "bonus." The car company thereupon engaged in the manufacturing business, while Seymour, Sabin & Co. continued the business of lumbering and merchandising. The latter proceeded to divide up among its own stockholders the stock of the car company, thus received, in exchange for its own stock, which was delivered up and cancelled, on the basis of two dollars of the former for one of the latter. The two companies continued in business about two years, during which they seem to have been in the habit of indorsing each other's paper for large amounts; at least, the car company indorsed that of Seymour, Sabin & Co. to the amount of $500,000, which was outstanding when both companies failed. During these two years the car company paid

$360,000 in dividends to its preferred stockholders, no part of which, as respondent alleges, was ever earned.

In May, 1884, both companies being insolvent, their affairs were put into the hands of receivers—the debts of Seymour, Sabin & Co. being over $2,000,000, and its assets realizing at receiver's sale only $45,000, or about two cents on the dollar of its indebtedness; and the debts of the car company being about $3,400,000, and its assets, which were of a very miscellaneous character, estimated at $4,372,000, but realizing at receiver's sale, two years afterwards, only $1,150,000, which, after deducting expenses and several hundred thousand dollars liabilities contracted by the receiver, left only about $225,000, or from 10 to 15 cents on the dollar for the creditors, and nothing, of course, for the stockholders. In November, 1884, some of the stockholders and creditors of the car company, with the view of saving something out of the wreck, organized the respondent, the Minnesota Thresher Manufacturing Company, with an authorized capital of $7,000,000, viz., $4,000,000 preferred stock, and $3,000,000 common stock, on the following plan, to-wit: paid-up preferred stock to be issued in exchange for claims against the car company at par, and paid-up common stock, in exchange for preferred stock of the car company, dollar for dollar. All of the stock of respondent has been issued on this plan; and included in the claims against the car company, for which respondent stock has been thus issued, are the indorsements of the car company upon the paper of Seymour, Sabin & Co., already referred to. The respondent has thus issued about $1,700,000 of its preferred stock, and $2,000,000 of its common stock, and thus become the owner of claims against the car company to the former amount, and of its stock to the latter amount. Down to April, 1887, the respondent alleges that it supposed that the assets of the car company would realize enough to pay its debts in full, and leave some surplus for its preferred stockholders; but since that date the respondent seems to have continued to issue its stock on the same basis or plan as before, except that those who exchange their preferred stock in the car company for the common stock of respondent are required to place the latter in the hands of certain trustees, to hold and vote for the term of five years. Common and preferred stock have the same voting power.

In 1887 the court ordered the receiver to sell en masse the entire assets of the car company, consisting of stock on hand, accounts, bills receivable to the amount of over $1,500,000, claims against Seymour, Sabin & Co. to a large amount, and some stock in two other insolvent corporations. The respondent purchased the whole of these assets for $1,150,000, and, in order to raise the amount of cash necessary to be paid on the purchase ($500,000), devised a scheme by which it executed a mortgage or trust deed for $1,600,000 on the entire property purchased, under which

it issued and sold its bonds to the amount of $1,173,000 to its preferred stockholders for 50 cents on the dollar, cash; they at the same time surrendering for cancellation and retirement one dollar of their stock for every two dollars of bonds purchased. After obtaining possession of the property thus purchased at the receiver's sale, which it alleges was worth more than double what it paid for it, the respondent engaged in the manufacturing of machinery at Stillwater, which it is still carrying on quite extensively, having, as it alleges, sold articles of its own manufacture since it commenced business of the value of $1,100,000. As purchaser and owner of the large claims already referred to against Seymour, Sabin & Co. and the car company, the respondent has commenced, or is about to commence, the following suits: *First,* against the stockholders of Seymour, Sabin & Co., who exchanged their stock for that of the car company, it being claimed that such exchange was illegal, and in fraud of creditors; *second,* against the holders of the common stock of the car company, on the ground that they have never paid for the same; *third,* against the preferred stockholders of the car company, to recover back the dividends received by them, on the ground that they were never earned.

The articles of association of respondent (Ex. F.) state that the organization is formed "pursuant to, and in conformity with, an act of the legislature of the state of Minnesota entitled 'An act relating to manufacturing corporations,' approved March 7, 1873, and the several acts of the legislature amendatory thereof." Gen. St. 1878, c. 34, §§ 120-143. The articles state that "the objects for which the association is formed are the purchase of the capital stock, evidences of indebtedness issued by it, and the assets of the Northwestern Manufacturing & Car Company, a corporation existing under the laws of the state of Minnesota, or any portion of said capital stock, evidence of indebtedness or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements, and machinery of which wood and iron, or either of them, form the principal component parts, and the manufacture of the materials therein used." These articles contain everything required by title 2, c. 34, except a statement of the highest amount of indebtedness to which the corporation should at any time be subject. The articles were also published and filed as required by that title. The directors also prepared a certificate in the form required by section 9 of the act of 1873 (Gen. St. 1878, c. 34, § 128), in case of manufacturing corporations, but (as we construe the allegations of the answer) it was never filed.

