Luther S. Dixon

SELECTED OPINIONS

of

LUTHER S. DIXON

and

EDWARD G. RYAN

Late Chief Justices of the Supreme Court
of Wisconsin

Edited with
ANNOTATIONS HISTORICAL,
CRITICAL AND LEGAL

By

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ILLUSTRATED WITH PORTRAITS

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PREFACE.

This compilation of leading opinions of Chief Justices Dixon and Ryan, of the Wisconsin Supreme Court, was prepared at the suggestion of some of the members of the Wisconsin Society of New York, who desired in this manner to testify their admiration for these great jurists, and is now published in the hope that it will prove of interest to laymen, as well as to members of the legal profession, both in Wisconsin and throughout the country.

The opinions themselves both in literary quality and legal learning, rank, it is believed, among the best of those delivered by American judges, and they admirably illustrate the growth and development of the jurisprudence of one of the great Western States.

It is intended in the note which follows each case, to give every decision in which the case has been cited and to indicate whether the reference to it was with approval or disapproval, and where several points are involved in the case to also indicate the precise point to which it was subsequently cited. These notes enable anyone to form some judgment of the value of the opinions as precedents and their influence in shaping the law of the country, while they direct the lawyer to the sources from which he can

determine the present state of the law upon any of the subjects covered in the opinions included in this compilation. In this respect it is hoped that this volume will prove of practical use to the members of the legal profession. Such historical information has also been added concerning the various cases as seemed to be necessary to a correct understanding of the case.

No effort has been made to confine the opinions to any particular question or class of questions; but on the contrary the endeavor has been to cover as wide a range of important subjects as possible. In selecting the opinions to be published, the editor has been embarrassed only by the wealth of material from which to choose, and while it is doubtless true that different selections might have been made with value to the work, it is certain that each of the opinions here presented possesses a distinctive interest and deserves high rank in legal literature.

Grateful acknowledgment is made to numerous friends, both laymen and members of the legal profession, for valuable suggestions and assistance in the preparation of this work and particularly to Hon. Robert G. Siebecker, of the Wisconsin Supreme Court, and Hon. Hugh Ryan, of Milwaukee, the son of Chief Justice Ryan, and Mr. Henry C. Davis, of New York City.

G. E. R.

New York, December, 1906.

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LIFE OF

CHIEF JUSTICE DIXON.

SKETCH OF THE LIFE AND SERVICES OF CHIEF JUSTICE DIXON AS CONTAINED IN THE MEMORIAL PRESENTED TO THE WISCONSIN SUPREME COURT ON HIS DEATH.

At a meeting held at the state capitol of Wisconsin on the 19th day of December, 1891, to take action upon the death of Honorable Luther S. Dixon, formerly chief justice of the supreme court of Wisconsin, a committee was appointed to prepare a memorial to be presented to the court.

On the 29th day of December, 1891, the Hon. Geo. H. Noyes, Esquire, on behalf of the committee addressed the court and presented the memorial hereinafter set out, which not only contains the leading events in the life of Chief Justice Dixon, but also testifies to the estimation in which he was held by the bench and bar of Wisconsin. The following is the memorial presented:

Luther S. Dixon, for over forty years prominent in the legal profession, and during more than fifteen years of most eventful history the chief justice of the supreme court of this state, died at his residence in Milwaukee on the 6th day of the present month.

Among the many distinguished names on the roll of our profession in Wisconsin, none shines with brighter luster than his; none is more prominently associated with its judicial history, and he has graven deep and lasting lines of influence upon the jurisprudence of the state. Among our great jurists none will be longer remembered for the qualities that command admiration and kindle warm attachment than he, whose manly personality won the regard and confidence of men in every walk of life. To the members of the bar of the supreme court whose work reaches back to the period of his service there remains a memory of one who presided with eminent ability, with a befitting dignity so blended with kindness, patience, consideration for every advocate who appeared before him as to make him loved and honored by the whole brotherhood of the bar. To all these the announcement of his death brings a deep sorrow. The world seems more lonely when so manly, so strong and helpful, and so gentle a spirit passes out of it; and our profession suffers a loss, the sense of which will long abide.

We, of the State Bar Association, at a meeting called for the purpose, in behalf of our brethren throughout the state, and the people at large, unite in the expression of our sorrow, and would offer our tribute of veneration and affection for one whose fame as a jurist, we well know, is above need of eulogy.

Luther S. Dixon was born in Milton, in the valley of the Lamoille, in the state of Vermont, June 17, 1825, of the sturdy stock of the New England farmers of the early part of the century. After laying the foundation of a good English education in common schools and academies, he entered the military school at Norwich in that state, then under the conduct of instructors of marked ability.

There he ranked high as a cadet, and was an excellent scholar in Latin. He received the thorough instruction, severe mental and physical discipline so valuable in forming character. After teaching school to procure the means of prosecuting his studies, he entered upon the reading of law in the office of Honorable Luke P. Poland, then of high standing among the lawyers of Vermont. He was admitted to the bar in 1850. The West was then the inviting field to the young men of New England; and Wisconsin was regarded as well out on the frontier. The young lawyer established himself at Portage in this state, about the year 1851, and entered upon the practice. His sterling qualities drew him clients, and he was twice elected district attorney of Columbia county, serving with zeal and fidelity. In 1858, upon the retirement of Honorable A. L. Collins, he was appointed judge of the Ninth judicial circuit, the duties of which office he discharged with such marked ability as to give great satisfaction to the bar, then composed of some of the most distinguished and able practitioners of the state.

The death of the eminent Chief Justice Edward V. Whiton in 1859 cast upon Governor Randall, then the executive, the duty of appointing a successor to hold office until the vacancy could be filled by election. He selected, with the general approbation of bar and people, Judge Dixon. The appointee was then but thirty-three years of age; and his previous professional and judicial experience—the latter less than a year on the circuit—though full of promise, had hardly foreshadowed his great abilities. But, assuming his seat April 19, 1859, he entered upon a career which soon made plain that he was born for a judge. He loved the law as a study. He loved the right, and with pure heart sought to find justice. En-

dowed by nature with a strong, vigorous mind, native sense and clear intuitions, with great capacity for mental labor, the power to grasp and analyze, the faculty to quickly develop a subject and perceive the point on which a controversy depended, he studied hard, steadily grew, and while yet a young man was recognized among the able judges of his time; his fame extending beyond the state in a constantly widening circle. He was happily constituted for judicial labor. If there was aught in him of the partisan it was completely subordinated in the judge. Free from all bias or prejudice, his mind serenely sought the right of the matter, never swayed, even unconsciously, by thought of popularity or personal consequences. No judge could more fully appreciate the words of the great Marshall, that "judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law." Devoid of what is called political ambition, he declined advancement in those fields so inviting to most men—in which he was admirably endowed to succeed—and wrought in the more laborious and, in a sense, less conspicuous labors of the bench. He was four times elected to his exalted place. Those who in honest difference opposed his first election were his warm supporters ever after, and his later elections were with virtual unanimity. He retired voluntarily in 1874 in the midst of his term, to the general regret of bench, bar, and people, for he then stood admittedly among the foremost judges in the Union.

His judicial work, to which he gave the best years of his life, will endure. His decisions will ever attract and charm the profound, for they were wise expositions of the law, professional in learning, logical in strength, and never wanting in an unstudied eloquence and beauty of expres-

sion. Who can read them without being impressed with the virtues of the man—his originality, sincerity, honesty, love of justice? The manliness and sweetness of his nature are reflected in his written judgments.

The judicial temper and quality of his mind were admirable. When he had reached his conclusion he had the strength of conviction of an earnest, honest soul, and naught could swerve him but to show him his error. And no man was freer from mere pride of opinion. In the texture of his firmness was no coarse fibre of obstinacy. With noble candor he reviewed his own decisions, frankly acknowledged his own errors, pointing them out himself where others had not found them. Herein his largeness of mind was exhibited. He reached his conclusions after long, patient investigation, his mind open to light from every quarter. He listened considerately to every argument with attentiveness that encouraged the advocate to do his best. He weighed well, reviewed carefully, knowing always how fallible is human judgment, how dangerous summary decision. None who argued causes before him ever felt for a moment, whatever the result, that the argument had been unheeded. Some of the decisions which he wrote, or in which he concurred, or from which he dissented, bore upon controversies which stirred the deepest popular feeling at a time when the bands of Union strained to their utmost tension were about to snap asunder. Yet, then, however emphatic the dissent of those in adverse interest or belief, his sincerity or purity of motive was never questioned. It may truly be said that time has vindicated his judgment, or at least that all have accepted as the law of the land some of his rulings which at the time evoked the most dissent. How fearless he was in following his convictions, with what moral courage he ad-

hered to them, even to the alienation of political friends and the peril of his seat, then but recently assumed, all will remember who but recall the intense excitement that culminated in the great civil war.

The virtues above ascribed to him are common to our American judges, and ever conspicuous on the bench which he so long adorned. In him they were so manifest in the amplitude of his understanding, the simplicity, strength and perfect balance of his character as to mark him for distinction on any bench or in any group of the great men of our profession.

He came to the bench at an important and critical time in the history of state and nation. Questions involved in the contentions of political parties must be decided and the judgments of courts could but provoke fierce criticism. Questions were pending which directly affected the interests of large classes of citizens, arising out of the early efforts in railway development, and the involvement in that behalf of public-spirited men. Fortunes and even homes were imperiled. Decisions were demanded favorable to those in jeopardy, and judges were threatened with the displeasure of masses if decisions gave disappointment. The then recent adoption of the Code had displaced the ancient, familiar practice, and thrown much labor on the court in settling the new procedure. New and important questions sprang up in the period of rapid development during and following the war; and the growth of the state largely increased the labors of the court. Chief Justice Dixon and his illustrious associates in that formative period worked with noble diligence for the welfare of the state. "Looking far behind them and far before them" they wrought with master hands in building a system of jurisprudence, mild and benign, of which

the materials were the excellences of the common law, the enlightenment, progress, and humanity of later times and legislation. Says the Majestic Webster: "Whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome higher in the skies, connects himself in name and fame of society." The work of Chief Justice Dixon and his eminent co-laborers on the bench, it may truly and we hope not inappropriately be said, placed our supreme court well forward among the strong, able tribunals of the country. His decisions embraced in twenty-six volumes of our court Reports constitute a record imperishable, and his ennobling influence upon the body of our law will be felt and acknowledged, as it now is, in the long future. In private life stainless, in the domestic relations and those of the neighbor and citizen irreproachable, he lived among us. In social intercourse, when professional toil could for a brief space be laid aside, it was pleasure to meet him. Of commanding presence, tall but well formed, with a natural grace of deportment perfected by his early military education, he bore nature's stamp of superiority. But he was unostentatious, simple and direct in manner as a child, cordial and generous; and there was something in him that won and held friends and gave him wide but unsought popularity. He had the sparkling wit without trace of bitterness, the buoyancy of spirit and keen sense of humor, so often observable in great lawyers. An agreeable converser, attent and sympathetic listener, he was the charm of a social circle. His kindly grace put all at their ease, and he could be interested in all with whom he came in contact. His career after he left the bench was in keeping with his noble work upon it. He

remained true to his profession at the last, though political honors were within his reach. Avoiding all notoriety, shunning all display, he modestly went about his work, at once assumed high rank at the bar, and enjoyed the rewards of extensive and important practice. His health forced him, some years ago, to leave a large and lucrative business here, and seek the higher altitudes and rarer atmosphere of the western mountains. Thereby, although he retained his residence in Milwaukee and considered this state his home, the profession here lost for the most part his delightful companionship and his powerful aid. It was almost as an exile that he went to Colorado, banished by the rigor of our climate. He went at a period of life when men are not wont to form new attachments, and, if engrossed in care, are unlikely to attract new friends. Depressed by suffering, for his asthmatic ailment deprived him of the blessedness of refreshing sleep, the cheerful ness which was one of the charms of his nature might well be quenched. But he entered at once upon an extensive practice, and amid the strife of constant legal controversy he came to be loved by his professional brethren there no less than here. In the resolutions passed at a large meeting of the bar in Denver, called when the announcement of his death reached them, they expressed in words of tenderness their "reverent respect and heartfelt affection."

He returned to his family in Milwaukee a few weeks since after a professional visit to Washington, so worn out by the long struggle with the malady which finally overbore his superb physical constitution, that age and the hand of death seemed visibly upon him. A short illness brought the last great change, and after a life of unsullied honor, faithful service in the highest field of usefulness, with a lasting fame firmly assured, life's work well done,

his body sleeps in the soil of the state he served so well, near the scene of his judicial labors and by the graves of his children. His immortal part, with God who gave and imbued it with much love of justice, such high intelligence, such sweetness and charity, now, as we devoutly trust, sees the right, not in the crepuscular dimness of human imperfection but in the clearness of eternal day.

To us who survive him, and to the long line who shall follow, his character as it shall live in memory and in his enduring labors will ever be an exquisite picture of the profound lawyer, the good man and the just.

To his grieving widow and family, whose sorrow cannot be lightened by being so largely shared, we extend our heartfelt sympathy. We know, too, how profound a sorrow his death has brought to the members of the court all of whom knew him so well in life, and especially to those veterans in service, "still shining in use," with whom he so long labored. To them as to us is left but the mournful pleasure of speaking his praise.

"Mingling our sorrows and regrets" with those of the court, we ask that this memorial—faintly as it portrays our sense of his worth and his service, and feebly as it expresses our affection and our sorrow—may be spread upon the records of the supreme court.

Edwin E. Bryant,
Moses Hooper,
Geo. A. Noyes,
A. A. Jackson,
James B. Taylor.
Committee.

SELECTED OPINIONS

OF

CHIEF JUSTICE DIXON.

Phelps v. Rooney, et al.

June Term, 1859.

(9 Wis. 70.)

Sections 51 and 52, chap. 102, Wisconsin Revised Statutes 1849, in force at the time of this decision, provided:

"Sec. 51. A homestead consisting of any quantity of land not exceeding forty acres used for agricultural purposes, and the dwelling house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any town plot, or city, or village; or instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a recorded town plot, or city or village, and the dwelling house thereon, and its appurtenances, owned and occupied by any resident of the state, shall not be subject to forced sale on execution, or any other final process from a court, for any debt or liability contracted after the first day of January, in the year one thousand eight hundred and forty-nine.

"Sec. 52. Such exemption shall not affect any laborer's or mechanic's lien, or extend to any mortgage thereon, lawfully obtained; but such mortgage, or other alienation of

such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same."

The majority of the court in this case held that a building constructed externally and internally in the style of a store and designed for use as a store, except that the second and third stories were finished off into rooms for use as a dwelling and were and had been used by defendant, Rooney, and his family as a dwelling house at the time the mortgage in question was given, was a homestead within the meaning of the above statute, and that the mortgage, therefore, which defendant Rooney had given on the property, not being signed by his wife, was void. From this position Chief Justice Dixon vigorously dissented.

The following are the propositions of law announced by Chief Justice Dixon in his dissenting opinion:

That the words "homestead" and "dwelling house," in their natural and ordinary import, cannot be construed to embrace the building above described; that these words are used in the statute in their plain and obvious signification, and not as synonymous with the mere general terms "habitation," "residence," "home" or "abode."

That the 52d section under which the defense is made in this action, is a disabling act and should be strictly construed in this case.

That if the effect given to the "exemption law" in this case by the majority of the court be that which the legislature intended, then the law to that extent violates section 9, article 1, of the constitution, which provides that "every person is entitled to a certain remedy in the laws, * * * ; he ought to obtain justice freely * * * completely and without de-

nial," etc. It is also repugnant to the requirement of section 17, article 1, of the constitution, that "the privilege of the debtor to enjoy the *necessary comforts* of life shall be recognized by *wholesome* laws exempting a *reasonable* amount of property from seizure or sale."

That these two sections must be construed together and are intended to guard the rights and interests of both debtor and creditor.

It is a well settled rule of constitutional construction, that every affirmative prescription implies a negative of everything contrary to, or inconsistent with it, and section 17 above quoted, therefore, by necessary implication, denies to the legislature the power to protect the debtor in the enjoyment of those things which are *not* of the *necessary comforts* of life, or to exempt an *unreasonable* amount of property or to enact laws *unwholesome* in their nature and tendencies to secure the privileges of the debtor.

The power and duty of the courts, in proper cases to construe and give effect to these sections of the constitution is as unquestionable as in any other case of legislative usurpation.

The presumption is always that the legislature has not intended to infringe the provisions of the constitution, and as by that instrument the legislature had no power to exempt "stores" or other places purely or principally devoted to trade or business, and as the act prescribing exemptions does not provide that such property should be exempt, but on the contrary its language indicates that which is entirely different, an intention to exempt it cannot be inferred nor can such effect be given to the act.

DIXON, Chief Justice. The question involved in this case is of very great importance, not only to the parties in interest, but as establishing the proper construction of the statute under consideration. It is one affecting the general interest of society as much, or more perhaps, than any other single question which could arise at this time; and disagreeing, as I do, entirely in the conclusions to which the majority of the court have arrived, I feel it my duty to state some of the reasons for my so doing. The facts in the case are stated as fully in the opinion of the court as I would desire, excepting in two or three particulars; but believing that the report of the case will contain a full statement of them, as well as the very able argument and points made by the appellant's counsel, I will not here attempt to supply them.

In my opinion the question is not so much one of doubt or ambiguity as to the general scope or purport of the statute, as one regarding the meaning to be attached to the word "homestead," and "dwelling house." These are words of very frequent and familiar use, and in ordinary language have, or ought to have, a fixed and definite meaning, which would convey nearly the same ideas to the mind of every person reading them, or hearing them spoken. For myself, I have no doubt that they have such meaning, and for the purpose of my argument, I shall assume that they have; that being a proposition which I cannot discuss. Common sense will readily teach every man whether I am right or wrong in this assumption. Upon its correctness the truth or falsity of my conclusions will in a measure depend.

Whatever abstruse or technical rules may heretofore have been laid down and followed for the purpose of giv-

ing construction to statutes or other instruments, I understand that it has now become the settled and universal rule, sanctioned by the highest authority, that whenever words of a general nature occur in a statute, or other instrument, that they are to be understood according to their natural and obvious import, unless such meaning is clearly repugnant to the intention of the framers, or would lead to great inconvenience or absurdity.

In Jones *v.* Harrison, 6 Exch. R. 327, Parke B., says: "The rule which the courts have constantly acted on of late years, in construing acts of parliament, or other instruments, is to take the words in their ordinary grammatical sense, unless such construction would be obviously repugnant to the intention of the framers of the instrument, or would lead to some other inconvenience or absurdity."

"The current of authority at the present day," says Bronson, J., in Waller *v.* Harris, 20 Wend. 555, "is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct what they may deem either excesses or omissions in legislation, nor relieve against the occasional harsh operation of statutory provisions, without the danger of doing vastly more mischief than good."

"The fundamental reason of the rule," says Sedgwick (Sedgwick on Statutory Law, page 261), "is that unless the courts, as a general thing, construe language in the same sense in which it was used by the legislature, that is, according to its ordinary and natural import, it would be in vain to attempt to preserve any harmony between

these two great co-ordinate branches of government; and the contrary doctrine would open the door to intolerable looseness of construction."

It is for the purpose of applying these principles that I assume as the legislature did, and as every one must, that the words in question have a natural and generally accepted signification. Lexicographers agree in defining the word *homestead,* primarily and naturally to mean, *the place of the house, the inclosure or ground immediately connected with the house or mansion;* not the house or dwelling itself, but the place of or for it; the ground or land on which it stands, and which is directly connected with it. It is therefore necessary to the existence of a homestead that it should be a piece of land designed or used as the place of the house. Although the word is sometimes used in an enlarged sense so as to include both the house and the land, yet such I apprehend is not its usual signification, or that in which it was used by the legislature. That they used it in its primary sense appears plainly from their language, "a homestead *consisting* of any quantity of land," etc.

I am thus particular in endeavoring to ascertain the true and primary meaning of this word, because I think the majority of the court, both in their reasoning and opinion in this case, have confounded this natural and obvious signification of the word with that of the words "abode," "dwelling house," "home," "residence," and the like, which do not necessarily mean the same thing. I can better illustrate by putting a case which is very likely to happen. Suppose the house of a debtor having a house and homestead, that is, the quantity of land exempt by statute, should, by some accident, such as fire or storm, be destroyed, and the debtor and his family be thereby

obliged to seek shelter and protection elsewhere, would the homestead be thereby subjected to seizure and sale, to satisfy the demand of some merciless creditor, whilst the unfortunate debtor was in good faith gathering the means and endeavoring to rebuild? I confess that in view of the benevolent spirit which actuated our exemption laws, and with my understanding of the word "homestead," I could never sanction such a proceeding and thus double his misfortunes. If, however, the word "homestead" means abode, residence or house, he would lose it, for it would not then, by reason of his misfortune, be his abode, residence, or house. But if the word is construed in its ordinary sense, it might well be construed to be within the language of the statute; as it certainly would be within its spirit. Johnson gives an instance of the distinctive use and sense of the words "house" and "homestead," in the following lines from Dryden:

> "Both *house* and *homestead* into seas are borne,
> And rocks are from their own foundation torn."

In ordinary conversation, or in giving a construction to written instruments, I imagine that few people would disagree as to the meaning of the words "dwelling house," when used. If, when taken together, they have not a fixed and definite signification, then I know of no words in our language that have. Webster defines the two words taken together, as "the house in which a man lives." The word "house," he says appropriately, signifies "a building or edifice *for* the habitation of man; a dwelling place, mansion, or abode, *for* any of the human species;" that is, a building or edifice, or place, *designed or constructed* for the habitation of man, as distinguished from those other buildings, edifices, etc., constructed by man for other purposes. This I believe to be the ordinary and obvious im-

port of the words, and to be the sense in which they were used by the legislature. It need not, it is true, be built of any particular materials, or in any particular style of architecture or workmanship, but it must be constructed and used for a dwelling for man, and not for other purposes.

The building in question is, by its location and external and internal construction, designed for a store, or place of business, and ever since its erection has been used by the defendant, and tenants holding under him, principally for that purpose. It seems to me that the error lies in misinterpreting the words "dwelling house." It is assumed that they are synonymous with "habitation," "residence," "home," or "abode." A dwelling house may be either of these, but it does not follow, therefore, that the words are convertible. The statute exempts a dwelling house, *eo nomine*. If the legislature had by name exempted every man's residence or habitation, there might be some propriety in extending the provision of the act to a case like the present; but even then I do not think it would be within its spirit. Man may take up his residence in any place which will afford him shelter or protection. Suppose a family were to reside in a steamboat (which very often happens), would that make the steamboat a dwelling house within the ordinary meaning of that word? It is true that the boat might not, owing to its being personal property, be exempt within the meaning of our statute, yet I think the illustration a fair one, for the purpose of showing the absurdity of calling everything which may be used as a place of abode, a dwelling house. Yet such seems to be the reasoning of the court; and the same magical power of construction which can convert what is essentially a store, constructed, known, and used as such, into a dwell-

ing house, in the ordinary or grammatical sense of the words, because some members of the human family happened to take up their abode therein, could, and if consistent, would be bound, under the same state of facts, to convert into dwelling houses, churches, warehouses, depots, barns, mills, manufactories, boats, vessels, and every other structure or edifice, though still occupied for the purposes for which they were designed. Thus, what is to-day a mill or factory, known and called such in ordinary language, would tomorrow become a dwelling house, upon some person making a residence of some remote nook or corner of it. When this loose rule of construction is once established, where is it to end? All the witnesses concur in saying that the building is *principally* designed and used as a store, and that its use as a residence is merely *incidental.*

The proof shows that at the time of the execution of the mortgage in question, and long before and after, the main portion of the building was leased by *Rooney* to tenants, who occupied it as a wholesale and retail clothing store, at an annual rent of $1,500, and that the annual value of the portion occupied as a residence was $250. Thus, it appears, not only that the building is by construction a store, but that *six-sevenths* of its value and use is devoted to that purpose. Now, if *one-seventh* of a building, being used as a residence, converts it *all* into a dwelling house, it is important that the court should define what lesser fraction would not. This is a calculation into which I confess my utter inability to enter; but as it is an important question, in which all the citizens of the state, and many out of it, have a deep interest, I insist that the court, which has adopted such construction, should define, by some means, arithmetical or otherwise, just how far this

system of transmutation may be carried. I mention this because it is intimated in the opinion of the court that a case might happen of a party occupying a part of a hotel or a mill, where they would not feel bound to consider it within the rule. It seems to me that such an intimation when compared with the principles established by the decision in this case is irrational, and that there can be no consistent limit except that fixed territorially by the statute.

The defendant's lot is 20 by 150 feet. He might own, on either side of him in the same block, two and two-thirds more stores, and still be within the statute limit. He might also very conveniently occupy the whole of the third or fourth stories for the various purposes of a kitchen, bedrooms, parlors, etc. If such were the case, he would, at the same rate, be in the enjoyment of an annual income of $5,500. Would the court interfere in behalf of a creditor in such a case? If so, how, and upon what principle?

I think it an utter perversion of language to call this building a dwelling house. It is not, in any fair sense of the word. No one knows it as such; no one calls it such. A circumstance worthy of note here, and which appears from the case, is, that neither the defendant, nor any of the witnesses called to testify, not even those called by him to prove that it was his *dwelling house*, call it by that name. No one ever seems to have imagined that it was a dwelling house. It seems to have been left for the courts to make that discovery. The defendant, in his mortgage, called it "store No. 107 East Water street," and every witness spoke of it in that way, or as "the Rooney store." If the defendant had possessed a water power upon the premises, which he had improved by the erection of a

mill or a factory, in some part of which he resided, the result must have been the same.

We are told in history that Diogenes, the celebrated cynic philosopher, at one time took up his abode in a tub belonging to the temple of Cybele; I suppose the tub became *ipse facto* a dwelling house in the ordinary sense of that word, and that hereafter strict propriety of language will require us to say that he lived in a dwelling house belonging to the temple instead of a tub. Nay, more, I suppose the moment the philosopher got into the tub, the whole temple instantly became a dwelling house, and that he might, had he been so inclined, have claimed it as exempt under the operation of a statute like ours.

If tomorrow a man in Madison should sell to another a lot in the city of Milwaukee, which the purchaser had never seen, and should represent to the purchaser that it had a dwelling house upon it, and should convey it as a house and lot, and the next day the purchaser should go to Milwaukee to see his property, I sincerely believe, if he had never heard of the decision in this case, that he would be surprised to find himself the owner of a lot with a shot tower upon it. If afterwards he should return to the seller and complain of fraud and misrepresentation, I suppose the justification of the seller would be that the courts had decided that whatever building a man lives in, is a dwelling house; that at the time he sold, his family resided in the tower, and therefore the purchaser had got what he bargained for. I mention these things for no other purpose than to show what appears to me to be the absurdity of the meaning attached to the words 'dwelling house,' and how totally variant it is from our common understanding of them.

A reason strongly urged for the contruction given by the court, is that any other construction would operate harshly on a large class of small tradesmen, artizans, and shopkeepers in some of our large towns, such as seamstresses, shoemakers, and others of kindred occupations, who, it is said, are oftentimes under the necessity, to a limited extent, of combining business and residence in the same building. My answer to this is, first, that if such would be the result, which I by no means admit, it furnishes no reason for the violation of well settled rules of statutory construction; and, secondly, that that question is not at all involved in this case. When a case arises where a residence is the *principal,* and the business the *incidental* use of a building, I will be prepared to discuss that question; but I do not feel called upon now to do so. The design of the legislature was to give to the debtor a home, and not to create in his favor a source of revenue. In this respect, I think, the construction given is not only a violation of the letter, but of the spirit of the statute. By pursuing the obvious import of the language, every object intended would be attained with no substantial inconvenience. But by the construction given, the fraud and injustice which dishonest debtors will be enabled to practice upon their creditors, is beyond calculation. The door to them is opened beyond the power of the courts to remedy.

It is suggested by the court, that the law is defective in allowing debtors to build large and expensive houses, and to hold them against their creditors. How much is the evil remedied by the decision in this case? It is laid down as a rule in construing statutes, that courts are to presume that the legislature intends only what is just and equitable. But here, because the law has some defects, (as what law has not?) it seems to be presumed that the legislature

intended to perpetuate all the iniquity in their power. If debtors have heretofore taken advantage of this defect in the statute, by building large and expensive houses, instead of devoting their means to the payment of honest debts, when it has been universally understood that they could use their houses for no other purposes than as residences for themselves, how much more will they do so now, when it is declared by this court, that they can make them a source of revenue by converting the greater portion into places of business to be occupied by others. By this unjust construction, the evil is enhanced one hundred fold, and that too, it seems to me, without the slightest shadow of sanction by any language used by the legislature.

In addition to the decision being contrary to public policy, and public justice in general, it is in direct violation of the rights of the plaintiff in this case. He advanced several thousand dollars on the security of this property. It was described and in actual use as a store. His own senses told him it was a store. It does not appear whether he knew the defendant's family lived in it or not. That fact might have been concealed from him. At all events there was nothing to put him on inquiry. If he had known it, however, and had sought advice, I very much doubt whether any one would have advised him that the signature of Mrs. Rooney was necessary to the validity of the mortgage. The defendant intended and supposed he had given the plaintiff security. The plaintiff believed he had it, and courts will not annihilate contracts and destroy the rights of parties except in clear cases. They will rather adopt such a construction as will promote the ends of justice and equity.

Although I am in favor of a fair, I might say liberal, construction of the statute in question, in aid of the inten-

tion of the legislature, yet as the fifty-second section, under which the defense in this action is made, is a disabling act, it should be in this case strictly construed. This rule of construction is well settled. In Smith *v.* Spooner, 3 Pick. R. 230, Chief Justice Parker says: "Every man of full age and sound mind is at liberty to make contracts, and if made upon good consideration and without fraud, he must be bound by them, unless by statute provision he is disabled. And disabling statutes of that nature should be strictly construed; for, though founded in policy and just regard to the public welfare, they are in derogation of private rights."

In Short *v.* Hubbard et al., 2 Bing. 349, 9 Com. Law R. 429, it was held that there was no impropriety in giving a strict construction to one clause and a liberal construction to another clause of the same statute.

In this view of the case, the question here presented is very different from what it would be were the plaintiff seeking to subject the property to the payment of his debt, by the ordinary process of law, against the will of Rooney, the owner, who, by executing the mortgage, has signified his wish and willingness to have it so appropriated. It was the exercise of a right on his part as the owner, with which no one could, by the common law, interfere. A liberal construction of this section may, at times, prove very inconvenient to some of these princely debtors, which it seems to be the design of the court to foster and protect.

Thus far, I think, upon principle, that the construction given is erroneous; that the legislature never intended it. My sense of justice to that branch of the government will never permit me to sanction it. So far as there are any authorities bearing directly upon the question, I think I am fully sustained in the views I have taken.

The case of Rhodes et al. *v.* McCormick, 4 Iowa Rep. 368, which arose under a statute like our own, is like the one under consideration in almost every circumstance, except that there the plaintiffs were seeking to satisfy an execution against *McCormick,* by a sale of the premises. In that case, the building was situated on a half lot in the city of Muscatine. The cellar and first story were rented by *McCormick,* and used as a store, whilst he occupied the second and third stories as a place of residence. The court held that the cellar and first story were liable to sale on the execution, whilst the debtor would remain the owner of the soil and the second and third stories.

In commenting upon the case, Wright, C. J., says: "A defendant cannot, by calling a house his homestead, make it such. He cannot, by occupying or using one room in a building containing forty, exempt the entire premises. Neither can he, by using all the rooms of the second and third stories, as a homestead, exempt from liability the store rooms that may be below, but which have no kind of connection with the homestead as such. * * * While, as a general rule, it may be true, that the term 'house' includes an entire building, yet, within the meaning of this chapter, it is to be so construed as to carry out the object and purpose of the laws, so as to give the claimant his homestead, and not stores, shops and rooms, which are never used by the family, or for a home, or any part of it. In our opinion, it was never the intention of the law-making power to exempt from execution an entire building or house, for whatever used, because some portion of it was used by the owner as his homestead. * * * The object of the law is to protect the home and preserve it for the family, and not shops, stores, rooms, hotels and office rooms, which are rented and occupied by other persons.

This construction attains the object of the code in exempting a homestead, and prevents the abuse of a law which was designed to discourage and not to encourage fraud."

Although I do not concur with the court in that case, that a building should be divided by horizontal lines, or by rooms, as the case might be, which might be productive of great mischief and inconvenience, being of the opinion that the converting of it principally to other purposes, ought to operate as a waiver of the right to claim it as exempt, I cannot but admire the strong sense of justice which pervaded the minds of the court.

In the case of the People *v.* Plumstead et al., 2 Gibbs Rep., (Mich.) 465, the court held that the owner of premises which had not previously been selected as a homestead, could convey them without the signature of his wife, notwithstanding the provisions of the statute are identical with our own, our statute having been copied from that of Michigan. The decision was made upon the ground that no *selection of the owner* was proved, though the previous occupancy, as a homestead, was fully established. In the present case no proof of selection by *Rooney* was made or offered. These are the only authorities to be found having any direct bearing on the question.

I think the judgment should be reversed.

NOTE.*

It is not easy to distinguish the *principle* upon which the minority and majority opinions in the above case differ, although the conclusions arrived at in the two opinions as to the particular case are directly opposed to each other. In the majority opinion, speaking of the argument that the doctrine there announced would enable dishonest debt-

* Cases marked with asterisk in the note cite Phelps v. Rooney, *supra.*

ors to perpetrate gross frauds, in holding a large mill or manufactory or hotel as a homestead by keeping some small portion of it as a residence, the court said, in substance, that it did not think the statute could be held to apply to such a case, but that if it did the remedy was with the legislature and not with the court. It seems to have been the precise point of the dissenting opinion of the chief justice that the case under consideration belonged to the class referred to in the majority opinion where a dishonest debtor was attempting to perpetrate a fraud upon a creditor by holding as exempt property which measured by its use was only one-seventh residence and six-sevenths leased for the business of a store. The rule deducible from the opinion of the Chief Justice, seems to be that where residence is the *principal* and business the *incidental* use of the building, the whole might be held exempt, but where, as in the case then before the court, the main use and value of the building was for business and it was being actually leased by the debtor for that purpose, no portion of it would be held a homestead. The exigencies of modern business well illustrate the wisdom and justice of the dissenting opinion. A modern skyscraper may represent an investment of millions, may yield in rentals a princely fortune annually, yet under the decision of the majority of the court, it would seem to be exempt if some portion of it was fitted for and actually used as a residence by the debtor and his family. Nevertheless the doctrine is firmly fixed in most of the jurisdictions that use of a portion of a building by the owner for business purposes, or a rental of a portion thereof to others, will not of itself operate to destroy the homestead rights in any portion of it. *Smith *v.* Pearce, 85 Ala. 258; *Norris *v.* Kidd, 28 Ark. 298; Klenk *v.* Knoble, 37 Ark. 298; Gainus *v.* Cannon, 42 Ark. 514; Ackley *v.* Chamberlain, 16 Cal. 183; *Skinner *v.* Hall, 69 Cal. 199; *Heathman *v.* Holmes, 94 Cal. 294; In re Ogburn, 105 Cal. 95; Kiesel *v.* Clemens, 6 Idaho, 444; Hubbell *v.* Canady, 58 Ill. 425; Stevens *v.* Hollingsworth, 74 Ill. 202; Smith *v.* Quiggans, 65 Ia. 637; Edmonds *v.* Davis, 122 Ia. 561; *Hogan *v.*

Manners, 23 Kan. 551; Rush *v.* Gordon, 38 Kan. 535; *Bebb *v.* Crowe, 39 Kan. 342; Hoffman *v.* Hill, 47 Kan. 611; Woodward *v.* Till, 1 Mich. N. P. 210; Orr *v.* Shraft, 22 Mich. 260; King *v.* Welburn, 83 Mich. 195; Lamont *v.* La Favre, 96 Mich. 175; Mercier *v.* Chase, 93 Mass. 194, (11 Allen); Lazell *v.* Lazell, 90 Mass. 575, (8 Allen); Pratt *v.* Pratt, 161 Mass. 276; Kelly *v.* Baker, 10 Minn. 153; *Umland *v.* Holcomb, 26 Minn. 286; *Adams *v.* Adams, 183 Mo. 396; Corey *v.* Shuster, 44 Neb. 269; Goldman *v.* Clark, 1 Nev. 608; Flannegan *v.* Stifel, 3 Tenn. Ch. 464; Hancock *v.* Morgan, 17 Tex. 582; Prior *v.* Stone, 19 Tex. 371; Sossaman *v.* Powell, 21 Tex. 664; Moore *v.* Whitis, 30 Tex. 440; *Forsgard v. Ford, 87 Tex. 185; King *v.* Hapgood Shoe Co., 21 Tex. Civ. App. 217; In re Tertelling, 2 Dill. (U. S.) 339; *Fink *v.* O'Neil, 106 U. S. 275.

How slight the use for residential purposes might be, and still maintain its character as a homestead, so as to be exempt, was not considered in the above cases.

In Hogan *v.* Manners, *supra,* Mr. Justice Brewer refers to the question, but expressly declines to pass upon it in that case.

This precise question, however, is considered in a late case in the Oklahoma Court: See DeFord *v.* Painter, 3 Okla. 80.

The Oklahoma Supreme Court in the DeFord case, *supra,* expressly approves the doctrine of the majority of the court in Phelps *v.* Rooney, but carries it further than the Wisconsin Court has ever gone, and holds that a building will be exempt as a homestead if some portion of it is actually occupied as a residence, no matter how small that portion may be and no matter to what uses the remainder of the building is dedicated.

The doctrine of principal use, however, as contended for by the Chief Justice in Phelps *v.* Rooney has found favor in a number of the courts. Garrett *v.* Jones, 95 Ala. 96; Turner *v.* Turner, 107 Ala. 465; Marx *v.* Threet, 131 Ala. 340; Laughlin *v.* Wright, 63 Cal. 116; McDowell *v.* His Creditors, 103 Cal. 264; Wright *v.* Ditzler, 54 Ia.

620; Philleo *v.* Smalley, 23 Tex. 498; Stanley *v.* Greenwood, 24 Tex. 224; Houston, etc., Company *v.* Gage, 44 Tex. 597; Iken *v.* Olenick, 42 Tex. 195; Grosholz *v.* Newman, 21 Wall. 481.

In Iowa still a different doctrine prevails. Commencing with the case of Rhodes *v.* McCormick, 4 Ia. 358, cited in Chief Justice Dixon's opinion, *supra,* that court has uniformly held that a building could, and in a proper case should, be divided on *horizontal* lines and the portion thereof not used by the debtor for residential purposes sold to satisfy his creditors. McCormick *v.* Bishop, 28 Ia. 233; Mayfield *v.* Maasden, 59 Ia. 517; Johnson *v.* Moser, 66 Ia. 536; Cass County Bank *v.* Weber, 83 Ia. 63.

On a motion for re-argument, Phelps *v.* Rooney, *supra,* was again before the Wisconsin Supreme Court and is reported in 12 Wis. 699. A majority of the court still adhered to the opinion previously expressed, and the Chief Justice again dissented in an elaborate opinion in which he contended strongly for the doctrine of horizontal division of a building, substantially as applied in Rhodes *v.* McCormick, *supra.* The Federal Court of Wisconsin expressly refused to follow Chief Justice Dixon's opinion on the subject of horizontal division of a building claimed as a homestead. *In re Lammer, 7 Bissell, 269. See also In re Wright, 3 Bissell, 359.

The Federal Court nevertheless in the cases cited denied the debtor's right to hold any portion of the building as a homestead and in the Lammer case rested its decision largely on the ground that the building, a store, was not constructed as a residence, and because of that, although actually occupied by the debtor and his family, the homestead exemption did not attach. This decision also goes in part upon the ground that the debtor had acquired this property, and moved into it as a home for himself and family, when insolvent, and paid for it out of the proceeds of property otherwise liable for his debts, and that these acts constituted a fraud upon his creditors. So far as this case rests upon this latter ground, it has been expressly re-

pudiated by the unanimous decision of the Supreme Court of Wisconsin. Comstock *v.* Bechtel, 63 Wis. 656; Binzel *v.* Grogan, 67 Wis. 147; *Palmer *v.* Hawes, 80 Wis. 474; Kepernick *v.* Louk, 90 Wis. 232; Scott *v.* Holman, 117 Wis. 206.

The cases last cited held that the debtor, though insolvent, may convert non-exempt property into exempt property for the purpose of holding it against his creditors, and he will nevertheless be protected in his exemption thus acquired, if it comes fairly within the terms of the statute.

Phelps *v.* Rooney has been frequently cited as authority by the Wisconsin Court and the rule there adopted by the majority of the court has been followed, though apparently with some misgivings. See Harriman *v.* Insurance Company, 49 Wis. 71; also Casselman *v.* Packard, 16 Wis. 114; Jarvais *v.* Moe, 38 Wis. 440; Kent *v.* Lasley, 48 Wis. 257; Schoffen *v.* Landauer, 60 Wis. 334; Palmer *v.* Hawes, 80 Wis. 474.

In Casselman *v.* Packard, *supra,* the premises in question consisted of less than a quarter of an acre of land in a village, on which, besides the dwelling house in which the owner resided with his family, were various other buildings used and occupied as stores, warehouses, shops, etc., and rented by the owner to third persons. Under the Wisconsin statute the homestead exemption in a village or a city is limited to one-quarter of an acre. The owner claimed that all the buildings, together with the land, were exempt as his homestead, and the Circuit Judge took this view of the case. The judgment, however, was reversed by the unanimous decision of the Supreme Court on the ground that the buildings and land not actually used for homestead purposes could not be claimed as exempt. Chief Justice Dixon in this case wrote a separate opinion in which he pointed out that the only difference between the opinion of the majority of the court in that case and his opinion on the re-argument in Phelps *v.* Rooney was the difference between a divison of the property upon *perpendicular* and *horizontal* lines. The doctrine of Casselman *v.* Packard has subsequently been adhered to and is

the undoubted law of Wisconsin at the present time. See Schoffen *v.* Landauer, 60 Wis. 334.

The doctrine of Casselman *v.* Packard has been rejected in the following cases: Lubbock *v.* McMann, 82 Cal. 226; Kennedy *v.* Gloster, 98 Cal. 143; Hubbell *v.* Canady, 58 Ill. 425; Stevens *v.* Hollingsworth, 74 Ill. 202; P. & R. Brewing & Malting Co. *v.* Schroeder, 67 Ill. App. 560; Kelly *v.* Baker, 10 Minn. 154; *Baldwin *v.* Tillery, 62 Miss. 378; Colbert *v.* Henley, 64 Miss. 374; Clark *v.* Shannon, 1 Nev. 568; Smith *v.* Stewart, 13 Nev. 65; *Greeley *v.* Scott, 10 Fed. Cas. No. 5,746 (2 Woods, 657).

On the similar principle the Wisconsin court has uniformly held that where the homestead exemption was claimed in agricultural land, such land, in order to be exempt, must be in one lot or tract, on which the dwelling house of the debtor must be located. Bunker *v.* Locke, 15 Wis. 635; Hornby *v.* Sikes, 56 Wis. 382.

Of course in those jurisdictions where the *value* of the homestead, which can be claimed as exempt, is limited by statute, the question upon which the members of the court differed in Phelps *v.* Rooney is less important. In those jurisdictions, however, in which no limit is placed upon the value of the homestead exemption, the rule of the majority of the court in that case seems unjust. At the time the opinion was delivered Wisconsin had no law limiting the value of the homestead exemption. See in this connection, Thompson on Homesteads and Exemptions, Sec. 103, 133, 136.

Chief Justice Dixon's opinion, *supra,* is quoted with apparent approval by the learned author in the above sections. The legislature of Wisconsin in 1901 by Chap. 267 of the laws of that year limited the value of the homestead exemption to $5,000.

Phelps *v.* Rooney is cited in notes to the following cases reported in Am. Dec., Am. St. Rep., and L. R. A.

American Decisions: Poole *v.* Gerrard (6 Cal. 71), 65 Am. Dec. 485; Rhodes *v.* McCormick (4 Ia. 368), 68 Am. Dec. 669; Pryor *v.* Stone (19 Tex. 370), 70 Am. Dec. 349, 350; Platto *v.* Cady (12 Wis. 461), 78 Am.

Dec. 754; Casselman *v.* Packard (16 Wis. 114), 82 Am. Dec. 712; McDonald *v.* Badger (23 Cal. 393), 83 Am. Dec. 129; Blue *v.* Blue (38 Ill. 19), 87 Am. Dec. 280.

American State Reports: Coates *v.* Caldwell (71 Tex. 19), 10 Am. St. Rep. 729; Gallagher *v.* Smiley (28 Neb. 189), 26 Am. St. Rep. 324.

Lawyers' Reports Annotated: Cass County Bank *v.* Weber (83 Ia. 63), 12 L. R. A. 479.

Knowlton v. The Board of Supervisors of Rock County.

June Term, 1859.

(9 Wis. 410.)

Section 1, Article VIII of the Constitution of the State of Wisconsin, provides:

"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall direct."

The Charter of the City of Janesville, as amended, chapter 179, Local Laws of 1854, provided, in substance, that unplatted or agricultural lands within the corporate limits of the City of Janesville should not be taxed more than one-half as much on each dollar's valuation for city purposes as the lots and platted portions of the land within said corporate limits were taxed. Taxes having been levied upon certain lots within the corporate limits of the city at double the rate levied upon other lands therein reserved for agricultural or horticultural purposes, and the taxes upon such lots not having been paid and the lots having been sold for the nonpayment thereof, this action was brought to restrain the issuance of tax deeds upon such sales. The Circuit Judge granted an injunction restraining the issuance of the tax deeds on account of the ununiform rule of taxation which had been applied. On appeal to the Supreme Court this judgment was affirmed, Chief Justice Dixon writing the opinion for the court, and Mr. Justice Paine concurring. Mr. Justice Cole dissented. A more detailed statement of facts will be found in the opinion.

The following are the propositions of law decided:

The charter of the city of Janesville included within its limits a large quantity of farming lands; and also provided, "that in no case shall the real and personal property within the territorial limits of said city, and not included within the territorial limits of the recorded plat of the village of Janesville, or of any additions to said village, which may be used, occupied, or reserved for agricultural or horticultural purposes, be subject to an annual tax to defray the current expenses of said city, exceeding one-half of one per cent., nor for the repair and building of roads and bridges, and the support of the poor, more than one-half as much on each dollar's valuation shall be levied for such purposes on the property within such recorded plats; nor shall the same be subject to any tax other than before mentioned, for any city purpose whatever." And the clerk of the city made out the taxes according to the provisions of the charter, and the treasurer of the county sold the unoccupied lots of the plaintiff for the nonpayment of taxes so levied not as on agricultural lands, though they did not lie within the limits of the recorded plat of the village of Janesville, or any of its additions; *Held,* that the taxes so levied on the lots are void, as being in violation of Sec. 1, Art. VIII of the constitution of Wisconsin, which provides that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall direct." And the court will enjoin the making of a deed upon such a sale.

Taxes are the burdens or charges imposed by the legislative power of a state upon persons or property for public use; and the power to tax is one of the essen-

tial attributes of sovereignty, inherent in, and necessary to the existence of every government; and this power would be unlimited, except by the integrity and sense of justice of the legislature, but for constitutional restrictions.

The theory of our government is, that socially and politically, all are equal, and that special or exclusive, social or political privileges or immunities cannot be granted, and ought not to be enjoyed; and, therefore, the burdens of supporting the government should be borne equally by all the individuals composing it, in proportion to the benefits conferred. To give permanency and force, and secure its rigid observance, limitations or restrictions were introduced into the constitution of this state.

The levying of taxes by the authorities of a county, city or town, for their support, is as much an exercise of the taxing power, as when levied directly by the state for its support. The state acts by the municipal governments, and their acts in levying taxes are as much the act of the state as if the state acted by its own officers.

The constitution of this state requires, as a rule, in levying taxes, that the valuation must be uniform, and the rate uniform, or in all cases alike, or equal, operating alike upon all the taxable property throughout the territorial limits of the state, or municipality within or for which the tax is to be raised. And where the legislature prescribed a different rule, the act is a departure from the constitution, and therefore void.

The constitution has fixed one unbending, uniform rule of taxation for the state, and property cannot be classified and taxed as classed by different rules.

The provisions of the constitution that "taxes shall be levied upon such property as the legislature shall direct," does not sanction a discrimination which provides for taxing a particular kind of property for the support of government by a different rule from that by which other property is taxed; for when the kind of property is prescribed, the rule of taxation must be uniform. All kinds of property must be taxed uniformly, or be absolutely exempt.

The support of the poor is a matter of common concern, and the expense thereof must be borne by the whole corporation, and therefore, where the charter of a city provided that certain property should pay but one-half as much upon the dollar's valuation as other property in the same city, *held,* that in that respect the provision is unconstitutional and void.

Dixon, Chief Justice. Section 2, of subdivision 5, of chapter 93, of the Local Laws of 1853, entitled "an act to incorporate the city of Janesville," provides that the common council of said city "shall annually levy a tax upon all the taxable property in said city subject to taxation, not exceeding one per cent., to defray the current expenses of the city; and also an additional tax of such sum as they may deem necessary for the repair and building of roads and bridges, and for the support of the poor." Beside the recorded plat of the village of Janesville and its additions, there was, by the act, included within the corporate limits of the city, a large quantity of the adjacent farming or agricultural lands. The owners of these farming lands, conceiving themselves too greatly and unequally burthened by taxation for the support of the new city government, applied to the legislature at the

session of 1854, for a modification of the rule of taxation as prescribed in the section above quoted, when it was enacted, Sec. 5, Chap. 179, Local Laws, 1854, "that in no case shall the real and personal property within the territorial limits of said city, and not included within the territorial limits of the recorded plat of the village of Janesville, or of any additions to said village, which may be used, occupied or reserved for agricultural or horticultural purposes, be subject to an annual tax to defray the current expenses of said city, exceeding one-half of one per cent., nor for the repair and building of roads and bridges and the support of the poor, more than one-half as much on each dollar's valuation shall be levied for such purposes on the property within such recorded plats; nor shall the same be subject to any tax for any of the purposes mentioned in Sec. 3, of Chap. 5, of the act of which this is amendatory; nor shall the said farming land be subject to any tax other than before mentioned, for any purpose whatsoever." Subsequently, in the same session, this section was amended, or intended so to be, (for by mistake undoubtedly, Sec. *four* instead of Sec. *five,* is named in the amendatory act,) as to make the last sentence read, "nor shall the said farming or gardening lands be subject to any tax other than before mentioned for any *city* purpose whatever." (See chap. 286, Local Laws of 1854.) In pursuance of these provisions, the city clerk so made out the tax roll for the year 1854, that the taxes for defraying the current expenses of the city for said year were levied upon the real and personal property within the recorded plat and its additions, at the rate of one per cent. on each dollar of the assessed value, and upon the real and personal property without the plat and its additions, at the rate of one-half of one per cent. of the assessed value. Several

lots described in the complaint in this action, and of which the plaintiff is now the owner, in the village of Rockport, which lies near to the village and within the corporate limits of the city of Janesville and which the city clerk treated as an addition to the village of Janesville, apportioning to them the taxes, for city purposes, at the rate of one per cent. upon their assessed value, were returned by the treasurer of the city to the county treasurer, "delinquent," and by the latter sold to satisfy the taxes due and unpaid thereon, and certificates of sale were issued on the second Tuesday of April, 1855. In July, 1857, the defendant, *Thomas,* as clerk of the board of supervisors of the county of Rock, published, in the usual form, in a newspaper printed in said county, a notice, in which, after reciting that the said lots described in the complaint, were, among others, sold on the second Tuesday of April, 1855, for taxes, costs and charges due thereon for the year 1854, and were still unredeemed; he stated that unless the same should be redeemed from such sale on or before the tenth day of April, 1858, (being three years from the date of the several certificates of sale,) the same or such parcels thereof as should remain unredeemed at said last mentioned date, would be forfeited and conveyed to the purchaser thereof. To perpetually restrain the execution and delivery of conveyances pursuant to such sales and notice, and to have the taxes and sales declared illegal and void, this action was commenced. Several questions are raised by the complaint as to the manner in which the lots in question were set down in the assessment roll, and the mode in which they were returned, and also as to whether the village of Rockport is to be considered as an addition to the village of Janesville, within the provisions of the statute, the same having

in fact been laid out and platted before the village of Janesville was laid out and platted, which, under the view we have taken of the case, it will not become necessary for us to consider. By far the most important question involved in the case is, whether the foregoing provisions of the charter of the city of Janesville are or are not in conflict with Sec. 1, of art. VIII, of the constitution, which is in the following words: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall direct." It was to this point that arguments of counsel were mostly directed, and for reasons existing outside of the present controversy, we were earnestly solicited by both sides to determine the case upon it. In view of these reasons, and because the question is fairly raised, we feel disposed to yield to the wishes of counsel, and shall therefore make it the only point of investigation. For this purpose the foregoing statement sufficiently embodies the facts alleged in the complaint. The complaint was demurred to by the defendants, for the reason that it did not state facts sufficient to constitute a cause of action. The circuit judge overruled the demurrer, and from his decision the defendants appealed. It has frequently been adjudged by this court that courts of equity in this state will, by way of preventing the creation upon the record of a cloud upon the owner's title, interfere by injunction to restrain the execution and delivery of a deed of lands sold for taxes, which have been illegally or improperly assessed.

It will be seen that these statutes, which were carried into effect in the assessment and levying of the taxes for the year 1854, provide for two distinct and unequal rates of taxation upon the same kinds of property for the support of the city government, the one an *ad valorem* tax of

one per cent., upon the real and personal property within the recorded plat and its additions, the other an *ad valorem* tax of one-half of one per cent., upon the real and personal property without the plat and its additions. The statutory requirements as to the levying and collection of taxes for the building and repairing of roads and bridges and the support of the poor, were also complied with.

But since there is some difference of opinion and conflict of authority, as to whether the word "taxation," in its ordinary sense, and as used in written constitutions, does or does not include assessments made for the purpose of building, repairing and improving roads, bridges and streets; and if such be the sense in which it is used in our constitution, whether or not it is modified or controlled by Sec. 3, art. XI, of the same instrument; while all agree that it does extend to taxes levied for the purpose of revenue, whether such revenue be applied to the support of town, city, county or state government; and that in this respect it is not affected by Sec. 3, of art. XI, we propose to confine ourselves to that branch of the present case which involves an inquiry into the power of the legislature to provide different rates of taxation upon property within the same municipal corporation for revenue purposes merely, leaving the other branch of the case to be settled in some one of the numerous cases in which it has been raised and so fully and ably discussed, at this present term.

Taxes are defined to be rates or sums of money assessed on the personal property of citizens by government, for the use of the nation or state; or, as the government sometimes exacts from individuals, services as well as money, a more enlarged and correct definition would be, that they are burdens or charges imposed by the legislative power of

a state upon persons or property for public uses. Taxation is the *act* of laying a tax, or imposing these burdens or charges upon persons or property within the state. It is the process or means by which the taxing power is exercised. The power of taxation is one of the essential attributes of sovereignty, and is inherent in and necessary to the existence of every government. In republics it is vested in the legislature, and in the absence of any constitutional restrictions, may be exercised by them, both as to objects and modes, to any extent which they may deem proper. It is then a matter of legislative discretion with which the courts can seldom or never interfere. In such cases the only guaranties against an abuse of this discretion, by harsh or unjust taxation, consists in the integrity and sense of justice of the legislature, their "responsibility to the people," and the power of the people, through the frequent recurrence of elections for the choice of new members to correct any evils which may have crept in. Such we believe has been the case with nearly all and is still with a majority of the states comprising the union. In several, however, and among others, in our own, the people have seen fit, by constitutional provisions, to limit and direct this power, and thus to guard against its abuse. The theory of our government is, that socially and politically all are equal, and that special or exclusive, social or political privileges or immunities, cannot be granted, and ought not to be enjoyed. In consonance with this theory, that of taxation, whether as the subject of legislative action, judicial inquiry, or constitutional law, has always been, that the burdens of supporting the government should be borne equally by all the individuals composing it, in proportion to the benefits conferred, and that the tax payer receives for the money exacted, a just compen-

sation by the protection afforded his person and property by the proper application of the tax. This principle of justice and equality which requires that each person should contribute towards the public expenses his proportionate share, according to the advantages which he receives, lies at the foundation of our political system; and, in our opinion, it was to give to it a greater permanency and force, and to secure its more rigid observance, that the section above quoted was introduced into the constitution. We have already said that all are agreed that the levying of taxes by the properly constituted authorities of a county, city or town government, for their support, is as much an exercise of the taxing power as when they are levied directly by the state for its support. There is no difference on principle or authority. It is all taxation for the purpose of revenue or the support of the government. The government of the state cannot be carried on except through the medium or agency of these municipal corporations or local sovereignties, and their acts in this behalf are as much the acts of the state, as if it directly performed them by means of its own officers.

We are of opinion that the rule of uniformity prescribed by the constitution, applies as directly to the question we are now considering, as it would were it a case where the legislature, in consideration of some supposed advantage which one portion of the state had over another, had levied upon such portion an *ad valorem* tax of double the amount which was levied upon the residue. For as each of these municipalities or local subdivisions of government are created, because it is believed that the interests and welfare of all the persons embraced within its territorial limits, will be thereby mutually and equally promoted, it follows that the burdens or charges for its

support or revenue should be equally borne by all; and as the rights and interests of all the owners of property are alike benefited and protected by its operation, it also follows that when property is the object of taxation, it should all alike, in proportion to its value, contribute towards paying the expense of such benefits and protection. These are plain and obvious propositions of equity and justice, sustained as we believe by the very letter and spirit of the constitution. Its mandate, it is true, is very brief, but long enough for all practical purposes; long enough to embrace within it clearly and concisely the doctrine which the framers intended to establish, viz.: that of equality. "The rule of taxation shall be uniform," that is to say, the course or mode of proceeding in levying or laying taxes shall be uniform; it shall in all cases be alike. The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform, the rate must be uniform. Thus uniformity in such proceeding becomes equality; and there can be no uniform rule which is not at the same time an equal rule, operating alike upon all the taxable property throughout the territorial limits of the state, municipality or local subdivision of the government, within and for which the tax is to be raised. The legislature, in accordance with sound principle and the spirit of the constitution, have provided that property shall be taxed according to its value; but in the instances before us, have departed from them by providing that the property, real and personal, in one portion of a municipal corporation, throughout which it is supposed to be alike benefited, shall bear according to its value a larger amount of the public

charges for its support than the property in the other portion. It may be as well claimed by counsel that the legislature acted unwisely or perhaps unjustly in including within the territorial limits of the city so much farming or agricultural land, but that is not a matter for judicial correction. Neither is it a matter for them to correct by discrimination in taxation, when the constitution has declared that there shall be no discrimination. The remedy lies in a repeal or an amendment of the charter.

It was contended in argument that as those provisions fixed one uniform rate without the recorded plats and another within them, thus taxing all the property without alike, and all within alike, they do not infringe the constitution. In other words, that, for the purpose of taxation, the legislature have the right arbitrarily to divide up and classify the property of the citizens, and having done so, they do not violate the constitutional rule of uniformity, provided all the property within a given class is rated alike.

The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by legislative discretion, whilst the constitution establishes but one fixed, unbending uniform rule upon the subject. It is believed that if the legislature can, by classification thus arbitrarily and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without, a recorded plat, they can also, by the same means, discriminate between lands used for one purpose and those used for another; such as lands used for growing wheat and those used for growing corn, or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by the

description, such as odd numbered lots and blocks and even numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use or description, or, as in the present case, by its *location,* and thus the *rules* of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions and locations of real and personal property. We do not see why the system may not be carried further and the classification be made by the character, trade, profession or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature, "you shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class and against another, as much as you please, provided you serve all of the favored or unfavored classes alike," thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust, that it will not find an apologist anywhere, at least outside of those who are the recipients of its favors. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it.

On the other hand, we are of the opinion that these are the very mischiefs which they intended to guard against

and prevent. Single individuals have seldom acquired such an influence over the legislative mind as to secure to themselves the advantages arising from such legislation: There was little danger to be apprehended from that source; but the combined influence and efforts of corporations and classes had. Such evils had been sorely felt in many of the older states; it was against them and all other unjust discriminations, that the people intended to provide. It cannot change the principle, nor is it a source of consolation to the unfortunate individuals or classes whose money is thus extorted from them, that it is distributed by government among many, instead of being applied to the benefit of a single person or corporation. It is also contended that under the last clause of the section, "and taxes shall be levied upon such property as the legislature shall prescribe," this discrimination is sanctioned; that by it the legislature have the right, in prescribing the property which shall bear the burdens of taxation, to specify certain kinds or species of property, and to entirely omit or exempt others; and that if they have the right to wholly exempt, they can do so partially, by saying that it shall pay a certain portion of the taxes, or that it shall be taxed at a certain rate lower than other taxable property, or that it shall pay a certain sum in lieu of all other taxation. Without stopping to consider whether this clause does or does not confer upon the legislature a power of general or specific discrimination as to what property shall be taxed, as is contended by some that it does not, but conceding that it does, and that the legislature may, by omitting to prescribe, exempt certain property from taxation, and that its effect is the same as if it contained a distinct grant of power to exempt, still we think this argument must fail; for the very moment that the legislature say

that a specific article or kind of property shall be taxed, or shall contribute at all towards the expense of government, from that very moment the first clause of the section takes effect, and it must be taxed by the uniform rule. The legislature can only "prescribe," and when they have done that, the first clause of the section governs the residue of the proceeding. There cannot be any medium ground between absolute exemption and uniform taxation.

Upon the argument we were referred to, and much stress was laid by the defendant's counsel as an authority sustaining his positions, upon the decisions of this court in the case of The Milwaukee and Mississippi Railroad Co. *v.* The Board of Supervisors of the County of Waukesha and others, made at the June term, 1855. Upon examination of the records and files of the court in that case, we can find neither head note nor opinion. As a matter of fact, we are told that none were ever written. We are therefore without any authoritative information as to the points there determined, or the views taken by the court; and under such circumstances, we can hardly say that we should not consider the questions there involved as still open. However, from the best information we have been able to obtain, we are relieved from any embarrassment growing out of the doctrines which it was claimed by counsel were established by it; as we learn that it was determined by the court that no question of the exercise of the taxing power was involved in it. The written opinion of the circuit judge in the same case will be found reported in volume two, page 616, of the American Law Register. The majority of the court have with great confidence come to the conclusion that so much of Sec. 5, of chap. 179, of the Local Laws of 1854, as provides that the real and personal property within the ter-

ritorial limits of the city of Janesville, and not included within the recorded plat of the village of Janesville, or of any of the additions to said village, which may be used, occupied or reserved for agricultural or horticultural purposes, shall in no case be subject to an annual tax to defray the current expenses of said city, exceeding one half of one per cent., while by a previously existing law, the residue of the real and personal property within said city is liable to a tax of one per cent., for the same purpose, is unconstitutional and void; and that, therefore, the judgment of the circuit court overruling the demurrer to the complaint in this action must be affirmed. Inasmuch as the support of the poor is a matter of common concern, the expense of which is to be borne by the whole corporation, we may add that in that respect also the section is unconstitutional and void.