Much of this history is perhaps irrelevant to any questions involved in these proceedings, but it will serve to convey a tolerably clear idea of the situation of things as presented by the record. The relator by his information stands admitting the cor-

porate existence of the respondent, but claims upon the facts four grounds of forfeiture of its franchises for misuser, viz.: *First,* doing business without filing a certificate, as required by section 9 of the act of 1873; *second,* dealing in negotiable paper, and in the stock and indebtedness of other and insolvent corporations, and issuing its stock therefor; *third,* purchasing and retiring its own stock, to the prejudice of its creditors and stockholders; *fourth,* using its franchises and powers as an instrumentality of fraud and oppression, in bringing a large number of suits against the stockholders of Seymour, Sabin & Co., and the car company upon the claims referred to. This last is but a make-weight, and is not urged upon the argument. Taken by itself, there is nothing in it, for, if respondent had the power to purchase these claims, it has an undoubted right to bring suits on them to test the question of the personal liability of the stockholders of these defunct corporations.

The determination of the case will require the consideration of two leading questions: *First,* what kind of a corporation is the respondent? and, *second,* what is the office of an information in the nature of quo warranto, and what will constitute a misuser of corporate franchises such as to warrant a judgment of ouster in such proceedings? * * *

While it is not necessary here to go at length into the subject, yet it is proper in this connection to consider briefly the second principal question referred to at the outset, viz., the office of an information in the nature of quo warranto, and what will amount to such a misuser of corporate franchises as to justify a judgment of forfeiture in such proceedings. And right here it is important to keep in mind certain distinctions which it seems to us counsel for relator have overlooked. And, first, these special proceedings upon information must not be confounded with a civil action, under Gen. St. 1878, chapter 79. Although, in a general sense, the two may be termed "concurrent remedies," yet it is undoubtedly true that the office or function of the latter has been enlarged somewhat beyond that of a common-law quo warranto information. In some jurisdictions, as formerly with us the civil action is the only remedy. But while, quo warranto having been revived in this state, we have now the two remedies, yet the office of the writ of quo warranto ought not to be extended beyond what it was at common law. The remedy by civil action is more in accordance with the ordinary mode of judicial procedure in determining property rights, and ought to be pursued except in those special or exceptional cases where the public interests seem to demand a more speedy or summary mode of procedure than by action in the district court. The common law quo warranto information, as we have it today, is substantially as left by the changes and modifications made by the statute of 9 Anne, c. 20. The scope of the remedy furnished by it is to forfeit the franchises of a corporation for misuser or non-user.

It is therefore necessary, in order to secure a judicial forfeiture of respondent's charter, to show a misuser of its franchises justifying such a forfeiture; and, as already remarked, the object being to protect the public, and not to redress private grievances, the misuser must be such as to work or threaten a substantial injury to the public, or such as to amount to a violation of the fundamental condition of the contract by which the franchise was granted, and thus defeat the purpose of the grant; and ordinarily the wrong or evil must be one remediable in no other form of judicial proceeding.

Courts always proceed with great caution in declaring a forfeiture of franchises, and require the prosecutor seeking the forfeiture to bring the case clearly within the rules of law entitling him to exact so severe a penalty. It is also necessary to notice the distinction, frequently overlooked, between franchises and powers. The definition of a "franchise" given by Finch, adopted by Blackstone, and accepted by every authority since, is "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant. It follows that the right, whether existing in a natural or artificial person, to carry on any particular business, is not necessarily or usually a franchise. The kinds of business which corporations organized either under title 2, c. 34, or under the act of 1873, are authorized to carry on, are powers, but not franchises, because it is a right possessed by all citizens who choose to engage in it without any legislative grant. The only franchise which such corporations possess is the general franchise to be or exist as a corporate entity. Hence, if they engage in any business not authorized by the statute, it is ultra vires, or in excess of their powers, but not a usurpation of franchises not granted, nor necessarily a misuser of those granted. Acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture. How far it must go to amount to this the courts have wisely never attempted to define, except in very general terms, preferring the safer course of adopting a gradual process of judicial inclusion and exclusion as the cases arise. But we think it may be safely stated as the general *consensus* of the authorities that, to constitute a misuser of the corporate franchise, such as to warrant its forfeiture, the ultra vires acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. But, in case of excess of powers, it is only where some public mischief is done or threatened that the state, by the attorney general, should interfere. If, as between the com-