Judgment affirmed.

NOTE.

Knowlton *v.* Rock County, *supra,* has been cited with approval in the Wisconsin Supreme Court, as follows: Weeks *v.* City of Milwaukee, 10 Wis. 262; Lumsden *v.* Cross, 10 Wis. 283; Atty. Gen. *v.* Plankroad Co., 11 Wis. 37, 38, 39, 42, 46, 48; Reedsburg Bank *v.* Hastings 12 Wis. 48; Slauson *v.* City of Racine, 13 Wis. 404, 405; Miltmore *v.* Supvs. of Rock County, 15 Wis. 10, 11; Kneeland *v.* City of Milwaukee, 15 Wis. 462, 466, 467; Knowlton *v.* Supvs. of Rock County, 15 Wis. 601; Dean v. Gleason, 16 Wis. 10; Tallman *v.* City of Janesville, 17 Wis. 74; City of Janesville *v.* Markoe, 18 Wis. 356; Curtis's Adm'r *v.* Whipple, 24 Wis. 355; Hale *v.* City of Kenosha, 29 Wis. 603, 605; Whittaker *v.* City of Janesville, 33 Wis. 89; Atty. Gen. *v.* City of Eau Claire, 37 Wis. 438; Marsh *v.* Supvs. of Clark County, 42 Wis. 511, 513; Flanders *v.* Town of Merrimack, 48 Wis. 571; Dalrymple *v.* Milwaukee, 53 Wis. 184; Richland County *v.*

Village of Richland Center, 59 Wis. 596; Bradley *v.* Lincoln County, 60 Wis. 75; Abbott *v.* McFetridge, 64 Wis. 141; G. B. & M. Co. *v.* Outagamie County, 76 Wis. 589; Ellis *v.* Thorne, 112 Wis. 86, 55 L. R. A. 958; C. & N. W. Ry. *v.* State, 128 Wis. 553, 108 N. W. 567, 569, 575; State *v.* C. & N. W. Ry., 128 Wis. 449, 108 N. W. 604, 617, 622, 623; Nunnemacher *v.* State (Inheritance tax), 129 Wis. ——, 108 N. W. 634.

It was commented upon disapprovingly by the same court in: Wisconsin Cent. Ry. *v.* Taylor County, 52 Wis. 68, 69, 71, 73, 75, 1 Am. & Eng. Ry. Cas. 549.

And by the Federal Supreme Court in Foster *v.* Pryor, 189 U. S. 334.

It has been cited with approval outside of the Wisconsin Supreme Court, as follows: Moog *v.* Randolph, 77 Ala. 603; Cole *v.* White County, 32 Ark. 51; Williamson *v.* Mimms, 49 Ark. 350; Palmes *v.* L. & N. Ry., 19 Fla. 267; Friesleben *v.* Shallcross (Del.), 9 Houst. 98, 8 L. R. A. 353; Verdery *v.* Village of Summerville, 82 Ga. 141; State ex rel. Lewis *v.* Smith, 158 Ind. 543, 63 L. R. A. 128; Commrs. of Ottawa Co. *v.* Nelson, 19 Kan. 238, 27 Am. R. 104; Cook *v.* Auditor Gen., 79 Mich. 110; City of Kansas *v.* Cook, 69 Mo. 128; State *v.* H. & St. J. Ry., 75 Mo. 212; Hamilton *v.* Rosenblatt, 8 Mo. Ap. 240; Johnson *v.* Hahn, 4 Neb. 149; Redmond *v.* Town of Tarboro, 168 N. Car. 127, 7 L. R. A. 540; Tucker *v.* Kenniston, 47 N. H. 271, 93 Am. Dec. 431; State *v.* Express Co., 60 N. H. 243; Vreeland *v.* Jersey City, 43 N. J. L. 138; State Board of Assessors *v.* Central Ry., 48 N. J. L. 349; San Antonio *v.* Jones, 28 Tex. 31; Gilman *v.* City of Sheboygan (U. S.) 2 Black, 515.

Knowlton *v.* Rock County, *supra,* has been cited in notes to the following cases reported in L. R. A., Am. Dec., Am. St. Rep., and Fed. Rep., including valuable collections of authorities.

Lawyers' Reports Annotated: Daly *v.* Morgan (69 Md. 460), 1 L. R. A. 758; Chaddock *v.* Day (75 Mich. 527), 4 L. R. A. 809; Mayor of Savannah *v.* Weed (87 Ga. 513), 8 L. R. A. 271; Miller *v.* Cook (135 Ill. 190), 10 L. R.

A. 294; Cook *v.* Portland (20 Ore. 580), 13 L. R. A. 533; Odlin *v.* Woodruff (31 Fla. 160), 22 L. R. A. 705; Briggs *v.* Russellville (99 Ky. 515), 34 L. R. A. 193; San Diego *v.* Irrigation Dist. (108 Cal. 189), 35 L. R. A. 35; State Board, etc., *v.* People ex rel. Goggin (191 Ill. 529), 58 L. R. A. 608; Bacon *v.* Board of State Tax Comrs. (126 Mich. 22), 60 L. R. A. 361, 362.

American Decisions: Holland *v.* Mayor, etc., of Baltimore (11 Md. 186), 69 Am. Dec. 201.

American State Reports: New Orleans *v.* Tel. Co. (40 La. Ann. 41), 8 Am. St. Rep. 506–7, 510.

Federal Reports: Railroad Tax Cases, 13 Fed. 788; People & Counties of Cal. *v.* Railroads, 18 Fed. 449.

It is useless to add to the literature that has grown up around this case by any extended comment here. All that can profitably be said on the subject, and perhaps more, will be found in the cases cited *supra.* Much of the confusion regarding it has arisen from the failure of courts to distinguish between *a direct tax on property,* which is governed by the constitutional rule of uniformity, and *license fees or privilege taxes* and other exactions, which, while they result in producing revenue, are not a tax on property within the constitutional provision considered in the Knowlton case. Eminent judges, including Mr. Justice Cassoday, of the Wisconsin Supreme Court, now Chief Justice of that court, have failed to make this distinction, and because of such failure have questioned the correctness of the decision in the Knowlton case. (See Wisconsin &c. Ry. *v.* Taylor County, 52 Wis. 37, *supra.*) The Supreme Court of Wisconsin, however, in the late cases cited *supra,* in 108 N. W., and 128 Wis., made perhaps the most elaborate investigation of the whole subject to be found in the books, and demonstrated that the decision in the Knowlton case is, and since it was made has been, the law of the State, and that it correctly interprets the constitutional provision discussed in it.

Von Baumbach v. Bade, et al.

June Term, 1859.

(9 Wis. 559.)

The chief interest in this opinion lies in its discussion of the extent to which existing remedies may be changed by legislative enactments.

The facts sufficiently appear from the opinion.

The propositions of law decided in this case are stated here substantially in the language of the Reporter of the Court, and are as follows:

The act of May 15, 1858, which provided that defendants in actions to foreclose mortgages which were executed prior to its passage, should have six months' time in which to answer the complaint, and that the mortgaged premises should not be sold upon the judgments, except upon six months' previous notice of the time and place, does not violate the provisions of the constitution of the United States, and of the constitution of Wisconsin, which declares that no laws shall be passed impairing the obligations of contracts; nor is it in conflict with Sec. 9, of Art. I, of the constitution of Wisconsin, which declares that "every person is entitled to a certain remedy in the laws, for all the injuries or wrongs, which he may receive in his person, property or character."

Although Sec. 9, Art. I, of the constitution of the state of Wisconsin, declares that "every person is entitled to a remedy in the laws for all injuries or wrongs,

which he may receive in his person, property or character;" and, although the remedy afforded by existing laws enters into and forms a part of the obligation of contracts, yet it is in the power of the legislature to amend, change or modify the laws governing proceedings in courts, both as to past and future contracts, if they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.

The legislature may alter or vary existing remedies provided that in so doing their nature and extent is not so changed as materially to impair the rights and interests of the parties.

The legislature may enact a statute of limitation by which the remedy upon existing contracts, if not prosecuted within a specified time, may be entirely defeated. So it may pass acts abolishing imprisonment for debts previously contracted, recording acts by which the older grant of real estate otherwise valid, is postponed and rendered void, as to a younger one, and other acts of a similar nature; and yet, such acts will be sustained as constitutional and binding.

So far as the constitution of the United States, or Wisconsin, reaches or affects the alterations of the remedy on contracts, such alterations are matters of sound discretion with the legislature. It has the power within the limits of the constitution, to control the remedy and to determine whether any change or modification of it is necessary, and what change, and whether the parties to the contract are left with a substantial remedy according to law, as it existed before the change, subject however to a final determination

by the courts of the constitutionality of such modifications or changes.

By the act of the 15th of May, 1858, the remedy of mortgagees as it previously existed, is substantially continued. No new conditions are engrafted on the remedy, the form and mode of proceedings in the action, the nature and extent of the judgment, and the rights under it are the same as before, except only in the matter of the time which is required for these purposes; and such a change does not infringe or materially impair the obligation of the contract.

The legislature may regulate at pleasure the modes of proceeding in the courts in relation to past contracts as well as future ones. It may limit or extend the time for answering, or taking any other step in an action in the courts. The only limit or qualification to this power is, that the legislature must confine their action within the bounds of reason and justice, and not so prolong the time in which legal proceedings are to be had, as to render them futile and useless in the hands of the creditor, or to seriously impair his rights and securities.

Although changes in remedies are in general unwise and unjust, yet if for any cause the public good demands a relaxation of them, it becomes the duty of the legislature, by proper and reasonable modifications, so to change them as to meet the wants of the community and afford the relief which the public good demands.

In determining whether such changes are reasonable and just, and demanded by the exigencies of the times, courts must look behind the statute and take notice of the causes which led to its enactment.

DIXON, Chief Justice.

This case comes before the court upon an appeal from the judgment of the circuit court of Milwaukee county, rendered on the 10th day of July, 1858.

The facts, as they appear from the record, are these: On the 2d day of June, 1857, the defendant, Bade, executed and delivered to the plaintiff a bond, conditioned for the payment of six hundred and fifty dollars on the first day of March, 1858, with interest at the rate of twelve per cent. per annum; and to secure the payment of the sum mentioned in the bond, with the interest, did, at the same time, together with his wife, execute and deliver to the plaintiff a mortgage conditioned for the payment of said sum of money and interest, according to the condition of the bond, by which he mortgaged to the plaintiff in fee, certain lands, situated in the city of Milwaukee. The mortgage also contained the usual covenant or agreement, that in case of a failure to pay the principal sum or any interest which might accrue thereon, or any part thereof, or to pay the taxes, etc.; that the plaintiff might sell the same at public auction, pursuant to the provisions of the statute authorizing the foreclosure of mortgages by advertisement.

Neither the principal nor interest having been paid, the plaintiff, on the 22d day of May, 1858, by the service of summons on the defendant, commenced his action to foreclose the mortgage. After the making of the mortgage and before the commencement of the action, the legislature passed an act, chapter 113, Laws of 1858, approved May 15th, and published May 18th, 1858, now repealed, the first section of which provided that, "in all actions and proceedings at law thereafter commenced under that portion of chapter 34 of the revised statutes of 1849, entitled,

'of the powers and proceedings of courts in chancery on bills for the foreclosure or satisfaction of mortgages,' the defendant or defendants in such actions or proceedings should have six months' time to answer the bill of complaint filed therein after service of summons or publication of notice, as then required by law; and that no default should be entered in any such action, until after the expiration of such time, any law to the contrary notwithstanding." The second section provided that "whenever in such action or proceeding, judgment should be entered or an order made by the court for the sale of mortgaged premises, it should before (be for) the sale of said premises, upon six months' notice of such sale, as thereinafter provided; and that in all cases where before the passage of the act, judgment had been rendered in any of the courts of this state, or in the district court of the United States for the district of Wisconsin, in an action to foreclose a mortgage or mortgages, or where an order or decree had been made by any such court, for the sale of mortgaged premises, the mortgaged premises should be sold only upon six months' notice given of the time and place of such sale, which notice should be given in the manner provided in the act for giving notices of the sale of mortgaged premises."

By the third section it was made the duty of the sheriff, deputy sheriff, or other officer appointed by the court, to make sale of the premises immediately after receiving a copy of the order for the sale of mortgaged premises, upon which such proceedings had been instituted, to publish, or cause to be published, notice of the sale of such premises, (unless otherwise ordered by the court,) describing the same therein, as then required by law, in some newspaper of general circulation in the county in which said

premises were situated, at least once in each month, for the period of six months before sale of the same; and if no newspaper shall be printed or published in said county, then the same should be published in some newspaper in an adjoining county, for the time aforesaid. It was further declared by said section, that no sale of mortgaged premises, under foreclosure by action, should be valid, unless made in accordance with the provisions of said act.

On the 10th day of June following, the defendant, Bade, by his attorneys, gave notice of his appearance in the action. On the 25th he was served with a notice that on the 3d day of July, the plaintiff would apply to the court for judgment. On the 3d day of July an order of reference was made by the court to a referee, to ascertain and report the amount due to the plaintiff on the bond and mortgage. The referee made his report, which was confirmed, and on the 10th day of July the usual judgment of foreclosure, and for the sale of the mortgaged premises was made, except that the sheriff was directed to give public notice of the time and place of sale by advertisement in a newspaper published in the city and county of Milwaukee once in each week for six successive weeks, and twice a week for the last three weeks of said six. From this judgment the defendant appealed, and insists that it is erroneous and ought to be reversed: 1st. Because judgment by default was entered against him before the expiration of the six months, after service upon him of the summons, within which he claimed the right to answer the complaint; and 2d. Because the mortgaged premises were ordered to be sold, upon six weeks' instead of six months' notice of the time and place of sale.

By the law, as it stood prior to the passage of the act above referred to, defendants in foreclosure, as in all other

actions, had but twenty days after service upon them of the summons, in the manner prescribed by law, in which to answer the complaint, and if no answer was made within the time, judgment by default might have been taken. There was no statutory provision fixing the time or manner of sale in such cases. The practice (regulated by rule of court in analogy to sales of real estate on execution), was to sell on six weeks' previous notice of the time and place of sales, unless the court otherwise ordered. Such was the law governing at the time of answering, and the entry of judgment by default; and such the practice of the courts, as to notice and time of sale, at the time the bond and mortgage in question were executed and delivered.

On the part of the plaintiff it is contended that the circuit court properly disregarded the provisions of the act, and proceeded to render judgment and direct a sale of the mortgaged premises as if it had not been passed. His counsel insists that the act is unconstitutional and void, because its provisions in relation to existing contracts violate the first subdivision of Sec. 10, Art. I, of the constitution of the United States; and the 12th section of the first article of the constitution of this state, which prohibits the passing of any law impairing the obligation of contract. The determination of the case depends upon the correctness of the position here assumed by the counsel for the plaintiff. The circuit court sustained them in it. If they are right the judgment must be affirmed, if wrong it must be reversed. This is not the first case in which this question has been raised and discussed at the bar of this court. It has during the present term, been argued in several cases, but as they were all actions pending at the time of the passage of the act, and as we felt

compelled to hold, that the act did not apply to such actions, it became unnecessary and improper for us to consider it. Owing to the vast interests affected by the act, the variety of opinions entertained by different members of the profession in relation to its validity, the conflict of decisions upon it in the several circuit courts, and the degree of dissatisfaction and opposition with which it was met in various quarters, the question becomes one of much importance.

The question, whether contracts derive their obligation solely from the acts and stipulations of the parties independent of the remedy given by law at the time they are made, to enforce them, or whether the obligation consists in part in the duty of performance, as it is then recognized and enforced by the laws, has been the source of much perplexing debate and doubt, and in its solution "all the acumen which controversy can give to the human mind has been employed." It is not however either a new or an unsettled question. If it were, or if we were permitted to determine it with reference alone to the provisions of the constitution of this state, as would have been had Sec. 9, of Art. I, been omitted, then, however much I might be inclined to yield to the powerful logic of Chief Justice Marshall in delivering the opinion of the minority of the court in the case of Ogden *v.* Saunders, 12 Wheaton, 322; and the forcible reasoning of Mr. Justice McLean dissenting, in the case of Bronson *v.* Kinzie, 1 How. 311, and come with them to the conclusion that the former position is correct, and that the legislatures may vary, or repeal remedial laws at their pleasure; yet, as Sec. 9, of Art. I, of the constitution of this state declares that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person,

property or character;" and as it has, with reference to the constitution of the United States, been authoritatively determined by the supreme court in the case last above cited, and in the subsequent case of McCracken *v.* Hayward, 2 How. 608, that the remedy afforded by the existing laws, enters into and forms a part of the obligation of the contracts, I feel bound in the decision of the question, to be governed by the principles there established, and to treat it with reference to them. The doctrines there established are, so far as I can learn, the settled doctrines of all the states with reference to the same provisions in their own and the federal constitutions. See Morse *v.* Gould, 1 Kernan, 281, and cases there cited.

The construction which has been thus put upon that clause of the constitution of the United States, which prohibits the passage of laws impairing the obligation of contracts, makes it equivalent, in its effect, to the section of the constitution of this state to which I have last referred; and hence the rules which have been established in reference to the former, may be deemed proper guides for our action with respect to the latter. I shall, therefore, whilst acknowledging the binding force of the latter, as the paramount law of the state, discuss the question with reference to the former provision alone, and the adjudications which have been made under it.

It being determined that the remedy, or laws for the enforcement of a contract existing at the time it is made, enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change or amendment of such remedy, or laws which in any manner delayed or rendered the enforcement of the contract less complete and effectual, would be unconstitutional and void. But such is not the case. All the authorities agree that it

is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.

In the principal case of Bronson *v.* Kinzie, *supra,* the court says: "Undoubtedly a state may regulate, at pleasure, the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it think proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence or well being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy, may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the constitution."

In accordance with the principles here laid down, it has been held that the legislature may enact a statute of limitation, by which the remedy upon existing contracts, if not prosecuted within a specified time, may be entirely defeated or cut off; that laws relieving debtors from imprisonment for debts previously contracted, and recording acts by which the older grant of real estate, otherwise valid, is postponed and rendered inoperative and void, as to the younger, if the prior conveyance is not recorded within a limited time, are constitutional and valid. Other laws of a similar nature might be named.

The result of the cases seems to be that the legislature may alter or vary existing remedies as it pleases, provided that in so doing their nature and extent is not so changed as *materially* to impair the rights and interests of the creditors. Practically this rule may seem vague and unsatisfactory, but it is the most certain *general* one of which the nature of the subject admits. The difficulty of applying its doctrines to particular cases, and of distinguishing between what are legitimate changes of the remedy, and those changes which, in the form of remedy, impair the right, has often suggested itself to the mind of courts when dealing with it. No such difficulty is experienced with regard to that kind of legislation by which the legislature, by attempting to change the terms or conditions of the contract itself, would relieve the parties from the performance of something which they had agreed to do, or compel them to do something which their contract did not require. So far, then, as the constitution of the United States reaches or affects alterations of the remedy, such alterations are, *first,* matters of sound discretion with the legislature, and, *secondly,* with the courts. The legislature having power within the limits above stated, to control,

at their pleasure, the remedy, are, in the first instance, to determine for themselves whether any change or modification of remedy is necessary, and if so, what change, and whether parties to contracts are left with a substantial remedy, according to the laws as they existed before such change, subject to a revision in the last particular by the courts.

In disposing of such a question, the greatest safety is in keeping strictly within the line of established precedents; and yet, as remedies are liable to be, and are varied in such a great variety of ways, but little light can be expected from former decisions.

In the case of Bronson *v.* Kinzie, laws of the state of Illinois, passed subsequently to the execution of a mortgage, which declared that the equitable estate of a mortgagor should not be extinguished for twelve months after a sale, under a decree in chancery, and which prevented any sale unless two-thirds of the amount at which the property had been valued by appraisers, should be bid therefor, were held to be unconstitutional and void. While the judgment obtained in a civil action may, for some purposes, be considered a part of the remedy, it is not so for all; and the court say that the law did not act on the remedy merely, but upon the contract itself, by engrafting upon it new conditions, unjust and injurious to the mortgagee; that it declared, after the mortgaged premises were sold under the decree of a court of chancery, the purpose and object of which, according to the laws as they stood at the time the mortgage was executed, was to cut off the equity of redemption of the mortgagor, and those claiming under him, subsequent to the mortgage, that the equitable rights of the mortgagor and judgment creditors should not be extinguished, but should continue as to the mort-

gagor twelve, and as to creditors, fifteen months after the sale; that it created in, and gave to the mortgagor and creditors, *new estates,* which, before its passage had no existence.

As to the prohibition to sell, unless two-thirds of the value of the mortgaged premises, as fixed by appraisers, was bid, they say that though it acts apparently upon the remedy, and not directly upon the contract, yet its effect was to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. The superadded condition that no sale should be made unless the sum specified was bid, was a denial altogether of the right to sell on cases where bids to that amount could not be obtained, and thus the obligation of the contract which could only be enforced by a sale of the premises, might be done away with and destroyed entirely.

The case of McCracken *v.* Hayward, arose under the same statute laws of Illinois, and involved the same question last mentioned, except that it arose upon the sale of real estate upon an execution at law; the provisions of the statute as to valuation and bidding, having been applied as well to sales of real estate on execution, as to sales under decrees in chancery. The court arrives at the same conclusion in this, as in the former case, and by a like process of reasoning.

In the late case of Curran *v.* State of Arkansas, 15 How. 304, the doctrine that the remedy forms, in part, the obligation of the contract, is distinctly repeated and reaffirmed. Mr. Justice Curtis, in delivering the opinion of the court says: "But it by no means follows, because a law affects only the remedy, that it does not impair the

obligation of the contract. The obligation of a contract, in the sense in which those words are used in the constitution, is that duty of performing it, which is recognized and enforced by the laws. And if the law is so changed that the means of enforcing this duty are materially impaired, the obligation of the contract no longer remains the same."

In this case it was held that several acts of the legislature of the state of Arkansas, by which they withdrew from the Bank of the State of Arkansas, of which the state was sole stockholder, and which had become insolvent, all its assets, both real and personal, and appropriated them to the use of the state, were, as against the creditors of this bank, unconstitutional and void, for the reason that they entirely defeated the remedy, by leaving nothing out of which the debts could be satisfied. The learned judge, after adverting to the case of McCracken *v.* Hayward, says: "The law now in question certainly presents a far more serious obstruction, for it withdraws the real property of the bank altogether from the reach of legal process, provides no substituted remedy, and leaves the creditor, as was truly said by the supreme court of Arkansas, in its opinion in this case, 'in the condition in which his rights live but in grace, and his remedies in entreaty only.' "

These are all the decisions of the supreme court of the United States which have any direct bearing upon the question now before us. Does it fall within either, or the principles laid down in them? I think not. It seems to me that, giving them all the force of authority, the legislation here complained of must be sustained. By it the remedy of the mortgagee, as it previously existed, is in all its parts *substantially* continued. No new conditions are engrafted. The form and mode of proceeding in his ac-

tion, the nature and extent of his judgment, and of his right under it remain the very same. It can be carried into as full and complete execution as at any former period. No clogs or impediments are thrown in the way, either of obtaining or finally executing the judgment, except in the matter of the time which is required for those purposes.

Is the time required by law for its accomplishment, so much of the essence of every legal remedy, that it cannot be changed or extended by the legislature? If so, then the legislature is shorn of a large share of its power to regulate and control remedies. And if so, then, I do not see how "a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future." The power to limit or extend the time for answering, or within which any other step in an action shall be taken, is, and must be conceded. It has been oftener exercised and less questioned than any branch of legislative power touching remedies. The only limit or qualification to its exercise is, that the legislature shall confine their action within the bounds of reason and justice, and that they shall not so prolong the time within which legal proceedings are to be had, as to render them futile and useless in the hands of the creditor, or seriously impair his rights or securities. Within these limits the legislature may safely exercise this power in such manner as they may deem most beneficial to the policy and internal economy of the state, and the interests of all its citizens.

Although such changes are, in general, exceedingly unwise and unjust, yet if from sudden and unlooked for reverses or misfortune, or any other cause the existing remedies become so stringent in all or a particular class of ac-

tions, that great and extensive sacrifices of property will ensue, without benefit to the creditor, or relief to the debtor, a relaxation of the remedies becomes a positive duty which the state owes to its citizens. The general welfare of the community is committed to its care and keeping, and on fundamental principles of justice, it is bound by reasonable regulations to promote and protect it. In passing upon questions like the present, courts must look behind the statute itself, and take notice of the causes which led to its enactment, for otherwise they would be unable to determine whether its regulations are reasonable or not, or were demanded by the state of the times or the financial situation of the country. By so doing in the present instance, I think it can be clearly demonstrated that the passage of the laws before us, was an exercise of sound discretion on the part of the legislature. But independently of these, or like considerations, and comparing the remedy as it existed before the passage of the law, with it as it was afterwards, I cannot say that the delay occasioned by it is so great, or so unreasonable, or that it so obstructs or embarrasses proceedings for foreclosure on the part of the mortgagees, as to make it, under any circumstances, unconstitutional and void. A complete and substantial remedy was left them, according to the course of justice, as it was administered before its passage, the only difference being that it was less expeditious, but not so much so as materially to affect or diminish their rights. All must admit, I think, that its unconstitutionality is doubtful, and in such cases it is a well settled rule of courts to resolve doubts in favor of the laws.

I am of opinion, therefore, that the judgment of the circuit court should be reversed, and the cause remanded for further proceedings.

NOTE.

The proposition that the remedy provided by law for enforcing a contract enters into and forms a part of the obligation of the contract, which this case correctly assumes to be the settled law (Ogden *v.* Saunders, 12 Wheaton 213; Bronson *v.* Kinzie, 1 How. 311), conducted the court to the perplexing inquiry, why, if such was the law, any impairment or indeed any change in the remedy did not amount to impairing the obligation of the contract within the prohibition of the Federal Constitution. It is this question which Chief Justice Dixon answered in his opinion in Von Baumbach *v.* Bade, *supra.* This case has subsequently been cited with approval by the Wisconsin Court as follows: Ogden *v.* Glidden, 9 Wis. 140; Starkweather *v.* Hawes, 10 Wis. 125; Robinson *v.* Howe, 13 Wis. 344; Oatman *v.* Bond, 15 Wis. 22; Knox *v.* Hundhausen, 23 Wis. 511; Knox *v.* Hundhausen, 24 Wis. 198; Baker *v.* Supervisors of Columbia County, 39 Wis. 448; Northwestern Mut. Life Ins. Co. *v.* Neeves, 46 Wis. 149; Plum and another *v.* City of Fond du Lac, 51 Wis. 396; Guianella *v.* Bigelow, 96 Wis. 198; Savings Bank *v.* Schrank, 100 Wis. 480; P. L. & C. Works *v.* U. O. & Co., 100 Wis. 496; Blonde *v.* Lumber Co., 106 Wis. 542; Oshkosh Water Works Co. *v.* City, 109 Wis. 213.

It has been commented on disapprovingly in Phinney *v.* Phinney, 81 Me. 465. It has, however, been cited with approval outside of the Wisconsin Supreme Court as follows: Jones *v.* Davis, 6 Neb. 37; Brown *v.* McPeak, 31 Neb. 143; Ahern *v.* Walsh, 31 Neb. 477; Lincoln *v.* Grant, 38 Neb. 374; Taylor *v.* Stearns, 18 Gratt. 250, 288; Lawson *v.* Jeffries, 47 Miss. 406; Pereles *v.* City of Watertown, 6 Biss. 84; Oskosh Water Works Co. *v.* City, 187 U. S. 437.

It has also been cited in the notes to the following cases reported in Am. Dec.; Am. St. Rep.; and Am. & Eng. Ry. Cas. as follows:

American Decisions: Halloway *v.* Sherman (12 Ia. 288), 79 Am. Dec. 538; Scobey *v.* Gibson (17 Ind. 572), 79 Am. Dec. 494; Meighen *v.* Strong (6 Miss. 177), 80

Am. Dec. 445; Morse *v.* Goold (11 N. Y. 282), 62 Am. Dec. 112; Cook *v.* Gray (2 Houston, 445), 81 Am. Dec. 193; Blann *v.* State (39 Ala. 353), 84 Am. Dec.) 790; Penrose *v.* Erie Canal Co. (56 Pa. St. 46), 93 Am. Dec. 782; Coffman *v.* Bank of Ky. (40 Miss. 29), 90 Am. Dec. 320; Goshen *v.* Stonington (4 Conn. 209), 10 Am. Dec. 137.

American State Reports: Phinney *v.* Phinney (81 Me. 450), 10 Am. St. Rep. 175.

American & English Railway Cases: Chattaroi Ry. *v.* Kinner (81 Ky. 221), 14 Am. & Eng. Ry. Cas. 33.

Valuable notes will be found upon this subject in the following volumes of the L. R. A.: 1 L. R. A. 356; 4 L. R. A. 348; 17 L. R. A. 611; 42 L. R. A. 341.

Ableman v. Booth.

June Term, 1859

(11 Wis. 498.)

The primary question of law discussed in the opinion of Chief Justice Dixon in the above case is thus stated by him:

> Whether section 2, article 3, of the constitution of the United States confers upon congress the power to provide by law for an appeal from the courts of the several states to the supreme court of the United States, and to authorize that court in the exercise of its appellate jurisdiction to review and reverse the judgments of the state courts in the cases specified in the 25th section of the judiciary act, approved September 24, 1789.

The following opinion of Chief Justice Dixon is the last filed in the Wisconsin Supreme Court in the cases arising out of the celebrated "Glover Rescue." Booth was charged on the 11th day of March, 1854, with having aided and abetted at Milwaukee, Wis., the escape of a fugitive slave from a Deputy United States Marshal, who had the slave in custody. Upon the examination of Booth before a United States Commissioner, it was found that there was probable cause to believe Booth guilty of assisting in the escape of the fugitive slave, and Booth was held for trial before the District Court of the United States for the District of Wisconsin, and, having failed to give bail for his appearance before the court, he was committed by

the Commissioner to the custody of the Marshal. Booth made application to one of the Justices of the Supreme Court of the State of Wisconsin for a writ of *habeas corpus*. The writ was granted, Booth was discharged and the act of the Justice, in discharging Booth, was thereafter affirmed by the Supreme Court of the State. Thereafter Booth was again arrested on a warrant issued by the United States District Judge for the District of Wisconsin, indicted by the Federal Grand Jury and tried and convicted and sentenced to imprisonment for assisting in the rescue and escape of the fugitive slave.

From this imprisonment he was again discharged on a writ of *habeas corpus* by the Supreme Court of the State of Wisconsin. The action of the Supreme Court of the State of Wisconsin in both instances in thus discharging Booth was reviewed and reversed by the Supreme Court of the United States, and the record in both cases containing the mandates of the Supreme Court of the United States were remitted to the Supreme Court of the State of Wisconsin. It was upon the motion made for leave to file with the clerk of the Supreme Court of Wisconsin the said mandates of the Supreme Court of the United States that the opinion of Chief Justice Dixon, hereinafter quoted, was delivered.

The Supreme Court of the State, at the time the motions were made to receive said mandates of the supreme court of the United States, was composed of Dixon, Chief Justice, and of Associate Justices Cole and Paine. Mr. Justice Cole had been a member of the court at the time the writs of *habeas corpus* were granted discharging Booth, and adhered to the views of the court, then expressed, that the Fugitive Slave Law was unconstitutional, and voted against receiving the mandates of the Supreme Court of

the United States. Mr. Justice Paine had been counsel for Booth and so took no part in the decision. The Chief Justice voted for receiving the mandates, but the court being thus equally divided the motions to receive and file them were denied by an order made in open court, but no opinion was filed by Mr. Justice Cole. The opinion of the Chief Justice was filed on the 14th of December, 1859, when the order was made denying the motions.

The note at the end of the opinion herein cites the cases in the Supreme Court of Wisconsin, as well as those in the United States Courts involved in this litigation.

DIXON, Chief Justice. On the 22d day of September last, and during the present term of this court, the United States district attorney for the district of Wisconsin, D. A. J. Upham, Esq., in behalf of the attorney general of the United States, appeared before this court, and by motions, entitled in these cases, asked leave to file with the clerk two mandates or remittiturs, one in each of the cases, from the supreme court of the United States. The motions were reduced to writing, filed with the clerk, and the attention of the court called to them by the district attorney, but no argument whatever was made. The mandates were also left with the clerk to be disposed of as the court should direct upon a final determination of the motions. The former is the title of a suit in error, in the supreme court of the United States, in which that court reviewed and reversed a judgment of this court rendered at the June term, 1854, in a proceeding entitled "In the matter of the petition of *Sherman M. Booth* for a writ of *habeas corpus,* and to be discharged from imprisonment," the facts in which, together with the several opinions of the justices of this court, will be found reported

in the third volume of Wisconsin Reports, pages 1 to 144 inclusive. The latter is the title of a like suit in the supreme court of the United States, in which the decision of this court, made at the December term, 1854, in a proceeding similarly entitled, and reported in the third volume of Wisconsin Reports, pages 157 to 218, was in like manner reviewed and reversed. The judgments and opinion of the supreme court of the United States will be found reported at length in Howard's S. C. R., vol. 21, page 506. The mandates are in the usual form, requiring the causes to be remanded to this court to be further proceeded with, in accordance with the opinion there given. No statement of facts is required beyond what will be found in the reported cases, except that I deem it advisable to state the proceedings had in this court on the receipt of the writs of error.

In the first case, the writ of error was served on the clerk of this court on the 30th of October, 1854. On the 6th of November following, it was duly allowed by the late chief justice of this court, now no more, and a return made to it by the clerk, under his direction and supervision. The service of the writ in the last case was made about the 1st of June, 1855. On the 26th day of March, previous, the clerk had made and delivered to the United States district attorney, at his request, a properly certified copy of the record. On receipt of the writ, the attention of the court was called to it by the clerk, when he was advised to make no return until specially advised so to do. He was afterward directed to make no return. The matter remained in this situation until the January term, 1857, when at his request, it was deemed proper by the court that an order, embodying the instructions which had been previously given, and which were merely verbal,

should be made and formally entered of record. Such order was, accordingly, on the 5th day of February, 1857, made, signed by the chief justice and entered of record, by which the court, after reciting and confirming the previous verbal instructions, directed the clerk to make no return. It may not, perhaps, be improper for me further to remark here, that in addition to what is already apparent from the above statement of facts, it is further evident from the opinion of the late chief justice in the case first above cited, 3 Wis. Rep., pp. 63 and 64, that at and before the time of the service and return of the first writ of error, he entertained no doubt of the appellate jurisdiction of the supreme court of the United States. After commenting upon the decisions which had before that time been made by that court as to the power of congress to legislate on the subject of the surrender of fugitives from labor, and showing that the point which he was then considering had not been passed upon in those decisions, he says: "We are of the opinion, therefore, that whatever may be the duty of this court in relation to the question of the power of congress to provide by law for the surrender of fugitives from labor to the persons to whom their labor is due, we are not at liberty to consider the question of the right of a person claimed as a fugitive to a trial by jury, before he can be surrendered or delivered up to the claimant, *as already settled by the court, which has the power finally to decide all questions growing out of an alleged violation of the constitution of the United States by an act of congress.* We must consider the question as an open one."

The only question that is or can be made on the entering and conforming to these mandates is: *Does the constitution of the United States confer on congress the power to*

provide by law for an appeal from the courts of the several states to the supreme court of the United States, and to authorize that court in the exercise of its appellate jurisdiction, to review and reverse the judgments of the state courts in the cases specified in the 25th section of the judiciary act approved the 24th of September, 1789?

The proper solution of this question always vastly and almost immeasurably important on account of the consequences involved, was never perhaps since the commencement of our national career more vitally so than at the present time. No question in an equal degree challenges the earnest and candid attention of the citizen. Certainly none could be presented for our determination which would demand more rigid investigation or more candid and solemn consideration. To the best of my limited ability, I have endeavored to give it both. In doing so I have been not a little embarrassed by the want of those arguments of experienced and learned counsel by which courts are usually so much enlightened and aided in the investigation of important questions.

Holding, as I feel compelled to, that the affirmative of this proposition is correct, my own embarrassments and its importance to me have been much increased, from what appears to have been the contrary decision of this court, as lately composed, by the refusal to make return to the second writ of error, and from the fact that my brethren entertain an entirely opposite opinion. These circumstances have imposed upon me increased care and watchfulness, and have led me the more anxiously and vigilantly to examine the ground on which I stand, lest I may be in error. Fortunately for me the field of inquiry and argument is not a new one. It is as old as the constitution itself, and had been traversed in its entire length

and breadth, and occupied in every available point, by the ablest and most distinguished jurists and statesmen of our country, long before many of the present generation came upon the stage of active life. This ordinarily would relieve me, if indeed I were competent for so great a task, from going over any part of it here, and would leave little to be said except on which side I am. In justice to myself I will say that since the making of these motions, I have been over it again and again, and that to the utmost of my ability, and with a solicitude becoming the position I occupy, and which I never before experienced, I have studied and considered every argument, for and against, within my reach. My sole purpose has been to be right—to assume such a position as under the constitution will abide the test of reason and patriotism. If I have failed, it is an error of the intellect to which all men are liable.

Under different circumstances, I would not, at the risk of repeating what has often been said before, venture to assign a reason for the conclusions to which I have arrived, but would content myself with simply referring the reader to those authorities and works where the whole question will be found fully discussed. But since, in view of what appears to have been the former solemn action of this court, we have arrived at a point in our system of double allegiance, where "fidelity to the state is treason to the United States, and treason to her, fidelity to them," I trust I shall be excused for stating, briefly as I can, some of the positions taken by those who assert the appellate jurisdiction, which appear to me to be unanswerable, and which in my humble judgment never have been, and never can be shaken by those who oppose it.

Before proceeding to state these views, I wish to say that in disposing of this question, I have endeavored to

decide it on the constitution itself fairly and legitimately interpreted, well remembering "that 'a frequent recurrence to fundamental principles,' is the only means of sustaining the government in its original purity, and of preserving the original landmarks established by its framers," and believing that those "fundamental principles" are to be found in that instrument and not elsewhere; and believing, furthermore, that if there are evils fairly to be apprehended from its settlement either way, they are such as are necessarily incident to every form of human government, and that they are not to be remedied by any judicial powers of construction which would give to the government an authority which it does not possess, or take from it any which is conferred by the constitution; and that the remedies lie in the hands of the people who created it, and who can apply them or not, as experience and wisdom shall dictate. I have not, therefore, on the one hand, pictured before my mind a gloomy congregation of states "disrobed" of their sovereignty, and prostrated at the feet of the general government by means of federal usurpation and assumption, nor, on the other, the weakened and powerless republic, begging at the hands of the mighty rulers of the states, the privileges of executing her laws within their borders. I have not placed on one side of me the horrors of "consolidation" and "despotism," and on the other those of "dissolution" and "anarchy," and endeavored to make choice between them. Neither have I attempted nicely to adjust and balance the centripetal and centrifugal forces of our government. These, though very proper to be considered in connection with such a question, are not the considerations which should control and govern the judicial mind. Its action is to be determined by the plain letter and spirit of the constitutiton, leaving the adjustment of

such matters to the people who made, and who can unmake or amend it. The judiciary are not responsible for the consequences which flow from a proper construction of that instrument. While I have a high regard for those illustrious judges and statesmen whose opinions I adopt, I trust it does not diminish my respect for those equally illustrious, who differ from them in opinion. I have not yielded my assent to the doctrines of the federal courts through any mean spirit of "dignified judicial subordination," nor as "hoary usurpations of power and jurisdiction, or time-honored encroachments on the reserved rights of the sovereign states," rendered sacred by "their antiquity," but because I believe those doctrines to be right. Neither policy, expediency, "uniformity," the peculiar characteristics of the controversy before me, nor vague speculations upon possible events or contingencies which may never happen are the foundations upon which I would frame a legal conclusion upon a constitutional question. With these remarks I will state the view of the constitution which, for the most part, leads me to the conclusion to which I have arrived.

The 25th section of the judiciary act above referred to provides "that a final judgment or decree in a suit in the highest court of law or equity in a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against the validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such, their validity; or where is drawn in question the construction of any clause of the constitution,

or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, etc.," and that "no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." That this section confines the appellate powers of the supreme court strictly within the limits of the constitution, provided such appellate powers exist, or are given at all, I believe has never been seriously disputed. Mr. Calhoun, in his "Discourse on the Constitution and Government of the United States," when commenting on the section in question and the clauses of the constitution granting and defining the judicial power, says (Calhoun's Works, vol. 1, page 321): "The question is thus narrowed down to a single point. Has congress the authority in carrying this power into execution to make a law providing for an appeal from the courts of the several states to the supreme court of the United States?" I shall, therefore, pass directly to the consideration of the powers conferred by the constitution. The two first subdivisions of the second section of the third article, familiar to all, are as follows:

"1. The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors,

other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between citizens of different states, between citizens of the same state, claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

"2. In all cases affecting ambassadors, other public ministers and consuls, and those to which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make."

The jurisdiction here conferred has been very properly divided into two parts; that which arises out of the subject matter, and that which arises out of the character of the parties litigant. Mr. Calhoun, without his usual accuracy, page 259, says: "The first clause which extends it 'to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which may be made under their authority, embraces the former; and the residue of the section, the latter.'" This, as a general proposition, may be true, but is not exactly so. "Controversies between citizens of the same state, claiming lands under grants of different states," are clearly cases where it is the subject matter and not the character of the parties litigant, which gives jurisdiction. The general rule drawn from this subdivision, as it respects jurisdiction given by the character of the parties litigant, without regard to the nature of the controversy, being, that as between citizens of the same state, the federal courts have no jurisdiction, whilst between those of different states,

they have; and that as between the latter, their jurisdiction would attach in such cases, without the aid of this clause, whilst as between the former, it would not; it is evident that it is the subject matter, and not the character of the parties litigant, which confers jurisdiction in such controversies. The same remarks are true of "cases of admiralty and maritime jurisdiction." This, however, is evidently an oversight on the part of the learned commentator—not necessary perhaps to have been noticed here. The whole controversy hinges upon the proper signification of the words, "all cases in law and equity," in the first subdivision.

As there is no provision in the constitution which expressly gives to congress the power to provide for appeals from the state courts to the supreme court of the United States, if such power exists on the part of congress it must be because the constitution itself vests in the supreme courts of the United States such appellate power, and because such legislation becomes necessary and proper to carry such power into execution. The 17th subdivision of section 8, of article I, the previous subdivisions of which are specifications of the express powers given to congress, provides that congress shall have the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof."

Now, whether such jurisdiction is vested in the judicial department of the government or not, depends on the meaning of the words, *"all cases in law and equity."* The supreme court of the United States have twice, upon full argument, first, in 1816, in the case of Martin v. Hunter's Lessee, 1 Wheat. 304; and secondly, in 1821, in Cohens

v. Virginia, 6 Wheat. 264, passed directly on the question and decided that these words mean all cases in law and equity in any court within the United States, whether state or federal, in which a right of action or a defense arises or is claimed under the constitution, laws or treaties of the United States; and hence that the appellate jurisdiction of that court under the second subdivision of the section, extends to all such cases, "with such exceptions and under such regulations" as congress has made by the 25th section of the judiciary act. These decisions have since been almost universally acquiesced in and regarded by the state tribunals as the *settled* law of the land. The first of these cases arose under circumstances of peculiar delicacy and interest. Martin, the plaintiff in error, had obtained from the supreme court of the United States, a writ of error requiring the court of appeals of Virginia to certify to the supreme court, for re-examination, the record of the judgment rendered by them in the case of the April term, 1810, reported 1 Munf. 218. The president of the court of appeals complied with the writ by certifying a transcript. The supreme court, at the February term, 1813, 7 Cranch, 603, reversed the judgment rendered by the court of appeals, and issued its mandate to that court, requiring the judgment rendered by them to be carried into due execution. This mandate the court of appeals, at April term, 1814, refused to obey, and resolved that the appellate power of the supreme court of the United States did not extend to that court; and that so much of the act of congress as extended the appellate jurisdiction of the supreme court to that court, was not warranted by the constitution, and that the proceedings of the supreme court were *coram non judice* as to that court.

This proceeding of the court of appeals with the argu-

ments of the judges, which have been very little strengthened by what has been said since that time, and who severally filed opinions, will be found reported in 4 Munford, 1. Upon this refusal a writ of error was awarded, and the cause was brought again before the supreme court of the United States, in the case above cited, in which the judgment of the court below drew in question and denied the validity of the statute of the United States, giving an appeal from the state court. The validity of this statute was the only question before the court. The court in these cases observed what must, I think, be obvious to every unprejudiced mind, and what those who deny the appellate power admit, as I shall hereafter show, that the object and effect of the first clause of the third section of article III, which extends the judicial power to all cases in law and equity, arising under the constitution and laws of the United States, and treaties made under their authority, is to make that power co-extensive with the constitution, and adequate to the protection and enforcement of all the rights and powers given by it; a power which is so indispensable to the existence of every government, that, with the exception of cases affecting ambassadors and other public ministers and consuls and cases of admiralty and maritime jurisdiction, which are essential to the sovereignty of the Union, as they enter into and affect national rights and policy, and the law and comity of nations, the jurisdiction conferred by the remaining clauses, which mainly depends on the character of the parties litigant, becomes comparatively unimportant, being almost entirely unnecessary to the effectual operations of the government, and given through motives of policy and expediency, to avoid those state attachments and prejudices which it was supposed might render such controversies

more safe in the hands of the federal than the state tribunals, and for the purpose of extending the power of the federal courts to cases to which otherwise it would not extend, under the general grant contained in the first clause. Such is the plan and obvious import of the language used, and it seems to me that no refinement of construction can remove, or take it away. The powers granted by the first clause were of paramount importance to the very existence of the future government, and could not have been overlooked or misunderstood by the framers, whilst those given by the other clauses, especially the two last, might have been entirely omitted without serious consequences.

The court further supposed, what congress by the passage of the statute in question supposed, that the framers of the constitution contemplated that cases within the cognizance of the courts of the United States, would arise in the state courts in the course of their ordinary jurisdiction; and that the state courts would and must incidentally take cognizance of and decide cases arising under the constitution, laws and treaties of the United States. This position, those who deny the appellate jurisdiction, not only assume to be correct, but, with the exception of Judge Cabell, of the court of appeals of Virginia, who in his opinion in Martin *v.* Hunter, 4 Munf. 15, intimates a contrary conclusion, insist that there is no power on the part of congress, by legislation, to withdraw such cases from the cognizance and jurisdiction of the state courts.

It was further remarked by the court that the constitution unavoidably dealt in general language; that it did not provide for minute specification of powers, or declare the means by which those powers should be carried into execution. It was foreseen that this would be a difficult and perilous, if not an impracticable task. Hence its powers

were expressed in general terms, leaving it to congress from time to time to adopt its own means to carry into effect legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interests should require. They observed that a distinction seemed to be drawn between the two classes of cases enumerated in the constitution. The first class included cases arising under the constitution, laws and treaties of the United States; cases affecting ambassadors and other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In that class the expression was that the judicial power should extend to *all classes.* That as these cases were of vital importance to the sovereignty of the union, the original or appellate jurisdiction in them ought therefore to be commensurate with the mischiefs intended to be remedied and the policy in view. But that in the subsequent clauses, which embraced all the other cases of national cognizance and formed the second class, the constitution seemed, *ex industria,* to drop the word *all* and to extend the judicial authority not to all controversies, but to controversies in which the United States should be a party, etc., leaving it to congress to qualify the jurisdiction, original or appellate, as sound policy might dictate. It was furthermore said by the court that, as the state tribunals might in the exercise of the powers with which the constitution found them invested, as the courts of independent sovereignties, have and exercise concurrent original jurisdiction over all or some of the cases provided for in the constitution, and as the constitution contemplated that they should exercise such jurisdiction, and as many cases under the constitution, laws and treaties of the United States might arise in the state courts which could not originate or exist in the federal courts, it would

necessarily follow, if the constitution was held to limit the appellate jurisdiction to cases pending in the courts of the United States, notwithstanding the absolute and imperative language of the constitution that "the judicial power shall extend to all cases in law and equity arising under this constitution," etc., that there would be a very large class of cases under the first and most important clause of the section which could never be reached by the federal courts, either by virtue of their original or appellate jurisdiction.

It is this conclusion, to which a denial of the appellate jurisdiction inevitably leads, that determines my mind upon the question. I have looked in vain through the arguments and commentaries of those who maintain that there is no appellate jurisdiction, for a satisfactory answer to it. I can find none. It is either passed in silence, or with a few general remarks, founded, for the most part, on assumptions which cannot be sustained. It virtually makes the first and leading clause, which declares that the judicial power of the federal courts shall extend to all cases arising under the constitution, laws and treaties of the United States, a dead letter—mere surplusage, and limits those courts, in a great majority of instances, to taking jurisdiction of such cases merely as an *incident* to the jurisdiction which they acquire by *reason of the character of the parties litigant* under the minor grants of power contained in the subsequent part of the section; for all practical purposes under such construction, the first clause might as well have been entirely omitted. The judicial power of the federal courts would have been nearly as extensive, without, as with it, the only difference being that with it, a shadow of power is given with reference to a particular, and by far the least numerous of any class of

cases, where otherwise the character of the parties would not confer jurisdiction; that is, in those cases where the plaintiff is able, from the nature of his case, to set up in his declaration or complaint, some right or equity against the defendant, arising under the constitution, laws or treaties of the United States. In such cases, the facts conferring jurisdiction, would, by the plaintiff's showing, appear affirmatively upon the record, and the court might entertain the case. Without the power of appeal, this, so far as I can see, is the utmost practical effect that can be given to the clause in question. Such a construction, if it were not directly at war with the words used, is, in my opinion, altogether too narrow and illiberal. It makes the provision altogether inadequate for the ends designed to be attained by it, viz.: Protection and preservation to the government, by means of its own judiciary, and an equal regard to the constitutional rights of all of its citizens.

Can it be reasonably contended that the framers, by the clause in question, intended to provide that a plaintiff in certain cases, but not in all, should have the privilege of having his rights, arising under the constitution and laws of the United States, determined in their courts, and that in no case should such privilege be extended to a defendant, and that such should be the extent of the jurisdiction of the federal judiciary, in cases arising under the constitution, laws and treaties of the United States as such? Such a provision gravely inserted in such an instrument would justly excite ridicule. "A case in law or equity," says Chief Justice Marshall, "consists of the right of one party as well as of the other, and may be truly said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction

of either." Such a construction would, furthermore, place it in the power of any one state, beyond all peaceful remedy, to arrest the execution of the laws of the entire Union, and to break down and destroy at pleasure every barrier created and right given by the constitution. But aside from these or similar considerations, it seems to me that by limiting the judicial power to a few cases only, it violates the plain language of the constitution, which declares that such power shall extend to *all* cases in law or equity arising under it and under the laws and treaties of the United States. It is a familiar rule in the construction of written instruments, often applied by the courts of this country in the interpretation of constitutions, that they are to be so construed as to give effect to all their parts, especially when such construction is in harmony with the whole instrument, and supported by the plain sense of the words used. Such is the case with regard to the appellate power in the section before us. The practical result of a contrary construction may be illustrated by a single example. Suppose a state were to pass a law that as between its own citizens the bills of certain banks should be a good tender in payment of debts. Laws akin to this have been enacted. Kentucky, in 1820, passed a law authorizing the defendant in any judgment or decree theretofore or thereafter obtained to replevy for two years all property levied on by virtue of any execution issued upon any such judgment or decree, unless the plaintiff, his agent or attorney, should endorse on the execution a direction in writing that the bills of either of two banks of that state, or their branches might be received by the officer in discharge of the whole of such execution. Suppose that under such law the debtor, relying on the same as a defense, tenders the bills of such banks to the creditor in payment of his

debt. Now, although the law palpably violates the constitution of the United States, and the defense urged under it is for that reason invalid, how is the judicial power of the federal courts ever to be extended to such a case?

There is nothing in the character of the parties which gives jurisdiction. The creditor can make no averment which will confer it. If he brings his action before any of those courts, it must, on the debtor's motion be dismissed. Thus it will happen, that the very party whose constitutional rights have been violated, and who is therefore deeply interested in obtaining redress and protection at the hands of the tribunals established by the constitution for that purpose, is forever precluded from doing so, although it expressly declares that their power shall extend to *all cases* arising under it; and he is compelled, if at all, to seek an ultimate remedy before the courts of the state of whose action he complains. Like illustrations might be made in the case of a state law impairing the obligations of contracts, of which the books abound in instances, *ex post facto* laws, bills of attainder and state laws directly impeaching the laws and treaties of the United States, but it is deemed unnecessary. The effect of this construction is not, as is claimed by its advocates, to make the jurisdiction of the state courts in cases arising under the constitution, laws and treaties of the United States, *concurrent* merely with the jurisdiction of the federal courts, but in a great majority of instances to make it absolutely and entirely *exclusive*—a position which it seems to me disproves itself, by proving too much.

The supreme court, in the cases which I have cited, referred to other parts of the constitution, and entered into profound and elaborate arguments in support of their position, drawn from the early action of the federal and state

governments and the theory and nature of government itself, which I deem it unnecessary to repeat here. Chancellor Kent, in the 1st volume of his Commentaries, page 349, while commenting on the 25th section of the judiciary act, and the decisions of the supreme court above referred to, says: "All the enumerated cases of federal cognizances are those which touch the safety, peace and sovereignty of the nation, or which presume that state attachments, state prejudices, state jealousies and state interests, might sometimes obstruct or control the regular administration of justice. The appellate power in all these cases, is founded on the clearest principles of policy and wisdom, and is deemed requisite to fulfill effectually the great and beneficent ends of the constitution. It is likewise necessary in order to preserve uniformity of decision throughout the United States, upon all subjects within the purview of the constitution; and the mischiefs of opposite constructions and contradictory decisions in the different states, on all these points of general concern, would be deplorable. The supreme court, by a train of reasoning which appears to be unanswerable and conclusive, came to the decision, that the appellate power of the United States did extend to cases pending in the state courts, and that the 25th section of the judiciary act of 1789, authorizing the exercise of this jurisdiction in the specified cases by a writ of error, was supported by the letter and spirit of the constitution."

I have quoted from the learned Chancellor, because he is justly considered one of the purest, most enlightened and patriotic of American jurists, and because, during all of his long, useful and illustrious public career, he never held a federal office, but was elevated to the highest posts of judicial honor in his native state, and cannot, therefore, be justly said to have had any of those attachments to

federal power, and inclinations to encroach upon the sovereignty of the states, which are so often attributed by the advocates of the opposite doctrine to the eminent men who have composed the supreme court.

The theory of those who maintain the opposite doctrine is, that the word *"cases"* is a *technical term* (I use Mr. Calhoun's language), defined in law to be a suit commenced, and that it "comprehends only suits or proceedings instituted in the federal court invoking the exercise of the judicial power of the United States;" that the second section of the third article, when construed in connection with the first section which provides that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish," is to be deemed to refer only to the courts to be established under the first section, and that the appellate power granted applies only to the removal of cases from the inferior federal courts to the supreme court; in other words, that *appellate* jurisdiction only exists in the supreme court in those cases where the inferior federal courts possess *original* jurisdiction. The radical defect of this doctrine is, that by giving this narrowed meaning in the word *"cases,"* it almost entirely cuts off, as has been above shown, the power of the federal courts with which the advocates of this doctrine themselves admit it was the intention of the framers to invest them by the clause in question, and vests it *exclusively* in the state courts.

Mr. Calhoun, at page 259 of his discourse, in speaking of the first clause of the second section, says: "It is clear on its face, that the object of the clause was to make the jursidiction of the judicial power *commensurate* with the authority of the constitution and the several departments

of the government, as far as related to cases arising under them, and no further."

And again, on page 321, in speaking of the first subdivision of the second section, which for convenience he divides into two clauses, viz.: such as confer jurisdiction with reference to the subject *matter,* and such as confer jurisdiction with reference to the parties *litigant,* he says: "The object of the former of these two clauses is simply to extend the judicial power, so as to make it commensurate with the other powers of the government." It is very difficult for me to perceive how, under the first clause, the judicial power of the federal courts is made *commensurate* with the authority of the constitution, and the other powers of the government, so long as the clause is to be so construed that such power can in no event reach a great majority of the cases arising under them. On page 328, he explains to us how he would make the judicial power *partially* commensurate, and in doing even so much, he is obliged to assume, as we shall see, what is not true in point of fact. He says: "The extension of the judicial power of the United States, so as to make it commensurate with the government itself, is sufficient, without the aid of an appeal from the courts of the states, to secure all the uniformity consistent with a federal government like ours. *It gives choice to the plaintiff to institute his suit, either in the federal or state courts, at his option.* If he select the latter, and its decision be adverse to him, he has no right to complain; nor has he a right to a new trial in the former court, as it would, in reality, be, under the cover of an appeal. *He selected his tribunal, and ought to abide the consequences.* But his fate would be a warning to all other plaintiffs in similar cases. It would show that the state courts were adverse, and admonish them to com-

mence their suits in the federal courts; and thereby uniformity of decision, in such cases, would be secured. Nor would the defendant, in such cases, have a right to complain, and have a new trial in the courts of the United States, if the decision of the state courts should be adverse to him. If he be a citizen of the state, he would have no right to do either, if the courts of his own state should decide against him; nor could a resident of the state, or sojourner in it, since both, by voluntarily putting themselves under the protection of its laws, are bound to acquiesce in the decision of its tribunals."

Now, admitting, by the narrow notions to be implied from the language here used, that we acquire no rights by virtue of our character as citizens of the United States, and that these wise and beneficent provisions of the constitution were intended only for the benefit of those who can come into court in the character of *plaintiffs,* yet it is not true that *the plaintiff can institute his suit either in the federal or state courts, at his option.* The case above supposed fairly illustrates the incorrectness of this assumption. He cannot in such a case at *his option,* either by the system of legal proceedings which prevailed at the time the constitution was adopted, and with reference to which it must have been framed, or by any system which has since prevailed, commence his suit with effect in the federal courts. He cannot by any pleading on his part *raise* the question which is to give the court jurisdiction. It must be raised by the defendant, and that as his voluntary act, for the court cannot compel him to set up the defense. If he fails to move a dismissal, but makes any other plea to the action, the suit must still be dismissed, as the jurisdictional facts will not appear. Thus, the plaintiff is compelled to sue in the state court, where the defense is at

once made. But admitting that the defendant might set up his defense in the federal court, so as to give it jurisdiction to hear and determine the action, it would then be *the option* of the *defendant,* and not of the *plaintiff,* which would make that court the *forum* for the trial of the cause.

Chief Justice Bartley, of Ohio, in his very able and somewhat celebrated *dissenting* opinion, in the case of Piqua Bank *v.* Knoup, 6 Ohio State, 342, by a, to my mind, rather "unsatisfactory mode of reasoning," attempts to answer the argument of the supreme court upon this question in Martin *v.* Hunter, and in so doing falls into the same error. He says: "In the case of Martin *v.* Hunter, 1 Wheat. 340, the supreme court of the United States concedes the fact, that the language of the constitution *extending* the judicial power to "all cases" arising out of the enumerated subjects, does not confer *exclusive* jurisdiction touching these matters. But Mr. Justice Story says that "as the state courts will exercise concurrent jurisdiction over many of the enumerated subjects, if no appeal can be taken from the state courts to the federal courts, the judicial power of the United States will *extend* only to *some,* and not *all such cases!* This is certainly an unsatisfactory mode of reasoning. If even the right to appeal from the state courts to the federal courts existed, it would frequently happen that an appeal would not be taken from the adjudication in the state court.

"In such case, could it be pretended that the constitutional exercise of the judicial power of the United States was defeated? Certainly not. It may be said, however, that the failing party had the *option* to appeal, and bring his case within the judicial power of the United States. But if this extension of the judicial power of the United

States to *all cases,* etc., is answered by leaving it to the *option* of one of the parties to bring the case within the exercise of it, *the option of the party instituting the suit to bring it in the federal courts, is all sufficient.* This would be extending the judicial power of the United States to all of the enumerated cases, in accordance with the constitution, which can mean nothing more than authority to exercise jurisdiction over any of the specified cases, whenever a party shall elect to institute a suit in the federal courts touching the same." Here, again, it is assumed that the constitution provides for courts, and invests them with power to decide cases arising under it for the benefit of *plaintiffs* only, and that they can, if they choose, in *all cases,* institute their suits in the federal courts, and that thus the mandate of the constitution, that the judicial power shall extend to *all cases,* is satisfied. The learned judge is quite right in his concluding sentence, that it is the power to exercise jurisdiction in any case, when its exercise is invoked by either party, and not that it shall in all proper cases be invoked, that is contended for. In another place, in commenting on the same clause, he says: "The constitution does not say that the judicial power shall extend to *all questions* arising under the constitution, laws and treaties of the United States. The idea that the judicial power of the United States extends to *every question* arising under the constitution, laws and treaties of the United States, is not only an absurdity, but an impracticability." This branch of his argument was completely answered by Chief Justice Marshall, in Cohens *v.* Virginia, more than thirty-five years before the learned judge wrote his opinion. He says: "This may be very true, but by no means justifies the inference drawn

from it. The article does not extend the judicial power to every violation of the constitution which may take place, but to a 'case in law or equity,' in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article."

Much time is spent by Chief Justice Bartley and those who agree with him in finding fault with congress for what is said to be a distinction invidious to the state tribunals made by the statute under consideration, by which it is said that the decision of the state tribunals, if they are in favor of the validity of a law of congress, etc., are presumed to be right, and no appeal is given, but if such decisions are against the validity of such law, then they are presumed to be wrong, and therefore an appeal is given. Much complaint is also made against the supreme court, because it is said that the court always sustains the action of congress. Whether these accusations be true or false has but little to do with this question. If it be granted that both congress and the supreme court have improperly discharged the high trusts reposed in them by the American people, it has no tendency to prove or disprove the existence of this power. But I have already gone much further than I at the outset intended, and further than I feel warranted in going. The subject is one of much interest, and it is difficult to know where to stop. If I have succeeded in causing some of the principal reasons why I feel bound by the oath which I have taken to depart from what seems to have been the recent decision of this court on the question under consideration, to be understood, I have done all that I expected or desired to do. In my

opinion the motions should be sustained, and the mandates of the supreme court filed with the clerk of this court.

NOTE.

The interest which this case has, is historical, rather than legal. So firmly settled in favor of the contention of Chief Justice Dixon is the question he discusses in the foregoing opinion, that it is hard for the younger generation of lawyers to understand how it was ever even within the borders of debatable law. Much more is it difficult to understand how the court of last resort of Wisconsin, and some other States, ever decided against it. That such decisions were rendered, and for a time adhered to, is abundantly shown by the reports.

See Hunter *v.* Martin, 4 Munford (Va.) 1; Padelford *v.* Savannah, 14 Ga. 438; Johnson *v.* Gorden, 4 Cal. 368; Stunt *v.* Steamboat Ohio, 3 Oh. Dec. Reprint, 362; also dissenting opinion of Chief Justice Bartley in Piqua Bank *v.* Knoup, 6 Ohio St. 344.

The decision of Chief Justice Dixon in Ableman *v.* Booth, testifies at once to his ability as a lawyer, and his courage and devotion to his conception of duty as a judge. The Dred Scott case (19 How. 393, December Term, 1856), had been decided by the Supreme Court of the United States, since the litigation in Ableman *v.* Booth had begun. The still more recent decision of the Supreme Court of the United States in Alabama *v.* Booth upholding the validity of the Fugitive Slave Law, of which it was said in the North that it made every man a slave catcher, had offended and affronted the people of the whole North, and the people of Wisconsin in particular, and there can be little doubt that popular disapproval was reflected in the action of the Wisconsin Supreme Court in refusing to permit the mandate of the Supreme Court of the United States to be filed therein.

Chief Justice Dixon was at this time a very young man, only lately elevated to the Supreme Bench of his State, and soon would be obliged to stand for re-election before the

voters of his State. He could easily have treated the question before the Court as having been settled by the Court before he became a member of it and thereby have escaped all responsibility. He could have voted in dissent, without filing an opinion, and, since his vote could not have affected the action of the Court, have attracted little attention. He chose the course which brought him in conflict with the previous decision of the Court, as well as with the wishes of a majority of the people of his State, merely because he believed it to be right, and thereby added to the many instances in which our judges have, by their courage and fidelity, vindicated the confidence reposed in them. Some familiarity with the litigation leading up to the above opinion of Chief Justice Dixon is necessary, in order to understand the full significance of the opinion.

On the 27th day of May, 1854, Sherman M. Booth applied to the Hon. Abram D. Smith, one of the Justices of the Wisconsin Supreme Court, for a writ of *habeas corpus* to be directed to Stephen V. R. Ableman, Marshal of the United States for the District of Wisconsin, who, it was alleged, restrained the said Booth of his liberty. The process by which the prisoner was held was issued by a Court Commissioner of the District Court of the United States for the District of Wisconsin, and recited that Booth was charged with having on the 11th day of March, 1854, at the City of Milwaukee, "aided, assisted and abetted a person named Joshua Glover, held to service or labor in the State of Missouri, under the laws thereof, and being the property of one Benjamin S. Garland, and having escaped therefrom into the State of Wisconsin," etc., to escape from the custody of the Deputy Marshal of the United States. The warrant recited the examination before the Commissioner, the holding to bail, the neglect and refusal to give bail, and then commanded the Marshal to convey Booth to the common jail of Milwaukee, etc. Mr. Justice Smith granted the writ and discharged the prisoner on the ground that the Act of Congress approved September 18, 1850, known as the Fugitive Slave Law, for a violation of which Booth had been arrested, was uncon-

stitutional, and for the further reason that the warrant of commitment stated no offense. (3 Wis., p. 1.) Upon a writ of *certiorari,* the decision of Mr. Justice Smith was reviewed and affirmed by the Court (In re Sherman *v.* Booth, 3 Wis. 49).

Afterwards and on the 26th of October, 1854, the Marshal, Ableman, sued out a writ of error returnable to the Supreme Court of the United States on the first Monday of December, 1854, to review the foregoing judgment of the Supreme Court of Wisconsin. The record and proceedings of the case were duly certified by the Clerk of the Supreme Court of Wisconsin, to the Supreme Court of the United States, in the usual form, in obedience to the writ of error. After the foregoing proceedings were had, Booth was again arrested, but this time on a warrant issued by a United States District Judge, on an indictment charging the same offense as that previously set forth. Before trial on this second indictment Booth again applied to the Supreme Court of Wisconsin for his release on *habeas corpus,* but the court refused to discharge him (3 Wis. 145). Thereafter Booth was convicted on the indictment by the United States District Court and sentenced to imprisonment. Whereupon he again applied to the Supreme Court for his discharge on *habeas corpus.* The application was granted and Booth was discharged (3 Wis. 157). This case is usually reported under the title of United States *v.* Booth. The orders of the Supreme Court of Wisconsin in each case were obeyed and Booth was set at liberty, as therein directed. A writ of error was thereupon allowed and issued from the Supreme Court of the United States, upon the application of the Attorney General of the United States, to review the judgment of the Supreme Court of the State discharging Booth from imprisonment after his trial and conviction. To this writ of error the Supreme Court of Wisconsin directed the Clerk to make no return and to enter no order upon the journals or records of the Court concerning the same. An order was thereupon laid by the Supreme Court of the United States upon the Clerk

of the Supreme Court of Wisconsin, which was ignored (United States v. Booth, 18 How. 476).

Thereafter the Attorney General procured and filed in the Supreme Court of the United States a certified copy of the record in the case of United States *v.* Booth, and such copy was received and the cause heard thereon. Both Ableman *v.* Booth and the United States *v.* Booth were reversed by the Supreme Court of the United States (21 How. 506).

It was upon the refusal of the Supreme Court of Wisconsin to receive the mandates from the Supreme Court of the United States reversing and remanding the causes for further proceedings, that the foregoing opinion of Chief Justice Dixon was delivered.

At the time of that opinion Chief Justice Dixon, and Justices Cole and Paine, associates, constituted the court. Mr. Justice Paine had been of counsel for Booth in all the cases and therefore took no part in the decision. Mr. Justice Cole adhered to the previous decision of the court and voted not to receive the *mandamus*. The court being thus evenly divided, the mandates were not received.

After the decision of the Supreme Court of the United States above referred to and on the first day of March, 1860, Booth was re-arrested and imprisoned in the Custom-House in Milwaukee, by an order of the Hon. A. G. Miller, United States District Judge for the District of Wisconsin.

On the 6th day of March, 1860, Booth again applied to the Supreme Court of Wisconsin to release him from such imprisonment. On this application Chief Justice Dixon and Mr. Justice Cole adhering to their former views, and Mr. Justice Paine taking no part, the application was denied upon this division of the court. Upon this application Mr. Justice Dixon delivered an oral opinion, in which, among other things, he said: "If this was an entirely new question (the constitutionality of the Fugitive Slave Law), if it had not been, as I think, constitutionally adjudicated by the tribunals of the highest authority, I should unhesi-

tatingly decide the act unconstitutional. The arguments against it made by this court and elsewhere, are, to my mind, as matters of logic, almost conclusive. But the subject of the rendition of fugitives was legislated upon by Congress at a very early day. The authority of Congress to do so has ever since been recognized by every department of the government, and by nearly all the States. The Supreme Court of the United States has frequently adjudged that Congress has that power, and it is too late now to question it. We must be bound by it, as if it were part of the letter of the Constitution."

After serving a part of the month's imprisonment, for which he was sentenced, Booth was pardoned by President Buchanan.

Garland, the owner of the fugitive slave, Glover, afterwards sued Booth in the United States Court for the District of Wisconsin, for damages arising out of the rescue, and recovered a judgment for damages, which the Wisconsin Supreme Court upheld as a good defense to an action of replevin brought against one who had purchased at a sale on an execution issued upon such judgment. Arnold *v.* Booth, 14 Wis. 180.)

The Wisconsin Supreme Court had previously decided in 1855 in the case of Bagnall *v.* Ableman (4 Wis. 163), that a United States Marshal was liable for the penalty provided by the Wisconsin Statute for a re-arrest after a discharge on *habeas corpus,* where it appeared that the Marshal had re-arrested the person discharged by a County Judge on *habeas corpus* from imprisonment under a warrant issued by a District Judge of the United States.

The Supreme Court of Wisconsin later asserted its jurisdiction to inquire by *habeas corpus* into the cause of detention of a soldier held by the United States officers and to discharge him if illegally held. (In re Tarbell, 25 Wis. 390.) Dixon, Chief Justice, dissented from this opinion. The case was afterwards reversed by the Supreme Court of the United States (Tarbell's Case, 13 Wall. 397). At about the same time the Wisconsin Supreme Court held that so much of the Act of March 2, 1867, as gave the

plaintiff the right to remove an action from the State to the Federal Court was invalid, and denied the plaintiff the right to remove his cause into the Federal Court. Dixon, Chief Justice, dissented in this case. (Whiton *v.* Chicago & Northwestern Railway Company, 25 Wis. 424.) This case was overruled by the Supreme Court of the United States (13 Wall. 270).

The Town of Milwaukee v. The City of Milwaukee.

June Term, 1860.

(12 Wis. 93.)

The facts of this case sufficiently appear from the opinion.

The following are the propositions of law decided:

The legislature has not the power, either directly or indirectly, to divest a municipal corporation of its private property, without the consent of its inhabitants.

The legislature, however, has an undoubted right to change the territorial limits of municipal corporations, and to detach from a town a portion of its territory and annex it to another town; and, in so doing, may provide for an equitable division of the common property.

Where the legislature takes from a town a portion of its territory, which includes land to which it has the exclusive title, and annexes the same to another town or municipality, without providing for the disposal of such land, under such circumstances that the assent of the town to part with its title cannot be presumed, such town still continues to be the owner of such land, notwithstanding such separation.

By an act of the territorial legislature, approved January 3rd, 1838, fractional townships 7 and 8, in Milwaukee county, were formed into a town by the name of the town of Milwaukee, and on the 14th of January, 1846, the supervisors of the town acquired, by purchase, a title to the land in controversy, "in trust for the sole use and benefit of said town forever;" the

territorial statute, at the time, giving to every such town, as a body corporate, the power to hold real estate for the public uses of its inhabitants, and convey or dispose of the same as might be deemed conducive to their interests, and providing, also, in case of the division of a town, or annexation of a part thereof to another town, for an equitable partition of such real estate, or apportionment of its proceeds, by the supervisors of the respective towns. The provision for the apportionment of property in case of the division of towns, ceased to be in force from and after the 1st day of May, 1849. On the 31st of January, 1838, a portion of town 7 was incorporated as the village of Milwaukee, but the government of the town of Milwaukee continued over both fractional towns, until January 31st, 1846, when the charter of the city of Milwaukee put an end to the government of the town of Milwaukee, in the territory embraced in the city limits, and the land in controversy continued to be within the town of Milwaukee until February, 1852, when the limits of the city of Milwaukee were enlarged by an act of the legislature, so as to include said land; none of said acts making any provision for the division or apportionment of the common property: *Held,* that the act extending the limits of the city of Milwaukee over the land in question, did not divest the town of its title thereto.

Dixon, Chief Justice. This is an action of ejectment commenced in the circuit court of Milwaukee county, by the town against the city, to recover possession of forty acres of land, situate within the present limits of the city. The town was organized by act of the legislature of

the territory of Wisconsin, approved January 3rd, 1838. On the 31st of January, 1846, a portion of the town was set off and incorporated into the city. On the 14th of January, 1846, the supervisors of the town, "in trust for the sole use and benefit of said town forever," acquired, by purchase from James Murray and wife, a title in fee simple to the land in question. The conveyance was executed to the supervisors by name, as such, and their successors in office. On the trial, the conveyance from Murray to the supervisors was produced and proved, and a regular chain of title from the government to Murray traced and established. It was admitted that the defendant, the city, was in possession. At the time the land was thus acquired by the town, it lay within its limits, and so continued until the 20th of February, 1852, when, by an act passed by the legislature of the State of Wisconsin, "an act to consolidate and amend the act to incorporate the city of Milwaukee, and the several acts amendatory thereof," the limits of the city were extended so as to bring it within them. In the original act of the territorial legislature, incorporating the city, and the subsequent act of the legislature of the State, amending and consolidating the same, and the amendments thereto, no provision whatever was made respecting the partition or division of the common property. No mention whatever was made of it, because no such provision was made by the legislature, and because towns are not authorized to hold land outside of their boundaries, the counsel for the city moved for a judgment of nonsuit in the action, which was granted. From this judgment the present appeal is taken.

The grounds taken by the counsel for the defendant to sustain in this court the judgment at the circuit, are the same as those there urged upon the motion for a nonsuit.

In support of them, he cites the cases of Denton *v.* Jackson, 2 John Ch. R. 320; North Hemstead *v.* Hempstead, Hopk. 288; the same case in the court of errors, 2 Wend. 109, and Medford *v.* Pratt, 4 Pick. 222. In order to determine whether those cases sustain the action had in this, it will be necessary briefly to examine them. But before doing so it will be well to notice the provisions of the territorial statutes in force at the time the town of Milwaukee acquired the land in question, touching the corporate character of the several towns then in existence in the territory, and their capacity and power to acquire, hold and pass the title to real estate.

By section 1 of chapter 2, part 1st, of an act to provide for the government of the several towns in the territory, and for the revision of county government, approved February 18th, 1841, it was enacted, that every town then established, or which might thereafter be established by the legislative assembly of the territory, should be a body corporate, and have capacity: 1. To sue and be sued in the manner prescribed by law. 2. To hold real estate for the public uses of the inhabitants, and to convey the same, either by a vote of the inhabitants or by a deed of their committee or agents. 3. To hold personal estate for the public uses of its inhabitants, and to alienate or dispose of the same, either by vote or otherwise. 4. To hold real and personal estate in trust, for the support of schools, and for the promotion of education within the limits of the town. 5. To make such contracts as may be necessary to the exercise of its corporate or administrative powers. 6. To make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants.

The third section of the same chapter provided that

all acts or proceedings by or against a town, in its corporate capacity, should be in the name of such town, but every conveyance of lands within the limits of such town, made in any manner for the use or benefit of its inhabitants, should have the same effect as if made to the town by name. These provisions being in force at the time the conveyance was made to the supervisors, comment upon them is unnecessary, for the purpose of showing not only that they were enabled to receive it, but that immediately upon its execution and delivery, for the uses therein specified, the title vested absolutely and entirely in the town, and that thereafter it could sell, dispose of and convey the same, as its own free will and pleasure. From the language of the third section above quoted, it may reasonably be implied, that it was the intention of the territorial legislature that the lands which towns were empowered to acquire, hold and dispose of, were to be situated within their corporate limits. Such intention is more plainly manifested by the first three sections of the second part of the same chapter, which immediately succeed those referred to. The first section provided that where a town seized of lands should be divided into two or more towns, the supervisors of the several towns constituted by such division should meet as soon as might be, after the first town meeting subsequently held in such towns, and, when so met, should have power to make such agreement concerning the disposition to be made of such town lands, and the apportionment of the proceeds, as they should think equitable, and to take all measures, and execute all conveyances which might be necessary to carry such agreement into effect.

The second section provided, that when any such town should be altered in its limits, by the annexing of a part of

its territory to another town or towns, the supervisors of the town from which said territory should be taken, and of the town or towns to which the same should be annexed, should, as soon as might be after such alteration, meet for the purpose, and possess the same power as provided in the first section. By the third section it was enacted, that if no agreement for the disposition of such lands should be made within six months after such division or alteration, then the supervisors of each town, in which any portions of such lands should lie, should proceed to sell and convey such part of said lands as should be included within the limits of said town, as fixed by the division or alteration, and that the proceeds should be apportioned between the several towns interested therein, according to the amount of taxable property in the town so divided or altered, as the same existed immediately before such division or alteration, to be ascertained by the last assessment list of such town. This act was not in force at the time of the amendment and consolidation of the charter, and the extension of the corporate limits of the city of Milwaukee, by the act of February 20th, 1852. It was repealed and ceased to be in force, from and after the first day of May, 1849 (Revised Statutes, 1849, chap. 156, sec. 4), and, consequently, the last three sections above referred to, have no bearing upon the subsequent legislation of the State, or upon this case, only so far as they go to show the intention of the territorial legislature to limit the power of towns in acquiring real estate to such as should be within their boundaries, and so far, furthermore, as they establish an assurance and pledge of public faith on the part of the territorial government, that no future division or dismemberment of any town should operate to destroy or divest the rights and interests of its inhabitants in and to any lands

which it had once lawfully acquired. The formation of our State government in no way affected the condition of either the town or city. When it came into existence, upon the foundation laid by the territorial government, it found and recognized them as existing municipal corporations. They are so recognized in the constitution, and have been so treated in all subsequent legislation. The change from territory to State produced no change in them. The corporation of the town of Milwaukee is to-day the same "artificial, invisible, intangible being," that it was when first organized in 1838. Though it may be more limited in its territorial jurisdiction, in the extent and sphere of its operations as a local government it is nevertheless the same. It was the same in 1852, when it is said to have lost the land in dispute, that it was in 1846, when it acquired it. So far as all past acquisitions of property, real or personal, were concerned, it existed the same at both periods, and still continues to do so, with all its faculties to hold, use and dispose of the same, untouched and unimpaired. Under these circumstances, the present case gives rise to very important questions. Has the legislature the power, under our constitution, and under the constitution of the United States, by act, without its assent, to divest the town of its property, and vest it in the city, or any other corporation or person? And, if so, is the act of severing and withdrawing the property from the political or territorial jurisdiction of the town, and annexing it to or placing it within that of the city, an exercise of such power?

It will be seen at once that these are very grave and perplexing questions. In deciding them, we have endeavored to give to them that careful consideration which their weight and importance deserve. Questions of a similar character have involved courts of great ability and learn-

ing in much doubt and anxiety. We may, therefore, well hesitate and be not too confident in the correctness of our judgment. Within the range of our reading we know of no adjudged case so like the present that we may rest upon it as a direct authority. We are not, however, without expressions of opinion from various learned courts and judges, which tend directly to sustain the conclusions to which we have arrived, whilst we know of none of a clearly opposite tendency.

The operations of government depend to a very great extent, for their success and accomplishment, upon the existence and agency of municipal corporations, such as counties, towns, cities and villages. Without the delegation of a portion of its powers to them, its ends and objects could not be attained. The purposes for which they are instituted, namely, the cheap, expeditious, and convenient promotion and preservation of good order and good government, demand that they should at all times be subject to legislative modification and control, in order that they may be varied with the ever varying condition of the country, and circumstances, habits and wants of the people. It is the apparent connection which these questions have with the exercise of this legislative power and discretion, that renders their decision perplexing and difficult. We would not unwisely or unnecessarily embarrass its exercise or impair its usefulness. Nevertheless, if by virtue of the provisions of our own constitution, or of the constitution of the United States, the legislature is prohibited from divesting or attempting to divest, without its assent, a municipal corporation of its rights of property lawfully acquired, it is plainly our duty so to declare. We think under the circumstances of the present case, the legislature had no such power. There are those who, independently of constitu-

tional restrictions, and upon general principles, and on the reason and nature of things, hold that legislative bodies have no such authority, and that such a proceeding would not be an act of legislation, but an act of lawless violence. See opinion of Mr. Justice Johnson, Fletcher *v.* Peck, 6 Cranch, 143: The constitutions, State and federal, furnish ample guards against such abuses, without resorting to such general principles.

Within the principles which we have above stated, the power of the legislature to enlarge, restrict, change, modify, control and repeal all merely public corporations, is undoubted. They are established as a part of the police of the State and to meet the object of their creation, must be subject to such changes as the exigencies of the times require. Hence the power of the legislature to enlarge the limits of the city of Milwaukee so as to embrace within them the land in question, and subject it and those who occupied it, to the jurisdiction and government of the city, cannot be questioned. All persons residing within the limits of such corporations are obliged to be its members, and to submit to the duties imposed by law. All persons holding or owning property within them are, as to it, bound to the same rule of submission.

The difficulty about the question is, to distinguish between the corporation as a civil institution or delegation of merely political power, and as an ideal being endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the legislature; but in its capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference or control, without the

consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body. It might sell its property, or the same might be lost or destroyed, and yet its powers of government would remain. In its character of a political power, or local subdivision of government, it is a public corporation, but in its character of owner of property, it is a private corporation, possessing the same rights, duties and privileges as any other. This distinction is clearly laid down and established in the case of Bailey and others *v.* The Mayor, etc., of the City of New York, 3 Hill, 531, and authorities there cited. The inviolability by legislative interposition of the rights and franchises of a private corporation, in cases where there is not, by its charter, or the constitution of the State by which it is granted, a reservation of power to repeal or modify, is demonstrated and established in the case of Dartmouth College *v.* Woodward, 4 Wheat. 518, by a force of reasoning and power of argument, to the strength and clearness of which nothing can possibly be added. It was there held that the charter of such a corporation was a contract within the meaning of the first subdivision of section 10 of article I of the Constitution of the United States, which declares that no State shall pass *any law impairing the obligation of contracts.* The same provision occurs in the 12th section of the first article of our State constitution. The reasoning of that case extends as well to the power of the legislature to interfere with the franchises as the rights of property of such corporation; but it is only with respect to the latter that it can be considered applicable to the question we are now considering. And there it is clearly

so. Every argument used goes with equal force to prove that the legislature has no power to divest a municipal corporation of its property, previously acquired by purchase or otherwise. This want of power depends, not upon the character of the corporation, but upon the nature of the right. The right to repeal or modify is not a right to interfere with vested rights of property. The former may exist without the latter. If the legislature possessed both, the exercise of one would not depend on the other. How the total repeal of the charter of a municipal corporation, without provision as to the disposition of its property (a circumstance not likely to occur), would affect such property, or the rights of its inhabitants, we are not called upon here to decide. It is sufficient that the corporation of the town of Milwaukee still continues to exist, and so long as it does so, it is impossible to make a distinction between its rights of property and those of a corporation merely private. Both are, and ought, in the nature of the things, to be equally sacred. In Terrett *v.* Taylor, 9 Cranch, 43, the right of a State government to dispossess a private corporation of its property, was directly passed upon and denied.

In the cases of Fletcher *v.* Peck, 6 Cranch, 87, and Pawlet *v.* Clark, 9 id. 292, it was held that grants of lands by States to individuals or corporations, were contracts within the foregoing provision of the constitution, and that the grantees were thereby protected from molestation by subsequent legislation on the part of such States. If the legislature, in the present instance, without the assent of the town, had attempted, by act, directly to transfer the lands in question from it to the city, or to declare the conveyance from Murray to the supervisors void, or to assert that the title of the town was forfeited, and that the same was vested in the State, could any lawyer be found who

would hesitate for one moment to give his opinion that such legislation was void? And could the legislature, by indirect means, accomplish that which it was impossible to do by direct? Did it possess this power as an incident to that of enlarging the limits of the city or diminishing those of the town? We think not. The only grounds upon which such a pretense could be justified are that the property of the town is the property of the State, and therefore subject to its disposal, which needs no argument to refute; or that the separation destroyed the *use,* which carried with it the *right,* and that the city would seize and occupy the land as a sort of *waif,* until the true owner could be let in. We cannot admit that the loss of the use carries with it the right. Under certain circumstances, as in the case of land purchased and used as a highway, which is not designed for, or devoted to, the exclusive use of the inhabitants of the town, but is common to all the people of the State, it might. In such case, the exclusive title of the town, if it may be said to have ever had any, might be considered at an end, for its continuance would be inconsistent with the general supervision which the officers of every town have, by statute, over the highways within their limits. But suppose a town house, prepared and erected by the inhabitants for the transaction of its public business, and the preservation of its records, should, without provision as to its disposition, be set off into an adjoining town, would the town thereby lose its right of property? Although it would thereby be prevented from using it for the transaction of business, which must be done within its limits, yet might it not sell it, and with the proceeds provide another? It is not, however, every severance of real property from the political jurisdiction of the municipal corporation to which it belongs, that involves a destruction of its use. By the

second section of the third part of the fifth chapter of the act of the territorial legislature, to which we have above referred, it was made the duty of the supervisors of the several towns of the territory, to take charge of, and provide for, the support of the poor within them, agreeably to the provisions of the law. In the discharge of this duty, there can be no doubt that the town could provide itself with houses and lands, suitable for the protection, exercise, and employment of such paupers. And if it should, the separation of such house and lands would not be inconsistent with the continued use by the town. Under such circumstances the use might be less convenient, but it would not be impossible. As the record in the present case does not disclose for what purpose the town owned and occupied the land in question, it is impossible for us to say that its annexation to the city interfered with its use by the town. If the legislature could, by virtue of its power of division or repeal, deprive a town of its property; and if, after having created it and incited it to such acquisitions, by giving it the capacity, it should do so, such proceeding would be, in the highest degree, arbitrary and indefensible. The perfidy of such an act would be acknowledged by all men.

We do not, however, wish to be understood as saying that the legislature may not, upon the repeal of the charter of a municipal corporation, or a division of its territory, provide for a fair and equitable disposition or division of its public property. It may, undoubtedly, do so. And ordinarily, when such provision is made, the assent of the corporations or inhabitants, is to be presumed. For, generally, it is not to be supposed that such acts would be passed against their wishes and interests, but that they are enacted at their request, and for their good. But where, as in this case, a small portion only of such corporation, in which it

has a valuable real estate interest, is set off and annexed to an adjoining corporation, and where, as here, it early asserts its claim to such real estate, and no provision is made in the law concerning the same, we do not think any such assent or request can be presumed. And particularly do we think this to be so, where, as here, no advantage is gained to the divided corporation from such division. The consideration of an advantage gained, often affords the strongest ground for the presumption of assent. Where, therefore, the legislature takes from a town a portion of its territory, which includes lands to which it has the exclusive title, and annexes the same to another town or municipality, without providing for the disposal of such lands, and under such circumstances that the assent of the town to part with its title cannot be presumed, such town still continues to be the owner of such lands, notwithstanding such separation. The rule of law upon this subject is well stated by Chief Justice Parsons, in the case of The Inhabitants of Windham *v.* The Inhabitants of Portland, 4 Mass. 384. He says: "A town incorporated may acquire property, real or personal; it enjoys corporate rights and privileges, and is subject to obligations and duties. If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, *unless some new provision be made by the act authorizing the separation.* Thus it would continue seized of all its lands, possessed of all its property, entitled to all its rights of action, bound by all its contracts, and subject to all its duties." This doctrine is sustained by the case of Medford *v.* Pratt, 4 Pick. 222, cited by the counsel for the defendant. It was there held,

that a meeting-house for public worship, built by a town before its division into parishes becomes, upon such division, the exclusive property of the first parish. It has always been held in that State, that upon the division of towns (which were parochial as well as municipal in their character, each town constituting, originally, a single parish) into two or more parishes, the parochial property, unless special provision was made, went to the first parish, that is, that portion of the town remaining after the erection of the new parish or parishes, as the original, or representative of the original parish. On this subject the court, in their opinion in that case, say: "The justice of this principle cannot be denied; for the remnant were discharged of no part of their duties or burdens, and the seceders always voluntarily withdrew, carrying with them a great part of the taxable property from which those duties and burdens were before discharged." The same principles are recognized in the cases of Brunswick *v.* Dunning, 7 Mass. 445; and Hampshire *v.* Franklin, 16 id. 76, and many others in that State.

Upon the want of power in the legislature of a State to deprive a municipal corporation of its right of private property, Mr. Justice Story, in delivering the opinion of the court in the case of Terrett *v.* Taylor, *supra,* says: "In respect, also, of *public* corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom, and at whose expense it was originally purchased."

And again, the same learned judge, in delivering his opinion in the case of Dartmouth College *v.* Woodward, at page 694, says: "It may also be admitted that corporations

for mere public government, such as towns, cities and counties, may, in many respects, be subject to legislative control. But it will hardly be contended, that in respect to such corporation, the legislative power is so transcendent that it may, at its will, take away the private property of such corporation, or change the use of its private funds, acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corporations are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our government, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion, in other cases, to express their opinion on this subject; and there is not the slightest inclination to retract it." At page 668 of the same case he also says: "Public corporations are generally esteemed such as exist for public purposes only, such as towns, cities, parishes and counties, and in many respects they are so, although they involve some private interests; *but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government.*" The same doctrine is established with reference to municipal corporations, by the supreme court of Massachusetts, in the case of Hampshire *v.* Franklin, *supra,* where an act of the legislature of that State, which

directed the payment of one county to another of a sum of money supposed to be equitably due, but for the payment of which there existed no legal obligation, was held unconstitutional and void. The court say: "It certainly must be admitted that, by the principles of every free government, and of our own constitution in particular, it is not in the power of the legislature to create a debt from one person to another, or from one corporation to another, without the consent, express or implied, of the party to be charged." See also City of St. Louis *v.* Russell, 9 Mo. 503.

The most frequent instances of the application of the rule that legislatures cannot interfere with the rights of property of municipal corporations are to be found in those cases where such corporations hold property as trustees, and for purposes other than those which are merely municipal. The reason of this probably is, that in such cases, without the consent of all persons interested, legislatures have no power whatever to interfere, and because in the division or other change of municipal corporations, they have almost invariably provided for the equitable distribution of their property which was strictly corporate, thereby saving interested parties from the necessity of calling upon the courts for assistance. If in the present case the land in question had been acquired and held by the town, under the fourth subdivision of the section of the territorial statute above quoted, "in trust for the support of schools, and for the promotion of education within the limits of the town," it would have been an instance of such special trust. The purposes for which it would then have held the land, would have been distinct from and independent of the purposes of its creation as a municipal government. They would have been educational and not municipal. In such cases, the right of the legislature to in-

termeddle by dividing or diverting the fund, without the consent of the inhabitants, has been often denied. From some decisions it may even be doubted whether the legislature has, without such consent, the power to repeal or destroy a municipal corporation as such trustee, and whether it is not to be treated, *quoad hoc,* as a separate corporation. Thus, in the case of Montpelier *v.* East Montpelier, 27 Vt. 704, by the charter of the original town of Montpelier there were reserved, among others, three rights of land for religious and educational purposes, which "together with their improvements, rights, rents, profits, dues and interests," were to "remain inalienably appropriated to the uses and purposes for which they were respectively assigned, and to be under the charge, direction and disposal of the inhabitants of said township forever." Subsequently the legislature, by act, abolished the old town, and in its place erected two new towns, named respectively Montpelier and East Montpelier. By the act it was provided, that all property owned or possessed by, or debts or choses in action due to the old town, should thereafter be owned and enjoyed by, and collected for the said towns of Montpelier and East Montpelier, in proportion to the grand list of the persons and property within the territorial limits of said towns, for the year when said act was passed. In a suit by Montpelier against East Montpelier (which latter had obtained the whole of the funds arising from the rents of such lands for the year 1851, and refused to pay over to the former any portion thereof), to recover its share of such funds in proportion to said grand list, it was held that such trust funds were not within the words of the act, and that neither of said new towns had any legal interest therein. In the opinion, the court refer to and comment upon the case of Dartmouth College *v.* Woodward, and several

others, and say that if the words of the act had extended to these trust funds, it would, without the assent of the inhabitants of the old township, who were to be regarded as the *beneficiaries,* or *cestuis que trust,* have been liable to constitutional objections. If this be so, and such assent could not be obtained, it would seem that the old corporation, for the purpose of such trust, must be still regarded as in existence. For otherwise it is difficult to perceive how the legislature might not defeat the charity, which all agree it cannot do. To the same effect is the case of the Trustees of the New Gloucester School Fund *v.* Bradbury, 11 Me. 118, where an act of the legislature of Maine, authorizing the town to choose a new set of trustees, and directing the first trustees to deliver over the property to them, was held unconstitutional. The fund had the effect to reduce the amount raised by taxation for support of schools in the town, whose inhabitants were thus beneficially interested in it, and the case was said to be within the very language of the case of Dartmouth College *v.* Woodward. An attempt to distinguish between a municipal corporation and a corporation merely private, in respect to such funds, was repudiated.

The court observe that Chief Justice Marshall, in delivering the opinion of the court in that case, says: "Strictly speaking, *public* corporations are such only as are founded by the government, for *public* purposes, where the *whole* interests belong to the government;" and that no authority exists in the government to regulate, control or direct a corporation or its funds, "except where the corporation is in the *strictest sense public;*" that is, where its *whole interests* and *franchises* are the *exclusive property and domain of the government itself.*"

To the same effect, likewise, is the case of Plymouth *v.*

Jackson, 15 Penn. St. 44, where officers elected by the owners of land within the original township of Plymouth, to take charge of funds arising from lands appropriated for the religious, literary and charitable uses of its inhabitants, which officers had, by an act of the legislature, been declared to be a body corporate by the name of the "Proprietors of Plymouth," were held to be *in esse* as such corporation, notwithstanding a subsequent act of the legislature, dividing the township of Plymouth and erecting two new townships out of it and some adjoining territory, by the names of Plymouth and Jackson, and authorizing the inhabitants of Jackson to elect officers who were to take charge of a portion of said funds within that township, and to be a corporation by the name of the "Trustees of the township of Jackson." See, also, the cases of Harrison *v.* Bridgeton, 16 Mass. 16; Commonwealth *v.* Cullen, 1 Harris, 133; Brown *v.* Hummel, 6 Barr. 86; and Poultney *v.* Wells, 1 Aik. 180, cited by the court of Vermont.

For the reasons which we have thus imperfectly attempted to give, and upon the authorities we have cited, we answer the first question in the negative, and give it as our opinion that the legislature has not the power, under the provision of our constitution and that of the constitution of the United States to which we have referred, either directly or indirectly to divest a municipal corporation of its private property, without the consent of its inhabitants lawfully obtained. Our answer to this question renders it unnecessary for us to notice the other. We will do so only so far as it is necessary, in the opinion of the court, to acquit the legislature of all intention, by the act extending the limits of the city of Milwaukee, to injure or deprive the town of any of its just rights. It is evident to our minds, from all the circumstances, that at the time of the

passage of that act the interests of the town in the land were either unknown, or not thought of, and that, therefore, its possible effects upon them were not taken into consideration.

Contrary to our intention at the outset, we have examined many authorities, and disposed of the case before noticing those cited and relied upon by the counsel for the city, which we will now proceed to do. And, first, we may notice a view taken by the counsel, upon which hinges, to a great extent, the application which he seeks to make of them to this case. The land in question was purchased on the 14th day of January, 1846. The city was originally chartered on the 31st day of the same month. So that, in reality, the territory constituting the city was, at the time the land was acquired, a part of the town. Upon these facts he says it is to be presumed that the land was paid for with funds raised from the whole taxable property of the town. He furthermore states, that the present limits of the city embrace a much larger portion of the taxable property of the town, as it was before the city was incorporated, than that which was left in the town after such act of incorporation of the city. He therefore contends that it was the intention of the legislature, by the separation of 1852, to transfer the property to the city, because the city, having contributed more towards the purchase money, has a better right in equity than the town. In answer to this argument, we may say, that it does not appear from the record that the city paid any portion of the purchase money, nor does the record show what the value of the taxable property of the city, as compared with that of the town, is. We cannot indulge in the presumption that the city paid any portion of the purchase money. The purchase of the land and original incorporation of the

city were very nearly contemporaneous acts, and it is quite as natural to suppose that the town paid for the land out of money afterwards raised by the inhabitants, as with funds realized in any other way. But suppose it was paid for in the manner which the counsel invites us to presume, still the inhabitants of the city, by procuring it to be incorporated as such, without any provision as to the land, and by an acquiescence of six years and upwards, must be presumed to have released their interest in it, and to have consented that it remain the sole property of the town as it was after such division. The charter of the city must be presumed to have been granted at the request of its inhabitants, and the loss to the town of so much of its taxable property, without a corresponding diminution of the expenses of its government, together with the advantages gained to the inhabitants of the city by their new form of government, furnishes ample consideration for such release, which, under the circumstances, must be presumed. By incorporating the city, without dividing the land, it became the sole property of the town; and, if such effect was inequitable, it was not in the power of the legislature, without the consent of the town, afterwards to remedy the evil. See Hampshire *v.* Franklin, 16 Mass. 76, where the doctrine of such presumptions, and the power of the legislature, are fully discussed. With these remarks, it will be readily perceived that the cases of Hempstead *v.* Hempstead bear very remotely upon the question we are considering, and, with the exception of a single remark, *merely obiter* made by the chancellor in 2 Johnson, and subsequently repeated in Hopkins and Wendell, their authority does not at all conflict with the conclusions to which we have arrived or the cases to which we have referred. It is

said that a town cannot "possess any control or rights in or over lands lying within another town." As applied to the facts in those cases, or if understood as limited to the rights of towns to acquire lands outside their boundaries, it is very proper. But, farther than this, we are unwilling to go. There was nothing in the facts of those cases which called for the remark or the establishment of such a principle. Each turned upon the doctrine, in favor of which the courts make many strong arguments, that the act dividing the town of *Hempstead* and creating the town of *North Hempstead* was passed at the request of the inhabitants, and that with their assent it operated as a legislative partition of the common property, which was divided according to the limits of the towns as they existed after the division. Chancellor Kent, in the case in 2 Johnson, says expressly, that "the erection of a new town cannot impair the rights of the old one, and the new town has none but what are given to it at the time of creating it, or subsequently." That it was a legislative partition with the consent of the inhabitants, is sustained by the language of the act, long acquiescence, and many express acts on the part of the towns themselves. It was upon this ground the cases were decided. In Hopkins, the chancellor says, that "the legislature, acting upon the application of some, and with the acquiescence of all, divided the town," and concludes his opinion in these words: "The general conclusions from all these views are, that the division of the original town of Hempstead, in 1784, was a legislative partition of the lands of the town between the two new towns; that the partition of these lands by the division of the town must have been within the contemplation and with the assent of those who solicited and those who acquiesced in the

division; and that the partition so made was not inequitable or unjust, in the state of things which then existed."

It follows from the views we have taken, that the judgment of the circuit court must be reversed, and a new trial awarded.

NOTE.

Milwaukee *v.* Milwaukee, *supra,* has been cited with approval in Wisconsin, as follows: State ex rel. etc., *v.* Haben, 22 Wis. 666; Mills *v.* Charlton, 29 Wis. 415; Town of Depere *v.* Town of Bellevue, 31 Wis. 125; Atty.-Gen. *v.* City of Eau Claire, 37 Wis. 436; Cathcart *v.* Comstock, 56 Wis. 600; Schriber *v.* Town of Langlade, 66 Wis. 631; Forest County *v.* Langlade County, 76 Wis. 610; School Directors of Pelican *v.* School Directors of Rock Falls, 81 Wis. 438; City of Columbus *v.* Town of Columbus, 82 Wis. 381, 16 L. R. A. 698; School Directors of Town of Ashland *v.* City of Ashland, 87 Wis. 536; Joint School Dist. No. 8 *v.* School Dist. No. 5, 92 Wis. 612; State ex rel. Princeton *v.* Maik, 113 Wis. 246.

It has been cited with approval outside of the Wisconsin Supreme Court as follows: Pearson *v.* State, 56 Ark. 153, 35 Am. St. Rep. 93; Lucas *v.* Bd. of Comrs. of Tippecanoe County, 44 Ind. 532, 538; City of Wellington *v.* Wellington Township, 46 Kan. 221, 39 Ia. 44; State *v.* Foley, 30 Minn. 357; City of Winona *v.* School Dist., 40 Minn. 18, 3 L. R. A. 48; Board *v.* Board, 30 W. Va. 430.

Valuable collections of authorities citing Milwaukee *v.* Milwaukee, *supra,* will be found in notes to the following cases reported in L. R. A.: State ex rel. Richards *v.* Cincinnati (52 Oh. St. 419), 27 L. R. A. 738; State ex rel. Bulkeley *v.* Williams (68 Conn. 131), 48 L. R. A. 486; State ex rel. White *v.* Barker (116 Ia. 96), 57 L. R. A. 251.

Hasbrouck v. The City of Milwaukee.

June Term, 1860.

(13 Wis. 37.)

It appears in this case that the Legislature of Wisconsin by chapter 171, Laws of 1853, authorized the City of Milwaukee to issue the bonds of said city to an amount not exceeding fifty thousand dollars, ($50,000), to raise money to be expended in the construction of a harbor in that city. By an Act of March 18th, 1856, the Legislature increased the amount of bonds the city could issue for the above purpose to One hundred thousand dollars, ($100,000). By a further Act of the Legislature approved February 23rd, 1857, it was provided that the city could issue such an amount of bonds as might be necessary to complete the harbor. Action was brought by Hasbrouck in the Circuit Court of Milwaukee County to recover a balance of something over Seventy-three thousand dollars ($73,000), alleged to be due him from the city, for labor and materials furnished in the construction of said harbor. It appeared from the complaint that Hasbrouck was the assignee of various contracts entered into with the city for the construction of the harbor, prior to the passage of said Act of February, 1857, and that said contracts provided for payments for the construction of such harbor far exceeding in amount the sums the city was authorized to expend by said Acts of 1853 and 1856, and the amount sued for by Hasbrouck was a portion of such excess. The Circuit Court sustained a demurrer to the complaint on the ground that it stated no cause of action.

The other facts sufficiently appear from the opinion.

The following are the propositions of law decided:

A municipal corporation does not possess the power to engage in works of internal improvement, such as the construction of railroads, canals, harbors and the like, unless that power is specifically granted by the legislature.

The "act to authorize the mayor and common council of the city of Milwaukee to issue bonds," etc., approved April 1st, 1853, and the act of March 18th, 1856, amending the same, did not confer upon the city of Milwaukee power to construct a harbor, the expense of which should exceed $100,000; and a contract for the construction of such harbor, which provided for a greater expenditure, was void as to the excess, for want of corporate power in the city to make such contract.

A subsequent legislative ratification of such contract was not sufficient *proprio vigore,* and without evidence that such ratification was procured with the assent of the corporation, or had been subsequently acted upon or confirmed by it, to make the contract obligatory upon the corporation.

Dixon, Chief Justice. The power of municipal corporations, when authorized by the legislature, to engage in works of internal improvements, such as the building of railroads, canals, harbors and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements and make good their pledges by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are nevertheless,

by reason of the facilities which they afford for trade, commerce, and inter-communication between different and distant portions of the country, indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience has demonstrated that they have added vastly and almost immeasurably, to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of the cities, towns, villages and rural districts through which they pass, and with which they are connected. It is in view of these results, the public good thus produced, and the benefits thus conferred upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them matters of public concern, for the accomplishment of which the taxing power might lawfully be called into action. It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in, or pledge their credit for their construction. Upon no other principle can the exercise of the power of taxation for such objects be sustained. And in doing so the courts have never, to my knowledge, extended it to cases where it was not apparent that the members of the corporation concerned would be benefited by the construction of the work contemplated. The building of the harbor at Milwaukee comes clearly within this principle, and upon it there can be no doubt that so far as the corporation has acted within the limits of the authority granted by the legislature, it is bound to a strict performance of its contracts. But whilst the power of such corporations when authorized, thus to engage in or loan their credit for the making of such improvements, has been almost invariably upheld, it has not

as yet, I believe, been adjudged in any case, that they could do so without such legislative authority. No court or writer upon the subject, so far as I know, has ever claimed or intimated that they could do so in the absence of such authority. On the other hand, the general expression of opinion has been that they are incompetent, by virtue of their ordinary powers, and without such special legislative authority, to contribute to such enterprises. Mr. Pierce, in his treatise on American Railroad Law, recently put forth, says that no attempt on their part, without such special legislative authority, to exercise such extraordinary powers, has yet been the subject of judicial examination, and adds his opinion that it could not be sustained. In several cases which have heretofore been before this court, it has been conceded by counsel that it could not be. In this case, the counsel for the plaintiff in error expressly waived its discussion, and virtually admitted that the rights of their client must stand or fall upon the true construction of the several acts of the legislature by which the city was permitted to engage in the work. They rested the case upon the effect to be given to those acts and the action of the city under them. Its decision, therefore, depends upon the construction which they shall receive, and the several steps taken by the city in pursuance of them.

And here it will become more convenient for me to reverse the order of argument pursued at the bar, and of time in which the several acts were passed, and to examine the last position taken by the counsel for the plaintiff in error under the last act first, and in connection with it the authorities by which they seek to support it. It is said by them, that if it be conceded that under the two previous statutes the city was only authorized to enter into

a contract for the construction of a harbor, the expense of which should not exceed $100,000, and that the municipal authorities were not, at the time they attempted to do so, empowered to make an agreement, or bind the corporation for the payment of a greater sum, the defect is cured by the operation of the act of February 23rd, 1857, (chapter 66, Private Laws, 1857), and that from and after the passage of this act, the agreement for the excess became valid and binding upon the city. To this position counsel cite several authorities, and as I am unable to agree with them, an examination of those authorities will become necessary. In the first place, it will be observed from what has already been said, and should be borne in mind, that the subject with which we are dealing is not one of public policy merely, but of corporate power, and that the inquiry is whether, where the supposed contract of a public corporation is absolutely void for want of capacity to enter into it, a subsequent legislative ratification or recognition of it is sufficient, *proprio vigore,* and without any evidence that such ratification or recognition was procured at the instance or with the assent of the corporation, or that the corporation had subsequently acted upon or confirmed it, to give such contract life and validity, and make it obligatory upon the corporation. Conceding that the previous statutes did not confer upon the city the power to enter into the contract, which I shall discuss hereafter, then I understand such to be the true nature of the inquiry here presented. I do not understand that the city, by any appropriate action, petitioned or asked for the passage of the act; nor is it averred that it subsequently ratified or assented to it. On the contrary, I infer from this proceeding, that it has refused to be bound by it, or the contract to which it had reference. Under these circum-

stances the question is, can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city as well as of the legislature in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it, is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that the legislature, of its own choice and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled rights of property, and to take the property of one individual or corporation and transfer it to another. It is certainly unnecessary at this day to enter into an argument or to cite authorities to show that under a constitutional government like ours the legislature has no power.

It is undoubtedly true that in cases like the present, where there is a strong moral but no legal obligation to pay, courts have often seized, and may again seize upon very slight circumstances of assent in order to give effect to the contract. And in this case, if it appeared that the city did, by some authorized action, procure the passage of the act, or had subsequently acquiesced in it by ratifying the contract, there would be little difficulty in the way of holding it bound by its terms. In such cases it is the contemporaneous or subsequent assent of the parties to be found, coupled with the power or ability on their part to

give such assent, which makes the contract obligatory. But the giving of such assent is a matter which depends upon their own free will. It is a voluntary act which they may do or not as they see fit, and in case they think proper to withhold it, the legislature has no power to compel it. If in a transaction between private parties, a contract made by them should be declared void by the provisions of some statute, as for instance, a statute against usury, no one I think would insist that the legislature could, without the consent of the borrower, remove the infirmity and make the agreement obligatory upon him. It might change the entire policy of the State upon the subject of interest, and declare that no rate however exorbitant should avoid the security, but it could not, without the assent of the parties, interfere with past transactions. Corporations, whether public or private, are within the same rule of protection, and I can see no substantial ground for a distinction between contracts which are void for a want of capacity in one or both of the contracting parties to enter into them, and those which are void for some other cause. If the city in this instance had accepted and approved the act of the legislature, in whole or in part, there can be little doubt that to the extent of such acceptance and approval it would have become bound. The case would then have fallen within the principles of the case of the City of Bridgeport *v.* The Housatonic Railroad Company, 15 Conn. R. 475, where the bonds of the city issued to aid in the construction of the company's road were held valid, because the confirmatory resolution of the general assembly was afterwards accepted by the freemen of the city. It would also come within the doctrine of this court laid down in the recent case of

Mills *v.* Gleason; but until there be such acceptance I know of no authority for saying that the city is bound.

The mistake of the counsel for the plaintiff in error consists in their supposing it to be a mere question of public policy. If it were, and the court were only called upon to determine what was the policy of the State with reference to allowing municipal corporations in general, and the corporation of Milwaukee in particular, to engage in works of that kind at the time the contract was enlarged, then I would admit that their position is supported by the cases of Shaw *v.* Norfolk County Railroad Company, 5 Gray, 163, and Hall and others, Trustees, *v.* Sullivan R. R. Co., U. S. Cir. Ct. for district of New Hampshire, reported in Pierce on American Railroad Law, page 520, note 1. In both these cases the question arises whether the instruments by which the railroad corporation had attempted to transfer their franchises were invalid upon grounds of public policy. It was insisted that as the franchises were created by the legislature for the public benefit, and confined to particular political persons to be exercised for that purpose, any attempt to delegate them to others was inoperative and void. In both instances the legislatures of the respective States had, by acts passed after the execution of the conveyance, referred to and recognized them as valid. In the first named case the conveyance had been directly ratified and confirmed by statute. The courts held that such acts of recognition were conclusive upon their effect, because they showed that at the time they were executed, no rule of public policy was contravened. They acknowledged the power of the legislature to determine and control the policy of the State with regard to corporations created under its authority, and looked into the acts as evidence of what that policy was

when the transfers were made. No question of corporate power was made. The policy being settled in favor of the transfers, the power to make them was conceded. But such is not the nature of the transaction before us. This is not a question of conceded power and doubtful policy at the time the plan was changed and the contract enlarged, but the reverse. We cannot, from an examination of the statute under consideration, say, as the courts there said, that it was originally the intention of the legislature that the corporation should possess the power which it has attempted to exercise. We cannot infer from it that the legislature intended at the outset that the people or corporate authorities of Milwaukee should have the power to expand the undertaking and augment its expense at their pleasure, but rather the contrary. The more natural and truthful inference is, that, in the opinion of the legislature, they had not such power, and hence the passage of the act for the purpose of enabling the city, if it chose, to do that which under the circumstances the legislature deemed to be equitable and just. The language of the act is permissive and not compulsory. It indicates no desire on the part of the legislature, even if it possessed the power, to compel the city to issue its bonds for the completion of the harbor. The legislature simply say that the mayor and common council are authorized and empowered to issue such an amount of bonds as may be necessary to complete it, in such denominations as they may deem proper, and bearing interest at a rate not exceeding seven per cent.

It furthermore sufficiently appears in both the above named cases that the railroad companies had acted under and ratified the confirmatory statutes. In the first it is distinctly stated that the company had paid a portion of

the interest which had accrued upon the bonds, for the security of which the mortgage was executed, after the passage of the statute; and in the second, although there is no separate statement of the facts, and we have only such as are to be gathered from the opinion of the court, which does not profess to give them completely and accurately, still I think it is fairly to be inferred from what is said, that the company had acted under the first statute and issued new stock in pursuance of the authority there given. So that if any doubts had arisen in those cases as to the power of the companies to mortgage their franchises, there was such evidence of their subsequent assent as would have cured the defect, and they would then have been no guide for the determination of this case.

It follows from what I have already said, that in my opinion this is not a defect which can be reached by the retroactive power of the legislature alone. It cannot, because in so doing the legislature would interfere with vested rights of property. It would of its own mere motion create an *obligation* where by law none before existed; it would impose a liability against the will and without the consent of the party to be charged. This the legislature cannot do. It can only act retrospectively for the purpose of furnishing a remedy for, or removing an impediment in the way of the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty. And the distinction, I think, will be found to prevail in all the cases. An examination of them will, I believe, show that such legislation has not been permitted to conclude the rights of the parties except when legal or equitable rights or obligations had grown up out of the previous lawful acts and dealings of the parties, and existed independently of the defect or

irregularity complained of, and which the legislature sought to cure or remove; and that no case can be found where it has been held that such legislative action alone was sufficient to give life and validity to supposed contracts or obligations which originated solely and exclusively in acts which it was unlawful or impossible for the parties themselves at the time to perform. Chancellor Kent, in the first volume of his Commentaries, page 455 of the original edition, in speaking of the retroactive power of the legislature in this country, sums up the doctrine very clearly and accurately. He says: "A retrospective statute, affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, *and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding to the means of enforcing existing obligations.* Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a statute to confirm former marriages defectively celebrated or a sale of lands defectively made or acknowledged. The legal rights affected in those cases by the statutes, *were deemed to have vested subject to the equity existing against them,* and which the statutes recognized and enforced. But the cases cannot be extended beyond the circumstances on which they repose, without putting in jeopardy the energy and safety of the general principle." In this case it is impossible to say that by virtue of the supposed contract the plaintiff did or could obtain any vested rights as

against the city, beyond the $100,000 which it was previously authorized to expend in the building of the harbor, for the reason that it was not in the power of the people or the corporate authorities, by any action which they could take, to lay the foundation for such rights. If the city had possessed the general authority to build the harbor without regard to the expense, but had failed through some technical error or mistake to exercise that authority in the manner prescribed by law, the case might then have fallen within the remedial power of the legislature; but now it does not, unless the city assents to it.

The authorities cited by the counsel for the plaintiff in error, and which may be supposed to be the strongest that can be found in support of their position, will sufficiently illustrate this rule. In Wilkinson *v.* Leland, 2 Peters, 627, the executrix appointed under a will which had been admitted to probate in the State of New Hampshire, under an order of the probate court of that State, sold and conveyed some real estate which had belonged to the testator, situated in the State of Rhode Island, for the payment of debts. The estate of the testator was represented to be insolvent and was in fact nearly so, there being only some £15 left for distribution after appropriating the proceeds of all his effects, including the price of the land in question, to the payment of the debts due from him, and deducting the expenses of administration. It was conceded that the probate court of New Hampshire had no power to direct the sale of lands in another State, and that the sale and conveyance were consequently inoperative and void. The legislature of Rhode Island subsequently, on the petition of the executrix, ratified and confirmed the deed. The funds realized were applied by her in discharge of the demands of the creditors. There was no

pretense that the sale was unfair, or that any part of the transaction was characterized by fraud or bad faith. The supreme court held that the act of ratification rendered the conveyance operative and effectual. In doing so, the court make the decision turn mainly upon the fact, that by the laws of Rhode Island, as of all the New England States, the real estate of testators and intestates stands chargeable with the payment of their debts, upon a deficiency of assets of personal estate, and although at law the title is said to vest in the heir or devisee immediately on the death of the ancestor or testator, yet it does so only conditionally and subject to the liens or claims of creditors, for the satisfaction of which it is liable to be divested and sold. It is only the interest which is left after the payment of the debts that goes to the heir or devisee. The court considered the estate or its proceeds as belonging to the creditors, for whose benefit it was liable in law to be sold and conveyed. Their rights were pre-existing and legal, and the act of confirmation, as well as the sale and conveyance, were purely remedial in their nature; they aided in the enforcement of existing obligations, in giving the creditors what justly already belonged to them. It is very evident from the opinion that if there had been no creditors, and therefore no pre-existing rights, the conclusion of the court must have been quite different. The sale and conveyance, at the time they were made, were not unlawful, improper or impossible in themselves. The defect consisted only in the *manner* in which they were made and executed.

The case of the Syracuse City Bank *v.* Davis, 16 Barbour, 188, is similar in its character. The bank lacked nothing of the *substance* of a good institution of the kind. It had a sound capital and had practically performed all

the duties which pertained to it, but a mistake had occurred in the form of the proof and acknowledgment of a part of the subscribers to the certificate. The objection was entirely technical in its nature, and did not go to any of the substantial requirements of the law. It was a bank *de facto,* and the act which it had done was not beyond the legitimate scope or powers of such a corporation. It was not the case of a bank attempting to do that which at the time no bank could do. The removal of the obstruction was therefore a remedial act which aided in the enforcement of a just and equitable obligation to which there was otherwise no legal objection. Possessing all the essential qualities of a perfect institution, and the transaction being lawful, its contract was not a nullity, so that with the aid of the legislature it could not be enforced. It was regarded so far a complete corporation as to have the capacity of acquiring vested rights, though owing to a technical irregularity there was an impediment in the way of applying the remedy, which the legislature proceeded to displace. The act did not profess to create a new corporation, but to remedy the defects in the organization of one which already existed. In the present case, if the statute is to be held to have any beneficial effect whatever, it must be because it gave to the city a power or capacity beyond what it before possessed. For if, as was contended by counsel, it had by the previous acts the authority to enter into a contract for the completion of the entire harbor on the plan last adopted and without limitation as to price, then the act was nugatory and useless. For then it would have had the power to issue its bonds or any other evidence of indebtedness, without the assistance of this statute. Such power would have flowed from its ability to contract, and it needed not the action of the legislature to enable it

to adjust or settle its liabilities in such form as the municipal authorities saw fit to adopt. See Mills *v.* Gleason, *supra,* and Ketcham *v.* The City of Buffalo, and the authorities there cited in the opinion of Wright, J. The statute therefore does not operate in this case as it did in that, remedially. It was there designed to cure a defective exercise of the power to organize a bank, a power which already existed. Here it was not intended to help out the operation of an existing power, but to confer one which the corporation did not before possess. The distinction is between aiding the imperfect execution of an authority previously granted or act lawful in itself, and the granting of a new authority or attempting to relieve against an unlawful act.

It requires no effort to distinguish between this case and that of Foster *v.* The Essex Bank, 16 Mass. 245. There the statute was clearly remedial. It provided generally that all corporations then existing or thereafter to be established, whose powers should expire at a given time, should be continued in existence as bodies corporate for three years after the time limited by their charters, for the purpose of suing and being sued, settling and closing their concerns, and dividing their capital stock; but not for continuing the business for which they were established. It is very evident that the object of the act was to save and continue the remedy upon existing obligations and not to create new ones. The same reasoning will apply to cases of marriage defectively celebrated, judgments entered on the wrong day (10 Serg. & Rawle, 101), deeds defectively acknowledged (16 id. 35), or remedies given where by law none before existed (7 Watts, 300).

I therefore think that this action cannot be maintained unless, as was contended by counsel, the city had the power

to enter into and bind itself by the contract under the provisions of the previous acts. If it had, then it may; for the contract was made and the work completed after their passage, but before the enactment of that which I have been considering.

I have already noticed that if, by the previous acts, authority was delegated to the city to complete the harbor in the manner in which it has been done, then the last act was wholly nugatory and useless. It would be so except so far as it might be considered as a legislative interpretation of the former acts, and in that respect it would make against the construction contended for by the counsel for the plaintiff in error. It shows most indubitably that in the opinion of the legislature the city was limited by them to an expenditure of $100,000. This I cannot for a moment doubt is the true construction of those acts. It is manifest to me from their entire scope and tenor, and the language used, particularly in the first, (chapter 171, Laws of 1853), under which the enlarged power is claimed, that such was the intention of the legislature. Its language is restrictive. The mayor and common council were authorized to issue bonds of the city to an amount *not exceeding fifty thousand dollars.* The regulations to be observed and steps to be taken before the bonds could be issued, clearly indicate it. The assent of a majority of the legal voters was first to be obtained. Before issuing any bonds the common council were required to submit the question of such loan to the legal voters of the city at an election to be called for that purpose, of which at least ten days' notice was to be given, and at which election the votes should be by ballot, which should have written or printed thereon the words "for the harbor loan," or the words "against the harbor loan;" and if a majority of the votes cast on

that subject should be "for the harbor loan," the common council should issue the bonds, but not otherwise. Why were these restrictive words used, and the authority of the mayor and council thus circumscribed, if the legislature intended, by making it their duty, "to let out the work by contract to the lowest bidder," to abrogate the limitation and to give them authority to bind the city to any extent they saw fit? Was it not the intention to make the power to contract subservient to the general restriction previously imposed? It seems to me clear that such was the object in view. Such construction is alone in harmony with the rule that we are so to construe statutes as that all may stand and no part be defeated. It is consistent with the latter provision and gives it the effect which the legislature intended, whilst the opposite construction would frustrate and render inoperative their will, as plainly expressed in the former. This interpretation is strengthened by sec. 3 of article XI of the constitution, which makes it the duty of the legislature to restrict cities and villages in their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessment and taxation and in contracting debts by such corporations. In imposing this restriction when the city was about to engage in such an enterprise, the legislature performed a plain constitutional duty. And in doing so what more unambiguous or less doubtful method could they have adopted than that of fixing the sum which the city might expend? Clearly none. Again, why submit the question to the will of the voters, if such submission was to have the effect of authorizing the municipal authorities to incur an indebtedness many times larger than that upon which they were called upon to express their opinion? Was it the intention to deceive and

trick upon them liabilities and burdens of which they had not the slightest intimation? Evidently, the legislature had no such design, but the intention was to allow the city to loan its credit to that amount, provided a majority of the voters gave their consent, otherwise not at all. With a majority vote against the loan, the provision in relation to letting the contracts would have remained a dead letter upon the statute book.

I need not spend time upon the act of March 18th, 1856, (chapter 145, Private Laws, 1856). It simply authorized an increase of the amount of the bonds to $100,000. No other effect was claimed for it.

I do not discuss the questions growing out of the alleged irregularities in the reletting or subsequent enlargement of the contract. The city having already exceeded the limits fixed by the first two acts, by issuing its bonds to a greater amount than they authorized, and there being no averment in the complaint that it has assented to or ratified the last, those questions become immaterial. In my judgment the judgment of the circuit court should be affirmed.

Judgment affirmed.

NOTE.

Hasbrouck *v.* Milwaukee, *supra,* has been cited with approval in Wisconsin as follows: Hasbrouck *v.* Milwaukee, 17 Wis. 266; Selsby *v.* Redlon, 19 Wis. 21; Veeder *v.* Town of Lima, 19 Wis. 291; Hasbrouck *v.* Milwaukee, 21 Wis. 234; Curtis's Admr. *v.* Whipple and others, 24 Wis. 355; Whiting *v.* S. & F. Ry., etc., 25 Wis. 216, 218; Mills *v.* Charlton, 29 Wis. 413, 415; State ex rel. McCurdy *v.* Tappan, 29 Wis. 680, 683; Blount *v.* City of Janesville, 31 Wis. 659; Atty.-Gen. *v.* City of Eau Claire, 37 Wis. 438; Kimball *v.* Town of Rosendale, 42 Wis. 412; Richland County *v.* Village of Richland Center, 59 Wis. 600; Kennan *v.* Rundle and others, 81 Wis. 225; Lund

v. Chippewa County and others, 93 Wis. 649, 34 L. R. A. 135; Town of Winneconne *v.* Village of Winneconne, 111 Wis. 17.

It has been cited with approval outside of the Wisconsin Supreme Court as follows: Hoagland *v.* Sacramento, 52 Cal. 150; Treadway *v.* Schnauber, 1 Dak. 250; Stockton *v.* Powell, 29 Fla. 36, 15 L. R. A. 45; City of Emporia v. Norton, 13 Kan. 586; Lowe v. Harris, 112 N. Car. 488, 22 L. R. A. 386; Bailey *v.* City of Raleigh, 130 N. Car. 209, 58 L. R. A. 179; Lancy *v.* King County, 15 Wash. 9, 34 L. R. A. 820; Northern Pac. Ry. *v.* Roberts, 42 Fed. 737 (West Dist. Wis.); Olcott *v.* The Supervisors, 16 Wall. 691; Southworth *v.* New Orleans, 24 La. An. 315; People ex rel. Murphy *v.* Kelly, 76 N. Y. 497, 5 Abb. N. C. 468.

It has been cited in notes to the following cases reported in L. R. A., and Am. Dec., in which valuable collections of authorities will be found:

Lawyers' Reports Annotated: Erskine *v.* Nelson County (4 N. Dak. 66), 27 L. R. A. 697; State ex rel. Bulkeley *v.* Williams (68 Conn. 131), 48 L. R. A. 479.

American Decisions: De Voss *v.* City of Richmond (18 Gratt. 338), 98 Am. Dec. 666; Korah *v.* City of Ottawa (32 Ill. 121), 83 Am. Dec. 257; Mills *v.* Gleason (11 Wis. 470), 78 Am. Dec. 729.

Kellogg v. The Chicago & Northwestern Railway Company.

January Term, 1871.