pany and its stockholders, there is a wrongful application of the capital, or an illegal incurring of liabilities, it is for the stockholders to complain. If the company is entering into contracts ultra vires, to the prejudice of persons outside the corporation, such as creditors, it is for such persons to take steps to protect their interests. The mere fact that acts are ultra vires is not necessarily a ground for interference by the state, especially by quo warranto, to forfeit the corporate franchises. It should also be borne in mind that acts ultra vires may justify interference on part of the state by injunction to prohibit a continuance of the excess of powers which would not be sufficient ground for a forfeiture in proceedings in quo warranto, and hence many of the numerous authorities cited by relator, being of that class, are not entirely in point here.

Applying these principles to the facts of this case, we think the state has failed to make out a case entitling it to judgment against respondent. Taking up, first, the issuing of its stock for the stock and indebtedness of the car company. None of the stockholders have any right to complain of this. They are all in the same boat. They got up the company for that express purpose and on that exact plan. A corporation may take property in payment of its stock, if it be done bona fide, and with no sinister or fraudulent purpose, and there be nothing in its charter or the nature of its business that forbids it. If this stock and indebtedness of the car company was taken in payment of respondent's stock with a fraudulent purpose, at fictitious values, in case the corporation becomes insolvent, creditors have their remedy against the stockholders as personally liable for stock not paid for. The alleged unlawful purchase and retirement of part of its own stock by the respondents stands on the same footing. If it is a wrong to other stockholders, they have a perfect remedy; and, so far as creditors are concerned, if the act is illegal, the parties who surrendered the stock would still be personally responsible as stockholders in case of the insolvency of the corporation. It may be that the plan on which this corporation is organized is not in accordance with the most approved financial principles, but with these financial matters we have nothing to do, except so far as they may affect the legal questions involved; and, upon the whole facts of the case, we do not think that, under the rules of law applicable, the state has made out a case entitling it to a judgment of forfeiture in these proceedings. It is also a consideration not without weight (although we do not place our decision upon it) that the consequences of whatever mistakes or unauthorized acts may have been made or done by respondent could not now be remedied by any such judgment. In view of the present condition of respondent's business, a dissolution of the corporation, and a forced winding up of its affairs, would involve new and additional loss to all parties concerned, both stockholders and creditors.

The demurrer to the answer is therefore overruled, and the information dismissed.

NEW YORK & LONG ISLAND BRIDGE CO. v. SMITH.

1896. 148 N. Y. 540, 42 N. E. 1088.

When Forfeiture Clause is Self-Executing.

BARTLETT, J.—The main question presented by this appeal is whether the New York & Long Island Bridge Company was, at the time this proceeding was instituted, an existing corporation duly authorized to acquire title to the land of the defendant Smith, for the purposes of constructing the bridge and its approaches.

The learned counsel for the appellant rests his attack upon the corporate existence on various distinct grounds, and a proper consideration of them involves a full examination of the legislation under which the bridge company claims the right to maintain this proceeding.

The appellant takes a preliminary point which, if sound, would require a reversal of the order appealed from, and a dismissal of this proceeding.

The act incorporating the bridge company (Chap. 395, Laws of 1867), provides in the twelfth section thereof that the bridge shall be commenced within two years from the passage of the act, and shall be continued without unreasonable delay, until it is completed, "or this act and all rights and privileges granted hereby shall be null and void."

It is the contention of appellant's counsel that this forfeiture clause is self-executing, and as it is admitted that the work was not commenced within two years from the passage of the act, the bridge company, ipso facto, ceased to exist.

We are referred to a large number of authorities as sustaining this position, and, among others, to several cases in this court.

It is observed that the question as to whether a forfeiture clause is or is not self-executing, depends wholly upon the language employed by the legislature.

Our attention is called particularly to In re Brooklyn, Winfield & Newton Ry. Co. (72 N. Y. 245), and Brooklyn Steam Transit Co. v. City of Brooklyn (78 N. Y. 524).

In the first case the words of forfeiture were, "its corporate existence and powers shall cease," and this court held that upon default the corporation's existence and powers ceased, without judicial proceedings. In the second case the words of forfeiture were, "this act and all the powers, rights and franchises herein and hereby granted shall be deemed forfeited and terminated," and this court held the clause to be self-executing, thereby recognizing the undoubted power of the legislature to provide that corporate existence shall cease by the mere fact of failure of the corporation to perform certain acts imposed by the charter.