(26 Wis. 223.)

This action was brought to recover damages for the destruction, by fire, of stacks of hay and straw, sheds and buildings belonging to the plaintiff. The fire was communicated by sparks or coals from defendant's engine, to dry grass, weeds and willows, on its right of way (which extended about fifty feet on each side of its iron track); and the fire passed thence upon plaintiff's pasture and meadow land, through dry stubble of grass and grain, crossing a brook about three feet wide, until it reached a hay-stack, and thence spread to the other stacks, and to the sheds and buildings, which were about a hundred and forty rods from where the fire started. The fire occurred in the month of November, which was shown to be usually a windy month in that region; and a strong wind was blowing at the time, from the point where the fire originated, towards where the property was destroyed. The season was a dry one, and the grass, weeds and stubble were "very dry." Some parts of plaintiff's pasture land, over which the fire passed, were "boggy and uneven." Along the edge of the brook where the fire crossed it, there was tall, dry grass. There was evidence to show that where the fire began, defendant's land was uneven, and that the grass, weeds and willows had not been removed for years, if ever. There was evidence which, on the other hand, tended to show that the company was in the habit of burning the grass along its track every year, to diminish the danger of accidental fires. There was a verdict and judgment for plaintiff, and defendant appealed.

The judgment was affirmed, Chief Justice Dixon writing the opinion for the court. Mr. Justice Cole concurred with him. Mr. Justice Paine dissented.

The following are the propositions of law decided by the Court:

Where sparks from defendant's engine set fire to dry grass, weeds and bushes, suffered to remain and accumulate on land used for the railway, and the fire, spreading upon plaintiff's lands, destroyed his property, the question whether defendant was negligent in leaving its land in that condition, was properly left *to the jury.*

It was not error, as against defendant, to submit to the jury the question whether plaintiff was also negligent in permitting dry stubble and grass to remain on his land, and in not having plowed a sufficient strip adjoining the railway to prevent the spread of the fire.

The fact that the fire would not have spread to the property destroyed unless the weather had been dry and the wind strong, does not affect defendant's liability.

The fact that the property destroyed was distant from defendant's road, and that the flame reached it only by passing through intervening fields, does not render the damages remote, or prevent a recovery.

Persons occupying farms along railroads are entitled to cultivate and use them in the manner customary among farmers, and may recover for damages by fire resulting from the negligence of the Railway company, although they have not plowed up the stubble, or taken other like unusual means to guard against such negligence.

Negligence of the plaintiff, in such cases, which precludes a recovery, is where, in the presence of a *seen*

danger (as where the fire has been set) he omits to do what prudence requires to be done under the circumstances for the protection of his property, or does some act inconsistent with its preservation. Where the danger is *not seen,* but anticipated merely, or dependent on future events (such as the future continuance of defendant's negligence), plaintiff is not bound to guard against it by refraining from his usual course (being otherwise a prudent one) in the management of his property and business.

In the exercise of his lawful rights, every person has a right to presume that every other will perform his duty and obey the law, and it is not negligence for him to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person.

The maxim, *causa proxima non remota spectatur,* is not controlled by time or distance, nor by the succession of events. An efficient, adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The maxim includes liability for all actual injuries which were the natural and probable result of the wrongful act or omission complained of, or were *likely* to ensue from it under ordinary circumstances. Ryan *v.* N. Y. Central R. R. (35 N. Y. 210), and Pa. R. R. *v.* Kerr (62 Pa. St. 353, or 1 Am. R. 431), examined and disapproved; Perley *v.* Eastern R. R. Co., 98 Mass. 414, and others, approved and followed.

The drouth and high wind in this case *held* not to be *extraordinary,* but *ordinary* circumstances, within the meaning of this rule.

This court will not reverse for errors in the instructions or rulings of the court, where it is clear that the verdict and judgment could not have been different on the evidence.

If a party wishes the jury instructed upon a point not embraced in the general charge given, or if an instruction merely requires modification in some particular or particulars not materially affecting its general correctness, an exception thereto should be particular, so as to call the attention of the court to the precise point of objection.

Dixon, Chief Justice. All the authorities agree that the presence of dry grass and other inflammable material upon the way of a railroad, suffered to remain there by the company without cause, is a fact from which the jury may find negligence against the company. The cases in Illinois cited and relied upon by counsel for the defendant hold this. They hold that it is proper evidence for the jury, who may find negligence from it, although it is not negligence *per se*. Railroad Co. *v.* Shanefelt, 47 Ill. 497; Illinois Central Railroad Co. *v.* Nunn, 51 id. 78; Railroad Co. *v.* Mills, 42 id. 407; Bass *v.* Railroad Co., 28 id. 9. The court below ruled in the same way, and left it for the jury to say whether the suffering of the combustible material to accumulate upon the right of way and sides of the track, or the failure to remove the same, if the jury so found, was or was not, under the circumstances, negligence on the part of the company. No fault can be found with the instructions in this respect; and the next question is as to the charge of the court, and its refusal to charge, respecting the alleged negligence of the plaintiff contributing, as it is said, to the loss or damage complained of. This is

the leading and most important question in the case. It is a question upon which there is some conflict of authority.

The facts were, that the plaintiff had permitted the weeds, grass and stubble to remain upon his own land immediately adjoining the railway of the defendant. They were dry and combustible, the same as the weeds and grass upon the right of way, though less in quantity, because within the right of way no mowing had ever been done, and the growth was more luxuriant and heavy. The plaintiff had not cut and removed the grass and weeds from his own land, nor plowed in or removed the stubble, so as to prevent the spread of fire in case the same should be communicated to the dry grass and weeds upon the railroad, from the engines operated by the defendant. The grass, weeds and stubble upon the plaintiff's land, together with the wind, which was blowing pretty strongly in that direction, served to carry the fire to the stacks, buildings and other property of the plaintiff, which were destroyed by it, and which were situated some distance from the railroad. The fire originated within the line of the railroad, and near the track, upon the land of the defendant. It was communicated to the dry grass and other combustible material there, by coals of fire dropped from an engine of the defendant passing over the road. The evidence tends very clearly to establish these facts, and under the instructions the jury must have so found. The plaintiff is a farmer, and, in the particulars here in controversy, conducted his farming operations the same as other farmers throughout the country. It is not the custom anywhere for farmers to remove the grass or weeds from their waste lands, or to plough in or remove their stubble, in order to prevent the spread of fire originating from such causes.

Upon this question, as upon the others, the court charged

the jury that it was for them to say whether the plaintiff was guilty of negligence, and, if they found he was, that then he could not recover. On the other hand, the defendant asked an instruction to the effect that it was negligence *per se* for the plaintiff to leave the grass, weeds and stubble upon his own land, exposed to the fire which might be communicated to them from the burning grass and weeds on the defendant's right of way, and that for this reason there could be no recovery on the part of the plaintiff. The court refused to give the instruction, and, I think, rightly. The charge upon this point, as well as upon the other, was quite as favorable to the defendant as the law will permit, and even more so than some of the authorities will justify. The authorities upon this point are, as I have said, somewhat in conflict. The two cases first above cited from Illinois hold that it is negligence on the part of the adjoining land owner not to remove the dry grass and combustible material from his own land under such circumstances, and that he cannot recover damages where the loss is by fire thus communicated. Those decisions were by a divided court, by two only of the three judges composing it. They rest upon no satisfactory grounds, whilst the reasons found in the opinions of the dissenting judge are very strong to the contrary. Opposed to these are the unanimous decisions of the courts of New York, and of the English court of exchequer, upon the identical point. Cook *v.* Champlain Transportation Co., 1 Denio 91; Vaughan *v.* Taff Vale Railway Co., 3 Hurl. and Nor. 743; Same *v.* Same, 5 id. 679. These decisions, though made many years before the Illinois cases arose, are not referred to in them. The last was the same case on appeal in the exchequer chamber, where, although the judgment was reversed, it was upon another point. This one was not questioned, but

was affirmed, as will be seen from the opinions of the judges, particularly of Cockburn, C. J., and Willes, J. The reasoning of those cases is, in my judgment, unanswerable. I do not see that I can add anything to it. They show that the doctrine of contributory negligence is wholly inapplicable—that no man is to be charged with negligence because he uses his own property or conducts his own affairs as other people do theirs, or because he does not change or abandon such use, and modify the management of his affairs, so as to accommodate himself to the negligent habits or gross misconduct of others, and in order that such others may escape the consequence of their own wrong, and continue in the practice of such negligence or misconduct. In other words, they show that no man is to be deprived of the free, ordinary and proper use of his own property by reason of the negligent use which his neighbor may make of his. He is not his neighbor's guardian or keeper, and not to answer for his neglect. The case put by the court of New York, of the owner of a lot who builds upon it in close proximity to the shop of a smith, is an apt illustration. Or let us suppose that A. and B. are proprietors of adjoining lands. A. has a dwelling house, barns and other buildings upon his, and cultivates some portion of it. B. has a planing mill, or other similar manufacturing establishment, upon his, near the line of A., operated by steam. B. is a careless man, habitually so, and suffers shavings and other inflammable material to accumulate about his mills and up to the line of A., and so near to the fire in the mill that the same is liable at any time to be ignited. A. knows this, and remonstrates with B., but B. persists. Upon A.'s land, immediately adjoining the premises of B., it is unavoidable, in the ordinary course of husbandry, or of A.'s use of the land, that there should be

at certain seasons of the year, unless A. removes them, dry grass and stubble, which, when set fire to, will endanger his dwelling house and other property of a combustible nature, especially with the wind blowing in a particular direction at the time. It may be a very considerable annual expense and trouble to A. to remove them. It may require considerable time and labor, a useless expenditure to him, diverting his attention from other affairs and duties. The constant watching to guard against the carelessness and negligence of B. is a great tax upon his time and patience. The question is: Does the law require this of him, lest, in some unguarded moment, the fire should break out, his property be destroyed, and he is remediless? If the law does so require, if it imposes on him the duty of guarding against B.'s negligence, and of seeing that no injury shall come from it, or, if it does come, that it shall be his fault and not B.'s, it is important to know upon what principle it is that the burden is thus shifted from B. to himself. I know of no such principle, and doubt whether any court could be found deliberately to announce or affirm it. And yet such is the result of holding the doctrine of contributory negligence applicable to such a case. A. is compelled all his life-time, at much expense and trouble, to watch and guard against the negligence of B., and to prevent any injuries arising from it, and for what? Simply that B. may continue to indulge in such negligence at his pleasure. And he does so with impunity. The law affords no redress against him. If the property is destroyed, it is because of the combustible material on A.'s land, which carries the fire, and which is A.'s fault, and A. is the loser. No loss can ever possibly overtake him. A. is responsible for the negligence, but not he himself. He kindles the fire, and A. stands guard over it. He sets the dangerous element in

motion, and uses and operates it for his own benefit and advantage, negligently as he pleases, whilst A., with sleepless vigilance, sees to it that no damage is done, or if there is, that he will be the sufferer. This is the *reductio ad absurdum* of applying the doctrine of contributory negligence in such a case. And it is absurd, I care not by what court or where applied.

Now the case of a railroad company is like the case of an individual. Both stand on the same footing with respect to their rights and liabilities. Both are engaged in the pursuit of a lawful business, and are alike liable for damage or injury caused by their negligence in the prosecution of it. Fire is an agent of an exceedingly dangerous and unruly kind, and, though applied to a lawful purpose, the law requires the utmost care in the use of all reasonable and proper means to prevent damage to the property of third persons. This obligation of care, the want of which constitutes negligence according to the circumstances, is imposed upon the party who uses the fire, and not upon those persons whose property is exposed to danger by reason of the negligence of such party. Third persons are merely passive, and have the right to remain so, using and enjoying their own property as they will so far as responsibility for the negligence of the party setting the unruly and destructive agent in motion is concerned. If he is negligent, and damage ensues, it is his fault and cannot be theirs, unless they contribute to it by some unlawful or improper act. But the use of their own property as best suits their own convenience and purposes, or as other people use theirs, is not unlawful or improper. It is perfectly lawful and proper, and no blame can attach to them. He cannot, by his negligence, deprive them of such use, or say to them, "Do this or that with your property, or I will

destroy it by the negligent and improper use of my fire." The fault, therefore, in both a legal and moral point of view, is with him, and it would be something strange should the law visit all the consequences of it upon them. The law does not do so, and it is an utter perversion of the maxim *sic utere tuo, etc.,* thus to apply it to the persons whose property is destroyed by the negligence of another. It is changing it from "So use your own as not to injure another's property," to "So use your own that another shall not injure your property," by his carelessness and negligence. It would be a very great burden to lay upon all the farmers and proprietors of lands along our extensive lines of railway, were it to be held that they are bound to guard against the negligence of the companies in this way—that the law imposes this duty upon them. Always burdensome and difficult, it would, in numerous instances, be attended with great expense and trouble. Changes would have to be made in the mode of use and occupation, and sometimes the use abandoned, or at least all profitable use. Houses and buildings would have to be removed, and valuable timber cut down and destroyed. These are, in general, very combustible, especially at particular seasons of the year. The presence of these along or near the line of the railroad would be negligence in the farmer or proprietor. In the event of their destruction by the negligence of the company, he would be remediless. He must remove them, therefore, for his own safety. His only security consists in that. He must remove everything combustible from his own land in order that the company may leave all things combustible on its land and exposed without fear of loss or damage to the company to being ignited at any moment by the fires from its own engines. If this duty is imposed upon the farmers and other proprietors of adjoining

lands, why not require them to go at once to the railroad and remove the dry grass and other inflammable material there? There is the origin of the mischief, and there the place to provide securities against it. It is vastly easier, by a few slight measures and a little precaution, to prevent the conflagration in the first place, than to stay its ravages when it has once begun, particularly if the wind be blowing at the time, as it generally is upon our open prairies. With comparatively little trouble and expense upon the road itself, a little labor bestowed for that purpose, the mischief might be remedied. And this is an additional reason why the burden ought not to be shifted from the company upon the proprietor of the adjoining land; although, if it were otherwise, it certainly would not change what ought to be the clear rule of law upon the subject.

And the following cases will be found in strict harmony with those above cited, and strongly sustain the principles there laid down, and for which I contend: Martin *v.* Western Union Railroad Co., 23 Wis. 437; Piggott *v.* Eastern Counties R. R. Co., 54 E. C. L. 228; Smith *v.* London and Southwestern R. R. Co., Law Reports, 5 C. P. 98; Vaughan *v.* Menlove, 7 C. & P. 525 (32 E. C. L. 613); Hewey *v.* Nourse, 54 Me. 256; Turberville *v.* Stampe, 1 Ld. Raym. 264; S. C. 1 Salk. 13; Pantam *v.* Isham, id. 19; Field *v.* N. Y. C. R. R., 32 N. Y. 339; Bachelder *v.* Heagan, 18 Maine, 32; Barnard *v.* Poor, 21 Pick. 378; Fero *v.* Buffalo and State Line R. R. Co., 22 N. Y. 209; Fremantle *v.* The London and Northwestern R. R. Co., 100 E. C. L. 88; Hart *v.* Western Railroad Co., 13 Met. 99; Ingersoll *v.* Stockbridge & Pittsfield R. R. Co., 8 Allen, 438; Perley *v.* Eastern Railroad Co., 98 Mass. 414; Hooksett *v.* Concord Railroad, 38 N. H. 242; McCready *v.* Railroad Co., 2 Stobh. Law R. 356; Cleveland *v.* Grand Trunk

Railway Co., 42 Vt. 449; 1 Bl. Comm. 131; Com. Dig. Action for Negligence (A, 6).

It is true that some of these cases arose under statutes creating a liability on the part of railroad companies, but that does not affect the principle. Negligence in the plaintiff, contributing to the loss, is a defense to an action under the statutes, the same as to an action at common law. 8 Allen, 440; 6 id. 7.

And the other objections against the liability of the company, that the fire set by its negligence was the *remote* and not the *proximate* cause of the injury done to the plaintiff, because his property consumed was situated from sixty-five to one hundred rods from the place where the fire started, and because there was a strong wind blowing in that direction at the time, are, in my opinion, equally untenable. The same objections were taken in several of the cases above cited, and overruled, and might have been taken in most of the others, if they had been considered legitimate grounds of defense. It would be strange indeed, if the liability of a party for the negligent destruction of property by fire were to depend upon the fact whether he set fire at once to the property, or whether he set fire to some other combustible material at some distance from it, but communicating with it, and which, it was apparent at the time, would inevitably, or almost inevitably, lead to its destruction. It was apparent in this case, almost as apparent and certain before the fire was set, that, if set at the time and under the circumstances, it *would* prove destructive of the property of the plaintiff or of others, as it was afterwards that it *had* so proved. It required no prophetic vision to see this. It was a matter within the common experience of mankind. There were the "natural and ordinary means" at hand, by which it

must prove so destructive. 13 Met. 104. Those means extended directly and continuously from the place where the burning coals from the engine first touched the dry grass and weeds on the company's road, to the plaintiff's stacks, buildings and other property. There were the dry grass, weeds and stubble communicating with the property, and the wind blowing in the direction of it. And this condition of things had existed for some time, and had been suffered to exist by the company. No steps had been taken to remove the dry grass and other inflammable substances from the roads, which, if they had been removed, would have prevented the injury. In this the company was at fault, and it was its sole fault, so far as can now be known, that the injury took place. It may be that the wind did not always blow, or in the same direction; but at that season of the year the times of calm were the exception. The wind was liable and likely to blow, and greatly to enhance the danger, at any time. The company, or its agents and employees, knew this, and were bound to increased care on that account. And the argument that because the wind blew at the time, or because the same negligence might not have produced the injury if the atmosphere had been calm, therefore, the company is not liable, is certainly a very odd way of reasoning upon such a subject. The argument is neither more nor less than this: that the greater the tendency and exposure to damage from negligence, the less the care and circumspection required by law to guard against or prevent such damage. In other words, that the obligation of diligence decreases in proportion as the necessity for its exercise increases. The company may neglect its duty, and set fires and destroy property, on a windy day or night when the danger is increased, and it shall not be liable; whereas, if it do the same thing.

at a time when the wind is not blowing and the danger is diminished, it shall be liable. It may be that this mode of reasoning merits the compliment of ingenuity in the endeavor to avoid the liability of a party for wrongs committed by him, but it clearly cannot be sound. The authorities all repudiate it, and it requires no effort of one's natural sense of reason and justice to do so. The winds and the dryness and the combustibility of the substances upon the surface of the land are what create the danger, and impose upon the company the obligation of care and circumspection in the use and management of its fire. It is impossible to separate the idea of such obligation or duty from these natural causes or agencies from which it arises. If the materials on the surface of the earth never became dry and combustible, and the winds never blew, the obligation would never have existed. It springs from these natural causes and agencies and is an obligation to guard against the evil effects produced by them, by the employment of such reasonable means and appliances as will prevent the escape or communication of the fire. To say, therefore, that the obligation ceases to exist, or that the party using the fire is justified in omitting the means or appliances to prevent its escape or communication, because of the presence of such natural causes or agencies, is to lose sight entirely of the ground upon which the obligation rests. The argument, if it proves anything, proves that there exists no obligation or duty at all in any such case. It disproves itself by proving too much.

But we are referred to the case of Ryan *v.* New York Central Railroad Co., 35 N. Y. 210, and the recent one in the supreme court of Pennsylvania. The Pennsylvania Railroad Co. *v.* Kerr, 4 Western Jurist, 254, 62 Pa. St. 353 (S. C. 1 American R. 431), as having a bearing favor-

able to the company upon the questions here presented. The facts of those cases so entirely distinguish them from the present, that it seems hardly necessary to comment upon them. The point decided in each case was, that when the fire is negligently communicated to one building, and it destroyed, and subsequently another distinct and separate building is set fire to and destroyed by sparks from that, the negligent party is not liable in damages for the destruction of the latter building. In those cases the buildings were the property of different owners, and not contiguous to each other. In deciding them, the courts professed to act on the maxim *causa proxima non remota spectatur;* and in the last one the court say: "The maxim, however, is not to be controlled *by time or distance, but by the succession of events.*" The point was, that the burnings were distinct and separate, a series of events succeeding one another. In the present case there was but one burning, one continuous conflagration from the time the fire was set on the railroad until the plaintiff's property was destroyed. The combustible material extended and the ground was burned over, all the way from the railroad to the plaintiff's property; and the fire, driven by the wind, was carried to his property in that manner. There was no distinct or separate setting fire to or burning of the stacks or buildings, and then a communication of the fire by sparks through the air from one stack or building to another. There was no succession of events, but only one event.

The facts of this case are altogether like those of the case of Field *v.* N. Y. C. R. R., *supra,* which is referred to approvingly in Ryan *v.* New York Central R. R. Co. It was not the intention of the court, therefore, in the latter case, to overrule the former, which, like the present, is clearly distinguishable.

But the doctrine of those cases has not received the unanimous assent of the courts. It is directly opposed by the decisions in Massachusetts and New Hampshire, above cited. In 98 Mass. 414, the case was where fire was set by a spark from an engine to grass near the track, and spread in a direct line, without any break, across land of several different proprietors, and a highway, to the woodland of the plaintiff, half a mile distant from the railroad, and burned large quantities of wood. It was held that the railroad company was responsible. In that case the case of Ryan *v.* New York Central Railroad Co. was cited, and the court commented upon it as follows: "In that case a distinction is made between proximate and remote damages. The fire was communicated from defendant's locomotive to their woodshed, and thence, by sparks, one hundred and thirty feet, to the plaintiff's house; and it was held that the plaintiff could not recover, because the injury was a remote and not a proximate consequence of the carelessness of the defendants in permitting their fire to escape. Our own cases above referred to, are not noticed in the opinion. Nor does the opinion draw any line of distinction between what is proximate and what is remote; and such a line is not obvious in that case. If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes, is proximate, the effect must continue to be proximate, as to everything which the fire consumes in its direct course. This is so, whether we regard the fire as a combination of the burning substances with the oxygen of the air, or look merely at its visible action and effect. As matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet, fired from the train, passing over the intermediate

lots, and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals, through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified, in every case, by bodily constitution, habits of life, and accidental circumstances."

And it is worthy of remark, too, that in the Pennsylvania case, as well as the New York one, there is no reference to the Massachusetts decisions, nor to the English common-law cases there cited.

The exception to the charge directing the jury to allow interest on the damages, is not urged here. It was held, in the case of Chapman et al *v.* Chicago and Northwestern Railway Co., just decided, that such direction was proper.

I am of opinion, therefore, upon the whole case, that there was no error of which the defendant can justly complain, and that the judgment should be affirmed.

Cole, J. I concur with the chief justice that there was no error in the rulings of the court below.

On motion by defendant for rehearing, the following opinion was filed September 21, 1871:

Dixon, Chief Justice.

The argument in support of the motion for a rehearing is certainly most able and dignified, and brings out with the greatest clearness and force all that can well be said in opposition to the views expressed by the majority of the court. Courtesy and a sense of our own obligation require this statement. It is no small privilege, but one greatly to be esteemed, when, upon questions of this nature, which

are comparatively new and as yet unsettled by many direct authorities, the court is required to retrace its steps and verify the correctness of its conclusions, or to acknowledge its errors, in the light of such an argument. And thus, though our views remain unchanged, our thanks are still due to counsel for the ability and learning they have displayed and the assistance they have rendered in the investigation and decision of the important questions involved in the action.

It is not the purpose of this opinion to re-examine, or again to discuss at any length, the questions which were considered in the former one. They were there so fully considered as to make this unnecessary and improper. A statement of the points adhered to, with some additional reasons, may be proper; and some consideration of those raised on the motion and now first pressed upon our attention, and of the authorities relied on, seems also to be required.

The position that there was negligence on the part of the railway company in not removing the dry grass and other combustible material from the track, or evidence tending strongly to show and from which the jury might find it, is still adhered to.

It was negligence of that continuous kind spoken of by the learned counsel as "consisting in the omission to perform a duty, whereby the happening of an event which may prove injurious is rendered possible," and which they frankly concede the authorities declare to be actionable, *provided* "the damages be such as would result from the event under *ordinary* circumstances," or such as are the *natural and proximate* consequence of the act or omission complained of. It was, therefore, present negligence, or negligence existing at the time of the injury, and by which

it was produced, as much so as if at that time, or immediately before, the company had caused or permitted the dry grass and other inflammable substances to be placed upon the track, well knowing the dangerous tendencies of such act or permission, and the injurious consequences which might ensue to the property of others from the taking and communication of the fire. All the cases agree that the presence of such combustible material upon the track, where, with the utmost precautions to guard against the escape of sparks and burning coals from the engine, it is subject to and frequently does take fire, and where there is nothing incombustible upon the line of the company's road and between its land and the lands of adjoining proprietors to prevent the spread of fire or stay the mischief, is a circumstance from which the fact of negligence may be found by the jury. The company act with full knowledge of the peril, and knowingly assume the risk. In Vaughan *v.* Taff Valley Railway Co., cited in the former opinion (3 H. & N. 743), the judge told the jury that he was prepared to decide that the defendants were liable, and he directed them, that if, to serve his own purposes, a man does a dangerous thing, whether he takes precautions or not, and mischief ensues, he must bear the consequences; that running engines which cast forth sparks is a thing intrinsically dangerous, and that if a railway engine is used which, in spite of the utmost care and skill on the part of the company and their servants, is dangerous, the owners must pay for the damage occasioned thereby. His lordship pointed out to them that by keeping the grass on the banks of the railway close cut, or by having the banks formed of gravel or sand so as to make a non-inflammable belt, all danger might be avoided; and he asked them whether they did not think there was inevitable negligence in the use of a dangerous

thing calculated to do, and which did cause mischief. And this direction was sustained by the court in bank, on a rule to show cause why a new trial should not be granted, and approved on appeal to the exchequer chamber.

And the majority of the court also still adhere to the position that the failure of the plaintiff to remove the dry grass or stubble from his own land in order to prevent the spread or communication of fire set by the default or misconduct of the defendant, was not wrongful and improper on his part, not a culpable omission of duty by which he may be said to have co-operated in the destruction of his own property. We still think that the law imposed no such duty upon him. In the exercise of his lawful rights, every man has a right to act on the belief that every other person will perform his duty and obey the law; and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person. Jetter *v.* New York & Harlem R. R. Co., 2 Keyes, 154; Earhart *v.* Youngblood, 27 Pa. St. 332. The rule of law on this subject, sustained by numerous authorities, is well stated in Shearman and Redfield on Negligence, sec. 31, as follows: "As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or even to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if *he has adopted the course*

which most prudent men would take under similar circumstances." And see particularly Newson *v.* Railroad Co., 29 N. Y. 390; Ernst *v.* Railroad Co., 35 N. Y. 28; Railroad Co. *v.* Ogier, 35 Pa. St. 60; Clayards *v.* Dethick, 12 Q. B. 439, and Johnson *v.* Belden, 2 Lansing, 437. And in section 6, the same authors correctly observe that the law makes no unreasonable demands; that no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances, even though, if he had used them, the injury would certainly have been avoided. In Vaughan *v.* Taff Vale Railway Co., last above cited, it appeared that in the plaintiff's wood adjoining the railway, "there was a great quantity of dry grass, of a highly inflammable nature. The wood had frequently been set on fire by sparks from the locomotives, and on four occasions the defendants had paid for the damage. In 1853 (the fire in question having occurred in 1856) the plaintiff wrote to the secretary of the company: 'No fire was known in the memory of man in the wood before the Aberdon Railway was made; since it has been made, four or five times the wood has been ignited. Any one looking at it can easily satisfy himself that in a *dry season* the wood is in *just about as safe a state as a barrel of gunpowder at Cyforthfa Rolling Mill.*' The plaintiff had taken no steps to clear away the accumulation of dry grass and fallen branches in the wood." Upon this evidence the judge refused to leave the question to the jury, "whether the plaintiff had not been guilty of negligence in permitting the wood to be in a combustible state by not properly clearing it," saying that he thought "there was no duty on the part of the plaintiff to keep his wood in any particular state." This ruling was affirmed on the proceeding to show cause against a new

trial, in the following language by Bramwell, B., delivering the judgment of the court: "It remains to notice another point made by the defendants. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss, and Mr. Lloyd very ingeniously likened the case to that of an overloaded barge swamped by a steamer. We are of opinion this objection fails. *The plaintiff used his land in the natural and proper way for the purposes for which it was fit. The defendants come to it, he being passive, and do it mischief.* In the case of the overloaded barge, the owner uses it in an unnatural and improper way, and goes in search of the danger, having no right to impede another natural and proper way of using a public highway. We therefore think the direction was right, the verdict satisfactory, and the rule must be discharged."

The learned counsel strongly combat this position, and argue that, if logically carried out, the doctrine would utterly abrogate the rule that a party cannot recover damages where, by the exercise of ordinary care, he could have avoided the injury; and so, in the present case, after discovering the fire, the plaintiff might have leaned on his plow-handles and watched its progress, without effort to stay it, where such effort would have been effectual, and yet have been free from culpable negligence. The distinction is between a known, present or immediate danger, arising from the negligence of another—that which is imminent and certain, unless the party does or omits to do some act by which it may be avoided, and a danger arising in like manner, but which is remote and possible or probable only, or contingent and uncertain, depending on the course of future events, such as the future conduct of the negligent party, and other as yet unknown and fortuitous

circumstances. The difference is that between realization and anticipation. A man in his senses, in face of what has been aptly termed a "seen danger" (Shearman and Redfield, sec. 34, note 1), that is, one which presently threatens and is known to him, is bound to realize it, and to use all proper care and make all reasonable efforts to avoid it, and if he does not, it is his own fault; and he having thus contributed to his own loss or injury, no damage can be recovered from the other party, however negligent the latter may have been. But, in case of a danger of the other kind, one which is not "seen" but exists in anticipation merely, and where the injury may or may not accrue, but is probable or possible only from the continued culpable negligence of another, there the law imposes no such duty upon the person who is or may be so exposed, and he is not obliged to change his conduct or the mode of transacting his affairs, which are otherwise prudent and proper, in order to avoid such anticipated injuries, or prevent the mischiefs which may happen through another's default and culpable want of care.

But the question chiefly discussed in the argument of counsel, and which may be said to be a new one, being now first presented, is, whether the damages sustained were the *natural and proximate* result of the negligence complained of, or whether the omission to remove the dry grass and vegetation from the railway track was negligence *with respect to the property of the plaintiff which was destroyed by the fire.* The questions whether the damages sustained were the natural and proximate result of the act or omission complained of, whether such act or omission constituted negligence with respect to the property injured, and whether the same was or was not the remote cause of the injury, within the maxim *causa remota non spectatur,* all

depend upon the same considerations, and come to one and the same point of inquiry. They are different modes of stating the same proposition or subject of investigation. This question was incidentally alluded to in the former opinion in connection with two recent decisions, one in New York and the other in Pennsylvania. Ryan *v.* New York Central Railroad, 35 N. Y. 210; and Pennsylvania Railroad *v.* Kerr, 63 Pa. St. 363 (1 American R. 431). It is principally, if not altogether, upon the authority of those decisions that the point is now urged, that the damages were remote, and, therefore, not recoverable. It was thought sufficient on the former occasion, to distinguish those cases from the present with respect to the principle upon which they obviously proceeded, and which was expressly stated in the latter to be, that the maxim *causa proxima non remota spectatur* was "not to be controlled by time or distance, *but by the succession of events.*" Upon that principle, not conceding or denying its correctness, we thought the cases fairly distinguishable. Counsel arraign our views of those cases, and of the principle upon which they were decided, and say that "events intervening between the act complained of and the injurious consequence for which compensation is sought, are at the same time both causes and results; and the remark quoted refers to these events as causes and not as results. The damage caused by the burning of the second building was, in that case, held remote, not because it stood second in the order of results; but, as in the case of *Ryan,* for the reason that it was the result of an intervening cause, *not necessarily following the first.*" How far counsel may be correct in this, will appear from a perusal of the opinions. A careful examination of them by ourselves discovers no such qualification of the principle as that the burning of the second building

must be a result *not necessarily following the burning of the first,* or, as expressed by counsel, "the result of an intervening cause *not necessarily following the first.*" The facts of both cases, and the entire reasoning of the judges, seem to us very clearly to show that such was not the view and understanding of the courts, but that the intention was to affirm, as a naked, unqualified principle of law, that for the burning of the second building which takes fire from the first, whether necessarily so or not, under ordinary circumstances, or under any circumstances, the party negligently setting fire to the first is not responsible; that for such second burning, as a mere second or succeeding event, without reference to its necessary connection with and dependence upon the first, the law imposes no liability upon the party negligently causing the burning of the first. This we understand to be the doctrine of succession of events established by those decisions, and upon which it was held that the application of the maxim alone depended. Each burning, including the first, is the immediate cause of that which follows, and all are remote as to the wrongdoer, except the first or very building, structure or thing to which he negligently applies the torch. The first fire causes the second, and the second the third, and so on, under all circumstances, and therefore, all after the first are not caused by the wrong-doer. He causes only the first, and for that only can be held responsible. To show that this is a correct exposition and true statement of the principle established, let us briefly examine the decisions. The facts in Kerr's case, as stated in the opinion, were as follows: "A warehouse of one Simpson, situate very near the track of the company's road, was set on fire by sparks emitted from a locomotive engine of the defendants, so negligently placed as to set it on fire. The burning of the warehouse commu-

nicated fire to a hotel building situated some thirty-nine feet from the warehouse, which, at the time, was occupied by the plaintiff as a tenant, and it was consumed with its furniture, stock of liquors and provisions; and for this the plaintiff sued and recovered below. Several other disconnected buildings were burned at the same time, but this is in no way involved in the case." Such is a statement of the facts, and the entire facts upon which the court professed to adjudicate and to rely. We notice, in the first place, the statement that "the burning of the warehouse *communicated the fire to a hotel building* situated some thirty-nine feet," etc. Next we notice there is no allusion in the opinion, from first to last, to any other circumstance, ordinary or extraordinary, such as the blowing of the wind or dryness of the season, intervening at the time as a cause or event tending to increase the danger or to carry or communicate the fire to the hotel building. And, further, we observe that there is no language in the opinion expressing, and none implying, the qualification of fact or of principle, that the burning of the hotel building did *not necessarily follow* the burning of the warehouse, or was *not an ordinary and necessary* consequence thereof. On the contrary, from the facts as stated, the proximity of the buildings, and the reasons and illustrations given by the court, the inference very clearly is, that the burning of the hotel *was the ordinary, natural and necessary* result of setting fire to and burning of the warehouse. The opinion says: "It is an occurrence undoubtedly frequent, that, by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third by the second, and so on, it might be for the length of a square or more. It is not in our experience that the first owner is liable to answer for all the consequences. And there is good reason for it. The

second and third houses, in the case supposed, were not burned by the direct action of the match; and who knows how many agencies might have contributed to produce the result? Therefore, it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done." Now, what means this reasoning and illustration, if not intended to sustain the proposition immediately afterwards broadly laid down, that it is the succession of events which controls the application of the maxim? Why put, for the sake of illustration, the case of a building *adjoining* the building fired, and to which the fire would communicate itself *by the mere force of the conflagration,* without the aid of the atmosphere to float or the wind to blow the sparks and coals? Why say that the second and third houses, in the case supposed, were not burned by the direct action of the match, if it be not to limit the liability of the party negligently applying the match to pay for damage to that house alone as the first in the order of destruction, or in the series or succession of events, the burning of each owner's house being regarded as an event by itself? It is true, the question is asked, "and who knows how many agencies *might* have contributed to produce the result?" From this we imply that because some other agencies, known or unknown, natural or artificial, *may* have contributed, and, indeed, *must* have contributed to produce the result, therefore the person by whose wrong the fire was set and these agencies called into action must escape, and the innocent sufferer from that wrong go unrequited. The oxygen of the air combining with the burning substances is such an agency. It produces the fire, and the fire produces the loss or destruction of the building; but the efficient cause of both the fire and the loss is the wrong of the individual who sets the fire. We

consider the rule, or the application of the maxim, as having been correctly stated by Thomas, J., in Marble *v.* City of Worcester, 4 Gray, 412: "Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of, the first, shall be found to intervene between it and the result." And surely it would seem to us, the combination of the oxygen, the communication of the fire by the mere force of the burning to the adjoining buildings or to those so near to that first fired as that they would ordinarily be consumed, and the floating of the sparks and burning coals through the air, must, if new causes, be regarded as merely *incidental* to the first or efficient cause. They spring naturally and inevitably out of it, and cannot be regarded as *independent* of it. And, so, too, in a country where winds generally prevail, and this motion of the air may almost be said to be its normal condition, so that sparks and coals of fire will float or be carried to a greater distance, and where seasons of dryness are frequent and ordinary, rendering all combustible things highly susceptible of ignition from contact with sparks and burning coals, must these not also, if regarded as causes, be considered such only as are incidental to the main, first cause? Do they not come in aid of it merely, rendering it the efficient agent of destruction? Certainly as independent causes they are powerless, and could not produce the mischief, and it is only as incidental to the first cause that they may be said to contribute in producing it. They are natural and ordinary conditions merely, by which that cause is made effective, and it seems hardly proper to speak of or regard them as causes in such connection.

And again, in the extract above made, what was intended by the conclusion that it would be illogical to hold

the match chargeable as the cause of what it did not do, and might not have done, if not to hold that the negligent party is responsible for the first house burned, and not for any other, regardless of all other considerations? And does not the conclusion also show that if by the possible co-operation of any other agency, natural or artificial (not that some new and independent cause *must* be found), the second house is destroyed, the wrong-doer is not chargeable, merely because such destruction is a second or succeeding event, and for no other reason? We must confess our inability to put any other construction upon the language.

And furthermore, we can conceive of no more unmistakable evidence of the doctrine held by the court, and upon which the decision proceeded, than is found in that part of the opinion quoted by counsel in their argument, and which is as follows: "It cannot be denied but the plaintiff's property was destroyed, but by a secondary cause, namely, the burning of the warehouse. The sparks from the locomotive did not ignite the hotel. They fired the warehouse, and the warehouse fired the hotel. They were the remote cause—the cause of the cause of the hotel being burned. As there was an intermediate agent or cause of destruction, between the sparks and the destruction of the hotel, it is obvious that that was the proximate cause of its destruction, and the negligent emission of sparks the remote cause. To hold that the act of negligence which destroyed the warehouse, destroyed the hotel, is to disregard the order of sequences entirely, and would hold good if a row of buildings a mile long had been destroyed. The cause of the destruction of the last, in that case, would be no more remote, within the meaning of the maxim, than that of the first; and yet, how many concurring elements of destruction there might be in all of these houses, and

no doubt would be, no one can tell. So to hold would confound all legitimate ideas of cause and effect, and really expunge from the law the maxim quoted, that teaches accountability for the natural and necessary consequences of a wrongful act, and which should, in reason, be only such that the wrong-doer may be presumed to have known would flow from his act." Comment upon this language seems scarcely admissible for the purpose of making the meaning and intention of the court more clear, that it is "the order of sequences," or, as previously stated in the opinion, "the succession of events," which determines the application of the maxim. The sparks from the locomotive fired the warehouse, and the burning of the warehouse fired the hotel; and therefore the firing of the warehouse was not the cause of the firing of the hotel. This is the logic. It was the burning of the warehouse, and not the wrongful setting fire to it, which caused the destruction of the hotel, no matter how *naturally, necessarily* or *inevitably even,* under any circumstances, the destruction of the latter may have followed from the wrongful act of firing the former. It is the order of sequences or succession of events which controls. The burning of each building, structure or thing having a separate existence, use, name or ownership, is an event by itself, and each event a cause by itself, which cause alone is to be considered as producing the next event or cause in the series, or as the proximate cause of it, regardless of the relation of one event to another, or of the necessary, natural or inevitable dependence of any or all of them upon the first cause or wrongful act of the party to be charged. Courts and juries are precluded by the maxim, and must shut their eyes to the natural and ordinary relation of things, or of cause to effect, and looking only to spark or match must follow that, and,

seeing what building or substance that ignited, must determine that the destruction of such building or substance alone was the result of the wrongful act. If there be other buildings or substances immediately connected with that to which the spark or match is applied, or so situated as that they must necessarily be and are consumed by the fire, they become and are intermediate agents or causes of their own destruction, and destroy themselves or each other. The building first fired is such an agent or cause with respect to that to which the fire is directly communicated from it. The warehouse was, in the language of the court, such "an intermediate agent or cause of destruction" with respect to the hotel. It was the warehouse that destroyed the hotel, and not the act of setting fire to the warehouse. It is true, that towards the close of the extract the court speak of accountability for the "natural and necessary consequences of a wrongful act;" but it is obvious they exclude and prevent such accountability by the interpretation given the maxim, and the definition of proximate and remote in the relation of causes to the effects produced—by arbitrarily establishing the rule, and holding that the burning of the first building is the only natural and necessary consequence of the wrongful act.

And if we turn to the case of *Ryan,* we shall find no material difference in the facts, nor in the reasoning or conclusion of the court. There is no allusion in it to any extraordinary circumstances existing at the time, contributing to the destruction of the plaintiff's house. It is not stated that the wind was blowing with unusual violence, nor that it was blowing at all, in the direction of the house, nor that the weather was dry. In the absence of any statement of either, as a circumstance affecting the case or influencing the judgment, it is fair to presume that neither

existed. It is fair to presume, therefore, and must be presumed, that the burning of the house was the natural and probable consequence of the setting fire to and burning of the woodshed with the wood therein, under ordinary circumstances, or circumstances the most favorable to the defendant, such as a still day and no dryness of the shingles or materials of which the house was composed, so as to increase the danger. It is true, it is stated that the house was one hundred and thirty feet from the shed, but it is also stated that there was *a large quantity of wood* in the shed, and that the house *soon took fire from the heat and sparks,* and was entirely consumed, *notwithstanding diligent efforts were made to save it;* from which we infer that the destruction of the house by fire was naturally and necessarily involved in the burning of the shed with the large quantity of wood therein, under any circumstances. The opinion states the facts as follows: "On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed." Forgetting the statute 6 Ann. c. 31, sec. 6, and its effect upon the proposition as hereafter noticed, the court then immediately proceed to state the question to be considered, as follows: "A house in a populous city takes fire, through the negligence of the owner or his servant; the *flames extend to* and *destroy an adjacent*

building. Is the owner of the first building liable to the second owner for the damage sustained by such burning?" It appears from this that the question to be decided was, as where the flames from the burning building, wrongfully fired, actually reach and necessarily and unavoidably consume another or an adjoining building, or where such other building is consumed by the mere force of the first conflagration. Next the court say: "It is a general principle that every person is liable for the consequences of his own acts. He is thus liable to damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote. In Thomas *v.* Winchester, 2 Seld. 48, Judge Ruggles defines the damages for which a party is liable, as those which are the natural and necessary consequences of his acts." Here follows an examination of some of the adjudged cases, and then these questions are put: "If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for the loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers?" After this the opinion alludes to the possible difference between an intentional and a negligent firing, and to an English decision which is directly opposed to the conclusion arrived at by the court, and proceeds thus: "Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of buildings upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the mo-

ment the fire was communicated to the building—that its destruction was the ordinary and natural result of its being fired. In the second, third, or twenty-fourth case as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread, and other buildings be consumed, is not a necessary or a usual result. That it is possible, *and that it is not unfrequent,* cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects. My own opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. *The immediate result was the destruction of their own wood and sheds; beyond that it was remote."*

We have thus given the facts, and all the reasoning of the court in support of the rule of law or principle attempted to be maintained by the decision. The residue of the opinion discusses some other cases upon the subject of negligence, including the leading one of Scott *v.* Shepherd, and calls attention to the disastrous consequences which must ensue to all wrong-doers and parties destroying the property of others by negligence, if any other rule than that adopted by the court were to be established. The foundation upon which the argument or conclusion rests,

is the assertion, broadly made, that the burning of the second building, though the *frequent,* is not the natural and expected result of the firing of the first, and the fact that the party wrongfully setting the fire cannot control the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. The heat generated by the fire which he has wrongfully kindled, is not within his control, and, therefore, he is not responsible for its effects. The fire once lighted and the heat in process of generation, he cannot stay such process or prevent the effects of the heat by any means or instrumentality within his power. He did not dictate the condition of the second building, nor the materials of which it should be constructed; and if the latter are combustible, and the former such that the building must take fire and be consumed, it is the unfortunate owner's fault, not his. Neither does he dictate the state of the atmosphere, nor the direction of the wind. These are the subjects of a higher power. He cannot rebuke the winds, or bid them cease or change their course, and if they carry the fire and waft destruction on their wings, it is not his fault. He may disregard all these circumstances, and wrongfully set the fire despite them if he will, knowing their existence and the results which they will surely produce, and yet shall be regarded faultless and innocent with respect to those results.

And as to the unqualified assertion that the burning of the second house is not the natural and expected result of the firing of the first, it seems to rest upon much the same basis of reason and regard for natural and physical truth, or for the relation of causes to their effects, as we find them constantly exhibiting themselves under the unvarying operation of universal natural laws. In the case supposed,

though the flames of the burning of the first house "extend to and destroy" the second by their own mere force, yet it is declared the destruction of the second is "not a natural and expected result of the first firing."

We have been led to this careful examination of the foregoing cases by the criticism of counsel, that our remark in the former opinion, that "the point of the decisions was that the burnings were distinct and separate, a series of events succeeding one another," and therefore, the defendants were not liable, was unjust and unfounded. We must now leave it with the reader to say whether it was so or not. The learned counsel having, as we are constrained to think and to say, learned their law in a wiser and better school, felt called upon to rescue those courts from the imputation of having so decided, and thus we were to be visited with the consequences of having mistaken or misunderstood their decisions, although we quoted their own words. As already observed, we deemed it sufficient at that time to distinguish those cases from the present upon the ground on which they obviously proceeded, and, although our views were then the same as now with regard to the correctness of the decisions, we thought it unnecessary to express them. Now, however, we have felt compelled to, and have freely done so; for it will appear from what has been said, that we do not at all accede to their correctness, notwithstanding the great consideration and respect so justly due to the judgments of the learned and able tribunals by which they were pronounced. And in these views we are happy to say, although he differed from Justice Cole and myself in other particulars, that our late learned and lamented associate, Mr. Justice Paine, now deceased, fully concurred. It will be observed that the cases are not referred to or relied upon in his opinion, and

are inconsistent with it; and we know, as he frequently said, that he considered them illogical and unsound in making the order of events the criterion of liability, and in considering every result remote, except that first or immediately produced by the application of the fire. We accept now, therefore, as we did then, and regard as just and well founded, the remark of the present learned chief justice of Massachusetts, when he said of the Ryan case: "Nor does the opinion draw any line of distinction between what is proximate and what is remote; and such a line is not obvious in that case." And the same observation is equally and more just and true of the opinion in the case of Kerr. With all due respect, we must say it seems to us that the distinction, as well settled both on reason and authority, is utterly confounded and lost sight of in both. It has been often truly said, that hard cases make bad precedents; and we cannot but think that the supposed hardship of holding the negligent party responsible for all the legitimate consequences of his act must have had its influence upon the mind of the court in each case. If a servant, driving his master's carriage in the street, negligently runs over and tramples a foot passenger, making him a cripple for life, the master must respond for the damages, be they never so much. If, by the same negligent act, the servant runs over, tramples and cripples two, three, twelve or twenty-four, must the master not in like manner respond in damages for the injuries sustained by each one of them? Will it make any difference that the servant crippled A. first, then B., then C., and so on down to Z., if the crippling, of all was the natural and necessary result of the same wrongful act? And will it make any difference also in such case, that the master may be overwhelmed in damages or involved in pecuniary ruin? It is

quite immaterial to the last or any intermediate sufferer, whether he be the last, first or any other in the order to receive injury; and it would seem a most inexplicable rule of law that should found a distinction upon this circumstance, and hold, because he was the last or any one after the first, he could not recover. Some one must suffer for injuries thus inflicted; and as between the master and innocent third persons, the law has wisely fixed that, so far as pecuniary compensation will go, it shall be the master who employs, controls and directs the servant.

Speaking of the liability of the master for damage done by the servant while actually employed in the master's service, Blackstone says: "Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master; because his negligence happened in his service." 1 Bl. Comm. 431. But this rule was changed by statute 6 Ann, c. 31, sec. 6, still in force, which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness. Ibid. That statute being in force in this country at the time of the revolution and since as part of our common law, sufficiently explains the absence of precedents for the recovery of damages in such cases; but, as it does not extend to any others, they are still governed by the rule of the common law, unless expressly excepted by subsequent statutory enactment. See 1 Cooley's Bl. Comm. 431, note (19); Bachelder *v.* Heagan, 18 Me. 33; Lansing *v.* Stone, 37 Barb. 15; Coburn *v.* Harvey, 18 Wis. 147.

And if, in a case like that above supposed, the servant negligently drives against and throws down one, and he

in falling strikes against and throws down another, and that one a third, and so on, until twenty-four are prostrated, trampled and injured, is the case any different, although all after the first might have escaped, but for the impulse wrongfully given to the first, which communicated itself through him to the second, and through the second to the third, and thus on to the last? The horses and carriage wrongfully driven against and prostrating the first, and passing thence on over, trampling and bruising all to the last, are the same means or instrument of injury first negligently set in motion. And so the fire first wrongfully applied to the house of A. is the same devouring element until it reaches and consumes the house of Z. Though fed on different substances, it is throughout its march of destruction the same means or instrument of injury first wrongfully set in motion. It may, with strict propriety of speech and of reason too, be said, that the fire which consumes the last house is the very same which was unlawfully applied to the first; and that it was applied to the last by the same unlawful act.

And if we consult the analogies of the criminal law, where it is obvious that the rule of the civil law should proceed as far and even go beyond it, we shall find the same principle prevails: "If A. have a malicious intent to burn the house of B., and in setting fire to it burn the house of C. also, or if the house of B. escapes by some acicdent, and the fire take in the house of C. and burn it, this shall be said in law to be malicious and wilful burning of the house of C., though A. did not intend to burn that house. And accordingly it has been said, that if one man command another to burn the house of J. S., and he do so, *and the fire thereof burn another house*, the com-

mander is accessory to the burning of such other house. So it has been held that if a person set fire to a stack, *the fire from which is* LIKELY *to communicate to a barn, and it does so,* he is, in point of law, indictable for setting fire to the barn." 2 Russell on crimes, 549. By parity of reasoning, if one negligently set fire to the house of A., or to his own house, the fire from which is *likely* to communicate to the house of B., and it does so, he should, in point of law, be liable for setting fire to the last house.

We remark, in passing, what has very recently fallen under our observation, that the supreme court of New York for the fourth judicial district, at general term, January, 1871, Judge Johnson delivering the opinion, in Webb *v.* The Rome, Watertown and Ogdensburgh Railroad Co., 3 Lansing, 453, took the same view of the case of Field *v.* New York Central Railroad (32 N. Y. 339), which was taken by ourselves in the former opinion, and in the case before them, which was like it and like the present, followed that decision. The court observe that the case was cited in the opinion in the *Ryan case* and not overruled, and think the question should again be presented to the court of appeals. They also observe: "It is difficult to see, it must be admitted, how both decisions can stand, or if a distinction can be found, on what substantial ground of principle it can be placed." We concur in this observation, and also the following: "The question is also one of vast importance at this time, when an element so dangerous if carefully handled and used, is carried with such frequency and speed through the length and breadth of the land by a power itself generates in its passage, and under no control, except that of the parties for whose immediate benefit it is thus carried and used, or their servants. The

principle is equally important to those who so use the element as a motive power, and to those who are liable to be injured by its escape along the path of its transit."

We also remark that it is said in the opinion in the case of *Kerr,* that in Smith *v.* The London and Southwestern Railway Co., L. R. 5 C. P. 98, the question whether the damages there recovered were proximate or remote, or whether the defendant was guilty of negligence with respect to the property of the plaintiff which was destroyed, was passed over *sub silentio.* We cannot so regard the case. On the contrary, we think that was the very point under discussion, and upon which the court divided. The facts of the case were, that workmen, employed by the company in cutting the grass and trimming the hedges bordering on the railway, placed the trimmings in heaps near the line, and allowed them to remain there fourteen days, during very hot weather in the month of August. Fire from a passing engine ignited one of these heaps and burned the hedge, and was thence carried by a high wind across a stubble-field and a public road, and burned the goods of the plaintiff in a cottage about 200 yards distant from the railway. It was held by Bovill, C. J., and Keating, J. (Brett, J., dissenting), that there was evidence to go to the jury of negligence on the part of the railway company, although there was no suggestion that the engine was improperly constructed or driven. Brett, J., states the point of his dissent as follows: "But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage. It seems to me that no duty was cast upon the defendants, *in relation to the plaintiff's property,* because it was not shown

that that property was of such a nature and so situate that the defendants ought to have known that by permitting the rummage and hedge trimmings to remain on the banks of the railway, they placed it under undue peril.—We read of such fires in the American prairies; but it would never occur, as it seems to me, to the mind of the most prudent person, that such an extraordinary conflagration could be caused in this country in the manner here spoken to by the witnesses." And Keating, J., after recounting the facts, said: "I therefore think it may be fairly inferred that the fire broke out under circumstances which showed that the materials it fell upon were in a highly combustible state. The fire extended up the bank to the railway, through the hedge, and across a stubble-field, and so to the plaintiff's cottage. Undoubtedly at that time there seems to have been a very high wind; and that would give a force to the fire which under ordinary circumstances it would not have had. But that which presses upon my mind is, that it is impossible to say, that the accumulation of such materials at such a season of the year, and permitting them to remain there so long, was not some evidence of negligence. It was proved that the weather was unusually dry, and that fires were occurring all about the country, though it was not expressly stated that these were on the line. Under these circumstances, I cannot help thinking that the allowing the accumulation of such materials so near to where trains were constantly passing, was evidence of negligence." And Bovill, C. J., said: "We must therefore look at all the circumstances occurring at the time of the accident, to see if there was anything upon which to found the charge of negligence. At the time this fire occurred, the weather was and had been for a considerable period unusually dry. The company's servants had been em-

ployed in cutting the grass and trimming the hedges at the sides of the line, and had heaped together the cuttings either for the purpose of burning or carrying them away, and had allowed them to remain in that state for about a fortnight. Under ordinary circumstances, it may be that hedges are not expected to ignite; but, if there be collections of grass and hedge trimmings near them in a very dry and inflammable condition, and these by some means become ignited, it may fairly be presumed that the hedges will be in danger; and who is to say where the danger will stop? It is said that no reasonable man could have supposed that, even if the fire did communicate to the hedge, it would run across a stubble-field and a public road, and so reach a building at the distance of 200 yards from the railway. But seeing that the defendants were using dangerous machines; that they allowed the cuttings and trimmings to remain on the banks of their railway, in a season of unusual heat and dryness, and for a time which, under these circumstances, may fairly be called unreasonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of these combustible materials, and that the fire did in fact extend to the cottage, I think it impossible to say that there was not evidence from which a jury might be justified in concluding there was negligence *as regards the plaintiff,* and that the destruction of the cottage in which the plaintiff's goods were was the *natural consequence of their negligence.* What the defendant's servants ought, as reasonable men, to have contemplated as the result of leaving the accumulations of cuttings and trimmings where and as they did, must depend upon all the circumstances."

Rejecting, as we are compelled to, therefore, the authority of the New York and Pennsylvania decisions, we ac-

cept that of the remaining cases cited by counsel, and also the authority of the learned counsel themselves. We entirely agree with the learned counsel when they say, speaking of the New York and Pennsylvania decisions as interpreted by ourselves: "With all due respect, we submit that this is not the true rule for determining as to the application of the maxim. * * * *

That it is not the true rule is demonstrated by the indisputable fact that compensation may be recovered for any number of injurious results, consecutively produced by impulsion, one upon another, and constituting distinct and separate events; provided they all necessarily follow the negligence or wrongful act constituting the first cause. * * * This is the distinguishing feature, upon which the damages have been held sufficiently proximate in many cases where, at first glance, they appear quite remote." This we regard as an undoubtedly correct statement of the law, and one which is upheld by all the authorities save the two cases last referred to, which, as it seems to us, are in direct opposition to all others. This statement was made on the authority of the two cases of McDonald *v.* Snelling, 14 Allen, 290, and Barron *v.* Eldredge, 100 Mass. 455, cited by counsel. The law upon the subject is laid down with great accuracy and precision in the former and numerous cases referred to. The court say: "Where a duty or right is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion, this is the well established and ancient doctrine of the common law, and such a liability extends to consequential in-

juries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is too remote if, according to the usual experience of mankind, the result was not to be expected. This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured, or the community generally; and, secondly, where it is apparent that the harm to the person or property of another, which has actually ensued, was reasonably likely to ensue from the act or omission complained of." And again: "It is clear from numerous authorities, that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been seen as probable, the liability continues."

The facts in that case were, that by the careless driving of his servant, the defendant's sled was caused to strike against the sleigh of one Baker, with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver, and to run violently along Tremont street,

round a corner, near by, into Eliot street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him to the ground. The court say: "Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not responsible for the mischief done by Baker's horse in his flight? If he had struck that animal with a whip, and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant, the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not, therefore, dealing with remote or unexpected consequences, not easily foreseen nor ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom."

And the court proceed to say, that the views thus expressed are fortified by numerous decisions, to a few of which it may be expedient to refer. And they refer to the case of Barnes *v.* Chapin, 4 Allen, 444, where it was held that when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse was liable for that damage. And also to Powell *v.* Deveney, 3 Cush. 300, where defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the street, after which

a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts around on the sidewalk so that they struck the plaintiff, who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. These are followed by several other citations.

Now it seems needless, after what has been said, to point out the inconsistency between the two decisions of which we have been speaking and the principles thus laid down, and the cases in which they have been applied, which are to be found in all the books. The conflict is manifest; and it is equally manifest, if those two decisions are to be regarded as correct in principle and good law, that hundreds, and it might perhaps with truth be affirmed, thousands of cases, both in England and this country, are unsound and must be overruled. We cannot so regard them. We cannot agree with the court of appeals that the burning of the second and other houses in the case supposed, or of the plaintiff's house in the case before the court, was not the *natural* and probable consequence, or the consequence *likely* to follow from the wrongful act complained of, under ordinary circumstances. It will be observed that the rule as we find it laid down, and as we must believe it to be, is *not* that the injury sustained *must* be the *necessary* or unavoidable result of the wrongful act, but that it shall be the *natural and probable* consequence of it, or one likely to ensue from it. We have endeavored to show in the case sup-

posed, and in that before the court, that it was the necessary or almost unavoidable result. The court admit that it is not *unfrequent.* By this we understand,—often to be met with—often repeated or occurring—not a particular accident, but one of the habitual incidents of setting fire to one of several houses or buildings so situated. Is it not then a natural and probable consequence, one likely to follow from the burning of the first? And may not such result be reasonably anticipated or expected according to the usual experience of mankind? If the running over a person in the street by a frightened horse which has escaped from the control of its driver, is, according to common experience, a result reasonably to be expected from the breaking away and flight of the horse, or if breaking the leg of a pedestrian by the shafts of a truck which are improperly shored up in the street, and which truck is hit by the truck of a third person, causing the shafts to whirl round and strike the leg, be a result reasonably to be expected from such improper shoring, then much more should we say that the burning of the second, third and other houses in the case supposed, was a result reasonably to have been expected from the fire of the first. A slight knowledge of the nature, laws and force of fire would seem to demonstrate this.

And the position of the court of Pennsylvania, by the rule laid down as to what is a proximate and what a remote cause, and which cuts off all liability and all remedy for consequential injuries of every name and nature in actions for torts and wrongs, seems to us still more objectionable. Upon the doctrine of that court, the escape of the horse caused by the careless driving of the defendant's servant, had in point of law no connection with the injury subsequently inflicted upon the plaintiff. It was the remote

cause. It was the running of the horse after its escape from the driver's control, which occasioned the injury, and that was the proximate cause, not produced by the carelessness of the servant and not rendering his master responsible. And so, too, in the case of the broken leg, it was the driving by the third truckman against the truck, even though he used due care, which caused the injury, unless the court would go on still further and consider the hitting of the truck one event and the whirling of the shafts another. And the strange misapplication of the maxim and of the case supposed by Professor Parsons, quoted at the outset of the opinion, of a debtor who fails to meet his engagement with his creditor, by reason of which the creditor fails to meet his, and is thrown into bankruptcy and ruined, is well illustrated by two cases cited and the comments upon them in the opinion above referred to, of the supreme court of Massachusetts. The court say: "Two recent cases, both much considered, sound and consistent with each other, well illustrate the true rule of law. A druggist who carelessly labelled belladonna, a deadly poison, as extract of dandelion, a harmless medicine, and sent it so labelled into the market, was held, by the court of appeals of New York, liable in damages, after it had passed through several intervening hands, had been purchased by an apothecary, and administered by the plaintiff to his wife, who was injured by using it as a medicine, in consequence of the false label. Thomas *v.* Winchester, 2 Selden, 397. Here the dealer owed a duty to the public not to expose human life to danger by falsely labelling a noxious drug and selling it in the market as a harmless article. To do so was culpable and actionable negligence towards all likely to be and who in fact were injured by the mistake. And the

injury that did follow was the naturally and easily foreseen result of the carelessness.

"On the other hand, where one article, black oxide of manganese, in itself harmless, which became dangerous only by being combined with another, was sold by mistake, the plaintiff who purchased it of a third party and mixed it with another substance, the combination with which caused a dangerous explosion, as held by this court to have no right of action against the original vendor who made the mistake, for the damages caused by the explosion. Davidson *v.* Nichols, 11 Allen, 514. The mistake in regard to an article in its own nature ordinarily harmless, in the absence of contract or false representation, was not a violation of any public duty, or negligence of such a wrongful and illegal character as to render the party who made it liable for its consequences to third persons. Nor was it a natural and probable consequence of such a mistake that this ordinarily innocuous substance would be mixed with another chemical agent, become explosive by the combination, and a third party be thereby injured."

The case of a debtor who fails to meet his engagement is not one of tort or wrong in any legal sense. The bankruptcy and ruin of the creditor by reason of such failure is not a result likely to ensue, a natural and probable one, from the fact of such failure. Ordinarily it produces no such result, and is not, therefore, reasonably to be expected by the debtor. In rare and exceptional cases it may do so, but then only by connection or alliance with other circumstances not necessarily known to the debtor and of which he is in general ignorant and without the means of knowledge. The embarrassment of the creditor, the extent of his engagements, his inability to meet them, and all

other circumstances which produce his bankruptcy and ruin, are facts usually known only to himself, and with reference to which no general engagement of the debtor to pay at a particular time can be presumed to have been made. And the decision in Insurance Company *v.* Tweed, 7 Wall. (U. S.) 45, referred to by the same court, also very clearly sustains our views. Discussing the doctrine of proximate and remote causes as it has arisen and been decided by the courts in a great variety of cases, the opinion says: "One of the most reliable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, *of itself sufficient* to stand as the cause of the misfortune, the other must be considered as too remote.

"In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. *The fact that it was carried to the cotton by first burning another building, supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of fire towards the warehouse, be considered as a new cause.* That may have been the usual course of the breeze in that neighborhood."

Another position taken by the learned counsel is, that the dryness of the weather and the blowing of the wind at the time the fire was set, were not *ordinary* but *extraordinary* circumstances, within the meaning of the rule above stated. That which is frequent or oft repeated, occurring year by year with almost unvarying regularity, like periods of drouth at certain times and seasons, or like the almost daily blowing of the winds in our country, cannot be re-

garded as extraordinary. These are ordinary circumstances in the completest sense of the word, and just such as persons engaged in a dangerous business the mischiefs of which may be thereby enhanced, are bound by the rule to foresee, and by increased care and vigilance to guard against.

Another and the last position of counsel which we notice, is, that it was error in the court not to have instructed the jury that they must find negligence on the part of the defendant *with respect to the property destroyed.* The question was not so put to the jury, but by a general instruction that they must find that the negligence of the defendant produced the loss and injury for which a recovery was sought. The question whether there was negligence in relation to the property destroyed, is undoubtedly one of fact for the jury, unless there is a total want of evidence tending to sustain that conclusion. It appears, however, from what has already been said, that in our judgment there was abundance of such evidence from which the jury must have so found the fact, had the point been thus submitted to them. Granting, therefore, that the instructions were defective in this particular, it would still seem to follow that the judgment ought not to be reversed. It is a settled rule that this court will not reverse for errors in the instructions or rulings of the court below, where it is clear that the verdict and judgment could not have been different on the evidence. Andrea *v.* Thatcher, 24 Wis. 471; Ketchum *v.* Zeilsdorff, 26 Wis. 514. But there is another rule of practice, also well settled, which would forbid such reversal. The general charge of the court, or instructions given, were clearly correct, embracing all the points necessary for the full understanding of the jury, except this particular one. In such case the rule is, that if a party desires to have the

jury instructed upon a particular point, not embraced in the charge given by the court, or if an instruction or conclusion of law merely requires modification in some particular or particulars, not materially affecting its general correctness, an exception thereto should be particular, so as to call the attention of the court to the precise point of objection. Browers *v.* Merrill, 3 Chand. 46; Lachner *v.* Salomon, 9 Wis. 129; Knox *v.* Webster, 18 Wis. 406; Weisenberg *v.* The City of Appleton, 26 Wis. 56; Northwestern Iron Co. *v.* Aetna Insurance Co., 26 Wis. 78. In this case there was only a general exception, which was insufficient. Had the attention of the court been called to the point now urged, the instructions would unquestionably have been so modified. It is a fact appearing from the argument of the case in this court, that the point is raised for the first time upon this application and argument for a rehearing.

The rehearing must be denied.

By the Court.—Rehearing denied.

NOTE.

The above able and elaborate opinion is one of the most widely cited and best known of the opinions of Ch. J. Dixon.

The decision has been uniformly cited with approval and is a most able exposition of the doctrine which it enunciates. That doctrine, to quote from the opinion of Potter J. in Reiper *v.* Nichols, 31 Hun. 495, is to the effect that "a person guilty of negligence is to be held responsible for all the consequences flowing naturally and proximately from the negligent cause, and that diversity of ownership of the buildings burnt, or the lands traversed by the fire, or mere distance of locality, or the period of time between the burning of the buildings, do not necessarily or at all relieve from liability until the primal cause ceases to operate, or

the chain of natural and proximate cause and effect have been interfered with by some agency, or neglect or fault of some other person either by his conduct or the condition of his property." The Kellogg case, *supra,* has been cited in Wisconsin with approval as follows: Whitney *v.* C. & N. W. Ry. 27 Wis. 348; Spaulding *v.* Ry. 30 Wis. 116; Servatius *v.* Pickel, 34 Wis. 299; Read *v.* Morse, 34 Wis. 315; Wilson *v.* Noonan, 35 Wis. 358; Stewart *v.* Ripon, 38 Wis. 592; Erd *v.* C. & N. W. Ry., 41 Wis. 67; Murphy *v.* C. & N. W. Ry., 45 Wis. 225; Jucker *v.* C. & N. W. Ry., 52 Wis. 152; Brown *v.* C. & N. W. Ry., 54 Wis. 355; Gibbons *v.* Wis. Valley Ry., 58 Wis. 343; Brown *v.* Kayser, 60 Wis. 7; Atkinson *v.* Goodrich Trans. Co., 60 Wis. 155; Marvin *v.* C., M. & St. P. Ry., 79 Wis. 145; Brown *v.* Brooks & others, 85 Wis. 297; Andrew *v.* C., M. & St. P. Ry., 96 Wis. 357; Deisenrieter *v.* Kraus-Merkel Malting Co., 97 Wis. 286; Becker *v.* Chester, 115 Wis. 139.

That nothing in the Kellogg case is to be construed as holding that a land owner adjacent to a railway track may not by contributory negligence defeat a recovery of damages on account of fire originating upon the track of the company, is made clear by what is said in Murphy *v.* Chicago & Northwestern Railway, 45 Wis. 225, *supra;* see also Clune *v.* Milwaukee & Northwestern Railway Company, 75 Wis. 532.

Kellogg *v.* Ry. has been cited with approval outside of the Wisconsin Supreme Court as follows: L. & N. Ry. *v.* Webb, 90 Ala. 192, 11 L. R. A. 677; Ry. Co. *v.* Fire Assn., 55 Ark. 177; Travelers Ins. Co. *v.* Murray, 16 Colo. 304; J. T. & K. W. Ry. *v.* P. L. T. & M. Co., 27 Fla. 116, 17 L. R. A. 56; St. J. & H. Ry. *v.* Ransom, 33 Fla. 415; Rodemacher *v.* M. & St. P. Ry., 41 Ia. 310; Small *v.* C. R. I. & P. Ry., 50 Ia. 355; Small *v.* C., R. I. & P. Ry., 55 Ia. 593; Pullman Palace Car Co. *v.* Laack, 43 Ill. 260, 18 L. R. A. 220; Toledo Ry. *v.* Wand, 48 Ind. 479; P. C. & St. L. Ry. *v.* Jones, 86 Ind. 500; L. N. A. & C. Ry. *v.* Krinning, 87 Ind. 355; L. N. A. & C. Ry. *v.* Falvey, 104 Ind. 428; L. N. A. & C. Ry. *v.* Wood, 113 Ind. 567; C. I. St. L. & C. Ry. *v.* Smock, 133 Ind. 417; St. J. & D. C. Ry.

v. Chase, 11 Kan. 56; A. T. & S. F. Ry. *v.* Stanford, 12 Kan. 379; K. P. Ry. *v.* Brady, 17 Kan. 384; Central Branch U. P. Ry. *v.* Hotham, 22 Kan. 52; White *v.* M. P. Ry., 31 Kan. 282; Mastin *v.* Levagood, 47 Kan. 42; Lewis *v.* Flint & Pere Marquette Ry., 54 Mich. 58; Wilder *v.* Me. Central, 65 Me. 340; Jones *v.* Mich. Central Ry., 59 Mich. 440; Johnson *v.* C., M. & St. P. Ry., 31 Minn. 61; Clarke *v.* C., St. P., M. & O. Ry., 33 Minn. 360; Shumaker *v.* St. P. & Duluth Ry., 46 Minn. 43; Fink *v.* Mo. Furnace Co., 10 Mo. App. 69; Moberly *v.* K. C., St. J. & C. P. Ry., 17 Mo. App. 543; Clemens *v.* Hannibal & St. J. Ry., 53 Mo. 371; Miller *v.* St. L. I. M. & S. Ry., 90 Mo. 394; Matthews *v.* St. L. & S. F. Ry., 121 Mo. 298, 25 L. R. A. 74; Diamond *v.* N. P. Ry., 6 Mont. 589; C. L. & W. Ry. *v.* Fredenbur, 3 Ohio Cir. Ct. 30; Adams *v.* Young, 44 Ohio, 80 and note; McKennon *v.* Winn, 1 Okla. 327; D. L. & W. Ry. *v.* Salmon, 39 N. J. Law, 305; De Camp *v.* Dobbins, 29 N. J. Eq. 44 note; Doggett *v.* R. & D. Ry., 78 N. Car. 307, 312; Rowell *v.* Ry., 57 N. H. 138; B. & M. Ry. *v.* Westover, 4 Neb. 276; Reiper *v.* Nichols, (N. Y.) 31 Hun, 495, 22 Abb. N. C. 381 (note on spread of fire); P. & R. Ry. *v.* Hendrickson, 80 Pa. St. 190; Oil Co. *v.* King, 6 Tex. Civ. Cas. 96; H. & T. C. Ry. *v.* McDonough, 1 Tex. Ct. App. 359; Seale *v.* G. C. & S. F. Ry., 65 Tex. 278; Ry. *v.* Benson, 69 Tex. 410; Clark *v.* Dyer, 81 Tex. 344; R. & D. Ry. *v.* Medley, 75 Va. 507; Snyder *v.* P. C. & St. L. Ry., 11 W. Va. 27; Milwaukee & St. P. Ry. *v.* Kellogg, 94 U. S. 474; Lusby *v.* A. T. & S. F. Ry., 41 Fed. 184; Marine Ins. Co. *v.* St. L. I. M. & S. Ry., 41 Fed. 653; McCarthy *v.* Traveler's Ins. Co., 8 Biss. 366.

Valuable collections of authorities will be found in the following, in which the main case is cited:

Lawyer's Reports Annotated: N. C. & St. L. Ry. *v.* Doane (115 Ind. 435), 1 L. R. A. 158; Knowlton *v.* N. Y. & N. E. Ry., (147 Mass. 606), 1 L. R. A. 627; Marion *v.* C., M. & St. P. Ry. (79 Wis. 145), 11 L. R. A. 510; L. & N. Ry. *v.* Webb (90 Ala. 192), 11 L. R. A. 677; Roux *v.* B. & D. Lumber Co. (85 Mich. 519), 13 L. R. A. 733; Wilson *v.* Troy (135 N. Y. 96), 18 L. R. A. 450; Brown

v. Brooks (85 Wis. 297), 21 L. R. A. 263; McKennon *v.* Winn (1 Okla. 327), 22 L. R. A. 509; Shumaker *v.* St. P. & D. Ry. (46 Minn. 39), 12 L. R. A. 259.

American State Reports: Kendrick *v.* Towle (60 Mich. 363), 1 Am. St. Rep. 532; Arnold *v.* Pa. Ry. (115 Pa. St. 135), 2 Am. St. Rep. 546; Gilson *v.* Del. Canal Co. (65 Vt. 213), 36 Am. St. Rep. 824.

American Reports: C. & N. W. Ry. *v.* Simonson (54 Ill. 504), 5 Am. Rep. 157; Flynn *v.* S. F. & S. J. Ry. (40 Cal. 14), 6 Am. Rep. 600; Jackson *v.* C. & N. W. Ry. (31 Ia. 176), 7 Am. Rep. 122; Salmon *v.* D. L. & W. Ry. (9 Vroom. 5), 20 Am. Rep. 362; Hoag *v.* L. S. & M. S. Ry. (85 Pa. St. 293), 27 Am. Rep. 653; L. N. A. & C. Ry. *v.* Richardson (66 Ind. 43), 32 Am. Rep. 98; Pa. Co. *v.* Whitlock (99 Ind. 16), 50 Am. Rep. 81; White *v.* Conly (14 Lea, 51), 52 Am. Rep. 157.

American Decisions: Burroughs *v.* Housatonic Ry. (15 Conn. 124), 38 Am. Dec. 72, 75 and 76; Thomas *v.* Winchester (6 N. Y. 397), 57 Am. Dec. 461; Fero *v.* B. & S. L. Ry. (22 N. Y. 209), 78 Am. Dec. 185, 186; Bass *v.* C. B. & Q. Ry. (28 Ill. 9), 81 Am. Dec. 259; Barnes *v.* Chapin (86 Mass. 444), 81 Am. Dec. 712; Knox *v.* Webster (18 Wis. 406), 86 Am. Dec. 783; Ernst *v.* H. R. Ry. (35 N. Y. 9), 90 Am. Dec. 787; Ryan *v.* N. Y. C. Ry. (35 N. Y. 210), 91 Am. Dec. 56; McDonald *v.* Snelling (96 Mass. 290), 92 Am. Dec. 777; Perley *v.* Eastern Ry. (98 Mass. 414), 96 Am. Dec. 649, 650; Strohn *v.* D. & M. Ry. (23 Wis. 126), 99 Am. Dec. 135; Martin *v.* W. N. Ry. (23 Wis. 437), 99 Am. Dec. 193; Ohio, etc., Ry. *v.* Shanefelt (47 Ill. 497), 95 Am. Dec. 509.

American & English Railway Cases: P. C. & St. L. Ry. *v.* Noel (77 Ind. 110), 7 A. & E. Ry. Cas. 537; Sheffer *v.* Washington City Ry. (105 U. S. 249), 8 A. & E. Ry. Cas. 62; White *v.* M. P. Ry. (31 Kan. 280), 13 A. & E. Ry. Cas. 475; Brown *v.* A. & C. Air Line Ry. (19 S. Car. 39), 13 A. & E. Ry. Cas. 492; Patton *v.* St. L. & S. F. Ry. (87 Mo. 117), 23 A. & E. Ry. Cas. 369; Bowen *v.* St. P., M. & M. Ry. (36 Minn. 522), 32 A. & E. Ry. Cas. 372, 373; Johnson *v.* N. P. Ry. (1 N. Dak.

354), 45 A. & E. Ry. Cas. 564; Northern Pac. Ry. *v.* Lewis (7 U. S. App. 254), 56 A. & E. Ry. Cas. 84; Mathews *v.* St. L. & S. F. Ry. (121 Mo. 298), 61 A. & E. Ry. Cas. 460.

All the courts profess to agree that the jury is to determine whether a certain effect is the natural and proximate sequence of a certain cause; but, to quote once more from Reiper *v.* Nichols, *supra,* "the states of New York & Pennsylvania hold that a jury should not be allowed to find that a cause is proximate beyond the first effect; that is, where the building which is fixed as a first effect, itself fires the second, and the second the third building, and so on to an indefinite extent." The leading case in New York, Ryan *v.* N. Y. Central Ry. (35 N. Y. 210), has been criticized, but never overruled and as regards the state of facts in question is the law of New York to-day. See Hoffman *v.* King, 160 N. Y. 618; Read *v.* Nichols, 118 N. Y. 229. Also followed in Pennsylvania Ry. *v.* Kerr, 62 Pa. 353; Hoag *v.* Ry., 85 Pa. 293. The doctrine of the Ryan case, *supra,* has been much limited and qualified in the following cases: Webb *v.* Ry. Co., 49 N. Y. 420; Pollett *v.* Long, 56 N. Y. 200; Cornish *v.* Farm Buildings Fire Assn., 74 N. Y. 295; Lowery *v.* Manhattan Ry., 99 N. Y. 158; Martin v. Ry., 62 Hun, 184; O'Neil *v.* Ry., 115 N. Y. 579; Flinn *v.* N. Y. C. & H. R. R. Ry., 142 N. Y. 11; Frace *v.* Ry., 143 N. Y. 189; Travel *v.* Bannerman, 71 A. D. (N. Y.) 442.

Hoyt v. The City of Hudson.

January Term, 1871,

(27 Wis. 656.)

This was an action brought in the Circuit Court of St. Croix County to recover damages claimed to have accrued to the plaintiff from the grading and raising of a street in the City of Hudson, whereby the water running through a ravine across the premises of the plaintiff adjacent to the street, was obstructed in its flow and set back upon the plaintiff's premises. The plaintiff alleged that this flow of water constituted a natural water-course, running across the plaintiff's land, and that by reason of the embankment raised in grading the streets of the city the waters of this water-course so accumulated upon plaintiff's land as to form a stagnant pool in close proximity to plaintiff's house, rendering a portion of said real estate worthless. The defendant denied the existence of any natural water-course, alleged that the grading and raising of the street was necessary for the improvement of the city, and that the only waters obstructed were surface waters. There was a verdict for plaintiff and defendant appealed.

The judgment was reversed by the Supreme Court for the reasons stated in the opinion of Chief Justice Dixon.

The other facts necessary to an understanding of the opinion are stated in it.

The following are the propositions of law decided:

A "water-course" is a stream *usually* flowing in a particular direction, in a definite channel, and discharging into some other stream or body of water; and the term does not include surface water conveyed from a higher to a lower level for limited periods

during the melting of snow, or during or soon after the fall of rain, through hollows or ravines which at other times are dry.

Although the owner of land cannot divert from its natural course and throw upon the land of another, to his injury, surface water falling or accumulating *upon his own land* (Pettigrew *v.* Evansville, 25 Wis. 223), yet the owner of lower land (acting in good faith, to secure the proper enjoyment and use of his own land), may lawfully obstruct the flow of surface water thereon from the adjacent higher grounds of other proprietors, and in so doing may turn the water back upon such adjacent grounds, or off from his own land on to or over the lands of another.

Quære, whether there may be an exception to this rule in the case of a hilly region where large tracts of land are drained through a narrow gorge, and would be submerged or greatly injured by its obstruction, so that the rule, if applied, would operate adversely to the interests of agriculture.

Cities, towns, and villages, as owners of lands for highways and other public purposes, have the same rights as private owners to obstruct or repel the flow of surface water.

Where the passage of surface water, through a ravine is obstructed by the officers or agents of a city in the construction of streets, the owner of adjacent land injured by such obstruction cannot recover damages therefor.

Dixon, Chief Justice. In Pettigrew *v.* The Village of Evansville, 25 Wis. 223, this court had occasion to examine the subject and express its views very fully as to the

rights and liabilities of conterminous proprietors of lands with respect to the obstruction and flow of mere surface water; and to say when, in its opinion, and under what circumstances, by what means, and to what extent, the owner of land might obstruct and prevent the natural and customary flow thereon of such water, and turn the same back upon or off on to or over the lands of others, without liability for injuries thus caused to the lands of other proprietors. The question was discussed in several of the aspects in which it has arisen and been considered by the courts, and many, probably most, of the cases relating to it cited and examined; and an attempt was made to point out and define the rights and duties of owners of lands in those particulars which heretofore have been and hereafter doubtless will be the most frequent subject of controversy. The result of that examination was, that this court rejected the doctrine of dominant and servient heritage of the civil law respecting the natural flow of such water, which is the rule of some of the states, and adopted the very opposite doctrine of the common law of England as held and expounded by the courts of that country and also by those of several of our own American states. The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the water cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor. Such seems to be the rule in the states of Pennsylvania, Iowa and Illinois, and perhaps in Missouri and Ohio. Kaufman *v.* Griesemer, and Martin *v.*

Riddle, 26 Pa. St. 407 and 415; Livingston *v.* McDonald, 21 Iowa, 160; Gillham *v.* Madison Co. R. R. Co., 49 Ill. 484; Laumier *v.* Francis, 23 Mo. 181; Butler *v.* Peck, 16 Ohio St. R. 334. The facts in the Ohio case were in all material respects the same as those in Pettigrew *v.* The Village of Evansville, and it distinctly affirms the same principle. The doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion. This is the rule in England, and in Massachusetts, New York, Connecticut, Vermont, New Jersey and New Hampshire, as will be seen by the authorities cited in Pettigrew *v.* The Village of Evansville, and also the following: Bowlsby *v.* Speer, 31 New Jersey Law Reports (2nd Vroom.) 351; Dickinson v. Worcester, 7 Allen, 19; Chatfield *v.* Wilson, 28 Vt. 49; Sweet *v.* Cutts (Sup. Ct. N. H.), 11 Am. Law Reg. (N. S.) 11; Trustees *v.* Youmans, 50 Barb. 316; Waffle *v.* N. Y. Central Railroad Co., 58 Barb. 413. Excluding from its operation surface water falling or accumulating on his own land, which, as decided in Pettigrew *v.* The Village of Evansville, the proprietor may not divert or cause to flow upon the land of another to his injury, the rule of the common law is correctly stated in Bowlsby *v.* Speer, that no legal right of any kind can be claimed, *jure naturæ,* in the flow of surface water; so that neither its retention, diversion or repulsion

is an actionable injury, even though damage ensue. An examination of the last named case will also show that the case of Earl *v.* De Hart, 1 Beas. 280, cited and relied upon in argument here, has been virtually overruled. The doctrine of dominant and servient heritage, so far as it may be supposed to have been sustained by the decision of the chancellor and his conclusion upon the facts of the case before him, which were in all material respects the same as in Bowlsby *v.* Speer and in this case, that it was a water-course or stream which was there filled up and obstructed, were directly and emphatically repudiated.

Such being the rule of the common law, which is the law of this state, and it also having been held in Pettigrew *v.* The Village of Evansville, that cities, towns and villages, as the owners of lands for highway and other public purposes, have the same rights to obstruct or repel the flow of surface water as other proprietors, it follows that the plaintiffs established no cause of action against the city, unless the ravine or hollow in question had the proper qualities of, and constituted what is known in law as a *water-course,* as distinguished from a ravine, hollow or other depression in land through which, in times of rains, heavy showers and melting snows, the surface water is accustomed to escape. The term "water-course" is well defined. There must be a stream *usually* flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water

from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation water-courses. Shields *v.* Arndt, 3 Green's Ch. 234; Luther *v.* Winnisimet Co., 9 Cush. 171; Washburn on Easements, 209, 210.

The testimony upon this point has been correctly collated by counsel, and is as follows. One witness testified: "A ravine ran across the premises, diagonally in a southwesterly direction; there was no constant stream there; it only ran there during wet weather, and when snow thawed." Another: "There was a ravine across the premises; the water ran down the ravine every heavy rain we had." Another: "Water has always run through the ravines in wet seasons, rain or thaw." Another: "I know the ravine in question; the water runs in this ravine only in the spring of the year when snow goes off, and in very heavy rains or long continued rains; does not run to exceed twenty days in the year; no water runs in the ravine except as I have stated; it is not a stream with banks, but simply a sag in the ground, but spreads out further down, without any particular channel." Another one testified: "I know the ravine running across the premises; water runs there after a heavy rain and melting of snow." And another: "During melting of snow and heavy rains, water runs in this ravine; there is more or less water runs in this ravine in the spring and fall; during wet and rainy weather, after the ground becomes saturated with water, a slight rain would cause water to run down the ravine." And the seventh and last witness examined said: "Water has run in this ravine after heavy rains and in the spring of the year; I have seen a flood of water run there at one time, and in half a day none would run there; until they

made the ditch back of the court-house, water would hold on longer than now; a month longer."

Such is a statement of all the testimony as given by the witnesses themselves; from which we think it clearly appears that it was a mere occasional flow of surface water down the ravine or hollow in question, which was obstructed by the agents and officers of the city, and not a stream or water-course within the meaning of the law on that subject. As observed in some of the decisions, it would be highly unreasonable and mischievous to attach the legal qualities of water-courses to ravines and hollows thus serving as conduits for mere occasional accumulations of surface water; and especially would it be so within the limits of large towns, cities and villages, where the population is dense and the quantity of land owned or occupied by each individual or family very small. In such cases the universal understanding and practice is, that owners of lots may fill them up or change their natural surface to suit their own tastes or convenience, and so as to obstruct or repel the surface water coming from the lots of others, without liability for injury; and that the public authorities have the same rights and privileges with respect to streets, squares and other public grounds. In such cases and as to such property the doctrine of dominant and servient heritage is rejected by those courts which hold to the rule of the civil law. Bentz *v.* Armstrong, 8 Watts & Serg. 40; Livingston *v.* McDonald, 21 Iowa, 174.

In no view of this case, therefore, does it seem that the plaintiffs established any cause of action. No actionable negligence or carelessness on the part of the agents or officers having charge of the work was shown. The work of grading the street was skillfully and properly done, unless the omission to put in a culvert to carry off the sur-

face water from the plaintiffs' premises made it otherwise. It follows from what has already been said, that the city was not bound to do this; and, besides, it has, in one case at least, been held on general principles that a municipal corporation is not liable to a private action for damages accruing from such a cause. Mills *v.* City of Brooklyn, 32 N. Y. 489.

In Bowlsby *v.* Speer, the court, first stating the rule of the common law, that no right of any kind can be claimed in the mere flow of surface water, and that neither its retention, diversion, repulsion, or altered transmission is an actionable injury, even though damage ensues, observe: "How far it may be necessary to modify this general proposition in cases in which in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains, or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question. It would seem that such anomalous cases might reasonably be regarded as forming exceptions to the general rule."

This exception, or suggested exception, seems sound and just. The rule itself is established in favor of agriculture, and of the right of every owner to make the most profitable use of his own land. But where, in such exceptional cases, it appears that considerable tracts of land are drained through ravines or narrow valleys, and would otherwise be submerged or greatly injured by the accumulation and presence of surface water, so that the rule would operate adversely to the interests of agriculture and be productive of more harm than good, it would seem that it ought to give way, or its application be suspended. At all

events, the suggestion presents a contingency, or possible class of cases, with respect to which this court should not be regarded as having expressed any opinion. Nor should the court be understood as deciding that the right of the land owner to obstruct or divert the natural flow of surface water is without limit or qualification by what may be necessary in the reasonable use and improvement of his own land. He may not do so wantonly or unnecessarily, or from mere motives of malice. In Sweet *v.* Cutts, the rule established is, that it is the right of every land owner to change the diffusion of surface water at his will and pleasure, provided it be done in good faith, in the enjoyment and for the greater usefulness of his own land. It is not the intention, nor has the court any desire here, to anticipate the future, or to lay down, or attempt to lay down, any rule for the decision of future distinguishable cases. Such cases will, and can only properly, be decided when they arise. The decision here is confined strictly to the question made by the record under examination.

By the Court.—Judgment reversed, and a new trial awarded.

NOTE.

The principal value of Hoyt *v.* Hudson, lies in the declaration that the Wisconsin Supreme Court has adopted the common law as to surface water, and also in the clear definition or description given of what constitutes a water-course. It is not possible to harmonize the cases on this subject, for the reason that the courts of some of the States have adopted the rule of the "civil law," and others have adopted that of the "common law." By the civil law, all waters, whether surface water or that flowing in what are known as water-courses, appear to be regulated by the same rule, which is, that the flow thereof from the higher to the lower ground cannot be interfered with. He who has the upper grounds cannot change the course of surface water

either by turning the water some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do anything that may hinder his grounds from receiving the water which they would naturally receive. The essence of the common law rule is that one may do what he pleases with his property regardless of the effect upon surface water. As stated, in substance, in the main case no legal right of any kind can be claimed *jure naturæ* in the flow of surface water, so that neither its detention, diversion nor repulsion is an actionable injury, even though damage ensue.

Even within the States which have adopted one rule or the other respecting surface water, the cases are not always harmonious, for the reason that it is next to impossible to determine, in some cases, whether moving water is to be considered as surface water, or as that of a watercourse, and this difficulty is augmented, when as in some cases the lower estate, so far from desiring to get rid of the water which flows upon it, may find its chief or only value in having the waters come to it as in a state of nature.

A rather remarkable illustration of this difficulty is afforded by Case *v.* Hoffman, *supra,* reported in 84 Wisconsin, and also in 100 Wisconsin. In that case there were large areas of land devoted to the cultivation of cranberries, which received the supply of water absolutely necessary to the growth and protection of the berries, from a lake known as Big Lake. The water after having passed some distance from Big Lake, however, spread out over a large surface and for a long distance did not run in any fixed and clearly defined channels, though it was finally gathered together again into a stream with continuous bed and banks. The defendants by diverting the flow of water from Big Lake in another direction prevented the waters thereof from reaching the lands of the plaintiff, rendering them practically valueless. The claim of the defendants was that the waters thus diverted were surface waters, while the plaintiff claimed that such waters were those of

a natural water-course. The facts in the case being fully pleaded in the complaint, the Circuit Court sustained a demurrer to the complaint on the ground that the waters described therein merely constituted surface water. On appeal to the Supreme Court of Wisconsin, the order sustaining the demurrer was reversed by a divided court, and a majority of the court declared that the complaint described a natural water-course. The members of the court holding this view were Lyon, Chief Justice, and Associate Justices Orton and Cassoday. Associate Justices Winslow and Pinney dissented and agreed with the view taken by the Circuit Judge. The case thereupon went back to trial at the Circuit upon the issue of water-course or no water-course, and it was found as a fact that the allegations of the complaint were true and that the waters diverted were those of a natural water-course. Judge Newman, however, who had sustained the demurrer to the complaint at the Circuit, had in the meantime become a member of the Supreme Court, and the trial of the case on the facts was had before Judge Bailey. Upon defendant's appeal to the Supreme Court from the judgment permanently enjoining the diversion of the water, the members of that court again divided, and Associate Justices Winslow, Pinney and Mr. Justice Newman, constituting a majority of the court as it was then made up, held that the finding of the Trial Judge was against the evidence and reversed the judgment. Chief Justice Cassoday and Associate Justice Marshall vigorously dissented. A motion for rehearing was made and granted on the ground that Mr. Justice Newman was disqualified to sit on the appeal, since he had tried substantially the same questions at the Circuit on the demurrer to the complaint.

The death of Mr. Justice Newman occurring shortly thereafter, his place on the Supreme Bench was filled by Mr. Justice Bardeen, and upon the final reargument of the case before the court as thus constituted a majority of the court, consisting of Chief Justice Cassoday and Associate Justices Marshall and Bardeen, affirmed the judgment of the trial court and awarded damages and made the injunc-

tion permanent in plaintiff's favor. Associate Justices Winslow and Pinney still, however, dissented.

The foregoing opinion has been cited, with approval, in Wisconsin, as follows: Fryer *v.* Warne, 29 Wis. 515, 516; Eulrich *v.* Richter, 37 Wis. 229; Spelman *v.* City of Portage, 41 Wis. 148; Allen *v.* City of Chippewa Falls, 52 Wis. 434; O'Connor *v.* Fond du Lac, etc., Ry., 52 Wis. 530, 531; Ramsdale *v.* Foote, 55 Wis. 560, 561; Waters *v.* Village of Bay View, 61 Wis. 644; Lessard *v.* Stram, 62 Wis. 114, 115, 116; Heth *v.* City of Fond du Lac, 63 Wis. 231; Addy *v.* City of Janesville, 70 Wis. 406; Johnson *v.* C., St. P., M. & O. Ry., 80 Wis. 645, 14 L. R. A. 497; Champion *v.* Town of Crandon, 84 Wis. 407, 19 L. R. A. 857; Case *v.* Hoffman, 84 Wis. 444, 445, 20 L. R. A. 42; Schroeder *v.* City of Baraboo, 93 Wis. 100; Borchsenius *v.* C., St. P., M. & O. Ry., 96 Wis. 450; Case *v.* Hoffman, 100 Wis. 323; Clauson *v.* C. & N. W. Ry., 106 Wis. 311, 312; Blohowak *v.* Grochoski, 119 Wis. 195; Schrunk *v.* St. Joseph, 120 Wis. 229; Merkel *v.* Germantown, 120 Wis. 497.

Hoyt *v.* Hudson has been commented on rather disapprovingly in Peck *v.* Herrington, 109 Ill. 617, 50 Am. Rep. 628; Lambert *v.* Alcorn, 144 Ill. 325, 21 L. R. A. 615.

It has been cited with approval outside of the Wisconsin Supreme Court, as follows: Taylor *v.* Fickas, 64 Ind. 177, 31 Am. Rep. 120; Weis *v.* City of Madison, 75 Ind. 256, 39 Am. Rep. 146; Rice *v.* City of Evansville, 108 Ind. 13, 58 Am. Rep. 26; Comrs. of Carroll County *v.* Bailey, 122 Ind. 49; Ross *v.* City of Clinton, 46 Ia. 614; Page *v.* Waverley, 105 Ia. 225, 40 L. R. A. 470; Palmer *v.* Waddell, 22 Kan. 357; Gibbs *v.* Williams, 25 Kan. 220, 37 Am. Rep. 247; K. C. & E. Ry. *v.* Riley, 33 Kan. 377; Morrison *v.* Bucksport & Bangor, 67 Me. 357; Mayor & C. C. of Cumberland *v.* Willison, 50 Md. 156; Burford *v.* Grand Rapids, 53 Mich. 101, 50 Am. Rep. 106; Gregory *v.* Bush, 64 Mich. 42, 8 Am. St. Rep. 801; Alden *v.* City of Minneapolis, 24 Minn. 263; O'Brien *v.* City of St. Paul, 25 Minn. 334, 336, 33 Am. Rep. 473; Rowe *v.* St. P., M. & M. Ry., 41 Minn. 386, 387, 16 Am. St. Rep.

708; Shane *v.* K. C., St. J. & C. B. Ry., 71 Mo. 254, 36 Am. Rep. 490; Benson *v.* C. & A. Ry., 78 Mo. 512, 514; Stewart *v.* City of Clinton, 79 Mo. 612; Abbott *v.* K. C., St. J. & C. B. Ry., 83 Mo. 286; Rychlicki *v.* City of St. Louis, 98 Mo. 512, 513, 514, 522, 4 L. R. A. 598, 601; Jones *v.* W. St. L. & P. Ry., 18 Mo. App. 257; Schneider *v.* Mo. P. Ry., 29 Mo. App. 72; Burke *v.* Mo. P. Ry., 29 Mo. App. 377; St. L., I. M. & S. Ry. *v.* Schneider, 30 Mo. App. 623; Morrissey *v.* C., B. & Q. Ry., 38 Neb. 418; Jessop v. Bamford, etc., Co., 66 N. J. L. 641, 58 L. R. A. 332; Barkley *v.* Wilcox, 86 N. Y. 145, 40 Am. Rep. 522; Franklin v. Durgee, 71 N. H. 186, 58 L. R. A. 113; Eaton *v.* B., C. & M. R. Ry., 51 N. H. 532, 12 Am. Rep. 177; West *v.* Taylor, 16 Ore. 172; Simmons *v.* Winters, 21 Ore. 40, 28 Am. St. Rep. 729; G., C. & S. F. Ry. *v.* Helsley, 62 Tex. 595; Walker *v.* So. P. Ry., 165 U. S. 603; C., V. & C. Ry. *v.* Brevoort, 62 Fed. 129, 25 L. R. A. 527.

Hoyt *v.* Hudson, *supra,* has also been cited in notes to the following cases reported in Am. Dec., Am. Rep., Am. & Eng. Ry. Cas. and L. R. A., in which are also valuable collections of authorities.

American Decisions: Martin *v.* Jett (12 La. 501), 32 Am. Dec. 125; Perry *v.* City of Worcester (6 Gray, 544), 66 Am. Dec. 440; Earl *v.* De Hart (1 Beasley's Ch. 280), 72 Am. Dec. 702; Butler *v.* Peck (16 Oh. St. 335), 88 Am. Dec. 457; Livingstan *v.* McDonald (21 Ia. 160), 89 Am. Dec. 572.

American Reports: C. & V. Ry. *v.* Stevens (73 Ind. 278), 38 Am. Rep. 144.

American & English Railway Cases: Pfleger *v.* H. & D. Ry. (28 Minn. 510), 5 Am. & Eng. Ry. Cas. 88; Davidson *v.* O. & C. Ry. (11 Ore. 136), 14 Am. & Eng. Ry. Cas. 271; L. & N. Ry. *v.* Hays (11 Tenn. 382), 14 Am. & Eng. Ry. Cas. 289; P. W. & B. Ry. *v.* David (68 Md. 281), 34 Am. & Eng. Ry. Cas. 150.

Lawyers' Reports Annotated: Fulmer *v.* Williams (122 Pa. St. 191), 1 L. R. A. 603; Moellering *v.* Evans (121 Ind. 195), 6 L. R. A. 449; O'Connell *v.* E. T. V. & G. Ry. (87 Ga. 246), 13 L R. A. 395; Wharton *v.* Stevens (84 Ia. 107), 15 L. R. A. 631.

Sutton v. Town of Wauwatosa.

June Term, 1871.

(29 Wis. 21.)

This was an appeal from the Circuit Court of Milwaukee County from a judgment of non-suit. It appeared from the evidence that plaintiff on a Sunday was engaged in driving about fifty cattle to market at Milwaukee and while crossing a public bridge over the Menomonee river on that day, the bridge, because of its rotten and defective condition, gave way under the cattle precipitating them into the river killing some and injuring others and causing the damage to recover which plaintiff brought his action. The ground of the non-suit was that because plaintiff was in the act of violating the statute of the state by driving his cattle to market on Sunday he could not recover for the damage occasioned as above stated.

The following are the propositions of law decided:

The fact that plaintiff, at the time he suffered injuries to his person or property from the negligence of defendant, was doing some unlawful act, will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury.

Thus, the fact that plaintiff was driving his cattle to market on Sunday, in violation of the statute, when they were injured by the breaking down of a defective bridge which the defendant town was bound to maintain, would not prevent a recovery upon due proof of defendant's negligence in constructing and maintaining such bridge.

The question whether plaintiff was guilty of contribu-

tory negligence, in driving so large a number of cattle as he did upon the bridge at one time, should be left to the jury, unless the evidence is decisive not only as to the number of cattle so driven upon the bridge, but also as to the weight which bridges on highways, like the one in question, should be constructed to sustain. A plaintiff should not be non-suited unless it appears that the evidence in his behalf, upon the most favorable construction that the jury would be at liberty to give it, would not warrant a verdict for him.

Dixon, Chief Justice. It is very clear that the plaintiff, in driving his cattle along the road and over the bridge, to a market, on Sunday, was at the time of the accident in the act of violating the provisions of the statute of this state, which prohibits, under a penalty not exceeding two dollars for each offense, the doing of any manner of labor, business or work on that day, except only works of necessity or charity. R. S., c. 183, sec. 5. It was upon this ground the non-suit was directed by the court below, and the point thus presented, that the unlawful act of the plaintiff was negligence, or a fault on his part contributing to the injury, and which will preclude a recovery against the town, is not a new one; nor is the law, as the court below held it to be, without some adjudications directly in its favor, and those by a judicial tribunal as eminent and much respected for its learning and ability as any in the country. Bosworth *v.* Swansey, 10 Met. 363; Jones *v.* Andover, 10 Allen, 18. A similar, if not the very same principle has been maintained in other decisions of the same tribunal. Gregg *v.* Wyman, 4 Cush. 322; May *v.* Foster, 1 Allen, 408. But in others still, as we shall hereafter have occasion to observe, the same learned court has, as it appears to us,

held to a different and contradictory rule in a class of cases which it would seem ought obviously to be governed by the same principle. The two first above cases were in all material respects like the present, and it was held there could be no recovery against the towns. In the first, the opinion, delivered by Chief Justice Shaw, and which is very short, commences with a statement of the proposition, repeatedly decided by that court, "that to maintain the action it must appear that the accident was occasioned exclusively by the defect of the highway; to establish which, it must appear that the plaintiff himself is free from all just imputation of negligence or fault." The authorities to this proposition are cited, and the statute against the pursuit of secular business and travel on the Lord's day then referred to, and the opinion proceeds: "The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases; and this would be a species of fault on his part, which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of." This is all of the opinion touching the point under consideration.

In the next case there was a little, and but a little, more effort at reasoning upon the point. The illustrations on page 20, of negligence in a railway company in omitting to ring the bell of the engine, or to sound the whistle at the crossing of a highway, and of the traveler on the wrong side of the road with his vehicle at the time of the collision, and the language of the court alluding to such "conduct of the party as contributing to the accident or injury which forms the ground-work of the action," very clearly indicate the true ground upon which the doctrine of contributory negligence, or want of due care in the plaintiff, rests,

but it is not shown how or why the mere violation of a statute by the plaintiff constitutes such ground. Upon this point the court only say: "It is true that no direct unlawful act of omission or commission by the plaintiff, done at the moment when the accident occurred, *and tending immediately to produce it,* is offered to be shown in evidence. But it is also true that, if the plaintiff had not been engaged in the doing of an unlawful act, the accident would not have happened, and the negligence of the defendants in omitting to keep the road in proper repair would not have contributed to produce an injury to the plaintiff. It is the disregard of the requirements of the statute by the plaintiff, which constitutes the fault or want of due care, which is fatal to the action." It would seem from this language that the violation of the statute by the plaintiff is regarded only as a species of remote negligence, or want of proper care on his part, contributing to the injury.

The two other cases above cited were actions of tort by the owners, to recover damages from the bailees for injuries to personal property loaned and used on Sunday—horses loaned and immoderately driven on that day. They were decided against the plaintiffs, and chiefly on the ground of the unlawfulness of the act of loaning or letting on Sunday of the horses, to be driven on that day in violation of the statute, which the plaintiffs themselves were obliged to show, and the doctrine of *par delictum* was applied. It was in substance held in each case that the plaintiff, by the first wrong committed by him, had placed himself *in pari delicto* with the defendant, with respect to the subsequent and distinct wrong committed by the latter, and the actions were dismissed upon the principle that the law will not permit a party to prove his own illegal acts in order to establish his case.

In direct opposition to the above decisions are the numerous cases cited decided by the courts of other states, the supreme court of the United States, and the courts of Great Britain, which have been so diligently collected and ably and forcibly presented in the brief of the learned counsel for the present plaintiff. Of the cases thus cited, with some others, we make particular note of the following: Woodman *v.* Hubbard, 5 Foster, 67; Mohney *v.* Cook, 26 Penn. 342; Norris *v.* Litchfield, 35 N. H. 271; Corey *v.* Bath, ib. 530; Merritt *v.* Earle, 29 N. Y. 115; Bigelow *v.* Reed, 51 Maine, 325; Hamilton *v.* Goding, 55 id. 428; Baker *v.* The City of Portland, 59 ib. 199; Kerwhacker *v.* Railway Co., 3 Ohio St. 172; Phila., etc., Railway Co. *v.* Phila., etc., Tow Boat Co., 23 How. (U. S.) 209; Bird *v.* Holbrook, 4 Bing. 628; Barnes *v.* Ward, 9 M. G. & S. 420.

It seems quite unnecessary, if indeed it were possible, to add anything to the force of conclusiveness of the reasons assigned in some of these cases in support of the views taken and decisions made by the courts. The cases may be summed up and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature, namely: first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of; and, secondly, that the fault, want of due care or negligence on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it. Under the opera-

tion of the first principle, the defendant cannot exonerate himself or claim immunity from the consequences of his own tortious act, voluntarily or negligently done to the injury of the plaintiff, on the ground that the plaintiff has been guilty of some other and independent wrong or violation of law. Wrongs or offenses cannot be set off against each other in this way. "But we should work a confusion of relations, and lend a very doubtful assistance to morality," say the court in Mohney *v.* Cook, "if we should allow one offender against the law to the injury of another, to set off against the plaintiff that he too is a public offender." Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the state, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail. It would extend the maxim, *ex turpi causa non oritur actio,* beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and over rigorous punishment upon the plaintiff, constitute the sole motive for such defense on the part of the person making it. In the cases of the horses let to be driven on Sunday, so far as the owners were obliged to resort to an action on the contract which was executory and illegal, of course there could be no recovery; but to an action of tort, founded not on the contract, but on the tort or wrong subsequently com-

mitted by the defendant, the illegality of the contract furnished no defense, as is clearly demonstrated in Woodman *v.* Hubbard, and the cases there cited. The decisions under the provision of the constitution of this state abolishing imprisonment for debt arising out of or founded on a contract express or implied, and some others in this court, strongly illustrate the same distinction. In re Mowry, 12 Wis. 52, 56, 57; Cotton *v.* Sharpstein, 14 Wis. 229, 230; Scheunert *v.* Kaehler, 23 Wis. 523, 527.

And as to the other principle that the act or conduct of the plaintiff, which can be imputed to him as a fault, want of due care or negligence on his part contributing to the injury, must have some connection with the injury as cause to effect, this also seems almost too clear to require thought or elaboration. To make good the defense on this ground, it must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident of which he complains, and that relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events as one event is known to precede or follow another. It must have been some act, omission or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission or fault of this kind, with reference to a defect in the highway or in a bridge over which a traveler may be passing, unlawfully though it may be. The fact that the traveler may be violating this law of the state, has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions

and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it of the question of contributory negligence is concerned. In this respect it would be wholly immaterial also that the traveler was within the exceptions of the statute, and traveling on an errand of necessity or charity, and so was lawfully upon the highway.

The mere matter of time, when an injury like this takes place, is not in general an element which does or can enter at all into the consideration of the cause of it. Time and place are circumstances necessary in order that any event may happen or transpire, but they are not ordinarily, if they ever are, circumstances of cause in transactions of this nature. There may be concurrence or connection of time and place between two or three or more events, and yet one event not have the remotest influence in causing or producing either of the others. A traveler on the highway, contrary to the provisions of the statute, yet peaceably and quietly pursuing his course, might be assaulted and robbed by a highwayman. It would be difficult in such case to perceive how the highwayman could connect the unlawful act of the traveler with his assault and robbery so as to justify or excuse them, or how it could be said, that the former had any natural or legitimate tendency to cause or produce the latter. It is true, it might be said, if the traveler had not been present at that particular time or place, he would not have been assaulted and robbed, but that too might be said of any other assault or robbery committed upon him; for if his presence at one time and place be a fault or wrong on his part, contributing to the assault

and robbery in the nature of cause to effect, it must be equally so at every other time and place, and so always a defense in the mouth of the highwayman. Every highwayman must have his opportunity by the passing of some traveler, and so, some one must pass over a rotten and unsafe bridge or defective highway before any accident or injury can happen from that cause. Connection, therefore, merely in point of time, between the unlawful act or fault of the plaintiff, and the wrong or omission of the defendant, the same being in other respects disconnected, and independent acts or events, does not suffice to establish contributory negligence or to defeat the plaintiff's action on the ground. As observed in Mohney *v.* Cook, such connection, if looked upon as in any sense a cause, whether sacred and mysterious or otherwise, clearly falls under the rule *causa proxima non remota spectatur.*

"The cause of an event," says Appleton, C. J., in Moulton *v.* Sanford, 51 Maine, 134, "is the sum total of the contingencies of every description, which being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily that condition is usually termed *the cause,* whose share in the matter *is the most conspicuous and is the most immediately preceding and proximate to the event.*"

In the present case the weight of the same cattle, upon the same bridge, either the day before or the day after the event complained of, when the plaintiff would have been guilty of no violation of law in driving them, would most unquestionably have produced the same injurious result. And if, on that day even, the driving had been a work of necessity or charity, as if the city of Milwaukee had been in great part destroyed by fire, as Chicago recently was,

and great numbers of her inhabitants in a condition of helplessness and starvation, and the plaintiff hurrying up his drove of beef cattle for their relief, no one doubts the same accident would then have happened, and the same injuries have ensued. The law of gravitation would not then have been suspended, nor would the rotten and defective stringers have refused to give way under the superincumbent weight, precisely as they did do on the present occasion. There are many other violations of law, which the traveler or other person passing along the highway may, at the time he receives an injury from a defect in it, be in the act of committing, and which are quite as closely connected with the injury, or the cause of it, as is the violation of which complaint is made against the present plaintiff. He may be engaged in cruelly beating or torturing his horse, or ox, or other animal; he may be in the pursuit of game, with intent to kill or destroy it, at a season of the year when this is prohibited; he may be exposing game for sale, or have it in his possession, when these are unlawful; he may be in the act of committing an assault, or resisting an officer; he may be fraudulently passing a toll gate, without paying his toll; and he may be unlawfully setting or using a net or seine, for the purpose of catching fish, in an inland lake or stream.

All of these are acts prohibited by the same chapter or statute in which we find the prohibition from work and labor on Sunday, and some of them under the same, but most under a greater penalty than is prescribed for that offense, thus showing the character or degree of culpability which was variously attached to them in the opinion of the legislature. And there are many other minor offenses, *mala prohibita* merely, created by statute, which might be in like manner committed. There are in Massachusetts,

and doubtless in many of the states, statutes against blasphemy and profane cursing and swearing, the prevention of which seems to be equally if not more an object of solicitude and care on the part of the legislature, than the prevention of labor, travel or other secular pursuits on Sunday, because more severely punished. It has not yet transpired we believe, even in Massachusetts, that the action of any person to recover damages for an injury sustained by reason of defects in a highway, has been peremptorily dismissed because he was engaged at the time in profane cursing or swearing, or because he was in a state of voluntary intoxication, likewise prohibited under penalty by statute.

It is obvious that the breaking down of a bridge from the rottenness of the timbers, or their inability to sustain the weight of the person or his horses and carriage, could not be affected by either of these circumstances, and yet, on the principle of the decisions above referred to in that state, it is not easy to see why the action must not be dismissed. On principle there could be no discrimination between the cases, and it could make no difference in what the unlawful act of the plaintiff consisted at the time of receiving the injury. We must reject the doctrine of those cases entirely and adopt that of the other cases cited, and which is well expressed by the supreme court of Maine, in Baker *v.* Portland, 59 Maine, 199, 204, as follows: "The defendant's counsel contends that the simple fact that the plaintiff is in the act of violating the law, at the time of the injury, is a bar to the right of recovery. Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages as to preclude his recovery; but to lay down such a rule as the counsel claims, and disregard

the distinction in the ruling of which he complains, would be productive oftentimes of palpable injustice. The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was traveling on runners without bells, in contravention of the statute, or that he was smoking a cigar in the street, in violation of municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offense did not in any degree contribute to produce the injury of which he complains."

Strong analogy is afforded and much weight and force of reason bearing upon this question are found in some of the cases which have arisen upon life policies, and as to the meaning and effect to be given to the condition usually contained in them, exempting the company from liability in case the assured "shall die in the known violation of any law," etc., and it has been held that the violation must be such as is calculated to endanger life, by leading to acts of violence against, or to the bodily or personal injury or exposure of, the assured, and so to operate in producing his death in the connection of cause to effect. See opinions in Bradley *v.* Mutual Benefit Life Ins. Co., 44 N. Y.

In the case of Clemens *v.* Clemens, recently decided by this court, it became necessary to consider the same question, though under different circumstances, as to what violation of law on the part of the plaintiff would bar his action in a court of justice and leave him remediless in the hands of an over-reaching and dishonest antagonist, and the views there expressed are not without their relevancy and adaptation to the question as here presented. In that

case, this court adopted the rule of law as settled in Massachusetts, favoring the remedy of the plaintiff, against the opposite rule sustained by the adjudications in some of the other states, and consistency of decision seems now clearly to require that our action should be reversed with respect to the rule established by the cases here referred to. The inconsistency upon general principle between these decisions of the same learned court and those there relied upon and adopted, will, we think, be readily perceived and conceded when carefully examined and considered in connection with each other.

The other question presented on the motion for a non-suit, and which the court below did not decide, but which has been argued here, is one of more doubt and difficulty to our minds. It is, whether the plaintiff was guilty of contributory negligence in permitting so many cattle to go upon the bridge at one time. To sustain the non-suit on this ground, it is necessary for us to look at the facts in the most favorable light possible for the plaintiff, in which the jury would have been at liberty to find them, and then to say that there was no evidence which would have justified a verdict in his favor, or such a clear and decided preponderance of evidence against him as would have required the court to set aside a verdict finding to the contrary. This court is not sufficiently familiar with the modes of constructing and using bridges upon country highways, the degree of strength required to render them ordinarily and reasonably safe and passable, the weight which they are expected or required to sustain, the care necessary in passing over them, and especially with herds of cattle or other animals, to say, with confidence in the correctness of his own judgment, upon the evidence before it, that the plaintiff was guilty of such negligence. The

evidence given throws little or no light upon these points, necessary to the formation of a correct judgment, and they are matters upon the evidence, when in, more properly to be considered by the jury, unless the evidence should be such, within the rule above stated, as to make it the duty of the court to withdraw them from the consideraion of the jury, and itself to determine the legal rights of the parties upon the truth of the facts thus assumed to be indisputably shown.

By the Court. Judgment reversed, an a *venire de novo* awarded.

NOTE.

Sutton *v.* The Town of Wauwatosa, *supra,* has been cited with approval by the Supreme Court of Wisconsin, as follows: The Lawrence University *v.* Smith, 32 Wis. 592; Alexander *v.* Town of Oshkosh, 33 Wis, 283; McArthur *v.* G. B. & M. Canal Co., 34 Wis. 149, 150; Kenworthy *v.* Town of Irontown, 41 Wis. 651, 652; Neanow *v.* Uttech, 46 Wis. 589; Quaife *v.* C. & N. W. Ry. Co., 48 Wis. 520; Jones *v.* C. & N. W. Ry. Co., 49 Wis. 354, 1 Am. & Eng. Ry. Cas. 62; Schomer *v.* Hecla Fire Ins. Co., 50 Wis. 579; Jucker *v.* C. & N. W. Ry. Co., 52 Wis. 152, 2 Am. & Eng. Ry. Cas. 42; Veerhusen *v.* C. & N. W. Ry. Co., 53 Wis. 696; Hogan *v.* C., M. & St. Paul R. Co., 59 Wis. 147; Knowlton *v.* Mil. City Ry. Co., 59 Wis. 282; Nelson *v.* C., M. & St. P. Ry. Co., 60 Wis. 324; Hoppe *v.* C., M. & St. P. Ry. Co., 61 Wis. 365; Reed *v.* City of Madison, 83 Wis. 178, 17 L. R. A. 736; Welch *v.* Town of Geneva, 110 Wis. 389, 390; Walker *v.* Village of Ontario, 111 Wis. 117; Mauch *v.* Hartford, 112 Wis. 58.

Sutton *v.* Wauwatosa, *supra,* has been cited with approval outside of the Supreme Court of Wisconsin, as follows: Alabama Gr. So. Ry. Co. *v.* McAlpine & Co., 71 Ala. 550; Schwenke *v.* Union D. & R. Co., 12 Col. 345; Broschart *v.* Tuttle, 59 Conn. 14, 11 L. R. A. 38; City of Chicago *v.* Keefe, 114 Ill. 228, 55 Am. Rep. 862; L. N.

A. & C. Ry. Co. *v.* Buck, 116 Ind. 571, 9 Am. St. Rep. 887, 2 L. R. A. 524; Schmidt *v.* Humphrey, 48 Ia. 656, 30 Am. Rep. 417; Tingle *v.* C., B. & Q. Ry. Co., 60 Ia. 334; Gross *v.* Miller, 94 Ia. 77, 26 L. R. A. 607; Kansas City *v.* Orr, 62 Kan. 68, 50 L. R. A. 786; Ill. Cent. R. Co. *v.* Dick, 91 Ky. 439; P. W. & B. Ry. Co. *v.* Lehman, 56 Md. 228, 40 Am. Rep. 417; Newcomb *v.* Boston Pro. Assn., 146 Mass. 603, 4 Am. St. Rep. 359; Reed *v.* Mo. P. Ry. Co., 50 Mo. App. 507; Wentworth *v.* Jefferson, 60 N. H. 158; Solarz *v.* Manhattan Ry. Co., 31 Abb. N. C. 428, 8 N. Y. Misc. 658; Platz v. City of Cohoes, 89 N. Y. 223, 42 Am. Rep. 289; McNeil *v.* Durham & C. Ry. Co., 135 N. C. 712, 67 L. R. A. 241; Baldwin *v.* Barney, 12 R. I. 397, 34 Am. Rep. 674; G. C. & S. F. R. Co. *v.* Johnson, 71 Tex. 621, 1 L. R. A. 731.

Sutton *v.* Wauwatosa, *supra,* was commented on somewhat disapprovingly in Johnson *v.* Town of Irasburgh (47 Vt. 33, 19 Am. Rep. 114). The facts in that case were that plaintiff drove to a friend's house on Sunday on an errand which the court held to be a matter of business, and *en route* was injured by means of a defect in the highway. The court decided that he could not recover, as he was traveling on Sunday in violation of law, and the town was not bound to maintain its highway for use by the plaintiff for an unlawful purpose.

In Duran *v.* Ins. Co. (63 Vt. 437), the case was on contract and not tort, and hence is not directly in point. The plaintiff sought to recover on an accident policy for injuries received while hunting on Sunday in violation of law; one of the conditions in the policy being that said policy would be void, if the injury occurred while plaintiff was engaged in a violation of law. The Sutton case, *supra,* is merely referred to in this decision as a holding by an able court, that the violation of a Sunday law is in the nature of a condition attending the alleged wrongful act rather than a cause producing it.

Hoadley *v.* The Int. Paper Co. (72 Vt. 79, 81), the latest case on the subject in Vermont, cites Sutton *v.* Wauwatosa, *supra,* with approval, and is decided in accord-

ance with the doctrine enunciated by Chief Justice Dixon. In this case the decedent while at work on Sunday in the defendant's paper mill repairing a pulp digester received injuries which caused his death within two or three days thereafter. Verdict and judgment for the plaintiff. On appeal the court said: "The court below, without submitting the question of proximate cause to the jury, should have held that it was no defense to defendant's negligence that the decedent was working for it on Sunday when its negligence caused his death." Judgment for plaintiff affirmed.

Massachusetts was the only other state in which it was ever held that the violation of a Sunday law by the plaintiff at the time of the injury was such fault as would defeat an action to recover for an injury received through defendant's negligence. It was uniformly held in numerous decisions in that state that a person traveling on Sunday, in violation of law, could not recover in an action against a city or town for injuries sustained through a defect in the highway. Bosworth *v.* Swansey, 10 Met. 363; Smith *v.* B. & M. Ry. Co., 120 Mass. 490; Lyons *v.* Desotelle, 124 Mass. 387; Davis *v.* Somerville, 128 Mass. 594; Butcher *v.* Pittsburg Ry., 131 Mass. 156; Day *v.* Highland St. Ry., 135 Mass. 113; Stanton *v.* Met. Ry., 14 Allen, 485.

The court evaded the question in several instances, by holding that calls made on Sunday for pleasure and exercise, the distances being in one instance one half mile, and in the other a mile and an eighth, did not constitute "traveling," within the meaning of the Sunday law, hence the plaintiffs were allowed to recover. See Hamilton *v.* Boston, 14 Allen, 475; Barker *v.* Worcester, 139 Mass. 74.

Finally in 1884 the legislature came to the rescue, and a law was passed (ch. 37, sec. 1, Laws of 1884, ch. 98, sec. 17, Rev. Laws of Mass. 1902), reading as follows: "The provisions of ch. 98 of the Public Statutes relating to the observance of the Lord's Day, shall not constitute a defense to an action for a tort or injury suffered by a person on that day." See Read *v.* B. & A. Rd. Co., 140 Mass. 199; Jordan *v.* N. Y., etc., Rd. Co., 165 Mass. 346.

In Watson on Damages for Personal Injuries, the learned author at sec. 231 quotes Chief Justice Dixon's reasoning in the Sutton case against the Massachusetts doctrine as it existed prior to the statute, characterizing his opinion in that case as most "elaborate and able."

The opinion is uniformly cited with approval in text and case books and in encyclopædæs, and is undoubtedly the law in every state at this time.

The Sutton case, *supra,* has been cited in notes to the following cases, reported in L. R. A., Am. Rep., Am. Dec., Am. St. Rep., and Am. & Eng. Ry. Cas.:

Lawyers' Reports Annotated: L. N. A. & C. Ry. Co. *v.* Buck (116 Ind. 571), 2 L. R. A. 522; Erickson *v.* St. P. & D. Ry. Co. (41 Minn. 500), 5 L. R. A. 787; Thompson *v.* Village of Quincy (83 Mich. 173), 10 L. R. A. 738.

American Reporter: Frost *v.* Plumb (40 Conn. 111), 16 Am. Rep. 23; McGrath *v.* Merwin (112 Mass. 467), 17 Am. Rep. 122; Damon *v.* Inhabitants of Scituate (119 Mass. 66), 20 Am Rep. 317; McCarthy *v.* Portland (67 Maine, 167), 24 Am. Rep. 26; Schmidt *v.* Humphrey (48 Ia. 656), 30 Am. Rep. 418; State *v.* Lorry (7 Baxt. 95), 32 Am. Rep. 557.

American Decisions: Woodman *v.* Hubbard (25 N. H. 67), 57 Am. Dec. 320; Cotton *v.* Sharpstein (14 Wis. 26), 80 Am. Dec. 782; Merrit *v.* Earle (29 N. Y. 115), 86 Am. Dec. 297.

American State Reports: Whitworth *v.* Thomas (87 Ala. 308), 3 Am. St. Rep. 730; Gilson *v.* D. & H. Canal Co. (65 Vt. 213), 36 Am. St. Rep. 819.

American & English Railway Cases: Johnson *v.* Mo. P. Ry. Co. (18 Neb. 690), 23 Am. & Eng. Ry. Cas. 435, 437.

Sutton *v.* Wauwatosa, *supra,* is also reported in Am. Rep. vol. 9, p. 534.

Morse and another v. The Home Insurance Company of New York City.

June Term, 1872.

(30 Wis. 496.)

In this case it appears that The Home Insurance Company, a corporation organized under the laws of the State of New York and doing an insurance business, made application to and was admitted to do business in the State of Wisconsin. The Wisconsin statutes at that time provided, in substance, that foreign insurance companies as a condition of doing business in that State, must, among other things, agree in writing not to remove suits, which might be brought against them from the State to the Federal courts.

The Home Insurance Company having been sued by Morse and another on a contract of fire insurance issued within the State, in violation of its agreement and contrary to the statute, duly filed its petition and took the necessary steps to remove the action to the Federal court. The State Court of Wisconsin, in which the suit was brought, held that the statute in question and the agreement made under it justified a denial of the petition to remove the cause into the Circuit Court of the United States, retained the case, and proceeded to trial and gave judgment for the plaintiffs on a verdict found in their favor.

Upon the affirmance of such judgment of the Wisconsin Circuit Court, the opinion hereinafter set out was rendered by the Chief Justice. The other facts necessary to an understanding of this case are stated in the opinion.

The following are the propositions of law decided:

The right of a citizen of one state, when sued in the courts of another state, to have the cause removed to a federal court, is one which he may waive, or estop himself from setting up, by a previous stipulation or covenant to that effect.

A corporation created by one state has no power to do any corporate act in another state, except by the express or implied consent of the latter, and upon such terms as it shall prescribe.

Section 22, ch. 56, Laws of 1870, which requires fire insurance companies incorporated by the laws of any other state, or of a foreign government, before transacting the business of insurance by agents in this state, to appoint an attorney in this state upon whom legal process may be served, and stipulate that it will not remove to the federal courts any suit commenced against it in a court of this state, is a valid enactment, and the stipulation so made is binding upon the company.

Analagous conditions may be imposed by its charter upon a corporation created by this State; and the acceptance of the charter will be a waiver of rights which the corporation would possess if not thus expressly denied.

The Fox and Wolf rivers in this State, above Oshkosh and between that place and Winneconne, are *held* not to be public navigable waters of the United States within the admiralty jurisdiction.

Dixon, Chief Justice. This is an appeal by the insurance company upon which but two questions are presented, and after very full arguments by counsel and a careful ex-

amination by ourselves, we are quite satisfied that both were correctly decided by the court below.