It requires, however, strong and unmistakable language, such as each of the cases referred to presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the attorney-general.

In the case at bar the words of forfeiture are, "all rights and privileges granted hereby shall be null and void."

It cannot be said that the words "shall be null and void" disclose the legislative intent to make this clause self-executing. The words "null and void," as used in this connection, clearly mean voidable. The word "void" is often used in an unlimited sense, implying an act of no effect, a nullity ab initio (Inskeep v. Lecony, 1 N. J. L. 112); in the case at bar it was not so employed, but rather in its more limited meaning.

We think these words mean no more than if the legislature had said, in case of default the corporation "shall be dissolved." The attorney-general was authorized to treat the charter of the bridge company, as voidable, and by appropriate legal proceedings to have terminated its corporate existence.

The Supreme Court of the United States, in passing upon the meaning of the words "void and of no effect," uses this language: "But these words are often used in statutes and legal documents, * * * in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. (Ewell v. Daggs, 108 U. S. 148.)"

Holding, as we do, that the forfeiture clause in the act of 1867 was not self-executing, we find in the various acts amending the act of 1867 repeated waivers by the legislature of the failure of the bridge company to begin its work within two years from the passage of the act of 1867. * * *

Order affirmed.[1]

WILSON v. LEARY.

1897. 120 N. Car. 90, 26 S. E. 630, 38 L. R. A. 240, 58 Am. St. 778.

Status of Corporate Property on Dissolution.

Civil action for the recovery of land, tried before Robinson, J., at Fall Term, 1896, of Bertie Superior Court, upon an agreed statement of facts, a jury trial being waived. The land in controversy was conveyed on the 5th day of July, 1849, by Henderson Wilson, the ancestor of plaintiffs, to trustees for Oriental Lodge, No. 24, Independent Order of Odd Fellows, which was incorporated under an Act of the General Assembly of North Carolina, at

[1] Compare In re Brooklyn, Winfield etc. R. Co., 75 N. Y. 335; In re Kings County Elevated R. Co., 105 N. Y. 97, 13 N. E. 18, especially 119-120.—Ed.

its session of 1850. The conveyance was in fee. The trustees and the Lodge went into possession and held it until 1872, when the Lodge ceased to exist, and was never revived. Under the direction of the Grand Lodge of Odd Fellows, the land was sold in 1873, to the defendants. Previous to the incorporation of Oriental Lodge by the General Assembly, it had been chartered by the Grand Lodge upon regular petition, and was one of the regularly constituted and duly organized subordinate lodges or branches of the order. It was also agreed that the plaintiffs had never listed its property for taxation. The action was brought March 5, 1892, by the plaintiffs, as heirs at law of Henderson Wilson, the original grantor, claiming that the land reverted to them upon the extinction of the corporation. His Honor gave judgment for the plaintiffs, and defendants appealed.

CLARK, J.: The plaintiffs must recover upon the strength of their own title, and not upon defects, if any, in the title of the defendants. The conveyance by their ancestor, Henderson Wilson, was in fee simple to trustees "to convey to Oriental Lodge, No. 24, I. O. O. F., when the same shall have been incorporated by the Legislature of North Carolina." It was subsequently incorporated. Though no conveyance by such trustees to the lodge is shown, the learned counsel for the plaintiffs admitted that the Statute of Uses, 27 Henry VIII, in force in this State by virtue of our statute, executed the use without the execution of a deed. The grant to the trustees being in fee simple, the cestui que trust took in fee. Holmes v. Holmes, 86 N. C. 205. When the lodge ceased to exist for want of members, whether its property passed to the grand lodge of I. O. O. F. in this State, of which Oriental Lodge, No. 24, was a member, or escheated to the State for the University (Code, Sec. 2627), does not concern the plaintiffs, and is not before us. The title in fee simple had passed out of the grantor, and having vested in the Oriental Lodge, upon the extinction of the latter as a corporate entity, its property, by no just construction, could return to those whose ancestors had conveyed it in fee upon receipt of the purchase money, which he and they have kept and enjoyed.

The plaintiff's counsel insist, however, that, at the time of the conveyance, the Revised Statutes (Ch. 26, Sec. 17), provided that a corporation, unless otherwise specially stated in its charter, had existence for only 30 years, and as there was no special provision in this charter, the grantor only parted with the property for 30 years and held a resulting trust. But the conveyance was in fee, and a corporation limited in duration can take a fee simple conveyance just as a natural being, whose existence is also limited. Either may convey away the property, and upon the death of either, without having disposed of it, the property will go to pay creditors, to heirs, to stockholders, or as an escheat, according to the circumstances, but in neither case is there any reverter to the

grantors. On the death of a corporation the property is usually administered by a receiver, and on the death of a natural person, by the personal representative or passes to the heirs.