The first question is as to the validity of so much of the act approved March 14, 1870, and of the agreement of the defendant company filed under it as declares that "it shall not be lawful for any fire insurance company, association or partnership, incorporated by or organized under the laws of any other State of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks, or transact any business of insurance in this state, unless * * * such company desiring to transact any such business as aforesaid, by any agent or agents in this state, shall first appoint an attorney in this state, on whom process of law can be served, *containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal Courts,* and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." Laws 1870, ch. 56, sec. 22. 1 Tay. Sts. 958, sec. 22. The company here having made and filed the agreement and transacted business in this state under it, attempted, when this action was commenced to repudiate it and to remove the suit to the United States circuit court in violation of its own deliberate promise, and one of the express conditions upon which it had been permitted to transact such business. The language of its stipulation was: "and said company agrees that suits commenced in the state courts of Wisconsin, *shall not be removed by the act of said company,* into the United States circuit or federal courts."

Both the act and agreement are attacked upon constitutional grounds. It is said that both the constitution of the

United States and the laws of congress provide for such removals, and that any legislation on the part of the states calculated to hinder or prevent them in cases otherwise proper, is unconstitutional and void. It may be conceded that any state legislation intended or calculated *of itself,* or *by its own mere force,* to defeat or prevent the exercise of the right of removal where it exists, would be unconstitutional and void. It may be conceded that if congress in the exercise of its plenary power had withdrawn all jurisdiction from the state courts in the class of cases to which this belongs, that is, as "between citizens of different states," that then state legislation of the kind here in question could not be sustained. If, under the constitution and laws of the United States, exclusive jurisdiction of suits between citizens of different states were given to the courts of the United States, then it might well follow that the state courts could get no jurisdiction by waiver or by express consent, whether such waiver or consent was procured by aid of state legislation or not. In that case consent would not confer jurisdiction. But the constitution of the United States does not provide, nor has the congress as yet enacted that the federal courts shall have exclusive jurisdiction in such cases. On the contrary, the constitution recognizes, and so do the laws of congress, expressly, that the state courts may and shall continue to exercise jurisdiction in all such cases, except where the power of removal has been conferred upon the non-resident suitor, and he has seen fit to avail himself of it by compliance with the regulations of congress, enacted in that particular. But as yet this is a mere privilege bestowed on account of the relationship of being a citizen of another state, and which such citizen may exercise or not, at his mere will and pleasure, and the question here would seem to be

whether it is a privilege of a kind capable of being waived by the party in whose favor it exists, or such that he may by stipulation or covenant deliberately and fairly entered into beforehand, bargain away or estop himself from setting up or taking future advantage of it.

And the question thus presented, differs very widely from those put by counsel, by way of attempted illustration of the supposed unconstitutionality of the act, and of the agreement entered into under it. The question differs very widely from that which would be presented, were this the case of a natural person, a citizen of another state, endowed with the full rights of an individual, and subject to no disabilities. It is not a question of the same kind at all, in substance or effect, as it would be, if the act and agreement involved the violation of some positive law of congress, as, a law relating to taxation by the United States, or laws regulating trade, commerce and navigation, or the carrying business between the different states. Instead of being an obnoxious, and unconstitutional act and agreement of that kind, it is one which relates to, and only proposes to deal with and take away, *by consent of the party having it,* a mere personal or individual privilege, conferred by law of congress, and which such party is and always has been at full liberty to accept or reject, as he may see fit, or think for his interest to do. The illustrations of the learned counsel fail, therefore, by reason of the essential differences of the cases. The mistake seems to be in supposing cases alike, which are materially and intrinsically different.

The question comes back, therefore, to one of competency on the part of this company to waive or surrender a right or privilege which it had, and which it could accept or reject as it chose, and also to one of power on the part

of the state legislature to exact such waiver or surrender as one of the conditions of permitting the company to do business in this state.

As to the first point, or that of competency to waive, we suppose it is too late to question at this day, that a party may, under proper circumstances, waive any right, even a constitutional one, in matters of a civil nature, and especially that this may be done by a corporation which is the mere creature of the legislative power, and subject to such conditions and restrictions as the legislature deems proper to impose. It was held by this court in Burrows *v.* Bashford, 22 Wis. 103, and for reasons which there sufficiently appear and also in Darge *v.* The Horicon Iron Manufacturing Company, ib. 417–421, where it was decided that a corporation created under a law of this state, could not be heard to object that a provision of its charter was unconstitutional or invalid, because it gave a beneficial right of appeal to the opposite party in a suit or proceeding, and at the same time gave the corporation only a nominal and unproductive right of appealing from the same judgment or decision. It was held that having organized and acted under the charter, so far as to take the property of the plaintiff in that suit, the company was precluded from then objecting to the validity of its provisions prescribing what the remedy against the company should be. In other words, it was held that the company having accepted and acted under its charter, and received the benefits of it, had accepted also the burdens and disabilities which it imposed, and waived what otherwise might have been a constitutional right or valid objection to the provision. See also cases there cited: The People *v.* Murray, 5 Hill, 468; Van Allen *v.* The Assessors, 3 Wallace, 573; and Dunmore's Appeal, 52 Pa. St. R. 374.

And it would seem on authority, that there are very few rights and privileges of this nature respecting the remedies of parties to contracts and civil actions, and to the time, place and mode of trial and of entering or of causing judgment to be entered against the party in default, which may not be the subject of express waiver. It was held, for example, by this court in Ladd *v.* Hildebrant, 27 Wis. 135, 146, that a party to an action might waive a future contingent right, such as, before trial in ejectment, the right to a second trial given by the statute, in case judgment in the first should be against him. It was there said that a party may waive a future contingent right as well as one which he presently has. But a very strong case upon this point is that of Bank of Columbia *v.* Okely, 4 Wheat. 235, where it was held that an act of the assembly of Maryland, incorporating the bank of Columbia, and giving to the corporation a summary process by execution, in the nature of an attachment, against its debtors, who had by an express consent, in writing, made the bonds, bills, or notes by them drawn or endorsed, negotiable at the bank, was not repugnant to the constitution of the United States or of Maryland. The objection urged was that the act contravened the article in the constitution of Maryland, which secured the right of trial by jury in all cases at common law, and also the seventh amendment to the constitution of the United States, which secured the same right in suits at common law, where the value in controversy exceeded twenty dollars, but the same was overruled on the ground of waiver, and because the defendant by giving his note payable at the bank had voluntarily submitted to the special jurisdiction created by the act.

The court say: "Was this act void, as a law of Maryland? If it was, it must have become so under the restrictions of

the constitution of the state, or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as a restraint upon his rights. It must have been against the acts of others. But, to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privations of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note payable at the bank of Columbia, the debtor chose his own jurisdiction; and in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in admiralty, whose voluntary submission to the jurisdiction of that court subjects him to personal coercion. It is true, cases may be supposed in which the policy of a country may set bounds to the relinquishment of private rights. And this court would ponder long before it could sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection." See also Arndt *v.* Insurance Co., 22 Wis. 516.

We are fully persuaded, therefore, that the right to remove this cause to the federal court for trial, was one which the defendant might waive and relinquish. We can per-

ceive nothing in the policy of the law, either state or federal, which should forbid or prevent it. As already observed, it was a mere individual or private right, given for the benefit of the defendant, and to be exercised or not at its option, and whether the cause remained in the state court by stipulation, or went to the federal court without, or because no stipulation had been made, was not a matter which in any manner infringed the policy of the federal government, or concerned or involved the dignity or independence of its judiciary. It was a matter which concerned the particular rights and interests of the parties to the action and no one else.

And as to the point of the power of the state legislature to pass such an act, the supreme court seems also to have very clearly and definitely settled that. In Bank of Augusta *v.* Earle, 13 Peters R. 519, it was decided that a corporation created by one state had no power to do any corporate act in another state, unless by the express or implied consent of the latter. And in Paul *v.* Commonwealth of Virginia, 8 Wal. 168, the court use this language: "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."

This seems decisive of the point and to preclude the necessity or propriety of further discussion, especially

when it is considered that the act does not purport to operate upon, or bind the foreign insurance company on the subject of removal, except *by its assent* freely and voluntarily given. As observed in Bank of Columbia *v.* Okely, it was with a view to the voluntary acquiescence of the foreign insurance company, nay, its solicited submission to the law of the contract, that this exclusive remedy in the state courts was given. By making and filing the agreement in the office of the secretary of state, the company chose its own jurisdiction, and, in consideration of the rights and privileges extended to it, of transacting business within the state, voluntarily relinquished the power and privilege of removal to the federal courts. As observed by the supreme court of Michigan in The Glen Falls Ins. Co. *v.* The Judge of the Jackson Circuit, 21 Mich. 580, a case fully in point upon the question here under consideration, the powers thus exercised by foreign insurance companies under our laws are the same as if they were incorporated by our laws, and they become, *pro tanto,* Wisconsin and not foreign corporations, for all practical purposes in this state. If, as decided in Darge *v.* The Horicon Iron Manufacturing Company, *supra,* the legislature may impose as a condition upon a corporation of its own creation, that it shall not have the right of appeal from an assessment by commissioners, or a judgment against itself, or the right of trial by jury, and such corporation cannot be heard to complain, or if as decided in Van Slyke *v.* The State, 23 Wis. 655, and in Bagnall *v.* The State, 25 Wis. 112, both since affirmed on error in the supreme court of the United States, taxes may be annexed to the franchise as a royalty for the grant, or consideration for the corporate powers given, where otherwise no taxes could be levied or collected, it would be very strange, we say, if similar conditions or re-

strictions could not be imposed upon a foreign corporation in consideration of the license or permission granted to it to transact business within the state. Considering that the foreign corporation has no power to do any corporate act in this state except by the assent, express or implied, of the legislature, and that it derives its whole power and authority to do so from the latter, it necessarily follows that the legislature has the same power and all the power and control over it that it has over a corporation of its own creation.

The other question presented on this appeal, is whether the Fox and Wolf rivers in this state, above Oshkosh and between Oshkosh and Winneconne, are public navigable waters of the United States, within the admiralty jurisdiction. The policy of insurance upon which this suit was brought, was against loss by fire of the steamboat "Diamond," owned by the plaintiffs and used in navigating those rivers between the places named, and among other clauses exempting the company from liability, the policy contained the following: "Nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist." The complaint contained the usual averment negativing the loss from such causes and the answer denied that part of the allegation which was that the loss did occur "in consequence of any neglect or deviation from the laws or regulations of police existing at the time of such fire." On the trial, the defendant interrogated witnesses and offered to prove that the steamboat was not enrolled and licensed for the coasting trade as required by the laws of congress for vessels engaged in navigating the public navigable waters of the United States, and that she had not on board those appliances, means and facilities for extinguishing fire pre-

scribed for such vessels by the act of congress, approved February 28, 1871, and by the printed rules and regulations adopted and issued by the board of supervising inspectors of steam vessels, under said act. The evidence was excluded, and the question thereupon arising, is whether the vessel was within the operation of those laws which depends upon the navigable character of the streams upon which she was employed at and before the time of loss. The acts of congress apply only to vessels navigating the public navigable waters of the United States, to which admiralty jurisdiction extends, and this question, much more than that first above considered, is one of peculiarly federal jurisdiction and cognizance.

We have been favored with a newspaper copy of an able and elaborate opinion of the circuit court of the United States for the eastern district of this state, delivered by Miller, D. J., in the case of The United States *v.* The Steamer Montello, which fully examines and discusses the navigable character of these rivers at and between the places above referred to, and from a point far below Oshkosh, on the Fox river. It was there held that the Fox river, and of course its tributaries above Depere Rapids, is not a public navigable water of the United States, within the admiralty jurisdiction. We are not aware that the precise question has been determined by the supreme court though the case in the circuit court was the same as that in the supreme, The Montello, 11 Wal. 411, where that court declined to consider it for want of sufficient allegations and evidence showing the precise character of the Fox River as a navigable stream, and remanded the cause to the court below for further proceedings, in order that those defects might be obviated. The cases of Veazie *v.* Wyman, 14 How. 568, and The Daniel Ball, 10 Wal. 557, seem to be

decisive of the principle of law involved, as well as the former to touch very closely upon the facts here presented. But it does not become this court to scrutinize or disregard the decision of the learned circuit court, upon a question of this nature. We cannot, if we would, force upon that court a jurisdiction which it declines to take under the laws of congress, nor give to those laws an interpretation different from that which they receive in the judicial tribunals, whose duty and sole prerogative it is to expound and apply them. When the decision of the circuit court is reversed, if by chance it shall be on a second appeal, which we understand is pending, then of course this court, in common with that, will stand corrected upon the question, but until that time, if it shall ever come, we are quite content to abide the decision of the circuit court.

In conclusion, we have to express the satisfaction that if we are wrong upon either or both the questions which have been considered, the defendant in the action has its remedy to correct us by writ of error issuing from the supreme court.

By the court.—Judgment affirmed.

NOTE.

The judgment of the Wisconsin Supreme Court in the foregoing case was taken on a writ of error to the Supreme Court of the United States where, by a divided court, the judgment was reversed. (Insurance Company *v.* Morse, 20 Wall. 445). In delivering the opinion of the United States Supreme Court, Mr. Justice Hunt held, among other things, that the statute in question was repugnant to the Constitution of the United States and therefore void, and that the agreement the insurance company made, in compliance with the terms of the statute, was also void.

There was a vigorous dissenting opinion by Chief Justice Waite, in which Mr. Justice Davis concurred.

In the course of his dissenting opinion, Chief Justice Waite said:

"The State of Wisconsin has made it a condition of admission that the company shall submit to be sued in the courts she has provided for the settlement of the rights of her own citizens. That is no more than saying that the foreign company must, for the purposes of all litigation growing out of the business transacted there, renounce its foreign citizenship and become *pro tanto* a citizen of that State. There is no hardship in this, for it imposes no greater burden than rests upon home companies and home insurers."

This subject is again referred to in The State *v.* Doyle, 40 Wis. 175, included in this compilation, where the rule is finally settled and concurred in by the Supreme Court of the United States in such manner as to give effect to the State statute.

Morse *v.* The Home Insurance Company, *supra,* has been cited, with approval, in Wisconsin, as follows:

Smith *v.* Lockwood, 34 Wis. 82; State *v.* Doyle, 40 Wis. 189, 190, 192, 194, 195, 196, 198; State ex rel. Atty. Gen. *v.* Milwaukee, etc., Ry. 45 Wis. 596; Wadleigh *v.* Standard Life & Accident Ins. Co., 76 Wis. 441; Lewis *v.* Am. Savings & Loan Ass'n, 98 Wis. 221, 39 L. R. A. 566.

It has been cited disapprovingly in Rese *v.* Newport News & Miss. Valley Co., 32 W. Va. 164, 3 L. R. A. 574.

LIFE OF

CHIEF JUSTICE RYAN.

SKETCH OF LIFE AND SERVICES OF CHIEF JUSTICE RYAN AS CONTAINED IN THE ADDRESS OF THE HON. WM. F. VILAS TO THE WISCONSIN SUPREME COURT, UPON THE DEATH OF THE CHIEF JUSTICE.

Edward George Ryan, having been in commission as a member and chief justice of the Wisconsin supreme court since the 17th day of June, 1874, died on the 19th day of October, 1880. On the 9th day of November following, the court met, pursuant to a previous adjournment, for the purpose of taking proper action and making some suitable record touching the decease of the chief justice.

Wm. F. Vilas, Esq., of the Dane county bar, thus addressed the court:

May it please Your Honors:—The usual assemblage of so many of the bar of the state, the sad sense of bereavement and sorrow which sits upon the visages of those here present, the funeral decorations of this court room, that empty chair, so eloquent, all presage the melancholy announcement which I am deputed by my brethren of the state bar, in accordance with the solemn usages of the profession, to formally make to the court.

Chief Justice Ryan is no more!

That profound and abundant wealth of learning, that

eloquent tongue, that massive brain, which, like an exhausless mine, yielded richer stores the deeper it was tried, while its every product sparkled with the gleam of priceless value, are gone from men, lost to us and to the state forever!

A pioneer of civilization to the bar of the west; an advocate fit to cope with any of historic renown; a lawyer and judge of comprehensive and accurate learning, penetrating acumen and wise judgment, the head of the bar and the chief justice of the state: profession and people may well sit down in sackcloth and ashes, lamenting our irreparable loss. "He was a man, take him for all in all, we shall not look upon his like again!"

The duty of this solemn hour I cannot hope to discharge. The day for preparation afforded me has been half destroyed by illness. But no time would be enough for me to do the great theme justice. He was, in every aspect in which his character and abilities are regarded, an extraordinary man. Every faculty he exerted, every accomplishment he assumed to possess, every passion which moved him, was great, intensely great. He was a giant among men, in soul, intellect and attributes.

It would require his own power and discrimination, his own perfection of speech, truly to represent him. In the hands of such an artist in language, the portrait of his mind and character would be as striking and absorbing in interest as any ever drawn for the gaze and wonder of mankind. But who now shall paint it? I know none who could but him, and, in his death, the subject, the artist and the portrait, are lost together!

I shall attempt but a rapid statement of his life, and to point out a few salient features of his character and powers.

On the 13th of November, 1810, at New Castle House,

in the county of Meath, Ireland, Edward G. Ryan was born. His parents were possessors of fortune, but, a second son, he took no share, save what was bestowed on his education. He completed in 1827 the course of instruction at Clougone's Wood Cottage, and entered upon the study of the law. He had but partly finished that course when, in 1830, he migrated to New York. There, sometimes teaching in private schools, sometimes at work in the office, to gain support, he pursued his legal studies until 1836. In that year he was called to the bar and removed to Chicago, then but a village in the remote west. Here he practiced for six years, mingling with professional duties the work of editing a newspaper. In 1840 and 1841 he was prosecuting attorney of the county. In 1842 he changed his residence to Racine; and in 1846 represented that county in the first constitutional convention of Wisconsin. In 1848 he removed his residence to Milwaukee, where his bones now repose. There he practiced his profession until called in June, 1874, to this bench, holding in the meantime, for three years, the office of city attorney. From the time he took his seat here, he continued in faithful labor, often interrupted by failing health, but always persistently resumed, until the 13th day of October last, when, broken and exhausted by his patient toil, he descended from his seat to his last bed, where on the morning of the 19th of October, he passed away. Laid to his final rest by his brethren of the bar and bench, his remains repose in Forest Home Cemetery, near the city of his unchanging love.

Heaven give him rest!

It is a fair question whether his wondrous powers as a writer, a speaker and a lawyer were due in greater degree to the strength of his natural parts or the perfection of his

education. Perhaps generally it would be answered, to the former. But certain it is, no one was ever more finished by education. Every spoken and every written performance of his life bears the impress of his learning, shines conspicuously with the lustre of his scholarship. His training was chiefly in law and in language; in both remarkable for accuracy and finish. And it is especially noteworthy, that he was, in his eminence in both, self-trained. He finished his course in school at seventeen; he was but twenty when he quit his pupilage in law in his native country for the new world. From that time forward his instruction was administered to him by himself, from books and observation of men. His history, as we see it, discloses no marked precocity. For six years after his coming to this country, he supported himself by teaching and clerical labor, while he prosecuted his preparations for the profession. He was admitted to the bar at twenty-six, but does not appear to have attracted especial attention to his superior powers until past thirty. He was in his thirty-sixth year when, in the first constitutional convention of the territory, he acquired that acknowledged pre-eminence which he ever after maintained.

To me, his natural parts appear most splendid and valuable for the manner in which they assimilated and profited by knowledge and observation. Every book he read and every hour he passed of life, made addition to his powers. He did not merely read and see to add to his store of learning; what he gained was not so much increase of possessions, as increase of power, of the mind. He read much, but never inactively. No book held him in passive submission; he mastered it easily with an acute and analytical grasp. His memory was retentive and exact; yet he never seemed to speak so much from remembrance as from him-

self. This was no less true of his discourse upon legal than upon literary topics. His understanding was so informed by his methods of study, that what it gave forth was his own; if in substance the learning of the books, in form and manner so marked by his genius as to be apparently his own.

And so vigorous was his grasp, so clear his conception, so finished his style, that it is rare to find instances where he has added to the vigor and beauty of his expression by any quotation from others, although his extensive reading supplied him readily.

But he was not only rich in the love of books, he was an accurate observer of men. It has never been my fortune to meet with any who was his equal in ability to analyze character. He read the motives of action, the various faculties and changing characteristics of men, with intuitive ease and nice justice. This gave peculiar force to his speech when inveighing against the conduct and motives of those he attacked; a feature of his powers which made him not less terrible to his enemies, than the wonder of his hearers, when the occasion demanded or allowed the exhibition.

His course of self-education was not limited, as so commonly the error is made, to mere processes of study. He refined and corrected his ideas by diligent writing, and enlarged their abundance by frequent conversation. They who read with delight the smooth and delicious flow of his composition, who ride at ease of understanding upon the perspicuous current of his expressed thought, clearly informed, without effort of their own save attention, upon abstruse and difficult subjects of distressful doubt, are little fitted to realize the freight of labor which every word carried from his brain. Yet they who know his habit of

writing can testify to the painstaking toil with which he criticized and purified every product of his pen. He could, if he would, compose with a rapidity unsurpassed by any; and the hasty labor of his desk he could well trust in competition with the fruit of pains in others. But he was too sincere and ardent a servant and lover of the English language, to imprint her words with haste, or indolent inattention, on a page where they might stand to her and his reproach. To him the legal rule of interpretation was a fact: "Every word has his meaning." He vigorously condemned the debauchery of language which the rapid penny-a-liners of the newspapers have inflicted on our native tongue, and the speech of some, even, of our scholars.

So, in all his labor of writing, dictionaries were his companions and his friends. He trusted to no one of them, but, surrounded by many, he gathered from the best linguists the perfect hue of intelligence and beauty that belonged to every word he used, and set it then in happy harmony with its fellows in the finished picture of thought which his every period became. Such discipline had its reward. His style is his own, strong, clear and beautiful; not wholly without fault, but as worthy of study as Addison's; not always, in his opinions, perfectly judicial, but turning from that path only to bring in gems of beauty by the way. To be able to write as Edward G. Ryan has written, is a crown of glory in letters, a sufficient title to literary renown.

He cultivated conversation, and, as I have thought, not only for its pleasures, but for its benefits to him. Certain it is, he shone in social discourse with a brilliancy not often equalled. In happy hours, when in health and spirits, who more delightful than he? His rapid and easy

speech was wise or witty as the time and subject suited, but always sweet in the simplicity and purity of the language he employed. He was ever conspicuous for elegant diction in ordinary speech; nor did the tumult of emotion or passion which sometimes possessed him, mar his accomplishment, or lead him to vulgarity. It rather seemed to heighten and intensify his powers, and clothe his expressions with a richer color.

Thus the self-imposed habits and discipline of his entire life finished and perfected all the powers of the man. He met all the points of Bacon's aphorism: reading made him a full man; conference a ready man; and writing an exact man.

Viewing his finished character and faculties as trained and accomplished by his course of education, and discarding the faults of temperament and want of self-control which blighted his life, casting up the account on his credit side only, how splendid and magnificent does he appear, the ideal and mirror of professional power and glory.

His learning of the law was thorough and profound. To him the science of jurisprudence was an open book; every page familiar to his eye. He was trained in its technical learning, and versed in the long line of precedents and judicial opinions which support and explain its nice distinctions and sometimes arbitrary doctrines. But he was far beyond that plane, the level only of the complete case lawyer. He knew the law far more profoundly. He had traversed the great superstructure with patient examination from its deepest foundations to the last pinnacle on the turret. He saw it not merely as a builded thing, acknowledging its parts and relations because he found them so. He knew the principles on which its foundations rest, which

support its noble walls, and partition its manifold departments, which inspire its pillars and its arches, which gild its towers with light, and fill its secret recesses with the blessing of justice for men.

He knew it as an architect who might have builded it, and who could finish, in harmony with the whole, the parts on which his duty set him to work.

And not alone the common law—the law of nature as applied to the relations of men among themselves; but his perception of the complex and delicate relations of the different portions and civil divisions of the union, and of the various duties and powers of its numerous officers and tribunals, federal and state, was singularly acute and comprehensive. Though a native of another land, he had from boyhood profoundly contemplated the wisdom of the fathers of this country of his adoption; and he was fit and ready when the hour came, to give unanswerable expression to that discriminating judgment of this court, in The State *v.* Doyle, which compelled the federal supreme court to recede from its former declaration that a statute of this state was void under the federal constitution, and to suffer its enforcement according to the mandate of this tribunal. In that result this bench and its bar, as well as the rights of the people, gained signal illustration.

Founded on such learning, our departed leader could not but be a great lawyer. But his professional powers were not only strong; they shone with splendor. He was a great advocate and a great orator. In many a cause in the forum, upon many a platform before the people, he has exhibited the eloquence and action which, with their opportunities, would have ranked him among the great names of the world. And though the memory of the advocate is local and generally fades with its generation,

he has left in bequest to his professional brethren some such examples of forensic eloquence as they will not "willingly let die."

But he will be longest remembered and honored for his work as the chief justice of this court.

He came to this great place, as every one should come who is worthy to occupy it. He came in the ripeness of years and experience, after a long life of labor at the bar. He came laden with profound knowledge of the science he was to administer. He came not from some obscure corner, to sit in judgment on arguments greater than his understanding; he was pushed by no skillful intrigue into a shameful reward for mere party service; but, sought and taken from the topmost place of professional leadership, which, by merit, he had worthily won, he came fit to govern and control where for so long he had confessedly led.

He came to the judgment seat with an honorable ambition, as to the crowning glory of a devoted professional life; but he came reverently, with an exalted sense of the responsibilities he assumed, and a noble devotion of all his faculties and strength to the performance of its duties. He came to rest on no pillow of repose, but to toil and build, that he might still higher elevate the court and the law, and exalt justice on earth.

And so he bent to his task with all the conscientious intensity of his nature. There fell to his lot to decide and elucidate as important and interesting questions as any which have come from this bench since its institution. I need not say in this presence with what satisfaction he expounded the views of the court. His opinions were not only profound, but profoundly beautiful in every circumstance which excites the admiration of the lawyer. It is matter of no wonder that a great university of the land

has chosen them for commendation to students of law as models of the purity, beauty and strength of the English tongue. They will carry his name with growing honor to generations of students and lawyers yet unborn.

Few, indeed, are the law books, where so much of excellence in literature and law is combined to the advantage of both; where the lamp of literature so illuminates the dark obscurities of the law, without a ray of meretricious light; where the strength of jurisprudence so informs words of beautiful harmony with a solid majesty like Grecian architecture.

We can but remember, too, that much of this crowning labor was done when his old frame was broken by the weight of years and infirmities, and torn by convulsions of passion; when his hours of rest were disconsolate and lonely, or racked with pain.

For with that justice he would have unsparingly administered, we cannot omit from view his faults and imperfections. They, too, were great. Principal of all was his sudden and violent temper. The electric current responds no quicker to a disturbing influence, than did his wrath to an offensive touch; and its explosions are not more furious than the outbursts of his anger. His passions burned, when lighted, like a flaming volcano, shaking him with fearful violence, and belching the hot lava of his wrath on everything and everybody which stood in opposition. He was a painful proof of the value of self-control. For the chiefest misfortune of his life was his weakness in presence of his own passion. That subdued and governed him, turning his power to his own destruction. It made him terrible to his friends as well as to his enemies; tyrannical, perhaps sometimes cruel, where he should have been gentle and loving; suspicious and jealous, where he

should have been confiding; violent and hostile, where he ought to have been friendly. It led him into false positions, from which he was too proud to withdraw. It stood in the path of his advancement among men, like a flaming sword. It turned friends into enemies, and froze off the tendrils of love. It brought humiliation, grief and loneliness to his soul and to his hearthstone.

Let us drop the veil over the contemplation of these infirmities of a great and noble mind. If, as I believe, these afflictions of character were mostly but manifestations of physical disease, which, at varying periods and with unequal intensity, spread inflammation through the sensitive fibre of his brain, the fault was not his own. The tear of pity must fall at view of the sufferings his nature inflicted. For, to whatever his infirmities were due, he was their victim and the great sufferer. With his death, their consequences mainly cease. What he leaves behind is the product and the legacy of his worth and virtue. The *good* he has done lives after him; let the evil be interred with his bones.

When we review his life, let us turn from its darkness and weakness, and rather view him in periods of light and power. Look on him in the happy hours of health. Thus shall you perceive the possibilities of his forces, and better take the lesson from his infirmities.

It is for us to contemplate him as he was to us, the lawyer and the judge. No lawyer ever lived whose standard of professional excellence was exalted higher. His conception of professional morals was as noble and refined, as pure and elevating, as wisdom, philosophy and religion can form. He loved and honored the profession of the law, above all occupations of men; he reverenced it as "subrogated," so he said, "on earth, for the angels who adminis-

ter God's law in Heaven." "This," said he to the graduating class of the law school in 1873, "is the true ambition of the lawyer: to obey God in the service of society; to fulfill His law in the order of society; to promote His order in the subordination of society to its own law, adopted under His authority; to minister to His justice by the nearest approach to it, under the municipal law, which human intelligence and conscience can accomplish."

He brought to the bench this spirit, and many judgments of this court have been radiant with its glory. They will be beacons on the track to pilot generations of lawyers to come. Let the hopeful enthusiasm of youth look upon his virtues, and, shunning his imperfections, strive for his height of learning and power. Can the neophyte, who sees in dreams the gleaming splendor of professional grandeur, but attain the one and avoid the other, he may confidently expect the highest rewards to which the noble profession leads.

SELECTED OPINIONS

OF

CHIEF JUSTICE RYAN.

The Attorney General vs. The Chicago and Northwestern Railway Company.

The Attorney General vs. The Chicago, Milwaukee and St. Paul Railway Company.

June Term, 1874.

(35 Wis. 425.)

On the 8th day of July, 1874, the attorney general of Wisconsin, acting in behalf of the state, filed in the Supreme Court informations praying for writs of injunction against the two defendant railroad companies, to restrain the defendants from exacting tolls for the carriage of passengers or freight in excess of the maximum rates established by ch. 273, of the Laws of 1874 of that state. The motions duly came on to be argued on the 4th of August following, and the argument terminated on the 11th of that month. The state was represented in the argument by I. C. Sloan, Assistant Attorney General, H. S. Orton, afterwards Chief Justice of the Wisconsin Supreme Court, and L. S. Dixon, former Chief Justice thereof. The defendants were represented by C. B. Lawrence, B. C. Cook, Smith & Lamb, John W. Cary and P. L. Spooner. An extended oral argument was made by Mr. Dixon, though no brief seems ever to have been filed by him in the case.

The legislation which was thus brought under review, is

usually referred to as the "Granger Laws." At or about the time the Wisconsin statute above mentioned was passed, the States of Illinois, Iowa and Minnesota passed similar statutes, all having for their object the regulation of the charges which public-service corporations might make for their service. The defendant railroad companies on these motions challenged the jurisdiction of the Wisconsin Supreme Court and apparently raised the other numerous questions discussed in the opinion of Chief Justice Ryan following.

The Syllabus of this case, as reported, is as follows:

That clause of sec. 3, art. VII, of the constitution of this state, which empowers the supreme court "to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,*" etc., and to "hear and determine the same," was designed to give this court original jurisdiction of all judicial questions affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people.

Hereafter, in all cases in which an exercise of this original jurisdiction is sought *leave* must be obtained of the court upon a *prima facie* showing that the case is a proper one for its cognizance.

This court has original jurisdiction of the writ of injunction, as a *quasi* prerogative writ, where that is the proper remedy, in matters *publici juris,* within the scope of the jurisdiction upon information of the attorney general; but not in suits between private parties or for the determination of mere private rights.

Courts of equity have jurisdiction, upon information of the attorney general, to restrain corporations from excess or abuse of corporate franchise, or violation of public law to the public detriment.

This jurisdiction of equity was already established at the time of the adoption of our state constitution; and sec. 5, art. I, of that instrument (which declares that the right of trial by jury shall remain inviolate, and shall extend to all cases at law"), has no application to it. But the defenses to the present information rest only in questions of law, and the granting of the injunctions sought will not have the effect to deprive defendants of any trial by jury.

Secs. 13 and 14, ch. 148, R. S., neither confer any jurisdiction upon this court, nor limit its jurisdiction. Whether they limit the jurisdiction of the circuit courts in cases of injunction against corporations, is not here determined.

Ch. 273, Laws of 1874, after fixing the maximum tolls chargeable by railroad companies in this state, gives certain civil remedies against the companies to persons injured by violations of the rates so fixed, and also provides penalties against the agents of the companies who may be guilty of such violations; but it does not provide penalties against the companies themselves. *Held*, that the legal remedies so provided furnish no sufficient ground for denying the relief here sought by injunction against the corporations.

(*It seems* that the rule that equitable proceedings will not lie to enforce a statute which provides penalties for all violations thereof, is not applicable to an information of the attorney general to restrain a violation of public right by a corporation. But it was not necessary to decide that question here.)

It is no objection to the granting of an injunction in such a case, that the information does not show any specific injury done to the public; but it is sufficient that facts

are alleged which satisfy the court that there is disobedience of the law by the defendant, productive of public mischief.

In such cases the court cannot speculate whether obedience to the law by the defendant may not cause greater mischief to the public than is caused by disobedience.

The rule that the granting or withholding of an injunction rests in the sound discretion of the court, relates only to *judicial* discretion, and to injunctions in aid of private rights. The granting of an injunction (or a *mandamus*) as a *quasi* prerogative writ, when necessary to protect public rights, is not a matter of discretion.

Where there are two affirmative statutes upon the same subject, without any express words of repeal, one is not to be construed as repealing the other, if both may consist together; and the court ought to seek such a construction as will reconcile them together.

Chapters 292 and 341, Laws of 1874 (approved March 12th), are both susceptible of being so construed as to consist with ch. 273 of the same year (approved March 11th); and the last named act is not repealed by either of the former.

The question of repeal being one of legislative *intent*, the facts that the three acts were pending together, and were all passed within two successive days, and that the legislature, by a subsequent joint resolution, directed the publication of ch. 273 to be delayed so that it should not become a law until after the other two acts had taken effect—may be considered by the court, as showing that the legislature did not intend any repeal.

(Possibly if the acts were inconsistent, ch. 273, by reason of such later publication, would repeal such parts of the other acts as were irreconcilable with it.)

Chapter 273, Laws of 1874, in its classification of the railroads of this state, names among those in "Class A," the "Milwaukee & St. Paul Railway Company." One of the defendant companies was formerly known by the name, and was so designated in previous acts of the legislature, granting powers here claimed by said company by virtue of such acts, including an act approved March 10, 1874. In February, 1874, however, under a general statute providing for such changes of corporate names, said company had changed its name to the "Chicago, Milwaukee & St. Paul Railway Company," by which name it is here made defendant. No other company has ever been known in this state by the name first above stated. *Held,* that the provisions of said act relating to the "Milwaukee & St. Paul Railway Company" must be regarded as applying to said defendant.

The constitutional amendment of 1871 (which prohibits the legislature from passing special laws, amongst other purposes, "for granting corporate powers or privileges, except to cities," and directs it to provide general laws for such purposes, "which shall be uniform throughout the state"), relates only to acts of incorporation thereafter to be granted, and does not impair the power of alteration or repeal, reserved to the legislature by the state constitution, in respect to charters granted prior to such amendment.

Whether said ch. 273, considered as an amendment of the general railroad law of 1872, would be invalid un-

der said constitutional amendment of 1871, because not uniform in its operation throughout the state, is not here decided; the provisions of said act touching the defendant companies being regarded as an alteration of their special charters.

Under the decisions of the supreme court of the United States in Dartmouth College *v.* Woodward, and subsequent cases, this court must hold that charters granted to private corporations, including railroad companies, are *contracts*, within the meaning of subd. 1, sec. 10, art. I, of the constitution of the United States, which prohibits the passage by a state of any "law imparing the obligation of contracts."

Although the legislature has a general authority to regulate the tolls of railroads under the *police* power, where the exercise of that power is not in some way suspended or restrained, yet such power cannot be exercised where the right of a railroad company to take tolls at its discretion is fixed by its charter, without any reserved right in the legislature to alter such charter.

(Under a grant to a railroad company of a right to take such tolls as it shall think reasonable, *it seems* that a person aggrieved by the exaction of unreasonable tolls would still have a remedy by an action at law, and that the courts would have power to determine whether the tolls charged were reasonable in fact.)

Sec. 1, art. XI, of the constitution of this state, after empowering the legislature to create "corporations without banking powers or privileges," provides that "all general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage." *Held,*

that this reserved power to alter or repeal operates as a qualification of every such grant of corporate franchises made by the legislature of this state, and a subsequent exercise of such reserved power cannot be regarded as impairing the obligation of the contract.

The power so reserved is limited only by the words used to express the reservation. A corporate charter of one kind cannot be changed into one of an entirely different kind, under the power to alter, but may be changed in detail, so long as the general identity of the corporation remains. And where the charter of a railroad company empowers it to exact tolls at its discretion, an act of the legislature restricting the company to the maximum rates prescribed, is an alteration within the scope of such reserved power.

This power to alter or repeal the charters of corporations does not affect their rights in their property, other than the franchises; but such rights remain inviolable.

Whether or not a corporation owning a railroad in this state would have a right to take tolls as an attribute of ownership, without any franchise to do so (a question not considered), still, where it has accepted a franchise to take tolls, it must be held to take the right under the grant, and subject to the power of the legislature to alter the same.

A mortgage of a railroad *and its franchises,* made by permission of the legislature, does not confer on the mortgagee any greater rights than the mortgagor had, nor affect the power of the legislature to alter the franchises.

(*It seems* that valid alterations of its charter are obligatory upon a private corporation, without its assent thereto; but if otherwise, it must accept, or discontinue its operations as a corporate body.)

(*It seems,* also, that where such corporations have proceeded under their charters after the passage of a valid act making alterations therein, this raises a presumption that they exercised their right of election (if they had any) by accepting the alterations. But it was not necessary to determine this or the preceding question in a suit to restrain such companies from future violations of the amending act.)

(*It seems* that a charter granted to a railroad company by the territorial legislature of Wisconsin, and accepted by the company prior to the adoption of the state constitution, without any power of alteration or repeal reserved in the charter itself or by any general law of the territory in force when such charter was passed or accepted, would have been unaffected by the reservation of power contained in sec. 1, art. XI, of our state constitution.)

(*It seems,* also that if a corporation organized under such a charter were permitted by an act of the state legislature to mortgage its property and franchises, and, if, upon default made in payment of the mortgage debt, another corporation, created by act of the state legislature, were permitted to purchase at a foreclosure sale the property *and franchises* so mortgaged, such second company would hold the franchises so purchased unaffected by the right of repeal or alteration reserved in the state constitution.)

(A power reserved by such a territorial charter to the legislature of the territory or state, to "resume the rights and privileges granted" by it, in case of any violation of its provisions, would be only a power of *repeal,* and would not authorize an act merely limiting the tolls; and would require for its exercise a *judi-*

cial determination of the fact that the charter had been violated. Whether the territorial or state legislature could exercise such a judicial function under such a clause, and thereupon repeal the charter, *quære.*)

'An act of the territorial legislature approved February 11, 1847, entitled "an act to incorporate the Milwaukee & Waukesha Railroad Company," appoints commissioners to take subscriptions of stock in said company, and provides that as soon as a certain amount of the stock shall be subscribed and a certain sum actually paid on each share, and a certain statement showing these facts deposited with the treasurer of Milwaukee County, the subscribers of such stock shall be a corporation vested with the franchises specified in the act. *Held,*

(1) That the corporation did not come into existence until such stock was subscribed and certified (those acts being named in the statute as conditions precedent), and perhaps not until directors were elected.

(2) That under such a charter, where the present existence of the corporation appears, there is a *presumption* that it was organized immediately after the passage of the charter.

'An act of the territorial legislature amendatory of the foregoing, approved March 11, 1848, authorizes the "Milwaukee & Waukesha Railroad Company" to extend its road from Waukesha to the Mississippi River, and provides that whenever said company shall decide to so extend its road, it may increase for that purpose its capital stock, etc. *Held,* that this act, in the absence of proof to the contrary, would create a presump-

tion that the corporation was in existence at the time of its passage.

It appearing, however, that the statement of subscription and payment of capital stock of said company was not made and deposited as required by the act of 1847, until April, 1849, and that the first board of directors was not elected until May, 1849, this is conclusive that the charter was accepted, and the corporation organized, after the adoption of the state constitution (in 1848), although it also appears that as early as November, 1847, and from thence until May, 1849, action was taken, by the commissioners named in the charter, to receive subscriptions of said stock, and that they elected a president and secretary, opened books of subscription, and applied to the territorial legislature for the supplementary act of March 11, 1849.

The rules that acceptance of a charter applied for, or beneficial to the corporation, may be presumed, and that, in similar cases, slight acts of the corporators looking towards an acceptance are sufficient to establish it, relate to charters which name the corporators and declare them incorporated, without preliminary steps; and they do not apply to a charter not naming the corporators, but prescribing conditions by which indeterminate persons may become incorporated.

Under said act of 1847, the commissioners could do no act tending to prove acceptance of the charter, because they had no right to accept; and the stock subscribers could do no act tending to prove acceptance before subscription of the whole capital stock, because until then they had no right to accept.

The act of March 11, 1848, is not *conclusive* evidence of the existence, at the time of its passage, of the corpor-

ation there named. Its terms are consistent with a belief on the part of the legislature that the company was not then organized; and even if it declared in terms that the corporation had been organized, it seems that such declaration could not prevail over the contrary fact clearly established by evidence.

The rule that legislative recognition, in a subsequent statute, of a corporation *de facto,* will cure irregularities in its organization and waive forfeiture incurred, does not apply to this case, in which there was no corporation *de facto* at the time of the passage of the act of 1848.

Sec. 2, art. XIV of the state constitution, provided that all laws then in force in the territory *not repugnant to said constitution* should remain in force until they should expire by their own limitation, *or be altered or repealed by the legislature. Held,* that the territorial acts of 1847 and 1848, providing for the incorporation of the "Milwaukee & Waukesha Railroad Company," were continued in force after the establishment of the state government, by virtue of said sec. 2, art. XIV of the constitution; and upon the subsequent acceptance of the franchises by said company, its charter became *a contract with the state,* subject to the power of alteration or repeal expressly reserved to the state legislature by said section.

(A general act concerning corporations in the territorial revised statutes of 1839, reserved to the legislature power to amend, alter or repeal all subsequent acts of incorporation. By the first state revision, of 1849, said act of 1839 (with many other acts) was repealed (the repeal taking effect January 1, 1850), with a proviso that such repeal should not affect any right

already accrued. Whether the legislative right reserved by the act of 1839 entered into and became a part of the contract between the state and the "Milwaukee & Waukesha Railroad Company," upon the acceptance of its charter; whether, as a right accrued, this reserved right would remain unaffected by the subsequent repeal of the acts of 1839; whether, without such reserved power attending them, the acts of 1847–8 would not have been repugnant to the state constitution; and whether the acceptance by the company of the charter after the adoption of the state constitution was not an acceptance subject to the legislative power reserved by the act of 1839 and by sec. 1, art. XI of the constitution, are questions not here decided.)

Those provisions of ch. 273, Laws of 1874, which limit the tolls chargeable by the *Chicago & Northwestern Railway Company* and the *Chicago, Milwaukee & St. Paul Railway Company,* upon their lines of Railway within this state, are valid, and are applicable to the road of the last named company extending from Milwaukee to Prairie du Chien, which it owns as successor to the property and franchises of the "Milwaukee & Waukesha Railroad Company." But this decision relates only to cases where the transportation is wholly within this state. As to commerce between states, nothing is here decided.

An information of the attorney general, *ex officio,* is equivalent to a bill in chancery verified on information and belief, and, like such a bill in proper cases, calls for an answer under oath; but a temporary injunction will not usually go upon such an information, or such a bill, unsupported by positive affidavit, until the de-

fendant has had an opportunity to contradict it on oath and has failed to do so. In the present cases, affidavits were filed by the attorney general before the motions for temporary injunctions were made, which affidavits, not being answered, are sufficient to show the disregard by defendants of the maximum rates fixed by the act of 1874.

The attorney general has his election to proceed against the defendant companies for their alleged violations of legal duty, either by information in the nature of *quo warranto,* or by injunction; but the court will require him to make his election, and not to proceed by both remedies.

Before permitting the temporary injunctions to issue in these cases, the court requires the attorney general to dismiss the informations in the nature of *quo warranto* pending against the same defendants, and to file in these cases a stipulation (signed by him *ex officio* and approved by the court or one of the justices thereof) that the state will not proceed by way of *quo warranto* for forfeiture, or for contempt in violating the injunctions so to issue, for any violation by defendants, before a certain day here fixed, of the above named provisions of the act of 1874.

No statute can abolish a writ given by the constitution, as such writ existed when the constitution was adopted. And the jurisdiction of this court being founded on the writ of injunction, the *writ* itself (and not the *order* provided by the statute as a substitute) will issue in such cases.

Ryan, Chief Jusice. These causes, although before the court now on motion only, are of high importance, for both

the interests and the principles which they involve. Most of the questions to be passed upon were elaborately argued with much learning and ability at the bar, and all have been patiently and laboriously considered by us, in view of the gravity and delicacy of the decision which we have to make.

I. The first question to be settled, and the one which has given us the greatest difficulty to settle, is the jurisdiction of this court to entertain the informations in these causes.

Since the case of Attorney General *v.* Blossom, 1 Wis. 317, the original jurisdiction of this court under the third clause of sec. 3, art. VII of the constitution of this state, has never been doubted in this court, has been recognized and asserted in many cases, and is no longer an open question. The original jurisdiction is conferred and limited by the power "to issue writs of *habeas corpus, mandamus, injunction, quo warranto, certiorari,* and other original and remedical writs, and to hear and determine the same." The court has many times exercised original jurisdiction in cases of *habeas corpus, mandamus, quo warranto* and *certiorari.* This is the first time it has been called upon to assert original jurisdiction of injunction. In the case of Cooper *v.* Mineral Point, 34 Wis. 181, application was made to this court to issue a writ of injunction in a cause pending in the circuit court. The court disclaimed jurisdiction to grant the writ in a cause not in this court, under either its appellate or original jurisdiction; but took occasion to assert its jurisdiction to issue the writ in a proper case commenced in this court, as an exercise of its original jurisdiction. But in neither of these cases, nor—so far as we are aware—in any other case, has it been considered what are the nature and limits of the original jurisdiction conferred on this court in cases of injunction, or how that

jurisdiction is to be exercised. And indeed the distinction between the writ of injunction and the other writs granted seems to have been overlooked in discussions which had relation chiefly to the nature and functions of those other writs.

In Attorney General *v.* Blossom, Smith, J., speaking of the group of writs given to the court, says that "this class of writs, it would seem, appertain to and are peculiarly the instruments of the sovereign power, acting through its appropriate department, prerogatives of sovereignty," etc. He calls them indiscriminately original and prerogative writs; and says that they "differ essentially, in their character and objects, from ordinary writs issued by the courts in the regular and usual administration of the law between parties. They go to accomplish peculiar and specific objects, carrying with them the special mandate of the sovereign power, etc. They bear no resemblance to the usual processes of courts by which controversies between private parties are settled by the judicial tribunals of every grade." He speaks particularly of the writs of *certiorari* and injunction as "remedical writs of high judicial character, and essential to the complete exercise of the function of sovereignty in the administration of justice."

Substantially correct of all the other writs named, this language does not appear to be accurately used of the writ of injunction. At common law, all the other writs given were prerogative writs, issuing on behalf on the state only; and though sometimes used for private remedy, were so used on special leave given, and in the name of the state, and were not ordinary writs applicable to private controversies or issuable of course. All the other writs must or might be original; as given to this court they must be original writs, in the modern and practical sense of the term

original writs. The writ of injunction was not original. They are, as given, essentially jurisdictional writs, implying the jurisdiction granted, in each case, *ex vi termini.* The writ of injunction was not an original writ, and by itself, as given, implies no specific jurisdiction. It was a judicial writ, going only upon some judgment, interlocutory or final, of the court issuing it, in some case of which the court had jurisdiction otherwise; never jurisdictional, but always remedial in aid of jurisdiction already attached, within the vast range of equitable cognizance. And the difficulty arises wholly from placing the nonjurisdictional writ in a group of jurisdictional writs; this judicial writ amongst original writs; this equitable writ of vague and varied application amongst common law writs of sharp and terse significance; this confusion of equitable and legal jurisdiction. In Attorney General *v.* Blossom, the jurisdiction in question was *quo warranto.* And elaborately as the question was discussed by the able judge who wrote the opinion, he seems to have followed the framers of the constitution in a want of perception that the writ of injunction appeared to be illy grouped with *habeas corpus, mandamus, quo warranto* and *certiorari,* and that the court might be troubled some day, as it has been now, how to take jurisdiction of a writ not before jurisdictional; how to hear and determine a writ not before original.

That common law, which gave the original writs adopted by the constitution, gave the forms of procedure. The jurisdiction of them, once ascertained, involved nothing difficult, nothing new; and when they were under consideration, the original jurisdiction of the court was easily asserted and discussed. It was natural that the court should overlook, it was fitting that the court should postpone, the difficulty arising on original jurisdiction of in-

junction, until the writ itself should be applied for, and a proceeding taken to put its original jurisdiction of the writ in motion. And the questions are now here, for the first time for settlement, What is that jurisdiction? What are its import and limits? How and at whose instance is it to be asserted? The writ does not of itself, like the rest of the group of writs given, furnish an answer to these questions.

From the beginning of the discussion of these motions, this difficulty stared us in the face, and we called on the bar for a solution of it. On the one side, we were first told that the writ gives this court general equitable jurisdiction, in all cases, between all parties, where injunction is prayed; thus substantially making this court one of general equitable jurisdiction, concurrent with all the circuit courts of the state. Later in the discussion an attempt was made to limit this interpretation to cases in which perpetual injunction is the sole relief sought. The latter construction is hardly consistent with the indisposition of a court of equity to be the handmaid of other courts, or the general maxim that a court of equity having once obtained jurisdiction for one purpose, will retain it for all purposes; or if consistent, not very available as a limitation. And an original equitable jurisdiction, however restricted, of purely private causes, concerning private interests, between private persons, would be wholly inconsistent with the manifest policy of the constitution to limit this court to appellate jurisdiction, superintending control over inferior courts, and original jurisdiction in certain causes *publici juris,* as is held in Attorney General *v.* Blossom. It would be a gross blemish upon the symmetry and economy of the constitutional distribution of jurisdiction, a solecism against the judicial order observed in it, to attribute to the

supreme court of the state original jurisdiction in one class of causes of private right, which is carefully excluded in all other causes, for no inherent distinction; for no assignable reason, except that it seems to follow from words used for a different purpose; a purely accidental and incongruous jurisdiction, which was surely not designed. (See the cases in Missouri cited *infra.*) We could not accept so vicious and mischievous a construction, resting really upon an imputation of an inaccurate use of terms in the constitution; and which after all does not fully meet the difficulty of jurisdiction given of a nonjurisdictional writ.

On the other side it was suggested that the writ of injunction does not go at all to the original jurisdiction of the court; and that it is inserted where it is, in aid of the appellate or superintending jurisdiction of the court. This construction is properly rejected in Attorney General *v.* Blossom. The framers of the constitution appear to have well understood that, with appellate jurisdiction, the court took all common law writs applicable to it; and with superintending control, all common law writs applicable to that; and that, failing adequate common law writs, the court might well devise new ones, as Lord Coke tells us as "a secret in law." Hence the constitution names no writ for the exercise of the appellate or superintending jurisdiction of the court. But the original jurisdiction depends on the writs given and hence the group of specific writs. The injunction given, mean what it may, appertains therefore to the original jurisdiction of the court.

Again we were told that the writ of injunction was inserted in the class of original writs *ex abundanti cautela,* where it does not fit, where it performs no office, where it stands mere surplusage, signifying nothing, *nudum verbum.* We might sympathize with this way out of the diffi-

culty, but we cannot accept it. We cannot so deal with the charter of this court. We cannot so dispose of a jurisdictional word. Even in ordinary phrases, in an ordinary statute, dealing with an ordinary subject, *verba aliquid operari debent, cum effectu sunt accipienda.* And surely we cannot, in the constitution which creates the court, reject as superabundant and unmeaning an independent, jurisdictional word, manifestly inserted for the purpose of imposing a distinct duty on the court, only because we find it difficult to apply it. We must hold that the grant of the writ had a definite purpose. This is proved by the independent use of the word, rarely appearing in such a grant of jurisdiction. We may say that we have found it difficult to define the purpose; but if we should find it impossible to interpret the organic law of the court, we might not unjustly be held to confess our unfitness for this place.

Receiving from the bar no solution of the difficulty which we could accept, we have patiently considered it, seeking light from the constitutional grant of jurisdiction itself, from the previous discussions of this court and from the discussions of other courts on kindred subjects; steadfast to accept or reject jurisdiction of these causes, as our duty might be; and as far as we should be able, and as far as might be necessary to our decision, to ascertain and define the jurisdiction in question for the future guidance of the court and the profession, until our construction should be modified or changed by our successors.

All the other writs of the group are common law writs. The writ of injunction, when the constitution was adopted, was exclusively an equitable writ, used only by courts of chancery. As such it was given to this court, implying and carrying with it equitable jurisdiction to employ it. It is therefore plain that the original juridiction of this

court is both legal and equitable, within certain limits; legal for the use of the common law writs; equitable for the use of the chancery writ. The use of the former must be according to the course of common law courts. The use of the latter, according to the course of courts of equity; in each case, subject to statutory modifications of the practice, which do not impair the jurisdiction granted. The common-law writs, as already observed, imply and define the jurisdiction appurtenant to them, as jurisdictional writs. It is otherwise with the writ of injunction. Equity has no jurisdictional writs. By the course of courts of equity, the jurisdiction must precede the writ. And though the writ is the end of the equitable jurisdiction implied, the scope of the jurisdiction must be sought mainly outside of the writ itself. It can issue only after bill or information filed. And the question still remains, what is the original equitable jurisdiction conferred on the court, of bills or informations, dependent on the use of the writ.

The grant of original jurisdiction is one entire thing, given in one general policy, for one general purpose, though it may have many objects and many modes of execution. So it is of the appellate power. So it is of the superintending control. There are three independent and distinct grants of jurisdiction, each compact and congruous in itself; each a uniform group of analogous remedies, though to be exercised in several ways, by several writs, in legal and equitable proceedings, on many objects, in great variety of detail. The constitution wisely, almost necessarily, stopped with the general grants of jurisdiction, carefully distinguished, and left details to practice and experience.

The grant is to the supreme court of the state, in the full significance of that term given in Attorney General *v.* Blossom; designed to have a general judicial oversight of the

state in all its interests, public and private. To this court, as such, are given general appellate jurisdiction and superintending control over all other courts throughout the state, because these are essential to the judicial supremacy of the court in all ordinary litigation; and original jurisdiction of certain writs, "because they are designed for the very purpose of protecting the sovereignty and its ordained offices from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against usurpation." This is the language of the court in Attorney General *v.* Blossom, which we adopt and approve as applicable to the question before us. And it tends to show, as the whole opinion in that case shows, that the three grants of jurisdiction proceed on one policy; appellate jurisdiction to decide finally all ordinary litigation; superintending jurisdiction over all other courts to control the course of ordinary litigation in them; and, outside of these, original jurisdiction of certain proceedings at law and in equity, to protect the general interests and welfare of the state and its people, which it would not do (to quote Smith, J., again) to dissipate and scatter among many inferior courts. Here are three jurisdictions, but one policy: to make this court indeed a supreme judicial tribunal over the whole state; a court of last resort on all judicial questions under the constitution and laws of the state; a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. Attorney General *v.* Blossom.

The other courts may, indeed, adjudicate public as well as private questions; and the appellate and superintending jurisdiction of this court may therefore reach public as well as private interests. But the framers of the constitution,

for greater security, added to these original jurisdiction over great public interests, for reasons already assigned. In a government like ours, public rights of the state and private rights of citizens often meet, and may well be involved in a single litigation. So it may be in the exercise of the original jurisdiction of the court. But it is safe to say that the constitution is content to intrust purely private rights to the appellate and superintending jurisdictions given, and to have granted the original jurisdiction of this court for the better and prompter and more authoritative protection of public interests. This is its primary and controlling object and character.

This is very plainly implied by the grant of the writs of *habeas corpus, mandamus, quo warranto* and *certiorari,* as is well reasoned in Attorney General *v.* Blossom. And, plainly recognizing the intention of the constitution to vest in this court one jurisdiction, by several writs, to be put to several uses, for one consistent, congruous, harmonious purpose, we must look at the writ of injunction in the light of that purpose, and seek its use in the kindred uses of the other writs associated with it. *Noscitur a sociis* is an old and safe rule of construction, said to have originated with as great a lawyer and judge as Lord Hale, peculiarly applicable to this consideration. Lord Bacon gives the same rule in a more detailed form, more emphatic here. *Copulatio verborum indicat acceptationem in eodem sensu.* Here are several writs of defined and certain application classed with one of vague import. We are to be guided in the application of the uncertain, by its certain associates. The joinder of the doubtful writ with the defined writs operates to interpret and restrict its use, so as to be accepted in the sense of its associates; so that it and they may harmonize in their use, for the common purpose for which it

is manifest that they were all given. And thus, in this use and for this purpose, the constitution puts the writ of injunction to prerogative uses and makes it a *quasi* prerogative writ.

There is the less difficulty in reaching this construction, and giving definite meaning to the jurisdiction of injunction, because of the very contrast between this writ and *mandamus*. The latter commands. The former forbids. Where there is nonfeasance, *mandamus* compels duty. Where there is malfeasance, injunction restrains wrong. And so near are the objects of the two writs, that there is sometimes doubt which is the proper one; *injunction* is frequently mandatory, and *mandamus* sometimes operates restraint. In these very motions it was argued on one side that the remedy of the state is by *mandamus,* on the other that it is by injunction. And it is very safe to assume that the constitution gives *injunction* to restrain excess, in the same class of cases that it gives *mandamus* to supply defect; the use of the one writ or the other in each case turning solely on the accident of over-action or shortcoming of the defendant. And it may be that where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose.

This view excludes jurisdiction of injunction in private suits, between private parties, proceeding on private right or wrong. In excluding them, we feel quite assured that we are only giving effect to the very purpose and limit of the constitution in the grant of jurisdiction. And we were aided in arriving at this conclusion, by decisions of the supreme court of Missouri, in somewhat analogous cases, excluding original jurisdiction of causes of merely private interest. State *v.* Stewart, 32 Mo. 379; State *v.* Lawrence,

38 id. 535; Foster *v.* State, 41 id. 61; Vail *v.* Dinning, 44 id. 210; State *v.* Vail, 53 id. 97. In our view, the jurisdiction of the writ is of a *quasi* prerogative writ. The prerogative writs proper can issue only at the suit of the state or the attorney general in the right of the state; and so it must be with the writ of injunction, in its use as a *quasi* prerogative writ. All may go on the relation of a private person, and may involve private right. It is the duty of the court to confine the exercise of its original jurisdiction to questions *publici juris*. And hereafter the court will require all classes of cases, as it has hitherto done some, in which it is sought to put its original jurisdiction in motion, to proceed upon leave first obtained, upon a *prima facie* showing that the case is one of which it is proper for the court to take cognizance.

Although the writ of injunction was at no time properly a jurisdictional writ, and it has long been held to be a judicial writ only, used to give effect to the general jurisdiction of courts of equity, yet in the early history of the English Chancery, the use of the writ rested on a jurisdiction of its own, borrowed from the Roman law by the churchmen who first sat in that court. 1 Spence, 668. And this early use of the writ as a *quasi* jurisdictional writ has aided us in giving to it the construction and use in the constitution, which we adopt.

We ought, perhaps, earlier in the discussion, to have indicated another section of article VII of the constitution, which has aided our conclusion. Section 8 gives jurisdiction to the circuit courts, original in all matters, civil and criminal, within the state, not excepted in the constitution or thereafter prohibited by law, and appellate from all inferior courts and tribunals, and supervising control over the same, and also power to issue writs of *habeas corpus*,

mandamus, injunction, quo warranto, certiorari and all other writs necessary to carry into effect their judgments, etc., and a general control over inferior courts and jurisdictions. A great jurisdiction, comprehending, as C. J. Stow remarked, in Putman *v.* Sweet, the united powers of the English courts of the King's Bench, Common Pleas, Exchequer and Chancery. The same writs are granted to those courts as to this. It is impossible for a lawyer to suppose that they are granted in the same sense and with the same measure of jurisdiction, to this court as to those courts. Such a proposition would shock the legal sense of any professional man. And the distinction is to be looked for, and is readily found, in the general constitution and functions of those courts and of this. The writs are given to the circuit courts as an appurtenance to their general original jurisdiction; to this court, for jurisdiction. Those courts take the writs with unlimited original jurisdiction of them, because they have otherwise general original jurisdiction. Other original jurisdiction is prohibited to this court, and the jurisdiction given by the writs is essentially a limited one. Those courts take the prerogative writs as part of their general jurisdiction, with power to put them to all proper uses. This court takes the prerogative writs for prerogative jurisdiction, with power to put them only to prerogative uses proper. The circuit courts take the writ of injunction with all the powers and uses of the English Court of Chancery. This court takes it as an integral element of its jurisdiction of prerogative writs. And it would be a rude and criminal emasculation of the judicial charter of the state, to disfranchise this court of all jurisdiction or use of injunction, as it would be a wild and reckless delusion, undiscerning the symmetrical distribution of judicial powers in the constitution, to attribute to this court the

same jurisdiction and uses of the writ which the circuit courts have.

And so the difficulty which seemed so great, becomes so little, and is overcome, as difficulties often are, by being directly met and carefully examined. And thus we find that Smith, J., was more apparently than really inaccurate in Attorney General *v.* Blossom, when he classed injunction with the other writs given, and called the whole group prerogative and original writs. For, in our view of its use, the injunction given to this court seems to become a *quasi* prerogative writ, and founds jurisdiction as if it were an original writ. It is certainly competent for the constitution to give new writs, or to put old writs to new uses; to make any writ, by the use to which it puts it, prerogative or original; and to found jurisdiction on any writ, as in case of a prerogative or original writ. And this it appears to have done, in effect, with the injunction which it gives to this court.

We therefore hold that this court has original jurisdiction of an information on behalf of the state in the nature of an injunction bill in chancery, in all cases coming within the scope of the original jurisdiction conferred on this court by the third clause of section 3, article VII of the constitution, in which injunction is the appropriate remedial writ.

The original jurisdiction of the court by way of injunction being thus settled, no question was made on the argument, and it is not perceived how any could well be, of our jurisdiction to entertain the informations in these causes, if they make a case for equitable cognizance.

II. But equitable jurisdiction of such informations was denied. It was argued that courts of equity have no juris-

diction, at the suit of the attorney general, to enjoin usurpation, excess or abuse of corporate franchises.

This question was argued very ably and at large, and has been carefully considered, although we have had no difficulty in coming to the conclusion that courts of equity have such jurisdiction, and that it is a very beneficial jurisdiction, almost essential to public order and welfare.

It was hardly denied that the English court of chancery entertains jurisdiction in such cases; and indeed the English books leave little room for such a denial.

But it was said that, in England, the attorney general has a right to elect his forum, legal or equitable. And it is so said in some of the cases. Attorney General *v.* Mayor of Galway, 1 Molloy, 103. But it appears to us that this logically follows, everywhere, upon equitable jurisdiction to restrain corporate violations of charters or other public law. In such cases there is always a remedy at law. The attorney general may proceed at law by *quo warranto* to forfeit the charter of the offending corporation; and, if there be a penalty, as often happens, he may sue for it at law. And the concurrent remedy by injunction inevitably gives the election imputed to the attorney general. And we see no reason why the attorney general here has not the same election. To deny him such an election is only another way of denying the jurisdiction.

The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference, when the state seeks it in preference. It seems to proceed on the presumption that it may better serve the public interest to restrain a corporation, than to punish it by penal remedies or to forfeit its charter; and that, in that view, the proper

officers of the state should have an election of remedies. And we may as well say in this connection, that the jurisdiction to entertain these informations is wholly independent of an adequate remedy at law; and that, were that otherwise, we could not consider the informations in the nature of a *quo warranto,* pending in this court against these defendants, as an adequate remedy at law, which could be a substitute for a bar to the injunction asked. Judgments of ouster on those informations might not only be of far more grave consequence to the defendants, but might be far less beneficial to the state, and less accordant with its policy, and altogether less equitable and proper, than the injunctions sought to restrain the defendants from doing what is alleged to work a forfeiture of their charters. Doubtless the court has power, in granting injunctions, to prescribe conditions controlling the action of the attorney general in the *quo warranto* cases. But if this court can enjoin, it can do so without regard to any remedy at law; and the attorney general has a right of election to resort to the more lenient remedy of injunction, in preference to the harsher and more dangerous experiment of forfeiture.

It was further urged for the defendants, against the authority of the English cases, that the jurisdiction of the English chancery in such cases, rests largely on recent acts of parliament. And we are referred, in support of that position, to the Railway and Canal Traffic Act of 1854, and to the Common Law Procedure Act of the same year (17 and 18 Vict. ch. 31 and ch. 125). We have carefully examined these statutes, and Mr. Joyce's comments upon them. We find that the former of them enlarged the powers of some of the common-law courts, and gave them jurisdiction of certain summary proceedings, and the equi-

table writ of injunction for certain purposes, against railway and canal companies. The second of these acts gives some equitable powers, and the writ of injunction, in certain cases, to courts of common law. But we fail to discover that either of these statutes adds anything to the jurisdiction of courts of equity. In this connection we were led also to examine the Railway Act of 1840 (3 and 4 Vict. ch. 97), and the Railway Act of 1844 (7 and 8 Vict. ch. 85). Section 11 of the former of these two latter acts, and section 17 of the latter of them, the second of these sections being a substitute for the first, give certain authority to the Board of Trade to require the attorney general to proceed against railway companies for violation of legal duty; and, upon such requisition, make it obligatory on the attorney general to take such proceedings. While the latter of these sections was in force, the attorney general filed an information in the court of chancery against a railway company for an injunction against acts within the letter and spirit of the section, without any requisition of the Board of Trade. On application for injunction, the vice chancellor says:

"It is, however, contended that as the act of 7 and 8 Vict. ch. 85, sections 16, 17, prescribes a particular remedy in such a case, the attorney general cannot take proceedings otherwise than in accordance with that provision.

"This objection in truth involves the contention that this court has no jurisdiction to entertain the suit by the attorney general, unless it is instituted under the circumstances mentioned in those sections.

"The effect of those sections is not to take away the right of the attorney general to file such an information at his discretion, although there is no certificate of the board of trade, or the jurisdiction of the court to entertain such a

suit. The only effect is, that if the board of trade has certified to the attorney general, he is *bound* to act, and compel the railway company to abstain from doing what is in violation of the law. In that particular case he can exercise no discretion; he must sue."

The information was sustained and the injunction issued. Attorney General *v.* Great Western Railway Co., 1 Drewry & S. 154.

We have been unable to find any English statute enlarging the jurisdiction of the court of chancery in such cases; and we find all the English cases proceeding without reference to statutory jurisdiction. We find no room for doubt that this jurisdiction of English courts of equity is independent of all authority by statute, and has long been as well recognized as any ground of equitable jurisdiction whatever. And these views are fully sustained by the case just quoted.

We cannot state the rule better than by taking it from the excellent work of Mr. Brice, so recently given to the profession.

"Under many circumstances, the court of chancery has, on public grounds, jurisdiction to prevent corporations acting in various ways, or contrary to the intent for which they have been created. The public, however, must be represented in all applications relating to such matters, and this is done by the intervention of the attorney general. No single person, whether a member of the corporation in question or not, is able on his own account, and of his own motion, to call upon the court to interfere for his special protection. The wrong he complains of is not confined to himself; no right or privilege peculiar to himself is violated; the wrongs inflicted and the rights invaded affect the public, and the public, consequently, must be a party

to the proceedings. The occasions upon which the court will exercise jurisdiction to restrain the doing of acts of this kind, seem to fall into the three following heads:" The author then proceeds to give the three heads of jurisdiction at large, which are thus classed in his own words: "1st. When a corporation is abusing powers given for public purposes; 2d, or is committing a breach of trust; 3d, or is acting adversely to public policy." We copy this last in full:

"When any corporation is doing acts detrimental to the public welfare, or hostile to public policy. The right of the attorney general to interfere on these grounds was fully established in Attorney General *v.* Great North. Railway Company, where the defendants had engaged in an illegal trade in coals. It was objected that it was not competent for him to file an information. But Kindersley, V. C., said: 'On this point I entertain no doubt whatever. Whenever the interests of the public are damnified by a company established for any particular purpose by act of parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function of the attorney general to protect the interests of the public by an information; and that, when in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney general, in cases of injury to public interests from such a cause, to file an information for an injunction.' "

The writer then proceeds: "The above being the grounds of the jurisdiction of the court of chancery in this behalf, the next point is, when can the attorney general direct proceedings on behalf of the public? He may do so whenever

public interests have been damnified, or will manifestly be damnified, in the result, by transactions which are now taking place. And it would seem from the judgment in Ware *v.* Regents Canal Company (3 De Gex & J. 212, 228), that he may do so when a corporation is going beyond its special powers, even though no definite injury has been done or is likely to be done to the public. Where there has been an excess of the powers given by an act of parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequence, I apprehend that no one but the attorney general, on behalf of the public, has a right to apply to this court to check the exorbitance of the party in the exercise of the powers confided to him by the legislature." Brice's Ultra Vires, 506–509.

The custom of courts of equity to interfere in such cases, at the suit of private parties, for private injuries, is quite old. It seems to have grown up out of the ancient jurisdiction to restrain waste and nuisance. We shall not attempt to trace it. It is recognized as an established jurisdiction by Lord Hardwicke in 1752 (Fishmonger's Co. *v.* East India Co., 1 Dickens, 163); and particularly as applied to corporations exceeding or abusing their franchises, by Lord Eldon in 1815. Agar *v.* Regent's Canal Co., Cooper, 77. In more recent times, as corporations have grown in number and power, cases applying this jurisdiction to them are very numerous. We cite a few at random: River Dun N. Co. *v.* North Mid. Railway Company, 1 English Railway Cases, 135; Blackburne *v.* Glamorgan Canal Navigation, 1 Mylne & K. 154; Coats *v.* Clarence Railway Company, 1 Russell & M. 181; Dawson *v.* Paver, 5 Hare. 415; Broadbent *v.* Imperial Gas Company, 7 De Gex, M. & G. 437; Ware *v.* Regent's Canal Company, 3

De Gex & J. 212; London & Brighton Railway Company *v.* Cooper, 2 English Railway Cases, 312.

The general grounds of jurisdiction, in favor of private persons as well as the public, are stated by Lord Eldon in Blackmore *v.* Glamorgan Canal Navigation. "When I look upon these acts of parliament, I regard them all in the light of contracts made by the legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such acts of parliament have now become extremely numerous; and, from their number and operation, they affect so many individuals, that I apprehend those who come for them to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else; that they shall do and forbear all that they are required to do and forbear, as well with reference to the interests of the public, as with reference to the interests of individuals. It is upon this ground that applications are frequently made," etc.

And the jurisdiction is now clearly defined as having two branches: one on behalf of the state, for public wrong, and the other on behalf of private persons, for private wrong, arising from an excess or abuse of corporate franchise. Relief against public wrong is confined to informations by the attorney general. Ware *v.* Regent's Canal Company, 3 De Gex & J. 212; Brown *v.* Monmouth Railway and Canal Company, 13 Beavan, 32. And it has been held, on the other hand, that the attorney general can-

not maintain information on the ground of mere private wrong. Attorney General *v.* Birmingham & O. Railway Company, 4 De Gex & S. 190, and 3 MacNaghten & G. 453. Though doubt is thrown upon this point by the later case of Ware *v.* Regent's Canal Company, 3 De Gex & J. 212.

Be that as it may, the authority of the English chancery to restrain corporate violations injuring or tending to injure public welfare, or to defeat public policy, at the suit of the attorney general, as stated by Mr. Brice, is now beyond controversy. Attorney General v. Johnson, 2 Wilson, 87; Attorney General *v.* Forbes, 2 Mylne & C. 123; Attorney General *v.* Eastern Counties Railway Company, 3 English Railway Cases, 337; Attorney General *v.* Great Nor. Railway Company, 4 De Gex & S., 75; Attorney General *v.* Sheffield Gas Co., 3 De Gex, M. & G., 304; Attorney General *v.* Great North. Railway Company, 1 Drewry & S. 154; Attorney General *v.* Mid. Kent Railway Company, 3 Chancery Appeal Cases, 100; Attorney General *v.* Cambridge Gas Co., 4 Chancery Appeal Cases, 7.

The grounds on which this jurisdiction rests are ancient; but the extent of its application has grown rapidly of late years, until a comparatively obscure and insignificant jurisdiction has become one of great magnitude and public import. The modern exercise of this jurisdiction has kept pace with the multiplication of great corporations in England. The cause may be found in the language of Lord Eldon already quoted, and the motive, in the language of Lord Cottenham three times repeated: "I have before taken occasion to observe that I thought it the duty of this court to adapt its practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress

daily making in the affairs of men, must continually arise; and not, from too strict adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is no other remedy." 1 Mylne & C. 559; 4 id. 141, 635.

In our day the common law has encountered in England, as in this country, a new power, unknown to its founders, practically too strong for its ordinary private remedies. The growth of great corporations, centers of vast wealth and power, new and potent elements of social influence, overrunning the country with their works and their traffic throughout all England, has been marvelous during the last half century. It is very certain that the country has gained largely by them in commerce and development. But such aggregations of capital and power, outside of public control, are dangerous to public and private right; and are practically above many public restraints of the common law, and all ordinary remedies of the common law for private wrongs. Their influence is so large, their capacity of resistance so formidable, their powers of oppression so various, that few private persons could litigate with them; still fewer private persons would litigate with them for the little rights or the little wrongs which go so far to make up the measure of average prosperity of life. It would have been a mockery of justice to have left corporations, counting their capital by millions—their lines of railroad by hundreds, and even sometimes, by thousands of miles—their servants by multitudes—their customers by the active members of society—subject only to the common law liabilities and remedies which were adequate protection against turnpike and bridge and ferry companies, in one view of their relations to the public; and, in another view, to the same liabilities and remedies which were found sufficient for

common carriers who carried passengers by a daily line of stages, and goods by a weekly wagon, or both by a few coasting or inland craft; with capital and influence often less than those of a prosperous village shopkeeper. The common-law remedies, sufficient against these, were, in a great degree, impotent against the great railway companies—always too powerful for private right, often too powerful for their own good. It was in these circumstances that the English courts of equity applied their restraining jurisdiction at public or private suit, and laid on these great companies the strong hand of equitable control. And all England had occasion to bless the courage and integrity of her great judges, who used so ably and so freely and so beneficially the equity writ, and held great corporations to strict regard to public and private right. Every person suffering or about to suffer their oppression, by a disregard of corporate duty, may have his injunction. When their oppression becomes public, it is the duty of the attorney general to apply for the writ on behalf of the public. And in this country, where the judicial tone is less certain, it is refreshing to read the bold and true words of which English equity judges do not spare the utterance. One of these corporations having violated an injunction, V. C. Shadwell says: "Considering then their conduct to be at once contumacious and otherwise illegal, to be wrongful against the plaintiff individually, wrongful against the Queen's subjects at large, and of, I had almost said, scandalous example; whatever amount of inconvenience may be the consequence of acting against the defendants on this occasion, I think it right to deal with them according to their merits. The consequence may possibly be to stop the railway. I answer again that it ought to be stopped, for it passes where it does by wrong. The directors of the

company and their agents cannot, on this motion, at present, be committed to prison; but what can be, shall be done, to repress a daring invasion of public and private rights, maintained in open defiance of law, authority and order. Let a sequestration issue." Attorney General *v.* Great North. Railway Co., 4 De Gex & S. 93. A great example, of authority, in proper cases, for all American judges.

And it is not unimportant to observe that this broad English jurisdiction was well established and publicly recognized at the time of the adoption of our state constitution.

It was, however, strenuously denied that it had been adopted in this country or could be upheld by the current of American authorities.

We have not found this jurisdiction as directly and succinctly stated in American treatises as in English, although it is fully recognized by the best of our elementary writers. Judge Redfield says that "injunctions in courts of equity, to restrain railways from exceeding the powers of their charters, or committing irreparable injury to other persons, natural or artificial, have been common, for a long time, in England and this country." 2 Redfield on Railways, 307. Nearly all the chapter of his work (ch. 39) from which we quote, is full of instruction on the question, and directly recognizes, especially in the valuable notes, the same jurisdiction of courts of equity in this country, both at the suit of private persons for private wrongs and of the attorney general for public wrongs, as that exercised by the English chancery. Later in the chapter he says that the equitable jurisdiction by injunction goes upon the ground of nuisance. As, indeed, any intrusion upon public right is in the nature of pourpresture. The ancient jurisdiction to restrain nuisance, is perhaps the most direct ground of the modern jurisdiction under consideration. And the former

is fully asserted as an American jurisdiction, as to remedies both by private persons and by the attorney general for the public. 2 Story's Eq. sections 920–923.

The remedy by injunction, at the suit of private parties, for private wrong, is recognized and enforced in a great number of American cases. Gardner *v.* Newburgh, 2 Johns. Ch. 162; Belknap *v.* Belknap, 2 Johns. Ch. 463; Couch *v.* Turnpike Co., 4 Johns. Ch. 26; Jerome *v.* Ross, 7 Johns. Ch. 315; Osborn *v.* United States Bank, 7 Wheat. 738; Bonaparte *v.* Camden & A. R. R. Co., Baldwin, 205; McArthur *v.* Canal Co., 5 Ohio, 139; Ross *v.* Page, 6 Ohio, 166; Mohawk Bridge Co. *v.* Utica & S. R. R. Co., 6 Paige, 554; Delaware & Md. R. R. Co. *v.* Stemp, 8 Gill & J. 479; Rowe *v.* Granite Bridge Co., 21 Pick. 344; Browning *v.* Camden & W. R. R. Co., 3 Green, 47; Jordan *v.* Phil., W. & B. R. R. Co., 3 Wharton, 502; Newburyport T. Co. *v.* Eastern R. R. Co., 23 Pick. 326; Bigelow *v.* Hartford Bridge Co., 14 Conn. 565; O'Brien *v.* Norwich & Wor. R. R. Co., 17 Conn. 372; Moorhead *v.* Little Miami R. R. Co., 17 Ohio, 340; Kean *v.* Central R. R. Co., 1 Stockton, 401; Newhall *v.* Galena & C. U. R. R. Co., 14 Ill. 273; Boston & L. R. R. Co. *v.* Salem & L. R. R. Co., 2 Gray, 1; Sanford *v.* R. R. Co., 24 Pa. St. 378; Bell *v.* Ohio & P. R. R. Co., 25 Pa. St. 161; Water Comm. *v.* Hudson, 2 Beasly, 420.

There are more cases to the same effect; an unbroken line of decisions, of the most respectable authority, covering some half a century; most of them going on excess or abuse of corporate franchise, and all fully sustaining equitable jurisdiction in case of private wrong. They seem to establish the jurisdiction of courts of equity in this country, as conclusively as it is established in England, of private suits

to restrain private wrong arising from excess or abuse of power by corporations.

In such cases, public wrong may be considered only as an aggregation of private wrongs. And, the jurisdiction once established to enjoin private wrong, in each case, at the suit of the person wronged, it is almost a logical necessity to admit the other branch of the jurisdiction, to enjoin, at the suit of the state, such a general wrong, common to the whole public, as interests the state, and could be remedied by private persons by a vast multitude of suits only, burthensome to each and impracticable for very number; more conveniently, effectively and properly represented by the attorney general as *parens patriæ*. But jurisdiction of informations of this nature has sometimes been denied here, courts of equity in this country, singularly enough, being sometimes more timid to control corporate power, and less willing to protect the public against corporate abuse, than the English chancery. In both branches of the jurisdiction, it proceeds as for *quasi* nuisance; and it is difficult to understand why the jurisdiction should be asserted as to private nuisance and denied as to public nuisance; why, for the same cause, individuals should have a remedy denied to the aggregate of individuals, called the public. But, as we remarked before, in this regard the judicial voice in America is less certain in tone than in England. We should be willing to follow the English rule, in this state, unless there were a preponderance of American authority against it. But fortunately we find this wholesome jurisdiction sustained here by the great weight of authority, and, with modern experience, we deem it only a question of time when it must be universally asserted and exercised.

In Bigelow *v.* Hartford Bridge Co., *supra,* Storrs, J., takes occasion to say: "Indeed it is upon the ground of particular injury to the plaintiff, distinct from what he suffers in common with the rest of the public, that all applications for injunctions against what is a public nuisance are sustained. And there is no good reason why, apart from such special injury, relief should be granted in this mode at the instance of a particular individual. Courts of equity, in this respect, proceed on the principle which prevails in courts of law, that an action will not lie in respect of a public nuisance, unless the plaintiff has sustained a particular damage from it, and one not common to the public generally. To preserve and enforce the rights of persons as individuals, and not as members of the community at large, is the very object of all suits, both at law and in equity. The remedies which the law provides in cases where the rights of the public are affected, are ample and appropriate; and to them recourse should be had when such rights are violated. The courts of equity in England will indeed sustain informations, not by individuals, but at the suit of the attorney general or the proper crown officer, for the purpose of abating public nuisances and what are termed pourprestures. That mode of proceeding has been, however, hitherto unknown here, and whether it would be tolerated in any case it is unnecessary to consider." 14 Conn. 578.

This is not a very accurate statement of the jurisdiction, which does not go to abate, but to restrain, which is the very ground of it, as distinct from legal remedies. The court holds the jurisdiction in cases of private nuisance and of public nuisance inflicting particular injury, at the suit of an individual, and questions it at the suit of the state. It is not easy to comprehend why the remedy should avail against the less evil, and not against the greater; why

equity should interpose to restrain what affects one person only, and refuse its protection against what affects all persons; in the case of a public nuisance, restrain it at the suit of one whom it especially aggrieves, and refuse to do so for the public whom it equally aggrieves. The reason assigned signally fails; for remedies at law reach private as well as public nuisances.

If, in saying that the remedy by information in behalf of the state was hitherto unknown there, the court meant in Connecticut, it was probably correct; if in the United States, it was certainly mistaken.

Bigelow *v.* The Hartford Bridge Co. was decided in 1842. As early as 1834, the jurisdiction was entertained and asserted by the court of chancery of New Jersey, in Attorney General *v.* New Jersey R. R. Co., 2 Green, 136. The chancellor says: "It would seem, at first, incongruous and improper for this court to interfere in cases of public nuisance. The very fact that nuisances of that character are offenses against the community, and necessarily savor of criminality in a greater or less degree, would seem to distinguish them as matters not proper to be dealt with by this court. But the jurisdiction of chancery, to a certain extent, in cases of public nuisance, appears to be admitted, although it has been very rarely exercised. It is asserted by Lord Hardwicke in Baines *v.* Baker, Ambler, 159, 3 Atkyns, 750, and is considered as existing by Lord Eldon, in the case of the Attorney General *v.* Cleaver, 18 Vesey, 211. He speaks with caution on the subject, as though it were new but not disputed ground. Chancellor Kent, in Attorney General *v.* Utica Ins. Co., 2 Johns. Ch. 371, appears rather to question the jurisdiction; considering that the cases of pourpresture which have often occurred in the Court of Exchequer on the equity side, differ in some im-

portant particulars from a strict case of public nuisance. He seems to think that the case of Baines *v.* Baker, before Lord Hardwicke, has been misunderstood. It was a bill filed by one individual against another, to stay building an hospital for people infected with the smallpox, very near the homes of several tenants of the plaintiff. The court said, if it were a nuisance at all, it was a public nuisance; that bills of that sort were founded on nuisances at common law, and if a public nuisance it should be an information in the name of the attorney general; and then it would be for his consideration whether he would file such information or not. Chancellor Kent throws out a doubt whether it was not meant that the attorney general might file an information in the King's Bench. Such has not been held to be the meaning by English lawyers or courts, and it appears to me their construction is the right one."

This is feeble language compared with the English cases cited. It is certainly not true in our day, that the English courts rarely exercise the jurisdiction; and the caution which the chancellor attributes to Lord Eldon has long since passed out of the court. It may be safely assumed that the chancellor of New Jersey who asserted the jurisdiction then, would be less timid in doing so now. But in that day he adds: "The very fact, however, that there may be a doubt on the subject by intelligent jurists, should be sufficient to induce caution on the part of this court. In cases of public nuisance there is an undisputed jurisdiction in the common-law courts by indictment, and a court of equity ought not to interfere in a case of misdemeanor, when the object sought can be as well attained in the ordinary tribunals." And so, asserting the jurisdiction, he denied the motion.

In 1836, notwithstanding the cases presently noticed in

2 Johns. Ch. and Hopkins, Chancellor Walworth asserted and enforced the jurisdiction in New York. The attorney general filed an information to restrain the defendant corporation, claiming a right so to do, from tapping a canal. The chancellor sustained the jurisdiction and the injunction, saying: "This court has jurisdiction to restrain any pourpresture, or unauthorized appropriation of public property to a private use, which may amount to a public nuisance, or may injuriously affect or endanger the public interest. And when the officers entrusted with the protection of such public interests, acting under the sanction of their official oaths, believe the intended encroachment will prove injurious to the navigation of the canals, private persons should not be permitted to interfere with the waters or embankments of the canals, contrary to law, upon a mere opinion, although under the sanction of an oath, that the intended trespass upon the public rights would not be an injury to the public." Attorney General *v.* The Cohoes Co., 6 Paige, 133. In emergency, the New York chancery overlooked Chancellor Kent's coy doubts and nice subtleties, and assumed the jurisdiction which he had involved in such learned obscurity.

In Georgetown *v.* Alexandria Canal Co., 12 Peters, 91, which was a bill to restrain the defendants from erecting a nuisance under their charter, decided in 1838, the supreme court of the United States thus state the jurisdiction:

"Were it even admitted that the canal company had exceeded the authority under which they are acting, nevertheless, as the Potomac River is a navigable stream, a part of the *jus publicum,* any obstruction to its navigation would, upon the most established principles, be what is declared by law to be a *public nuisance.* A public nuisance being the subject of criminal jurisdiction, the ordinary and

regular proceeding at law is by indictment or information, by which the nuisance may be abated, and the person who caused it may be punished. If any particular individual may have sustained special damage from the erection of it, he may maintain a private action for such special damage, because to that extent he has suffered beyond his portion of injury in common with the community at large. Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisance, by an information filed by the attorney general. This jurisdiction seems to have been acted on with great caution and hesitancy. Thus, it is said by the chancellor in 18 Vesey, 217, that the instances of the interposition of the court were confined and rare. He referred, as to the principle authority on the subject, to what had been done in the court of exchequer, upon the discussion of the right of the attorney general, by some species of information, to seek, on the equitable side of the court, relief as to nuisances and preventive relief. Chancellor Kent, in 2 Johns. Ch. 382, remarks that the equity jurisdiction in cases of public nuisance, in the only cases in which it had been exercised, that is, in cases of encroachment on the king's soil, had lain dormant for a century and a half; that is, from Charles I. down to the year 1795. Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all, that it is one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it."

These views were adopted by the United States circuit court of Michigan, in the same year, on a bill for injunc-

tion against a nuisance. The court asserts both branches of the jurisdiction in equity, and says: "No individual has a right to prosecute for a public nuisance, in his own name or at his own instance, in this form of action, unless the nuisance be irreparably injurious to himself. The United States, through their law officer, might well ask to have this nuisance, if it shall be one, abated; but the special and private injury to an individual is the only ground on which he can ask relief against it." Spooner *v.* McConnell, 1 McLean, 337.

And the same views were again recognized and affirmed by the supreme court of the United States, in 1851, in Pennsylvania *v.* Wheeling Bridge Co., 13 Howard 518.

The same question came before the supreme court of Pennsylvania in 1854, at the suit of the attorney general against a railroad company to restrain them from filling up a canal in the construction of their road, under their franchise. The court says:

"The boldness of this act seems almost like a studied test of the vigilance of the canal commissioners, and of the efficiency of the remedies which the state has provided for the prevention of injuries. It is hoped that the equity remedy, being somewhat unusual and peremptory in its character, will not be applied to an act which does so little injury. But writs of *capias,* replevin, foreign and domestic attachment, estrepement, prohibition and *habeas corpus,* are quite as efficient and peremptory in their power, and most of them more easily obtained, and yet they are common law writs. And estrepement applies to many of the same cases as injunction, and may issue without bail. And so it was once with the prohibition. In most of the cases, moreover, in which we hear this objection to the injunction, the common law allows more speedy remedy, for it permits the in-

jured party to redress himself by driving off the wrongdoer.

"The argument that there is no irreparable damage would not be so often used by wrongdoers, if they would take the trouble to observe that the word "irreparable" is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimable only by conjecture and not by any accurate standard. 3 Railway Cases, 106, 345; 4 id., 186; 1 Sim. & Stuart, 607; 3 Atkyns, 21; 3 Johns. Ch. 501; 16 Pick. 525; 3 Wharton, 513. As this argument is generally presented, it seems to be supposed that injunctions can apply only to very great injuries; and it would follow that he who has not much property to be injured, cannot have this protection for the little he has.

"Besides this, where the right invaded is secured by statute or by contract, there is generally no question of the amount of damage, but simply of the right. He who grants a right cannot take it away, even on giving a better, without a new agreement for the purpose. 19 Eng. L. & E. 287; 16 Pick. 525; 4 Simons, 13; 8 Wend. 99; 8 Paige, 351; 2 Swanston, 253. And such was our decision in the late case of the Western Saving Fund Co. *v.* Philadelphia.

"And so it is where the public rights are invaded. In the case of the Attorney General *v.* The Cohoes Co., 6 Paige, 133, there was an offer to tap the state canal for a mill purpose, and it was stopped by injunction, without any regard to evidence tending to disprove damage. And in Downing *v.* McFadden, 18 State R. 334, we justified the keepers of the public works in abating a house that en-

croached upon the enbankment of a railroad, though a jury had found that it did no injury.

"And when railroad companies or individuals exceed their statutory powers in dealing with other people's property, no question of damage is raised when an injunction is applied for, but simply one of the invasion of a right. 1 Railway Cases, 135; 4 Mylne & C., 254. And railway companies will not be allowed to exercise their discretion capriciously (1 Railway Cases, 288), but the court will supervise their discretion, as in seeing that they shall not take more land than is needed, nor take any land merely in order to get earth for embankments (1 id. 576; 4 Mylne & C. 116); and that they do not unnecessarily affect a mill-race by too small an arch over it. 1 Russell & M. 181; 2 Railway Cases, 280.

"Railway companies must stand upon a strict construction of their chartered privileges. 21 State. R. 22; 9 Beavan, 391; 2 Mann & Granger, 134; 7 id. 253; 1 Railway Cases, 576; 3 id. 563; 21 Eng. L. & E. 620. With the immense powers that are freely and loosely given to them, this much restraint is essential to the protection of private rights. 1 Railway Cases, 154, 504, 636; 4 Mylne & C. 120.

"If they step one inch beyond their chartered privileges to the prejudice of others or of the stockholders, or offer to do any act without the prescribed preliminary steps, they are liable to be enjoined, irrespective of the amount of damage." Commonwealth *v.* Railway Co., 24 Pa. St. 159.

There is no doubt or hesitation here. Time and experience had done their work; as the court says, referring to the English cases: "Such at least is the practice elsewhere,

and it may be well for us to learn from the experience of others." And the same doctrine is reaffirmed by the court, in 1867, Sparhawk *v.* U. P. Railway Co., 54 Pa. St. 401.

The question came again before the New Jersey chancery and court of errors in 1853, upon information and bill to restrain a corporation from exercising their franchise by the erection of a public nuisance. The chancellor refused a preliminary injunction, but briefly and clearly asserted the jurisdiction. He says: "I have no doubt of the power of the court to interpose in this case by injunction; nor of the propriety of its exercising that peculiar jurisdiction, if, as alleged, the defendants, under and by virtue of the power of the legislature, conferred upon the Patterson and Hudson River Railroad Company, to bridge the river Passaic, are obstructing the navigation of that river, in violation of the provisions of the act from which they derive their authority."

The court of errors reversed the order of the chancellor and granted the injunction, stating the doctrine in the language of Story's Equity. " 'In regard to public nuisances,' says Justice Story, 'the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances strictly so called, but also to pourprestures upon public rights and property, as public rivers, etc.' " Att'y Gen. *v.* Hudson River R. R. Co., 1 Stockton, 526.

And again in 1855, upon an information and bill to restrain abuse of corporate franchise, Chancellor Halsted had allowed a preliminary injunction, in an opinion in which, after his few authoritative words in the case last cited, he tacitly assumes the jurisdiction. A motion for attachment for violation of the injunction was heard before

Green, C. J., sitting for Chancellor Williamson, who had succeeded Chancellor Halsted and had been of counsel in the cause. Chief Justice Green reviews the merits of the case at great length, without a word said of jurisdiction, and sustains the information on the merits. He gives a second opinion on the merits, upon exceptions taken, with the same significant silence. Elmer, J., delivers the judgment of the court of errors on appeal, at some length, affirming the orders of the chancery, with the same tacit recognition of the jurisdiction, as one not to be doubted. An eloquent silence, following twenty-one years after the faltering opinion in Att'y Gen. *v.* N. J. R. R. Co., *supra.*

We can see nothing in conflict with these cases in the intermediate case of Att'y Gen. *v.* Paterson, 1 Stockton, 624, cited for the defendants, which is indeed a confirmation of the jurisdiction. In 1865, in Pennsylvania, one corporation filed a bill against another to enforce the charter obligations of the defendant. The court holds that, suffering no special injury, the plaintiff could not maintain the bill; and thus, after much similar discussion, assigns the reason of the judgment; "It is plain, therefore, that a private individual may not, in the absence of a special right or special authority, vindicate the public for breach of duties owing to her alone. Nobody will doubt that he may enforce against public corporations, contracts and duties which they ought to perform towards himself; and, in doing this, sometimes the public interests are subserved, and this is all right. But it is his special interest that gives him the right to act. This might be enough for this case; but it may not be out of place to add that we have no doubt but the remedy by a bill for an injunction, sued out on the part of the commonwealth, by the attorney general, would lie against a company to compel them to observe their charter obligations.

It would in this case be a substitute for a *mandamus,* and come within the power given to courts of equity to control corporations other than municipal." Buck Mountain C. Co. *v.* Lehigh Coal & N. Co., 50 Pa. St. 91.

The same question came before the supreme court of Missouri, in 1873, upon an information in equity against a municipal corporation. Shepley, S. J., in delivering the opinion of the court, reviews the cases at great length, and sustains the jurisdiction. This is his general conclusion: "It seems to me that, both on principle and authority, this proceeding is maintainable; and that, while in case of private corporations, the courts of this country, will sustain the conclusions arrived at in 2 Johns. Ch. 371, in 103 Mass. 138, and 104 Mass. 239, that the writ of *quo warranto* affords ample and efficient remedy for violation of its charter or misuse or abuse of its powers, and that therefore this form of proceeding will not lie, the powers of the state, through its proper legal officers, to restrain public corporations from a violation of the law will be sustained." State *v.* Saline Co., 51 Mo. 350.

There is a strong presumption that the term private corporations, as here used, is intended to designate private trading corporations; and the term, public corporations, to include all *quasi* public corporations, whose relations with the public involve public interests and public questions. This is indicated by the cases in Massachusetts on which the distinction is rested, and the language of the court in those cases; and seems to follow from many other cases cited and commented on, which certainly do not confine the remedy to private corporations, in the sense in which these defendants are such. And, indeed, it is not easy to see how a private trading corporation could cause public injury by a mere abuse or excess of franchise, or

otherwise than as a natural person might. This construction of Judge Shepley's language is confirmed by the additional opinion of Judge Bliss, who discusses the question at some length, and recognizes no such qualification of the jurisdiction. He says:

"How much more adequate the remedy that prevents the doing of any legal wrong, than those that are merely punitive, or that compel every tax payer to prosecute." "I am aware that the jurisdiction of a court of equity, by injunction, even to restrict a public nuisance, has been denied in Massachusetts under their statute (Hale *v.* Cushman, 6 Metc. 425), but it is established in England, and generally admitted in the United States; and the rule as to the proper plaintiff is, I believe, universal."

And this is further confirmed by the dissenting opinion of Wagner, J. He objects to the jurisdiction assumed, as injuriously affecting the rights of stockholders, which must mean those of *quasi* public corporations. And we feel safe in assuming that, so far as it is necessary here, this decision is in accord with the others cited on this point.

In our investigations of this question, we have carefully examined all the authorities cited at the bar and many others. It is probable that there may be others, which have escaped our attention. But we think we have sufficiently shown that the jurisdiction has long been asserted and is very generally recognized in the United States. And, before leaving this review of the authorities sustaining the jurisdiction, we wish to quote the terse and comprehensive statement of its scope, given by the supreme court of Pennsylvania. "This remedy extends to all acts that are contrary to law, and prejudicial to the interests of the community, and for which there is no adequate remedy at law." Kerr *v.* Trego, 47 Pa. St. 292.

Two cases in Massachusetts were cited for the defendants, as denying the jurisdiction. They do not seem to us to do so.

The Attorney General *v.* Salem, 103 Mass. 138, was an information in the nature of *quo warranto* against a municipal corporation for failure of duty. The court holds that the remedy does not lie in the case, for reasons not pertinent here. It was, perhaps, a case for *mandamus.* Having so decided the case, Morton, J., adds:

"But the plaintiffs urge that this proceeding may be treated as a proceeding for general relief on the equity side of the court. If the necessary amendments were made to change it into an information or a bill in equity, we are of opinion that it still could not be sustained. Whether, in this state, in the absence of any express grant of jurisdiction, the attorney general can bring a bill in equity to redress any public wrong or grievance, need not be decided. It is clear that such a bill cannot be sustained for a private wrong. In this case, the grievance complained of is not a public wrong, in which every subject of the state is interested; and therefore cannot be redressed by a public prosecution or proceeding."

This was only a refusal to pass upon the question, because the question was not before the court. The refusal certainly implies a doubt, very much such as that suggested by the supreme court of Connecticut. But the doubts even of such respectable tribunals cannot weigh against so much solid authority.

The Attorney General *v.* Tudor Ice Co., 104 Mass. 239, was an information on the relation of a private person, to restrain the defendant from trading outside of its franchise. The court says: "The Tudor Ice Co. is a private trading corporation. It is not in any sense a trustee for

public purposes. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation, and cannot, under any legal construction, be held to constitute a nuisance." "No case is therefore made, upon which, according to the principle of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery."

This disposes of the case. But the court proceeds to quote, with implied approbation, Att'y Gen. *v.* Utica Ins. Co., *infra,* and Att'y Gen. *v.* Reynolds, 1 Eq. C. Abr. 131; and to make this comment on later English cases: "The modern English cases, cited in support of the information, were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain, and doing acts which were deemed inconsistent with the rights of the public."

Without stopping to consider the accuracy of this comment, we content ourselves with the remark that no doubt is implied of the jurisdiction of such informations as those now before this court.

After some particular comments on certain English cases, the court proceeds to state the position of Massachusetts on this question, thus: "However that may be, by our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate and complete remedy at law, as well in suits by the commonwealth as those brought by private persons. Gen. Stat. ch. 113, sec. 2."

This shows that the court seems to think their jurisdiction, in such cases, crippled by statute. And yet that court has, not only in the cases above cited sustained priv-

ate suits within the jurisdiction in question, but appears to have acted on the public branch of that jurisdiction in several cases. It is true that they are cases of nuisance, but they seem to us to be within the broad principles laid down in England and this country. Att'y Gen. *v.* Boston Wharf Co., 12 Gray, 553; Dist. Att'y *v.* Lynn & B. R. R. Co., 16 Gray, 242; Commonwealth *v.* Smith, 10 Allen, 448. The case in 16 Gray appears to us fully to support the jurisdiction of equity to restrain corporations from excess or abuse of franchise.

Other cases outside of New York were cited against the jurisdiction but on examination we cannot consider any of them as having bearing and weight upon the question. But the cases in New York require consideration.

In that state the authorities are conflicting, and do not appear to us to rest on distinct and settled principle. We have already cited several cases decided by Chancellor Kent and other judges, sustaining the private remedy in equity against nuisance, and one case sustaining the public remedy. And the last case which we have seen in the court of appeals sustains the public remedy in equity. People *v.* Vanderbilt, 26 N. Y. 287.

The jurisdiction, as applied to abuse or excess of corporate franchise, is denied in the last case we have seen in that court on the precise question. People *v.* Albany & Vt. R. R. Co., 24 N. Y. 261.

We have been referred to several cases, in other courts of that state, for and against the jurisdiction. For it are Davis *v.* Mayor, etc., 2 Duer, 663; People *v.* Mayor, etc., 32 Barb., 102; People *v.* Albany & Vt. R. R. Co., 37 Barb. 216, reversed in 24 N. Y. 261. Against it are dicta of Vice Chancellor McCoun in Verplanck *v.* Mercantile Ins. Co., 1 Edwards, 88, and of Strong, J., in Smith *v.* Lock-

wood, 13 Barb. 219; People *v.* Miner, 2 Lansing, 407 and People *v.* Albany & Vt. R. R. Co., *supra.*

We must accept this last case as authoritative on the precise point, for the present, in New York; though in view of all the authorities, it is difficult, at this day, to reconcile it in principle with the later case of People *v.* Vanderbilt. The latter case goes on the ground of pourpresture, which is a special kind of public nuisance. The common-law defines a nuisance as anything unlawful, which works hurt, inconvenience or damage; and a pourpresture, formerly an intrusion on the King's soil, is now defined as an encroachment upon public rights or property. It is easy to understand how the courts have, of late, applied both terms to unlawful excess or abuse of corporate franchise, as an encroachment upon and a hurt to public rights. But it is difficult to appreciate how the courts of New York continue to adhere to the physical meaning of pourpresture, in the light of all the modern authorities, and to relieve the public and individuals against material nuisance, and refuse to relieve the state against the most serious form of pourpresture, only because it is immaterial.

And we must be permitted to remark that the opinion of the court in 24 New York is destitute of authority cited to uphold it; rests on the unsupported *dictum* of the court; and, however respectable in itself, and for the authority of the court which utters it, does not compare favorably with the able and learned opinions of Duer, J., in Davis *v.* Mayor, etc., and of Hogeboom, J., in People *v.* Mayor, etc. In the face of all the authorities, and apparently ignoring them, it disposes of the question of jurisdiction in this brief and bare sentence: "Any remedy which the public may have for a breach or neglect of duty imposed by the Railroad Act, must be by *mandamus, quo warranto* or in-

dictment; and the performance of such duty cannot be specifically enforced in equity at the suit of the attorney general." Outside of New York, this opinion can weigh little against the current of authority.

We are led to believe that the singular and erratic course of the New York courts on this subject is somewhat attributable to the case of Attorney General *v.* Utica Ins. Co., 2 Johns. Ch., 371, in 1817, followed in 1825 by Attorney General *v.* Bank of Niagara, Hopkins, 354.

Whatever degree of deference might be due, in this day, to the decision of so illustrious an equity judge as Chancellor Kent, made at so early a day, we are unable to regard Attorney General *v.* Utica Ins. Co., as authority against the jurisdiction under consideration. It was an information in equity by the attorney general for an injunction against the corporation to restrain it from usurping banking powers. The court held that no injury to the public or private persons was averred or apparent; which, in that day, if not now, would be adequate ground for dismissing the information. But the court goes on to discuss the equitable jurisdiction of nuisance and kindred cases, and incidentally denies the authority of equity to enjoin excess of corporate franchise; though the chancellor leaves room for an inference that he might have held otherwise, had a public evil been averred or apparent. It must be borne in mind that this was long before the era of great corporations in this country, and that the modern practice of courts of equity in England and this country, of applying the equitable remedy against nuisance to abuse of corporate franchise, was nearly or quite unknown. And the chancellor, passing from the single point of his decision, brings all his great learning to bear on all collateral questions, in such variety and at such length, that it is not altogether easy to discover

what his precise views were on many subjects discussed. We adopt the view of Chancellor Vroom, *supra,* that Chancellor Kent only "appears rather to question the jurisdiction." Be that as it may, it doubtless misled many, as V. C. McCoun, in Verplanck *v.* Mercantile Ins. Co., to think that the decision was against the jurisdiction under any circumstances. And with all our admiration of his learning and deference for his authority and veneration for his judicial qualities, we cannot help feeling that, as in the case of the exercise of the right of eminent domain, the great chancellor misled the courts of New York into error on this question also. In the one case, it took them some quarter of a century to return to sound principles. In the other, they have not yet done so. So mischievous is the sanction of a great name to error.

It is hardly necessary to add that we sustain the jurisdiction to enjoin a corporation from abuse or excess of franchise, or other violation of public law to public detriment, on information in equity, filed *ex officio* by the attorney general.

It will be perceived that we do not found our jurisdiction on ch. 148, secs. 13 and 14, R. S. We quite agree with the counsel for the defendants, that these sections confer no jurisdiction on this court. Whether they operate to limit the jurisdiction of the circuit courts, or are only declaratory of the jurisdiction which we hold to exist outside of them, we need not consider here. It is certain that they do not limit the jurisdiction of this court, if it be competent for the legislature to limit it.

The jurisdiction which we claim for this court puts the writ of injunction to a prerogative use. And we are strongly inclined to think that our views of our jurisdiction of these informations, follow almost logically from our

views of our jurisdiction of the writ as a *quasi* prerogative writ. And we have illy expressed ourselves, and illy applied the authorities quoted, if we have not already made it apparent that we consider this jurisdiction, in this court, a necessary and most salutary one for the preservation of public right and public authority.

It was objected to the exercise of the jurisdiction in these cases, that it would deprive the defendants of the right of trial by jury, secured by sec. 5, art. 1 of the state constitution, extending to all cases at law.

It has been held by this court that this constitutional guaranty does not extend to cases in equity, including such cases of legal right as, by the practice of courts of equity, had become of equitable cognizance at the time of the adoption of the constitution. Stilwell *v.* Kellogg, 14 Wis. 461, affirmed in several late cases cited in Vilas & Bryant's notes.

The constitution was adopted in 1848. And the English cases prior to the time are authority to show this equitable jurisdiction. For it was fourteen years later that the court of chancery was authorized by act of parliament to determine all questions of law and fact, with one qualified exception, 25 and 26 Vict., ch. 42, sec. 1. And the English and American cases cited show that this jurisdiction was an established equitable jurisdiction at the time the constitution was adopted. But were this otherwise, we cannot perceive of what trial by jury, of what right, these informations can deprive the defendants. Their whole defense rests in questions of law. There is no fact for them to traverse, except their violation of the law. And their denial of this, if indeed they are to be taken as denying it, is manifestly formal only. And, if it were a *bona fide* denial, these proceedings would not deprive them of any

legal right triable by jury. If the law be valid, they are bound to obey it. If they are obeying it, the injunction cannot harm them or deprive them of any trial. If they are not obeying it, there is nothing involved here to be tried. The objection is specious, but is only specious.

The question is not here, and we shall not consider it, whether, under our practice, we could take equitable jurisdiction of a case in which a legal right is involved triable by jury, and provide for a trial of that right by a jury, so as to satisfy the provisions of the constitution.

It was also urgently pressed upon us that, all other questions apart, no equitable proceedings would lie to enforce chapter 273 of 1874, because it furnishes its own remedies by providing penalties against the corporations violating it. We do not consider the rule on which the defendants rely, applicable to cases of this character, and should probably hold so in these cases, if the fact were as stated. But we shall not discuss the question, because it is not here. These informations go to enforce the rates fixed by the statute itself, not rates fixed by the commissioners. It does not appear that the commissioners have fixed any rates or classified any article of freight. And for violations of the rates fixed by the act itself, no penalties are provided against the corporations; certain civil remedies are given, but no penalty. There are penalties against agents; but the remedy against the corporations is a distinct thing from the liability of their servants, as individuals, for violations of public law, mandatory upon them as private citizens.

This is, perhaps, as appropriate a place as we may find to notice an objection taken to the informations. It is said that they aver no specific injury to the public. Such an injury, in such a case, is a conclusion of fact, rather than a fact. The injury is a logical sequence of the facts. The

acts of the defendants charged give the jurisdiction; and it is for the court to judge of the consequent evil. Many of the cases cited import, and some of them express, the rule governing such cases. It is not the averment of the pleader, but the nature of the acts pleaded, which is material on the question of public injury. The conscience of the court must be satisfied; and it may be satisfied or not, with or without averment. If an information should aver public mischief, where the court could see that there was none, the averment would go for nothing. So, without averment, it suffices that the court can see the public injury. It was hardly questioned that, in these cases, a public injury is apparent in the acts charged against these defendants. Directly or indirectly, this injury reaches every inhabitant of the state, and affects the whole state in its corporate capacity. It was, indeed, confidently foretold by the counsel for the defendants, that obedience to the law would work a still greater public injury. Upon that it is not for us to speculate. And if we could, we cannot sit here to offset a speculative injury arising from obedience of law, against a positive injury arising from disobedience of law. In these days of self-judging insubordination, it would ill become this court to set so bad an example of compromise between right and wrong. We cannot look to the consequences of legislation. Let the legislature see to that. We have no discretion. We, at least, must obey the law. We can only see the direct public injury. And the acts charged satisfy the conscience of the court of the public injury. If the acts be illegal, that is sufficient.

Whether an information of this character would lie, as suggested by Mr. Brice, even though no definite injury had been done, or was likely to be done, to the public, we are not called upon to decide in these cases.

III. These questions of jurisdiction settled, still leave

some preliminary matters to be considered, before we can reach the provisions of chapter 273, of 1874, which the informations charge that defendants disregard and violate.

The act has many provisions not material in these causes. And this is a convenient place to state briefly the provisions which are material to any consideration involved here. The act classifies all the railroads of the state; fixes different *maximum* rates for passengers for each class of roads; classifies certain specified articles of freight; fixes *maximum* rates for each of the classes of freight, differently affecting different classes of roads; provides civil remedies against the companies, and penalties against their servants, for taking greater rates than those fixed by the act; provides for railroad commissioners, and gives them authority to classify articles of freight not classified by the act, and to reduce rates of freight; and provides civil remedies and penalties against the companies for taking greater rates than those fixed by the commissioners.

It does not appear that the commissioners have acted in any way under the act; and the question of the validity of their powers, is therefore, not here.

The act was approved by the governor, March 11. It was contended for the defendants that it was repealed by chapters 292 and 341 of the same session; both approved by the governor March 12. We have informed ourselves that the three acts passed the legislature in the same order in which they were approved.

This is a question of constructive repeal. In Attorney General *v.* Brown, 1 Wis. 513, this court adopted the uniform rule governing such cases. If there be two affirmative statutes upon the same subject, one does not repeal the other, if both may consist together; and we ought to seek for such a construction as will reconcile them together.

Section 2 of chapter 292, in which the repeal by that act

is claimed, amends sec. 55 of the general railroad act of 1872. The section amended provides that existing companies shall have all the powers and be subject to all the duties prescribed by that act. The amendment provides that they shall have all the powers of the general railroad act and of their charters. It seems to us that the intention of the amendment is very manifest; and it is a question of legislative intention. The amendment was probably adopted *ex abundanti cautela,* to remove any possible doubt that the franchises of the general act had superseded the franchises of existing charters. And the amendment is not a grant of powers, but a mere confirmation of powers previously granted. It left the companies where it found them. And if chapter 273 be a valid alteration of railroad charters previously existing, it is no more repealed by sec. 2 of chapter 292, than any other previous amendment of such charters. The powers of railroad companies confirmed by this section, are those powers of their charters, controlled by all amendments of them and other public acts validly affecting them, as they existed when the section was passed. It is not difficult to make chapters 273 and 292 stand together.

Chapter 341 is an act in relation to railroads with many provisions for their general government, perhaps all resting in the police power of the state. Amongst the rest, sec. 9, under which the repeal is claimed, provides a penalty against any railroad company taking more than a reasonable rate of compensation. It was claimed that this provision licenses a reasonable rate of compensation in all cases, and therefore repeals the *maximum* rates specifically fixed by chapter 273. There are three answers to this:

First. Chapter 273 limits the companies to the *maximum* rates provided, but does not expressly license them to exact

those full rates. And it might well happen, and the legislature may have so considered, that rates then reasonable might, in change of circumstances, become unreasonable; and that these companies continuing to charge the full *maximum* rates might be charging unreasonable rates.

Secondly. The act provides no fixed, statutory rates of freight for class C of roads. This class is forbidden to charge more than in June, 1873, which might be an unreasonable rate. And it includes all railroads not included in classes A and B, and might therefore well include roads not operated in June, 1873, which would have no limit of rates of freight under the act. Here is ample scope for sec. 9 of ch. 341, without disturbing the fixed rates of ch. 273.

Thirdly. Chapter 273 does not assume to fix rates for all traffic on railroads. The commissioners might not fix the remaining rates, or might delay in doing so, or might naturally, by inadvertencies, omit articles of freight in their classification. Here again is subject for sec. 9 of ch. 341 to act upon, applying the rule of reasonable compensation.

It must be admitted that this looks like careless and slovenly legislation. But either of these views is one which we are bound to seek, and which, seeking, we readily find, to reconcile the two acts and make them consist together.

The question of constructive repeal is one of legislative intent. The three acts were passed within two successive days, and must have been pending together. And it is not possible to believe that the legislature intended to defeat the operation of ch. 273 by the other acts, going through the forms of legislation contemporaneously with it. And this question of intent seems to us to be absolutely determined by the passage of joint resolution No. 11, delaying the publication of ch. 273, so that it could not become a law

until after chapters 292 and 341 had taken effect as laws; so that the constructive repeal should precede, not follow, the act repealed. The resolution, and the consequent order of publication of the three acts, seem to us not only to demonstrate that the legislature intended no repeal, but might possibly have had the effect, if there must be a repeal, of making chapter 273, as the later act, repeal sec. 2 of ch. 292, and sec. 9 of ch. 341.

It was contended by the *Chicago, Milwaukee & St. Paul Company,* that it is not in class A of railroads, because the corporation in that class is called the Milwaukee & St. Paul Company; whereas the defendant had just one month before added the prefix, Chicago, to its name, under a statute authorizing such change of name. This was merely assuming an *alias dictus,* not changing the body nor wholly changing its name. It had been called by one name and chose to be called by another, very similar; differing only by the addition of one word, as a sort of *prænomen.* These facts are pleaded on both sides. The information avers that there had been no other corporation of the name used in the chapter, and the answer cannot be held to deny it, though there is a qualified general denial. Sexton *v.* Rhames, 13 Wis. 99; Allis *v.* Sabine, 17 Wis. 626. Indeed we think that there is a presumption that there is no other corporation of the name. We have therefore little difficulty in holding that the corporation named in the act is the defendant. It is said that we cannot resort to evidence *aliunde* to ascertain the corporation intended by the act. Probably not, but we do not need any. We can, however, look into the laws of the state to solve the question. In another case of misnomer of a corporation, this court held, "that the objections to the act are too technical and evasive. Legislative enactments are not to be defeated on

account of mistakes, errors or omissions, any more than other writings, provided the intention of the legislature can be ascertained from the whole act." The court might well have added, but that it was not there necessary, that it could equally look into other acts in *pari materia,* as the rule is. Nazro *v.* Merchant's M. Ins. Co., 14 Wis. 295. This act, by the name it uses, intended some corporation; there is no other but this, and this had lately been designated by the name used. And we find for years before, acts granting powers to the Milwaukee & St. Paul Railway Company claimed here in its answer by this defendant. We find a grant of power to it, passed at the same session and approved by the same governor, March 10, the day before chapter 273. We find no trace in the statutes of any other corporation by either of the *alias dicti* of this defendant. We should assuredly hold it entitled to the grant of March 10, and we will hold it subject to the act of March 11. We should be ashamed to sit here and suffer the law to fail, where the design of the legislature is so apparent, through so mere a verbal quibble on so mere a verbal accident.

Rex *v.* Croke, 1 Cowper, 29, cited by the defendant, goes upon a confusion of things, not of names; one designating, as Lord Mansfield says, the corporation at large; the other, a select body. And in People *v.* Oakland Co. Bank, 1 Douglass, 282, also cited, the names of the corporation chartered and of the corporation repealed were so essentially different, that the court could not gather the legislative intention. The court says: "It is not intended to assert that there should be an exact correspondence between the act creating and the one repealing a corporate charter, so far as the name of the corporation is concerned. All that is required is, that the repealing act should indicate with sufficient clearness the name of the corporation intended. There

should be such a correspondence as to leave no doubt of the intention of the legislature." There is surely such a correspondence here.

We imply no censure on any of the distinguished counsel who argued these motions with so much professional ability. We allude to the defendants when we say, that we are constrained to regard some of these points last considered, as unworthy of these causes. And, while we are not disposed to censure them for litigating the main questions involved, these petty points could not fail to remind us of the pungent criticism of Lord Langdale, in Brown *v.* Monmouth R. & C. Co., on such technical points introduced by other great corporations into other great litigations.

IV. A question was made on the argument, of the effect of the constitutional amendment of 1871 upon sec. 1, art. XI, of the constitution.

The provision of the constitution, as first framed, was, that corporations might be formed under general laws, but not by special acts, except in cases where the legislature should judge that the objects could not be attained by general laws; and that such general laws or special acts might be altered or repealed at any time.

Of the first clause of this section it was said: "It seems very obvious, on the face of the provision, that it aimed at the evils of special legislation. The provision is against creating corporations by special acts." "It is doubtful also whether this clause can, at best, be regarded as anything more than directory to the legislature, as it leaves the whole matter, after all, to its judgment." Clark *v.* Janesville, 10 Wis. 119.

And, as a directory provision, it proved to be largely unavailing, as our statute books abundantly show. Therefore came the amendment of 1871, prohibiting special legisla-

tion in this and other cases. This amendment prohibits the legislature from passing special laws, amongst other purposes, for granting corporate powers or privileges, except to cities; and directs that the legislature shall provide general laws for purposes for which special acts are so prohibited, which shall be uniform throughout the state.

It was contended that this amendment, prohibiting the grant of corporate powers by special act, operates as a repeal of the reserved power of altering existing special charters by special acts; that the prohibition to grant corporate powers includes, not only the creation of new corporations, but also the grant of new powers to existing corporations, and by inference the limitation or regulation of existing corporate powers, by special acts; and so confines reserved power to alter special charters, to general laws.

The difficulty of altering special charters by general laws, which shall be uniform throughout the state, is very apparent. And if this were the true construction of the amendment, it would almost follow that special charters could no longer be repealed by special acts, and that the whole reserved power was relegated to general laws. It was even said by counsel that the charter of a corporation, organized under general law, could be repealed only by repeal of the general law; so that one corporation of one kind could not be subjected to repeal without repealing the charters of all corporations of the same kind under the same general law. This is almost an argument *ad absurdum*. And it is all a very inconvenient and, we may say, dangerous construction, which we should be very unwilling to adopt.

We shall not stop to dwell here on the importance of the reserved power. We may do that later, in a more appropriate connection. We shall only assume here that it is a

power of great significance and gravity; of such moment, that it is impossible to believe that the legislature and the people intended to surrender or impair it; very hard to believe that they suffered themselves to surrender or impair it, by implication, in an amendment designed for quite a different purpose, quite consistent with the reserved power.

But the purpose of the amendment, so far as it affects sec. 1, art. XI, appears to us very manifest. It was designed to act on the first clause only of the section, taking away the legislative discretion and changing the directory provision into a prohibitory one; and not to touch the second clause of the section at all, leaving the reserved power where it found it, to be exercised thereafter as theretofore, upon special charters, by special acts. The amendment is prospective only, not retrospective. It prohibits an old way and provides a new way of creating corporations, but was not designed to effect existing corporations in any way. If it could operate to take away legislative control over existing charters, it might well be argued—as it was in Indiana—that it operates to repeal them altogether.

We can see nothing in the letter or spirit of the amendment to warrant us in giving it a construction to impair the reserved power. Under the rule of constructive repeal, we are bound to give such construction to these constitutional provisions, as will leave both to stand together. It is not for us to wrest so great a power from the legislature, by construction, unless the legislature and the people have made such construction inevitable. And we feel bound to hold, and find no difficulty in holding, the phrase in the amendment, to grant corporate powers or privileges, to mean in *principio donationis,* and equivalent to the phrase, to grant corporate charters. This is implied not only by the word grant, but also by the word corporate. A franchise

is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understand it, franchise by act of incorporation.

There are cases in Iowa with some bearing on this question, which are not cited, but which we have carefully considered.

The constitution of that state, of 1857, art. III, sec. 30, prohibits local or special laws in certain cases; among these, for the incorporation of cities and towns; and provides that, in the cases enumerated, all laws shall be general and uniform throughout the state.

In Ex parte Pritz, 9 Iowa, 30, Davis *v.* Woolnough, 9 Iowa, 104, and McGregor *v.* Baylies, 19 Iowa, 44, the supreme court held that, under the clause of their constitution mentioned, the legislature had not power by special act to amend city or town charters, existing by special act at the time of the adoption of the constitution. With great respect for that court, we should hesitate long before concurring in the reasoning or adopting the rule of those cases. And the more so, because in Von Phul *v.* Hammer, 29 Iowa, 222, that court also held that, although the legislature could not amend existing charters, yet every corporation of the kind might amend its own charter, under a power in the general law. But we need not consider the reasoning of the Iowa cases, because we can not consider them applicable here. There is no equivalent in their constitution for the reserved power in ours, to enter into or control the construction of the clause in question.

The constitution of Indiana, 1851, art. IV, sec. 22, has a similar prohibitory clause of special legislation in specified cases, including laws for the punishment of crime and misdemeanors; and a similar provision for general laws uniform throughout the state. And the question came be-

fore the supreme court, whether a law punishing certain misdemeanors, local in its application and not uniform throughout the state, and therefore in conflict with the constitutional provision adopted, but which was in force at the time of the adoption of the constitution, was not repealed by the constitution. But the court held, without difficulty, that the constitutional requirement was prospective, and did not apply to laws passed before its adoption. State *v.* Barbee, 3 Porter, 358. This is an aid to our construction.

We hold the amendment of 1871 to relate to future corporations, and to leave existing corporations under the original provision of the constitution; and that, as to the existing corporations, the reserved power to alter or repeal remains unimpaired.

V. The *maximum* rates of chapter 273, of 1874, expressly apply to the railroads of the defendants. The defendants plead various antecedent charters, with express power to take toll, without express limitation. The exact language differs in different charters; but the substance is, we believe, alike in all: power to exact tolls in the discretion of the company, not essentially different from the power in the general railroad act of 1872.

And the defendants thereupon insist that the limitation of those powers in their charters, by the fixed rates of chapter 273, impairs the obligation of the contract of their charters, and is, therefore, in violation of the provision of the constitution of the United States, art. I, sec. 10, subd. 1, which provides that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

The construction and application of this clause by the supreme court of the United States are certain and defined, and are, of course, beyond the reconsideration of this court.

But a brief review of the clause and its construction is not irrelevant to the questions before us.

Mr. Madison, Federalist, No. 43, thus explains the policy and objects to this provision: "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of those fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen, with regret and indignation, that sudden changes and legislative interferences in cases affecting private rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations in public measures, and inspire a general prudence and industry, and give a regular course to the business of society."

If this be, as may be safely inferred, the sense in which the prohibition was adopted, it is very certain that its fram-

ers' did not foresee or intend the uses to which it has been put. So, indeed, Chief Justice Marshall himself admits, in his opinion, in the leading case. 4 Wheaton, 644.

As early as 1810, the supreme court of the United States held that an act of a state legislature might be a contract within the meaning of the prohibition, and therefore beyond subsequent legislative control. Fletcher *v.* Peck, 6 Cranch, 87.

In 1819, the same great tribunal held that the charter of any corporation, not municipal, was a contract within the prohibition, which the legislature could not impair, by subsequent amendment against the will of the corporation. Dartmouth College *v.* Woodward, 4 Wheaton, 518. And that remains the law of the land to this day.

It is easy to criticise the decision; to say that the very point was not in the case; to impeach the reasoning of the opinions. Many able jurists and statesmen have done so and are doing so. It is easy to foretell that the case will be opened. Many do so. Here is one of the latest and most thoughtful of such speculations:

"Some of those who think it would have been better had the case been decided the other way, may reasonably condemn any attempt to unsettle a branch of the law so long established. But the murmuring at the whole doctrine, which is beginning to be heard throughout the country; the restless, fitful desire to get rid of it, not yet fully understood by themselves, which large classes of people begin to feel, indicates that the whole subject must, at no distant day, be carefully re-examined. Any decision in an ordinary case ought, as a rule, to stand; and when a decision has stood for fifty years, even to question it lightly and without sufficient consideration, is injurious and censurable, as tending to unsettle an entire system of juris-

prudence. But constitutional decisions which take from the political department of government powers and prerogatives usually belonging to it, and which legislation cannot remedy, stand on a different footing from ordinary precedents involving questions of private rights. Fifty years is a short period in the history of a nation living under a constitution intended to be perpetual. The consequences of the Dartmouth College case are now beginning to press heavily on great communities, and the pressure, we believe, will increase rather than diminish. It involves questions of political power, political necessity, it may yet be of political safety, and the case will not be let alone, however wise it might be to do so." 8 American Law Review, 191.

The court was not unanimous in the Dartmouth College case, and has not always been unanimous in subsequent cases applying the rule. Indeed it is a constant tradition of the profession, that the bench has never since been unanimous on the full extent of the doctrine of that case.

The spirit of the decision, and the grounds on which it goes, are best found in the opinions of the judges who made it.

Chief Justice Marshall says: "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 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 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. 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 all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with the 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 has never 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."