By the Constitution of North Carolina (Article VIII, Sec. 1), all corporations (if chartered since 1868) are subject to extinction at any time, or their duration can be abridged or extended, at the will of the legislature. It would now be a startling doctrine that upon the repeal of a charter, all real estate, though conveyed to the corporation absolutely in fee simple, reverts as at common law to the original grantors, to the total exclusion and loss of creditors and stockholders. On the contrary, such property, when not held on a base or qualified fee, as was the case in State v. Rives, 27 N. C. 297 (though it has been since held that there are no qualified fees in this State—School Com. v. Kesler, 67 N. C. 443), would be administered to pay creditors, the surplus being divided among the stockholders. If there were no stockholders, then the question might arise whether the property had escheated to the state, but certainly the grantors, upon such corporation becoming extinct, would have no greater right to a reversion than would the grantors to any other corporation. There was no attempt to make avail of the three years and a receiver allowed by the Code, secs. 667, 668, to wind up a corporation and sell its property, and hence no question is raised whether they apply to a corporation which was chartered before they were enacted.

It is true, it was held in an opinion by Gaston, J. (Fox v. Horah, 36 N. C. 358), that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the State, and its choses in action became extinct, and hence that, on the expiration of the charter of a bank, a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtor being absolved by the dissolution. Judge Thompson (5 Thomp. Corp. § 6720), refers to this decision "in accordance with the barbarous rule of the common law" as "probably the last case of its kind," and notes that it has since been in effect overruled in Von Glahn v. De Rosset, 81 N. C. 467, and it is now expressly overruled by us. Chancellor Kent (2 Com. 307, note), says, "This rule of the common law has, in fact, become obsolete and odious," and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations (5 Thompson, supra, Sec. 6730). The subject is thoroughly discussed by Gray on Perpetuities, Sections 44-51, and he demonstrates that my Lord Coke's doctrines rested on the dictum of a 15th century judge (Mr. Justice Choke, in the Prior of Spalding's Case, 7 Edw. IV., 1467), and is contrary to the only case deciding the point, Johnson v. Norway, Winch. 37 (1622), though Coke's statement has often been referred to as law. But whatever the extent of this rule at the common law, if it was the rule at all, it was not

founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that "upon a dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not escheat to the state." 5 Thompson, supra, Sec. 6746; Owen v. Smith, 31 Barb. 641; Towar v. Hale, 46 Barb. 361. The crude conceptions of corporations naturally entertained, in a feudal and semi-barbarous age, when they were few in number and insignificant in value and functions, by even so able a man as Sir Edward Coke, and the fanciful reason given by him (Coke Lit. 13b) for the reverter of their real estate, to wit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited. That which is termed "the common law" is simply the "right reason of the thing" in matters as to which there is no statutory enactment. When it is misconceived and wrongly declared, the common rule is equally subject to be overruled, whether it is an ancient or a recent decision. Upon the facts agreed, judgment should be entered below against the plaintiffs, dismissing their action.

Reversed.[1]

[1] In Heath v. Barmore (1872), 50 N. Y. 302, Rapallo, J., said: "In so far as the plaintiff's right to recover in this action is sought to be sustained, on the ground that at common law real estate held by a corporation at the time of its dissolution reverts to the grantor, it can not be supported * * * because the rule of law invoked by the plaintiff does not prevail in this state in respect to stock corporations. Under the provisions of 1 R. L., 248, and 1 R. S., 600, §§ 9 and 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed), for the purpose of paying the debts of the corporation and dividing its property among its stockholders; and these provisions apply as well to the real as to the personal property of corporations. * * Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor." (p. 305.)

But see Mott v. Danville Seminary (1889), 129 Ill. 403, 21 N. E. 927; Danville Seminary v. Mott (1891), 136 Ill. 289, 28 N. E. 54 (eleemosynary corporation); Titcomb v. Kennebunk Mutual Fire Ins. Co. (1887), 79 Me. 315, 9 Atl. 732 (mutual insurance company without stockholders); Mormon Church v. United States (1889), 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. 792. In the last cited case, Mr. Justice Bradley said: "When a business corporation, instituted for the purposes of gain, or private interest, is dissolved, the modern doctrine is, that its property, after payment of its debts, equitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject as we shall hereafter see to the charitable use. To this rule the corporation in question (the Church of Jesus Christ of Latter-Day Saints) was undoubtedly subject." (page 47.)—Ed.

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