If property, as the great chief justice indicates, be the test, it might well be said that aggregations of persons in municipal corporations may have rights of property as clearly as aggregations of persons in private corporations, and come as well within the prohibitions. So the court afterward found in East Hartford *v.* Hartford Bridge Co., 10 Howard, 511, and other cases, in which the court disregards the property test, and rests the application of the rule on the distinction between public and private corporations. See Charles River Bridge *v.* Warren Bridge, 11 Peters, 420. And so of offices, it might well be suggested that the emoluments of public office, conferring rights which may be asserted in a court of justice, might logically come within the property test.

Mr. Justice Story, another great name which has reflected its lustre on this decision, says: "Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses whose stock is

owned exclusively by the government, is, in the strictest sense, a public corporation. So an hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of Insurance, Canal, Bridge and Turnpike Companies. In all these cases, the uses may, in a certain sense be called public, but the corporations are private; as much so as if the franchises were vested in a single person."

It is difficult, at this day, to recognize the sound policy of this strict distinction between municipal and all classes of *quasi* private corporations, or to appreciate the wisdom which admits the necessity of legislative control over all municipal corporations of every grade and nature, and denies it to all other corporations of every grade and nature. It is quite safe to say that in this state of Wisconsin, each of these defendants, a private corporation for the purposes of this rule and placed by it above legislative control of its franchises, directly exercises, to say nothing of its indirect influence, more power over the public interests of the state, over the public welfare and prosperity of the state, over the commonwealth, than the largest municipality in the state with its 90,000 or 100,000 souls. The state entrusts it with the exercise of sovereign right of eminent domain, with the construction and operation for public purposes of hundreds of miles of public thoroughfare of the most dangerous character to public safety, with a virtual monopoly within its district of the carrying trade, with almost a control of all commerce within its reach, and a power almost of life and death over its people—and yet it is a private corporation, whose charter the legislature

cannot control; while the most insignificant town in the state, with no extra-territorial influence and hardly any extra-territorial recognition, is invested with the dignity of a public corporation, over which it is unsafe to deny legislative control.

It is not to be overlooked that the decision was made long before the era of great corporations in this country, long before what were then private corporations had become of more public significance than municipal corporations were then, long before our present civilization hinged almost as much on *quasi* private corporations, as Hallam says early modern civilization did on municipal corporations; before Judge Story had lived to see a bank, which he defined to be a private corporation, notwithstanding its public relations, wage war, unequal at last, but long doubtful war, with the federal government itself. The difficulty arises probably from applying old names to new things; applying the ancient definition of private corporations to corporations of a character unknown when the definition arose, corporations of such great and various public relation and public significance; a definition which, as applied to them, is wearing out, so that courts are beginning to call them *quasi* private corporations and *quasi* public corporations, as in truth they are.

The remarks since made, from time to time, on this decision, by the court which made and has always hitherto sustained it, are perhaps the severest commentary upon it, in the broad sense in which it is applied. It deprives the states of a large measure of their sovereign prerogative, and establishes great corporations as independent powers within the states, a sort of *imperia in imperiis,* baffling state order, state economy, state policy. Well might a distinguished judge of the same court, when the extent of the

evil was becoming apparent, start back, shocked at the claims of corporate immunity from law, and cry out:

"No state, it is declared, shall pass a law impairing the obligation of contracts; yet with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society." And he adds, speaking of the right of eminent domain: "It would imply an incredible fatuity in the states to ascribe to them the intention to relinquish the power of self-government and self-preservation." West River Bridge Co. *v.* Dix, 6 Howard, 507.

It was lately said by the same court, speaking of this construction and application of the constitutional prohibition: "A departure from it now would involve damage to society that cannot be foreseen; would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government." Binghamton Bridge, 3 Wallace, 51. Perhaps so; there is always inconvenience and sometimes danger in abandoning old rules of judicial decision. But there is danger in adhering to this rule. And it is not always the better part of wisdom to bear the ills we have, than fly to others that we know not of. And it must be conceded that the language of the court, just quoted, sounds rather like apology than justification.

Be all this as it may, the rule in Dartmouth College *v.* Woodward stands, and we must all yield to it while it does stand. Neither this nor any state court can disregard or evade it, while the court which established it may see fit to adhere to it. And the rule that corporate charters are contracts within the prohibition, has been expressly applied by that court to railroad charters. Wilmington R. R. *v.* Reid, 13 Wallace, 264; Humphrey *v.* Pegues, 16 id. 244.

And we have given some brief history of the rule, and of its application and its mischief, not for any purpose of combating it, but for the purpose of showing the significance and scope of the reserved power over corporate charters in our state constitution. For the very purpose of that reservation of power was to exclude the rule from all application to corporate charters in this state, and to restore to the state all its otherwise inherent authority over its own corporations.

This court has several times had occasion to discuss this reserved power, as one well understood and of undoubted efficiency. Madison W. & M. Plank Road Co. *v.* Reynolds, 3 Wis. 287; Pratt *v.* Brown, id. 603; Nazro *v.* Merchants' M. Ins Co., 14 id. 295; Kenosha, R & R. I. R. R. Co. *v.* Marsh, 17 id. 13; Blair *v.* Milwaukee & P. du C. R. R. Co., 20 id. 254; Whiting *v.* Sheboygan & F. du L. R. R. Co., 25 id. 167; State *v.* Milwaukee Gas L. Co., 29 id. 454; Chapin *v.* Crusen, 31 id. 209; West Wisconsin R. R. Co. *v.* Trempealeau, 35 Wis. 257.

As long ago as 1854, six years after the adoption of the constitution, Mr. Justice Smith observed in Pratt *v.* Brown, *supra:* "In all instances, however, in which this power to take private property for public use has been delegated to corporations, the parties interested in such grant have been compelled to rely for the perpetuity of the grant, either

upon the pledged faith of the sovereign power making the grant, or upon constitutional compacts inhibiting the power of revocation. The doctrine that a charter of incorporation, conferring certain franchises upon a company or individual, was in the nature of a grant, and hence protected from encroachment or attack by the federal constitution, was established after elaborate argument and on full consideration by the supreme court of the United States, in the Dartmouth College case. This doctrine has, since that decision, been acquiesced in by nearly if not quite all the state courts of the union. It is competent, nevertheless, for each state, by constitutional regulation or specific legislative enactment, to reserve the power to modify or repeal all such acts of incorporation. When the power of modification or repeal is reserved, either in the one mode or the other, it is obvious that the grantees must rely, for the perpetuity and integrity of the franchises granted to them, solely on the faith of the sovereign grantor. Hence, since the decision of the Dartmouth College case, some of the states, and our own among the number, have, by constitutional provision, reserved to their legislature the right of modification or repeal of all special acts of incorporation; and all such corporations now rest upon the faith of the state, taking care to deserve its favor by observing strictly the limits of their powers, and accomplishing by all legitimate means the objects of their incorporation."

In 1863, in Kenosha R. & R. I. R. R. Co. *v.* Marsh, *supra,* Mr. Justice Paine said: "The occasion of reserving such a power in the constitution or in the charters themselves, is well understood. It grew out of the decisions of the supreme court of the United States, that charters were contracts within the meaning of the constitutional provision that the states should pass no law impairing the

obligation of contracts. This was supposed to deprive the states of that power of control over corporations which was deemed essential to the safety and protection of the public. Hence the practice, which has extensively prevailed since those decisions, of reserving the power of amending or repealing charters. It was solely to avoid the effect of the decision that the charter itself was a contract between the state and the corporation, so as to enable the state to impose such salutary restraint upon those bodies as experience might prove necessary. Undoubtedly the legislature might under this power, impose new duties and new restraints upon corporations in the prosecution of the enterprises already undertaken. And provisions of this nature would be binding, whether assented to or not."

In 1870, in Whiting *v.* Sheboygan & F. du L. R. R. Co., *supra,* Chief Justice Dixon enters into an able and elaborate consideration of the subject, from which we quote: "And here it occurs to us to observe that, under the principles announced in the Dartmouth College case and in the numerous cases which have followed it in the same court, and by the authority of which the courts of all states are bound, this power of the state to regulate and control the franchise and fix the amount of the tolls has been frequently wholly lost. Be this matter as it may in other states, the question can never arise in this state. Our people, by a most wise and beneficient provision in their constitution have perpetually reserved the power to the legislature to alter or repeal all charters or acts of incorporation at any time after their passage. As yet, we believe, the power has never been exercised with respect to any railroad company organized in this state, and possibly it may never be. It is valuable, however, as a check upon the rapacity which these corporations sometimes exhibit, and the time

may come when the legislature will be imperiously required to exert it; but when it does, if ever, it will not be to deprive the corporation or its stockholders of their legitimate rights, but to correct abuses and save the rights of the people. The legislature will not reduce the tolls or rates to an unreasonably low figure, or so as to disappoint the just expectations of the owners of stock."

In 1874, this sounds like prophecy.

And at the last term, in the case of West Wis. R. R. Co. *v.* Trempealeau, *supra,* Mr. Justice Cole said: "The validity of these acts repealing the exemption is mainly rested upon the power reserved to the legislature by sec. 1. art. XI of the constitution, which in terms declares that all general laws or special acts under which corporations without banking powers are created, may be altered or repealed by the legislature at any time after their passage. If proper force and effect are given to this constitutional provision, it would seem to afford ample authority for the enactment of the repealing statutes above cited, as it reserves the right to the legislature to amend and revoke all corporate franchises and privileges which it might grant. In this case the legislature first relinquished the right of taxation, so far as the lands in controversy are concerned, and then subsequently resumed it. But this, the learned counsel for the company contend, it was not competent for the legislature to do, because it impaired the obligation of a contract which the state had made. The doctrine that a state may grant or bargain away beyond recall, the right of taxation, a high political and sovereign power, essential to the very existence of the state, and without which no governmental functions can be exercised or carried on, has always seemed to me to rest upon very unsatisfactory grounds, and I am unable to assent to its general correctness. If the legisla-

ture of a state may relinquish for a specific period the right to tax the property of persons or corporations within its jurisdiction, it may do so permanently; and it may, upon the same ground, relinquish its police power, the right of eminent domain, and other sovereign powers, until nothing of the state government remains but a name. I should greatly regret the general recognition of such a doctrine, or even acquiescence in it without protest, as sound constitutional law. And therefore I feel constrained to withhold my assent to it at this time. I do not propose to enter upon any discussion of the question, however, as it is not necessarily the ground upon which our decision in this case is founded. I concede that the Supreme Court of the United States say that the question whether the legislature has the power to grant away the right of taxation is one not open to discussion in that court, because this power has been affirmed by repeated adjudications made in that court, and the doctrine of the Dartmouth College case has been applied in all its extent and rigor to such a legislative grant. * * * The object and historical origin of the provision in the constitution of this state are matters known to all professional men. They were, through this paramount authority, to retain and secure to the state full power and control over corporate franchises, rights and privileges which it might grant,—a power and control which the state was in a measure deprived of by the federal constitution, as that instrument had been interpreted in the celebrated Dartmouth College case. With the grant of exemption from taxation was annexed the reservation that such grant might be altered or revoked by the legislature at any time after its passage. It was a qualification of the grant, and the subsequent exercise of the reserved power cannot be regarded as an act impairing the obligation of

contracts." And the court sustained the exercise of the reserved right.

This has been the unanimous opinion and decision of the court, always, in all cases before it. And, by force of the constitutional power reserved and of the uniform construction and application of it, the rule in the Dartmouth College case, as applied to corporations, never had place in this state, never was the law here. The state emancipated itself from the thraldom of that decision, in the act of becoming a state; and corporations since created here have never been above the law of the land.

Subject to this reserved right, and under the rule in the Dartmouth College case, charters of private corporations are contracts, but contracts which the state may alter or determine at pleasure. Contracts of that character are not unknown in ordinary private dealings; and such we hold to be the sound and safe rule of public policy. It is so in England. It is so under the federal government itself. The material property and rights of corporations should be inviolate, as they are here; but it comports with the dignity and safety of the state that the franchises of corporations should be subject to the power which grants them, that corporations should exist as the subordinates of the state, which is their creator, *durante bene placito.*

This is a question of state law, not of federal law. We give full scope to the federal constitution as interpreted by the federal courts, but we stand clearly outside of both. This question could be brought within the Dartmouth College rule, not by interpretation of the federal constitution, but by interpretation of the state constitution only. That is our function. We accept the construction of the federal constitution as the federal courts give it. But we give

construction to our own constitution for ourselves. And there we might well rest.

But the exercise of this reserved power has been sanctioned by the federal and other state courts.

The general banking law of New York, of 1838, provided that stockhoders of banks under it should not be personally liable for the debts of their banks, unless they should expressly so declare by their articles of association; but the law reserved power to the legislature to alter or repeal it at any time, the very words of our constitution. Under this law, a bank was organized in 1844, and the stockholders declared, by their articles of association, that they should not be liable for the debts of the bank. Afterwards the constitution of the state, of 1846, declared the stockholders liable, and the legislature of 1849 passed an act to enforce that liability. The courts of New York held the stockholders liable; and the supreme court of the United States affirmed the judgment, holding that the constitutional provision and act of 1849 impaired the obligation of no contract, either in the general banking law or in the articles of association, because the reserved power subjected the contract and the stockholders to the change made in their liability. Sherman *v.* Smith, 1 Black, 587. See also 21 N. Y. *infra.*

In the Pennsylvania College Cases, 13 Wallace, 190, the opinion of the court states that: "Cases often arise, where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charters conditional, or reserve to the state the power to alter, modify or repeal the same at pleasure. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that re-

served power cannot be regarded as an act within the prohibition of the constitution. Such a power, also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to acts of incorporation or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation. Reservations in such a charter, it is admitted, may be made; and it also conceded that when they exist, the exercise of the power reserved, by a subsequent legislature, does not impair the obligation of the contract created by the original act."

The same point is ruled in many cases, amongst others, in Miller *v.* State, 15 Wallace, 478; Tomlinson *v.* Jessup, 15 id., 454; Holyoke Co. *v.* Lyman, 15 id., 500; McLaren *v.* Pennington, 1 Paige, 102; Re Oliver Lee's Bank, 21 N. Y. 9; Perrin *v.* Oliver, 1 Minn. 202; Mayor, etc. *v.* Norwich & W. R. R. Co. 109 Mass. 103; Parker *v.* Metropolitan R. R. Co., id., 506; Stevens *v.* Smith, 29 Vermont, 160.

In Olcott *v.* Supervisors, 16 Wallace, 678, a case from this state, turning on the relations of a railroad company and the state, the court takes occasion to say of the reserved power in our constitution: "That the legislature may alter or repeal the charter granted to the Sheboygan & Fond du Lac Railroad Company, is certain. This is a power reserved by the constitution. The railroad can, therefore, be controlled and regulated by the state. Its use can be

defined; its tolls and rates for transportation may be limited."

It was argued for the defendants that the power is a limited one. It is so said in Miller *v.* State, and Holyoke *v.* Lyman, *supra,* and in some Massachusetts cases, that it must be reasonably exercised. But the remarks in the former cases seem to relate to the property, rather than to the franchise, and are vague. And it seems to us that the legislature is the sole judge of the reasonable nature of the alteration, as it is the sole judge of the reasonable nature of the original charter. And so that court itself says in effect in Mayor *v.* Norwich & W. R. R. Co., *supra.* But these dicta are too vague and general for either guidance or authority.

The reserved power in our constitution is a positive provision entering into all charters under it, and must be construed as it is written. We cannot construe away its meaning, or hold it to mean something else, which we or others might consider wiser or better. We are bound, in our construction of it, by the very words used. We refer to a large number of cases on this point of construction, collated by Dixon, C. J., in 26 Wis. 451. The power is limited by its own words only. Any limitation of it must come from those words. And we must be guided in our construction of the words used, if the words will admit of it, by the purpose of the provision, to do away in this state with the rule in the Dartmouth College case so far as it relates to charters of private corporations. The power to repeal can bear but one construction; for, in this use, the word has but one meaning. The power to alter depends on the meaning of the word, alter. To alter is to make different, without destroying intentity (Crabb); to vary without

entire change (Webster and Imp. Dict.). A corporate charter of one kind cannot be altered to a charter of an entirely different kind. But a corporate charter may be altered so as to make it different in detail, so long as the general identity of the corporation remains; so that it is varied, without entire change. This is the obvious meaning to lawyer or layman. Arguments *ab inconvenienti* cannot weigh against the manifest meaning of the word used; they may go to impeach the wisdom of the power, but not to impair its import.

We think that Mr. Justice Paine recognized the true limit, depending on the word used, in Kenosha R. R. Co. *v.* Marsh, *supra*: "I suppose it would hardly be claimed that the state, even where this power of amendment is reserved, could, by amending the charter of a railroad company so as to provide for a new and entirely different road, impose any obligation on the corporation to build it." That is a particular application of the rule, not to alter so as entirely to change.

But it is unnecessary to pursue this topic further, as there can be no doubt that here is as unquestionable an exercise of the power to alter as can well be. The charters of the defendants gave them an unlimited right of toll. The alteration limits the right. This is a strict alteration, or there is no such thing as alteration. This is just what Strong, J., says, in Olcott *v.* Supervisors, *supra*, and Dixon, C. J., says, in Whiting *v.* S. & F. R. R. Co., *supra*, the legislature can do under the power to alter.

We shall not discuss the question whether the defendants have a right to take toll, as intimated by Mr. Justice Strong in the State Freight Tax Case, 15 Wallace, 232, without any franchise to take it, as an attribute of ownership. They certainly could not have a right to exact

what they might please. But the question is not here, because these corporations accepted a franchise to take toll, and must be held to take it under the franchise.

And we need hardly notice the point made, that the franchise to take toll without limitation, once granted, inheres in the railroad as property, beyond the reach of the reserved power to alter. Logically considered, this is only a denial in another form of the reserved power to alter. If the franchise inhere in the property by the use of it, and be revocable, then it would be severed from the property by repeal, and, upon alteration, would inhere only as altered. A building is real estate, by being attached to the soil; but if it be taken down, the brick and wood do not still inhere in the land. The reserved power would be nugatory, if the mere use of the franchise could operate to put it beyond alteration or repeal. The position is mere *petitio principii.*

Of the same type is the argument that ch. 273 violates the contracts of these defendants with their creditor. This position appears to us to rest in the absurdity that the mortgagor can vest in his mortgagee a greater estate than he had himself. Perhaps the statute may lessen the means of payment of the defendants. So would a fine for homicide, under the police power of the state. But to lessen the means of payment of a contract, is not to impair the obligation of the contract. These defendants took their franchises, and their creditors invested their money, subject to the reserved power, and suffer no legal wrong when that is exercised.

It was said that ch. 273 violates the rights of property of these defendants. We cannot perceive that it does. Whether it will lessen the income of their property, we cannot foresee. We only know that it does lessen their

rates of toll. But it does not wrongfully touch their property. As far as the franchise is to be considered property, it was subject to this very limitation; and the limitation is the exercise of a right over it, which does not violate it. The right of limitation entered into the property and qualified it. And the act does not at all meddle with the material property, distinct from the franchise. It acts only on the franchise, not at all upon the material property. And it is sufficient to say that they acquired the material property, as distinct from the franchise, subject to the alteration of the franchise under the reserved power. That was a condition under which they chose to hold their property; and they have no right to complain when the condition is enforced. Their rights in their material property are inviolate, and shall never be violated with the sanction of this court. But they are no more violated by this act and its enforcement, than by foreclosure of a mortgage or ejectment by paramount title. It is a right over property which is enforced, not a wrong to right in property.

We listened to a good deal of denunciation of chapter 273 which we think was misapplied. We do not mean to say that the act is not open to criticism. We only say that such criticism is unfounded. It was said that its provisions, which have been noticed, were not within the scope of the legislative function; as if every compilation of statutes, everywhere, in all time, did not contain provisions limiting and regulating tolls; as if the very franchise altered were not a rebuke to such clamor. It was repeated, with a singular confusion of ideas and a singular perversion of terms, that the provisions of the chapter amount to an act of confiscation; a well defined term in the law, signifying the appropriation, by the state, to itself, for its own use, as upon forfeiture, of the whole thing confiscated.

It was denounced as an act of communism. We thank God that communism is a foreign abomination, without recognition or sympathy here. The people of Wisconsin are too intelligent, too staid, too just, too busy, too prosperous, for any such horror of doctrine; for any leaning towards confiscation or communism. And these wild terms are as applicable to a statute limiting the rates of toll on railroads, as the term murder is to the surgeon's wholesome use of the knife, to save life, not to take it. Such objections do not rise to the dignity of argument. They belong to that order of grumbling against legal duty and legal liability, which would rail the seal from off the bond. They were not worthy of the able and learned counsel who repeated them, and are hardly worthy even of this notice in a judicial opinion.

We have, according to our duty, dealt with the questions we have considered as questions of law. We cannot judge of the policy or of the fairness of the act. That is for the legislature. We can only say that it is the law. We cannot judge of the propriety of these informations. That is for the law officers of the state. We are only to determine what the law is, and to administer it as we find it, in causes over which we have no other control. And we can join in no outcry against the law, which it is our duty to administer. Neither can we countenance any outcry against the railroads. We cannot consider any popular excitement against them warranted or useful. The railroads have their rights, and so have the people. Whatever usurpation or abuses, if any, the railroad companies may be guilty of, can find a remedy in calm, just, appropriate legislation. And this court will firmly and impartially protect all the rights of the railroads and of the people, in all litigation which may come here. But we can take no part in popular

outcry against these companies, or countenance any prejudice against them. We endorse here the full meaning of what Mr. Justice Paine so eloquently said in Whiting *v.* Sheboygan R. R. Co., *supra:* "Railways are the great public highways of the world, along which its gigantic currents of trade and travel pour—highways compared with which the most magnificent highways of antiquity dwindle into insignificance. They are the most marvelous invention of modern times. They have done more to develop the wealth and resources, to stimulate the industry, reward the labor, and promote the general comfort and prosperity of the country, than any other, and perhaps all other, mere physical causes combined. There is probably not a man, woman or child, whose interest and comfort have not been in some degree subserved by them."

And we endorse and repeat what Chief Justice Dixon well said in the same case: "The power of the legislature to regulate the tolls and charges of such companies is in itself a limited one, if not in a constitutional sense, certainly in the sense of morality and justice. If there be not an express, there is certainly an implied, obligation and promise, on the part of the state, never to reduce the tolls and charges below a standard which will be reasonable, or which will afford a fair and adequate remuneration and return upon the amount of capital actually invested. This obligation and promise, which spring from the act of incorporation and invitation by the state to persons to invest their money in the stock, it is presumed that no legislative body would disregard, except where the company, by gross and wanton abuse of its privileges, had forfeited its rights; and then, instead of legislative action, it is also presumed that the regular course of judicial proceedings would be preferred. The true intent and object of the power is, that

the legislature shall be able to protect the rights and interests of the people, but not that it should arbitrarily impair the rights and franchises of the company, or destroy the property of its stockholders. The good faith of the state is pledged against this, and it is not within the range of presumption that it will ever be done. The individuals owning the property, and whom the corporation represents, purchase it under this pledge and inducement held out by the state. To them it is a matter of mere private business, engaged in under the sanction and encouragement of the state, and for their individual gain and emolument; and the legislature will no more unnecessarily interfere with it, or with the business of the corporations when it is legitimately and properly conducted, than it will with any other private business."

And, fully sustaining the reserved power and this exercise of it, as matter of law, we add to what the judges of this court have said, what Chancellor Kent says, that it should be matter for serious consideration how far the exercise of the reserved power is consistent with justice and policy, and that it ought to be under the guidance of extreme moderation and discretion. 2 Kent's Com. 306.

It is deeply to be regretted that there is just now more or less excitement against railroad corporations, although we believe that its extent is greatly exaggerated. But it seems to us quite safe to say that, though this feeling may be unwise, it is not vindictive; but is rather of the nature of parental anger against those spoiled children of legislation, as our statute books abundantly show them to be, who, after some quarter of a century of legislative favors lavishly showered upon them, unwisely mutiny against the first serious legislative restraint they have met. If it be true that the people are too angry, it is very sure that the

companies have been too defiant. But, be all this as it may, there is some excitement against them. We entertain no doubt, however, that through it all, the sound and just views just quoted from their chosen and trusted judges, Dixon and Paine, are the views of the people of this state to-day; that they always have been; and that these corporations and all interested in them may safely rely on the sense of justice of the people and the legislature. The judgment of both may err. It is said that it has erred in the details of this chapter 273. Of that we are not the judges; but we believe that it is yet to be verified by experiment. It may well be that the high rates charged by the railroads have lessened their own receipts, by crippling the public interests. The affidavits of experts have been read to the contrary; but they are only opinions, founded indeed on past statistics. Such opinions, founded on such statistics, would have defeated cheap postage, and are helping to-day to defeat a moderate tariff. Experience often contradicts such theories. The interest of the public, in this regard, seems to be identical with the interest of the railroads. We think that there must be a point where the public interest in railroads and the private interest of the corporators meet; where the service of the public at the lowest practicable rate will produce the largest legitimate income to the railroads. It seems to us an utter delusion that the highest tolls will produce the largest income. The companies have hitherto absolutely controlled their own rates. The legislature now limits them. The companies say that the limit is too low. But there is no occasion for heat or passion on either side. The people and the legislature understand well the necessity of the railroads to the state, and the necessity of dealing fairly and justly, and even liberally, with the companies. Time and prudence

and wise counsels will set all this right. This very controversy may well bring about a better and more permanent understanding and relation between the state and its corporations. We say so much in deference to an earnest appeal from the bar to counsel moderation. But, in the meantime, we cannot legislate for either party. We can only say what the law is, and administer it as we find it.

An objection was taken to chapter 273, that it is not uniform throughout the state, as required of general laws under the constitutional amendment of 1871. As we think that we have already sufficiently indicated, we sustain and apply this act as an alteration of the special charters of these defendants, and not as an amendment of the general railroad act of 1872. It was said, on the argument, that one of the roads of the *Chicago & Northwestern Company* was organized under the general act. But that is not pleaded, and does not appear in any of the papers in the case; and of course we cannot act upon a mere verbal suggestion of the kind. So the question whether chapter 273 can be held a valid alteration of the general railroad act of 1872, is not before us, and is not passed upon.

Neither do we express any opinion on the validity of any provision of chapter 273 not expressly involved in the decision of these motions. And, in that connection, it is proper to say that the injunctions prayed for exclude all question here on what is called inter-state commerce.

We only hold the provisions of chapter 273 of 1874, regulating their tolls, to be valid amendments of the special charters of these defendants, obtained from the state under the constitution as it stood before the amendment of 1871.

VI. Supposing chapter 273 to be, on the part of the state, a valid amendment of the charters of the defendants, it was objected that it could not be a valid amend-

ment *quoad* the defendants, without acceptance of it on their part; and until such acceptance, not obligatory upon them. And this proposition is sanctioned by Yeaton *v.* Bank, 21 Grattan, 593, and other cases cited.

It was said in Kenosha R. R. Co. *v.* Marsh, *supra,* and we think said—certainly implied—in other cases in this court, that valid alterations of a charter, under the reserved power, would bind the corporation, whether assented to or not. The same thing has been said by other courts, is implied in a great many cases, and is expressly decided by the supreme court of Massachusetts in Mayor *v.* Norwich & W. R. R. Co., *supra.* And we think that the better opinion.

But it appears to us to be here a distinction without a difference. For it is very evident, as it is said in Yeaton *v.* Bank, that if the corporation do not accept the amendment, it must abandon its charter. The court says: "One consequence undoubtedly is, that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body."

If the amendment be obligatory, the corporation may suspend; if it be not obligatory, the corporation must accept, or suspend; we fail to see the practical difference in such a case as this. Whether or not the defendants had an election to accept or reject, and whether or not they accepted the amendment, they had no right to go on in disregard of the amendment. And we think that their proceeding under their charters, after the passage of the alteration, raises a presumption that, if they had a right of election, they exercised it by accepting the alteration. Otherwise, it was their duty to suspend their operations. In any

case, the question cannot weigh in the consideration of our duty to enjoin their actual disobedience of the law.

VII. The defendant *The Chicago, Milwaukee & St. Paul Company* pleads the charter of the territorial legislature of February 11, 1847, incorporating the Milwaukee & Waukesha Railroad Company, and the organization of the corporation thereunder; the act of the territorial legislature of March 11, 1848, extending the road from Waukesha to Prairie du Chien, and the construction of the road from Milwaukee to Prairie du Chien in the years 1850–1856; the act of the state legislature of February 1, 1850, giving the corporation the new name of the Milwaukee & Mississippi Railroad Company; the act of the state legislature of March 31, 1860, to facilitate the formation of a corporation with the franchises of the original company, upon foreclosure of their mortgage, and the formation thereunder, by the purchasers, of the Milwaukee & Prairie du Chien Railway Company; and the conveyance of the road and franchises by that company to the defendant by deed of August 1, 1868; and we find an act of February 15, 1868, ratifying the purchase by the defendant of the road and franchises. We presume that the purchase had been then made, though the deed followed after.

We have not considered the title of the defendant to this road, because we think it immaterial here. The road is actually operated by the defendant, and is, therefore, included in the same class with the other roads of the defendant by chapter 273. And the question before us must rest on the charter of the road, not on the title of the defendant. In saying this, we imply no doubt of the title; we only say that we have not investigated it, because it does not enter into any question before us.

The charter of 1847–1848 appoints commissioners to

take subscriptions of stock; and, upon subscription and payment of stock as therein directed, creates the subscribers a corporation vested with the franchises of the act. This act does not create a corporation by its own force only; the prescribed subscription is a condition precedent to the existence of the corporation. The corporation came into existence, probably, upon the election of directors by the subscribers. Putnam *v.* Sweet, 1 Chandler, 286.

It is not pleaded, and does not appear, when the corporation was actually organized. For all that appears here, it may have been at any time between 1847 and 1850. We are inclined to think, however, that under such a charter, when the existence of the corporation appears, as here, there is a presumption that it was organized immediately after the passage of the charter. In this case, there is certainly a presumption that the corporation was *in esse* before the passage of the supplementary act of March 11, 1848, because the act deals with it as an existing corporation by name. This is not, of course, conclusive of the fact, but it is all that we have in this case now; and we must presume, for the purposes of this motion, that the charter was accepted and the corporation organized under it, before the adoption of the state constitution in 1848.

The original charter contains a franchise, upon completion of the road or any ten miles of it, to take such toll as the company should think reasonable.

The road was not constructed till after the adoption of the constitution, but it was constructed under the territorial charter. And the title to the franchise, which runs with the road, dates from the organization of the corporation.

There may be facts which are not before us, or there may be legislation which we have not been able to find,

which might operate to make the defendant hold the road built in pursuance of the territorial charter, under franchises granted to the defendant, or to the defendant's grantor, by the state, and so bring the franchises of this road under the reserved power in the constitution. On the argument, we called on the attorney general for information on this point; we were only informed that the territorial charter contained a reserved power to alter or repeal.

On examination, we find this to be a mistake. The only power reserved is in section 20 of the act. And that only provides that in case of violation of the charter by the company, the territorial or state legislature might resume the rights and privileges granted by it.

The right reserved in this section is dependent on violation of the charter. That must first be established. That is clearly a judicial function. We need not stop to inquire whether the territorial legislature could have exercised such a function, under such a clause, and thereupon repeal the charter; nor whether the state legislature could do it now. It is enough that neither has done it. And, in any case, the power reserved is simply one of repeal, which can in no way aid the application of chapter 273 to the road built under the territorial charter.

Sections 1 and 2 of art. XIV, of the state constitution provide, if provision were necessary, for the continuance of the territorial charter in force under the state government.

We have carefully examined the several acts of the state legislature applicable to the title of this road, so far as it is disclosed to us; and we find nothing to defeat or impair the franchises of 1847, as appurtenant to this road, to this day. Sec. 1 of the act of 1860, and sec. 33 of ch. 79 of the Revised Statutes, both provide that the purchasers on the

foreclosure should take the road with the franchises relating to it, as granted to the original company. And this seems to be recognized by the act of 1868. This is not a new grant of franchise. The state had licensed the mortgage of the road and franchise, the corporation had mortgaged the road and franchise, and both were vested in the purchasers by operation of law. The provision of the act of 1860 was only declaratory of an existing right. And as far as the facts are before us, we see nothing to sever the territorial charter from the road, or to operate as a surrender of that charter or as a relinquishment of the franchises granted by it or as an acceptance of new franchises from the state, to bar the corporation operating the road from relying on the franchises granted by the territory. Neither party appears to have investigated the facts, and they may not be all before us. We rest this opinion on what is before us. And we hold the territorial charter of 1847, enlarged by the territorial act of 1848, to be the existing charter of the road built under it from Milwaukee to Prairie du Chien.

This chapter, being accepted—as we are bound here to assume—before the adoption of the state constitution, is not affected by the reserved power in that instrument. And it is undoubtedly a contract within the rule in the Dartmouth College case, which the state legislature cannot impair. And we have therefore, the direct question, whether the franchise granted by it, to take such tolls as the company should "from time to time think reasonable," is part of the obligation of the contract which the state cannot impair, and whether it would be impaired by the application to it of the rule of fixed *maximum* tolls prescribed by chapter 273.

We are of opinion that the franchise is not one vesting

in the corporation an absolute right of exacting whatever tolls it might see fit. The courts have authority to limit the right to reasonable tolls; to tolls reasonable, not in the arbitrary judgment of the corporation, but in fact. That is, indeed, as against a great railroad company, not a very effective remedy. But the law gives the remedy to all aggrieved by the exaction of unreasonable tolls. The question here, however, is not what the courts can do to control the exercise, but what the legislature can do by statute to limit the right of a franchise so broad that it seems to invite extortion.

We have already sustained the power of the legislature to limit rates of toll of railroads subject to legislative control. But that power rests on the authority of the legislature, not on the reasonable rate of tolls fixed. And the restraint of a franchise to take reasonable tolls, to tolls reasonable in fact, is a judicial, not legislative function. Any authority of the legislature, not under the reserved power of the constitution, to regulate tolls under a franchise to take tolls, cannot be derived from the judicial function, but must rest in some proper legislative function.

And therefore, as far as the legislative power over it is concerned, this must be taken as a valid and absolute franchise to take tolls at discretion.

And here, again, we think that the question of the right to take tolls, without a franchise to take them, does not arise. Because the legislature has given and the corporation has accepted a franchise to take them. Whatever right there might have been outside the franchise, is merged in the franchise. Both parties are bound by the franchise. Viewed as a contract, the franchise is the written agreement between the parties on the subject. Had we been able to agree with the defendant's counsel, that the right to take

tolls is not derived from the franchise, but is—in the language of Mr. Justice Strong—an attribute of ownership; ownership, we are inclined to think that we might have ruled this point differently. But we have to do here with the right under the franchise, not with a right which might have existed without the franchise.

We have no doubt of the general authority of a state legislature to regulate the tolls of a corporation of this character, as a necessity of public welfare and public order, under the sovereign power of police, when the exercise of that power is not in some way suspended or restrained.

But the right of the corporation here to take tolls at discretion, being thus fixed by express franchise in their charter, there seems to us to be no room for doubt that, viewing the charter as a contract, the franchise is a positive grant to take tolls in the manner and to the extent prescribed by it, subject to such judicial construction and control as it may bear; and as a vital part of the contract of the charter, within the authorities.

We are not considering the charter as a mere statute. We are considering it, in obedience to the Dartmouth College rule, as a contract. We are not giving our own views of its effect. We are looking at it in the mirage of federal construction. Considering this matter of purely state law and state polity, we are sitting *in vinculis,* bound by an interpretation of the prohibition in the federal constitution, on a subject with no federal relation, which we think it ought not to bear, and which, it is admitted, it was not intended to bear; but which, while it stands, emasculates state authority over state corporations. We are sitting on this question of state law and state polity, not so much as the supreme court of Wisconsin, as an inferior federal court. And we are bound, on this subject, to rule, not as

we think, but as the federal supreme court thinks. The adjudications of this court on state law and state policy, having no possible relation to federal law or federal policy, have been frequently overruled by that court, without excuse found in the federal constitution. We do not mean to give an opportunity now, with excuse. On this point, we admit and defer to their authority. It is evil example, subversive of judicial order and judicial authority, not becoming judges or courts, to disregard the authority of courts within their peculiar and appropriate jurisdiction; whether it be of federal by state courts, or of state courts by federal. We do not propose to follow a bad example. And, in all questions under the federal constitution, it is the duty and choice of this court to follow, as nearly as it can, the principles and spirit of the adjudications of the federal supreme court.

We think that the state ought to possess the same power over this, as over other railroads. And we think that the right of the state to control territorial charters, independently of the reserved power, ought to exist, as one well founded in principle. We are even inclined to think that the weight of state authority is in favor, rather than against it, even under the Dartmouth College rule. We have considered, with great interest, an able and instructive note of Judge Redfield to the Philadelphia, W. & B. R. R. Co. *v.* Bowen, Am. Law Reg., March, 1874. We think, however, that the distinguished jurist had too little in his view the spirit and scope of the decisions of the supreme court of the United States; and that he shows rather what the law ought to be, and would be but for those decisions, than what it is under them. He seems to think that the Dartmouth College rule is being pushed to such an extreme as will ultimately defeat it altogether, by a *reductio ad absur-*

dum. So many are beginning to think, and so we think. But we think that he errs in laying the blame on those who oppose the extent of the rule, which we think belongs to those who support it. But, after very deliberate consideration, we find that principle and state authority leave us no room for doubt, that this case comes within the prohibition, under the decisions of the supreme court of the United States.

We think that the rule to be gathered from all the decisions, and which should govern us, is accurately stated in Judge Cooley's excellent work, and we give it in his own words:

"The limit to the exercise of the police powers in these cases must be this: the regulations must have reference to the comfort, welfare or safety of society; they must not be in conflict with any provision of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights or privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." Cooley's Const. Law, 577.

The fixed limitations of toll in chapter 273, if applied to the territorial franchise, would limit tolls under the latter, whether the fixed rates be reasonable or not. And we think that we have sufficiently explained the conflict between the two, to show that the state act does essentially limit a right which the territorial charter confers.

The very point which arises here has not, so far as we are aware, been passed upon by the supreme court of the United States. But the principle governing it has been, in many cases. We shall not attempt to review the cases. We will only say that a court which has several times held that state relinquishment of the sovereign right of taxation in

favor of a corporation is a valid contract which the state cannot impair by resumption of the right to tax, is not to be expected to sustain such a substantial impairment of a franchise to take toll, which, at its worst, could effect no public power of the state, and could only be abused by individual extortion. And, in view of all their decisions, and in submission to them, we feel bound to hold the territorial charter of 1847, enlarged by the territorial act of 1848, to be a contract within the prohibition of the federal constitution, the obligation of which the state can pass no law to impair; and that the provisions of chapter 273, of 1847, limiting the tolls of railroads operated by the *Chicago, Milwaukee & St. Paul Company,* if applied to the road from Milwaukee to Prairie du Chien, built under that charter, would impair the obligation of the contract of that charter, and that therefore those provisions of chapter 273 do not apply to that road.

If, indeed, that charter was not accepted and the corporation under it was not organized before the adoption of the state constitution, a grave question would arise of the effect of the reserved power in the state constitution upon the charter accepted and the corporation organized, after that instrument had gone into operation. But that question is not here, and we express no opinion on it.

VIII. Before the commencement of the argument an objection was made to the hearing of these motions on the unverified informations of the attorney general, unsupported by affidavit. We hold, on the authority of the Attorney General *v.* The Cohoes Co., 6 Paige, 133, and other cases, that an information of the attorney general *ex officio* acting under the sanction of his oath of office, is equivalent to a bill in chancery verified on information and belief. Like such a bill, it will call, in proper cases, for an-

swer under oath. But, as in case of such a bill, an injunction will not usually go upon it, unsupported by positive affidavit, until after the defendant has had the opportunity to contradict it on oath, and has failed to do so.

We say this now only for the purpose of settling the practice. In these cases the difficulty was cured by affidavits filed by the attorney general before the motions were heard, which the defendants had leave to answer, of which they declined to avail themselves.

These affidavits, uncontradicted, establish what we presume that defendants denied only *pro forma,* the disregard of the *maximum* rates of toll prescribed by chapter 273, of 1874. Indeed some of the affidavits filed by the *Chicago, Milwaukee & St. Paul Company* admit the violation of that rule of rates, and some of those filed by the *Chicago & Northwestern Company* very forcibly imply a similar violation. We therefore take the fact to be undisputed.

IX. These views substantially dispose of these motions. A moving appeal was made to us on the argument, if we should sustain these informations, to withhold the writs in our discretion. The appeal was such and so made as could not fail to leave a deep impression on our minds. It was founded on very strong affidavits of the injurious effects to these defendants and to the public interest in their well doing, which it was feared would result from the enforcement of the rates of toll prescribed by the statute. These affidavits are entitled to great respect. They are not the affidavits of speculators, at a distance, in the affairs and control of these railroads, reputed to play with the public and private interests involved in them, with cruel success. They are chiefly the affidavits of well known men of high character and standing, of great experience in the affairs

of railroads, and especially conversant with these roads. And we may well be permitted to say here that there is great cause for regret that these men and others like them, acquainted with the state and its people, their resources and their needs, and likely to act in sympathy with them as well as for the true interest of the roads, have not been independent in the local management of these corporations. If they had been, we are quite confident that there would have been no cause for this unfortunate controversy. But the affidavits, after all, give us only their theories, which do not satisfy us of the ruin which they foretell. Still the appeals seemed so urgent and so sincere that they left impression enough on our minds to make us somewhat reluctant to grant the writs. But we have no discretion to disregard our plain duty.

It is true that it is said that the granting or withholding of an injunction rests in the sound discretion of the court. But that is judicial discretion, not willful choice. And the rule is applied to injunctions in aid of private remedies. The same rule applies to *mandamus* in cases of private right. But it does not apply to the application of the writ to things *publici juris*. There the writ goes *ex debito justiciæ*. The court has no discretion to withhold it. Tapping, 287.

We need not repeat here the analogies already stated between the two writs, used as prerogative or *quasi* prerogative writs, to protect public right. And we have no more discretion to withhold injunction to restrain violation of public right, than to withhold *mandamus* to enforce public duty.

We have held that here is positive violation of positive public law to positive public injury, and that we have jurisdiction of this writ, as a prerogative writ, to restrain it.

There is no room for discretion. The duty is positive, *ex debito justiciæ.* The discretion which we were urged to exercise would be discretion to permit the violation of the laws which we sit here to enforce. It was said to us by counsel, in a professional and not offensive sense, that we dare not issue these injunctions. We reply that, holding what we have held, we dare not face the judgment of the profession for withholding them.

We disregard the appeal made to us reluctantly. But it is not to us that such appeal should be made. We had no part in promoting these cases. We have no voluntary part in the decision of them. We only obey the law as we understand it. We cannot care for consequences. We must do our duty, be the consequences what they may. If such appeal be fit, it is fit to make to the attorney general, not to us. He can heed it. We cannot.

But while we have no discretion, we have power to impose terms which seem to us just. We have already expressed the opinion that the informations in the nature of *quo warranto,* pending in this court against these defendants, are not a bar to these informations, and our reasons why this may be considered the better remedy. But we do not think that the attorney general should have both remedies at once. He has an election, but he must elect. If he has these injunctions, he should dismiss those informations. And time will be necessary to these defendants to arrange the change of rates. We presume that the remaining half of this month will be adequate.

And therefore, before these injunctions issue, we require the attorney general to dismiss the pending informations in the nature of *quo warranto,* and to file in these causes a stipulation signed by him *ex officio,* and approved by the court, or one of the justices of the court, that the

state will not proceed by way of *quo warranto* for forfeiture, or for contempt in violating the injunction to issue against the defendants, for any violation of the provisions of chapter 273, of 1874, involved in these causes, done or suffered to be done prior to the first day of October next.

If the time allowed for the change should be found insufficient, the defendants may move, on notice and proper proofs, to enlarge it, on either of the remaining Tuesdays of this month.

On the terms stated, the injunctions will issue as to all the roads of the *Chicago & Northwestern Company,* and as to all the roads of the *Chicago, Milwaukee & St. Paul Company,* except the road from Milwaukee to Prairie du Chien, built under the territorial charter of 1847–1848.

If the attorney general should be advised that the corporation under the territorial charter was not organized until after the adoption of the state constitution, he will be at liberty to renew his motion as to the road now excluded from the jurisdiction.

If the *Chicago & Northwestern Company* should make it appear that one of the roads now included in the injunction was organized under the general railroad act of 1872, they will be at liberty to move to dissolve the injunction as to such road.

But if such motions should be made, they will be heard only on the particular ground reserved in each case in this opinion.

No statute could have force to abolish any writ given to this court by the constitution, as it existed when the constitution was adopted. And, as our jurisdiction is founded on the writ of injunction, we think it better practice, in such cases, to send out the writ itself.

Upon a motion for rehearing, the following opinion was filed by Ryan, Chief Justice:

In passing upon the principal motion of the attorney general for an injunction against the defendant, we excepted from the writ then allowed, the railroad of the defendant from Milwaukee to Prairie du Chien, built under the territorial charter of 1847–1848. There was then no evidence before us of the time when the Milwaukee & Waukesha Railroad Company was organized under that charter. But we held that, in the circumstances, and especially because there seemed to be a recognition of the corporation as organized in the territorial act of 1848, there was a presumption that the charter was accepted and the corporation organized before the adoption of the state constitution. But there was sufficient doubt of the actual fact to induce us to give leave to the attorney general to renew his motion so as to include that road in the injunction, if he should be so advised.

He has accordingly made this motion, and in support of it he produces a certified copy of the statement of subscription and payment of capital stock, required by sec. 2 of the charter of February 11, 1847, dated April 5, 1849, and filed, as the section required, with the treasurer of Milwaukee county, in the same month; and also an affidavit of the election of the first board of directors, May 10, 1849.

This is conclusive of the fact that the charter was accepted and the corporation organized many months after the adoption of the constitution and the admission of the state into the Union by congress. It would have saved great trouble had the attorney general presented the fact on the first motion.

It is true that the defendant has filed an affidavit show-

ing that, as early as November, 1847, and from thence till the organization of the corporation in 1849, action was taken by the commissioners appointed by the charter to receive subscriptions to the capital stock of the proposed corporation, who elected a president and secretary, and opened books of subscription to the stock, and caused application to be made to the territorial legislature for the supplementary act of March 11, 1848, all tending towards the organization of 1849. The affidavit states that by April 5, 1849, the necessary subscriptions and payments were made, but it does not state that any subscription was made before the establishment of the state government.

We do not think that these statements touch the conclusion to which we have come. The proceedings led up to the acceptance of the charter, but could not, by the terms of the charter, operate as an acceptance of it. Even if it had appeared that there were subscriptions to the stock before the territory had become a state, such subscriptions, short of $100,000, required by the charter, could give no right to the subscribers to accept the charter. The terms of the charter expressly exclude such a right. The charter prescribes the conditions of acceptance. It gives no such right to the commissioners. They were only officers of the territory to fulfill a given function. And it gives no such right to the subscribers, until they should have subscribed the entire capital stock and made certain payments towards it. Then, and then only, the charter confers on them the right of acceptance, in the manner which it provides; that is, by filing the very certificate of April 5, 1849. On and by the doing of that, the charter declares that the subscribers should be created a corporation. And thereupon an election of directors should be had, until which the commissioners should act as directors. There may be some

doubt when the corporation actually came *in esse,* whether on the filing of the statement or on the election. Putman *v.* Sweet, 1 Chandler, 268. That question is not material here. It is very certain that, by the terms of the charter, it was accepted by the making or the filing of the statement, and not before.

We have been referred by the defendant's counsel to some authorities holding that acceptance of a charter applied for, or beneficial to the corporators, may be presumed; and that, in similar cases, slight acts of the corporators looking towards acceptance are sufficient to establish it. But these authorities relate to charters naming the corporators and declaring them incorporated, without preliminary steps, *ipso facto,* by force of the charter. These rules have no application to charters not naming the corporators, and prescribing conditions and formalities by which indeterminate persons may become incorporated. We take the distinction to be correctly stated by Angell & Ames, § 83: "A corporation created by statute which requires certain acts to be done before it can be considered *in esse,* must show such acts to have been done, to establish its existence; but this rule does not apply to corporations declared such by the act of incorporation."

Such a charter is held to be a contract between the political body granting it, and the corporators under it. The territory of Wisconsin proffered such a contract by the charter in question. So proffered, it remained a mere proposal, *in fieri,* until accepted according to its terms. Who could accept it? Not the commissioners, as we have seen. Only the subscribers. When could they accept it? Only upon subscription of the full amount of capital stock. How could they accept it? By making and filing the statement of subscription. And the commissioners could do no

act, at any time, tending to prove acceptance, because they had no right to accept. And the subscribers could do no act tending to prove acceptance, before subscription of the whole capital stock; because, until then, they had no right to accept. Such evidences of acceptance as the defendant relies on, must be accompanied by a present right to accept, or they go for nothing.

The territorial charter remained a naked, unaccepted proposition until April 5, 1849, long after the territory had ceased and the state was in existence.

The defendant, however, insisted that, be this as it might, the territorial act of March 11, 1848, recognized the corporation as organized; and that therefore it is not competent for the state now to question its organization prior to the passage of that act. The act of 1848, does *prima facie* imply such a recognition; but as we said in passing on the former motion, that is not conclusive. That is a matter on which the legislature might well be misled or misinformed. And, even if the act declared in terms that the corporation had then been organized, we cannot see how such a declaration could prevail over the manifest fact, that the corporation was not organized for upwards of a year after. But the act contains no such declaration. It is entitled an act supplementary to the original charter, and gives new powers to the corporation authorized by the original charter, giving them throughout to the corporation so authorized, by its corporate name. Without the fact of the subsequent organization, that seems to imply present organization of the corporation. But the language of the act may well go upon either theory, that the legislature understood that the corporation was not organized, or that it was misled into a belief that it was. The use of the corporate name throughout the act does not necessarily imply

that the corporation was already *in esse.* It is quite consistent with the truth that it was still only *in posse.* And the fact, now appearing, does away with a different presumption of fact, as we held it would do in our former opinion.

Some cases were cited to show that legislative recognition in a subsequent statute of a corporation *de facto,* will cure irregularities in its organization and waive forfeitures incurred. People *v.* Manhattan Co., 9 Wend. 351; Railroad Co. *v.* Barnard, 31 Barb. 258. We do not perceive the application of these cases to aid the view of the defendant. The principle on which they rest appears to us to go the other way. Such recognition has relation to a corporation *in esse,* waiving irregularity and forfeiture. An act of the legislature relating to a corporation, not creating or authorizing one, may well have the effect of condonation, but not of creation. It goes by way of confirmation or release; and there must be a corporation *de facto* to be confirmed or to be released. Here there was no corporation *de facto* to confirm or to release. The inherent trouble of the defendant's position is, that it goes to contradict an admitted fact, and to give life to a corporation a year or so before it was born.

The attorney general having established the fact, as we now hold it to be established, we signified our intention to confine the further discussion of this motion to the legal effect of the fact on the question of the right of the state to alter or repeal the charter. Two other points were discussed, however, which we shall briefly notice.

It was urged, against the views we had before expressed, that the state statutes authorizing the mortgage of the road built under the territorial charter, and authorizing the purchasers on foreclosure to organize anew with the territorial

franchises, operated as a grant from the state of the franchises of the territorial charter. We cannot think so, for the reasons assigned in our former opinion. The franchise is *quasi* property; and by whomsoever held, under whatsoever chain of title, is derived from the territorial charter, not from the state statutes. The state statutes did not create it, and do not grant it. They simply authorized the sale and purchase, and the organization by the purchasers of a new corporation, to hold the old franchise, under the old grant. The state statutes are merely enabling acts, conferring no franchise, but only authorizing the transfer of the title to existing franchises. If one purchase under a statute enabling a person, otherwise incompetent, to convey, or enabling a corporation, before unauthorized, to convey, he surely does not take his title from the state; he takes his title by authority of the state, but he takes it from his grantor. The title of the Milwaukee & Prairie du Chien Company to the franchise was derived from the territorial charter, though so derived and held by permission of the state. The question turns on the title of the vendor, not on the license given to him to convey; on the title to the thing purchased, not on the license to the purchaser to hold it. The authority given to the purchasers to organize a corporation to operate the railroad, is very similar to authority given to an alien to hold real estate. Both take the authority from the state, but not the title. All these state enabling acts might be repealed without impairing the franchises of the territorial charter, however the repeal might affect the title to them. We have no doubt of this position; and we think that it is fairly recognized in Vilas *v.* Milwaukee & P. du C. R. R. Co., 17 Wis. 497.

It was suggested with much ingenuity that, as the territory was the creature of the United States, the state upon

its organization succeeded to the sovereign rights of the United States in the territory, as well those reserved by the United States as those delegated to the territorial government; full sovereignty subject only to the federal constitution; and that, as the organic act of congress reserved to that body the right to annul all acts of the territorial legislature, the state succeeded to that right. We cannot think so. Waiving all question of the sovereign rights of the United States over the territory, the state came into the union "on an equal footing with the original states in all respects whatever." The United States derive their powers from the states, not the states theirs from the United States. And though Wisconsin became a constituent of the United States "as one born out of due time," it is none the less an equal constituent with the original states. On its establishment, it took no governmental rights or powers from the United States, as a state. As a member of the union, it took, in common with all the other states, such rights as the federal constitution confers on the original states, as members of the union. The sovereignty and rights of sovereignty of this state came from no organized power. They are inherent in and are derived from its people. The power of congress over the territorial legislation was an incident to the territorial condition, and lapsed, with the territorial government, when the state came into being. The state, *ipso facto,* assumed all political authority within its boundaries, not limited or surrendered by the constitution of the United States. And the source of all legislative authority within its bounds must now be found in the state and federal constitutions, and nowhere else.

On the argument of the principal motion, it was not suggested at the bar, and it wholly escaped our attention, that a general act concerning corporations in the territorial

revision of 1839 reserved to the territorial legislature power to amend, alter or repeal all subsequent acts of incorporation. This act remained in force until the first state revision in 1849, when it, with many others, was repealed; the repeal to take effect January 1, 1850; with a saving clause, that the repeal should not affect any right accrued under any of the statutes so repealed.

The attorney general has now called our attention to this act. And it was argued that the reserved right to amend, alter or repeal the territorial charter, entered into and became a part of the contract of the charter, when accepted; and thus became a right accrued, which was not affected by the repeal; that the repeal could not take effect as to the territorial charter, so long as the charter itself remained unrepealed; the reserved power continuing so far to exist, by force of the charter itself, as a contract. These are nice questions, not necessary to the disposition of this motion, and on which we shall therefore not express an opinion.

If the territorial charter be a contract, as is held, it became such only upon acceptance by the corporators. Before that, as already seen, it rested in proposition, to ripen into a contract upon acceptance in the manner which it provided. And being so accepted after the territory had ceased to exist, it never became a contract between the territory and the corporation. The state constitution, as already observed, continued in force all territorial acts not repugnant to it. The charter thus became a statute of the state. And its acceptance, after the organization of the state, so far as it is a contract, makes it manifestly a contract with the state. There was then no other public authority or political body with which the corporators could contract. It is either not a contract, or it is a contract with the state.

The state adopted the charter, then a mere statute, not a contract, so far only as it was not repugnant to the constitution. With the reserved power of the territorial act of 1839 entering into it and forming a part of it, as a proposition, it was in no way repugnant to the constitution. Without that power, it manifestly was. It is true that the language of sec. 1, art. XI, is expressly prospective. But it is prospective not only as to acts of incorporation, but also as to the formation of corporations. "All general and special acts enacted under the provisions of this section may be altered or repealed;" and, "corporations may be formed," etc. The whole section, taken together signifies clearly, not only that no charters should be passed, but also that no corporations should be formed, not subject to the reserved power. It seems to us quite plain that a territorial charter, not subject to the reserved power, and not yet accepted, was "a law in force in the territory, repugnant to this constitution." Art. XIV, sec. 2. And the position that its acceptance from the state, after the adoption of the constitution, was an acceptance subject to the reserved power in the territorial act of 1839, and in sec. 1 art. XI of the constitution, is certainly a very strong one. There is high authority for going even further. After saying that a private corporation may forfeit its franchise by misuser or nonuser, Mr. Justice Story says: "This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government, may be abolished." Terrett *v.* Taylor, 9 Cranch, 43. *A fortiori* may this be said of a charter passed before and accepted after a change of government. There is indeed some conflict between these

views and those expressed in State *v.* Roosa, 11 Ohio St. 16. But we shall not comment on that case, or pursue this consideration further, because we shall not rest our decision wholly on it, as there appears to us to be safer and clearer ground for it to stand upon.

It was quite competent for the state constitution to have repealed all laws of the territory which had not ripened into contracts, under the rule in Dartmouth College *v.* Woodward, 4 Wheat. 518. So was it competent for it to adopt them. So, also, to adopt them *sub. modo.* This last is what the constitution did. Sec. 1, art. XIV, provides that all rights, actions, contracts, etc., as well of individuals as of corporations, shall continue and be as valid as if no change from territorial to state government had taken place. This provision is in favor of rights and contracts, and is properly absolute. It might have applied to the territorial charter, if then accepted. Sec. 2 provides that all laws then in force in the territory, not repugnant to the constitution, should remain in force, until they should expire by their own limitation or be altered or repealed by the legislature. This provision has relation to public policy, and is properly subject to absolute legislative control. The distinction is a just one, and is very marked and manifest.

It may be that the territorial laws would have survived the change, without this constitutional provision, as the laws of conquered countries are said to survive conquest. Even in that case, they would have been subject to repeal. But the territorial laws actually survived the change by force of no such principle, but by the express provision of the constitution. That instrument expressly continued them in force, until altered or repealed by the legislature, and no longer. The effect is to render subject to subse-

quent alteration or repeal, all territorial laws which were then subject to alteration or repeal. This makes all such laws expressly subject to alteration or repeal, the identical words of the reserved power in section 1, art. XI. And this use here of the very words used there, and the provision for laws expiring by their own limitations, raise a very strong presumption that section 2, art. XIV, has special relation to corporate charters. For there was probably no statute of the territory which would expire by its own limitation, except such charters. Indeed the whole provision for alteration or repeal is nugatory, except so far as it has relation to charter contracts within the Dartmouth College rule; for all other laws would be subject to repeal without any provision for it. The provision was probably intended to take the place of the reserved power in the territorial R. S. of 1839, which, being so replaced, was accordingly repealed in the first state revision in 1849.

We therefore hold that the unaccepted territorial charter of the Milwaukee and Waukesha Railroad Company, till then subject to alteration or repeal by the territorial legislature, was continued in force by sec. 2, art. XIV of the constitution, subject to alteration or repeal by the state legislature, just as a charter granted by the state; and all the positions of our former opinion in regard to state charters apply equally to the territorial charter of 1847–1848.

The present motion of the attorney general must therefore be granted.

By the Court.—So ordered.

NOTE.

(Each case in this note after which is placed the figure ([1]) relates to the subject discussed in the foregoing opinion numbered I; those numbered ([2]) relate to the subject in the opinion numbered II, etc.)

Attorney General *v.* The Railroads, *supra,* has been cited with approval by the Supreme Court of Wisconsin, as follows: Atty.-Gen. *v.* West Wis. Ry.,[7] 36 Wis. 496; Atty.-Gen. *v.* City of Eau Claire,[1] 37 Wis. 443, 444, 445; Atty.-Gen. *v.* C., M. & St. P. Ry.,[3] 38 Wis. 70; State ex rel. Wood *v.* Baker,[1] 38 Wis. 79; State ex rel. King *v.* Kromer,[1] 38 Wis. 79; Hinckley *v.* C., M. & St. P. Ry.,[3] 38 Wis. 196; State ex rel. Cash *v.* Supervisors of Juneau County,[1] 38 Wis. 557; Cleaver *v.* Cleaver,[1] 39 Wis. 102; Sellers *v.* Union Lumbering Co.,[5] 39 Wis. 529; State *v.* Doyle,[1] 40 Wis. 185; State ex rel. Continental Ins. Co. *v.* Doyle,[9] 40 Wis. 236; N. W. Mut. Life Ins. Co. *v.* Germantown Fire Ins. Co.,[3] 40 Wis. 451; Petition of Semler,[1] 41 Wis. 522; Kimball *v.* Town of Rosendale,[6] 42 Wis. 416; Gibson *v.* Gibson,[1] 43 Wis. 33; Curry *v.* C. & N. W. Ry.,[1] 43 Wis. 670; In re Ida Louisa Pierce,[1] 44 Wis. 418, 431, 434, 436, 438, 440, 441, 456; Ditberner *v.* C., M. & St. P. Ry. Co.,[4] 47 Wis. 142; Cohn *v.* Wausau Boom Co.,[5] 47 Wis. 324; Smith *v.* Sherry,[4] 50 Wis. 212, 215; Atty.-Gen. ex rel. Saunders *v.* A. A. & N. I.,[2] 52 Wis. 480; State ex rel. Hudd *v.* Timme,[4] 54 Wis. 338; State ex rel. Green Bay, etc., Co. *v.* Jennings,[1] 56 Wis. 120; State ex rel. Agricultural Society *v.* Timme,[3] 56 Wis. 428; Germantown Farmers' Mut. Ins. Co. *v.* Dhein,[3] 57 Wis. 525; State *v.* St. Croix Boom Corp.[1] 60 Wis. 567; Jensen *v.* State,[1] 60 Wis. 582; Palms *v.* Shawano County,[3] 61 Wis. 215; Brock *v.* Dole,[1] 66 Wis. 149; Ellis *v.* Milwaukee City Ry. Co.,[3] 67 Wis. 138; Sleeper *v.* Goodwin,[5] 67 Wis. 589; McCaul *v.* Thayer,[3] 70 Wis. 149; State ex rel. Cream City Ry. Co. *v.* Hilbert,[5] 72 Wis. 193; Purtell *v.* Chicago Forge & Belt Co.,[4] 74 Wis. 134; State ex rel. Atty.-Gen. *v.* Cunningham,[1, 2] 81 Wis. 473, 489, 491, 492, 15 L. R. A. 565, 570; State ex rel. Lamb *v.* Cunningham,[1] 83 Wis. 120, 125, 156, 17 L. R. A. 161, 162, 172; State ex rel. Rade *v.* Shaugnessey,[1] 86 Wis. 647; Black River Imp. Co. *v.* Holway,[6] 87 Wis. 589; State ex rel. Lederer *v.* International Investment Co.,[1] 88 Wis. 519; Jackson *v.* The State,[1] 92 Wis. 425; C., M. & St. P. Ry. *v.* City of Milwaukee,[5] 92

Wis. 423; In re Hartung,[1] 98 Wis. 141; Mason *v.* City of Ashland,[5] 98 Wis. 545; State ex rel. Hartung *v.* City of Milwaukee,[1, 2] 102 Wis. 512, 513, 514; State ex rel. 4th Nat Bank *v.* Johnson,[1, 2, 4] 103 Wis. 611, 615, 51 L. R. A. 53, 73 note; State ex rel. Donnelly *v.* Hobe,[6] 106 Wis. 424; In re Town of Holland, [1, 2] 107 Wis. 179; State ex rel. Atty.-Gen. *v.* Portage City Water Co.,[2] 107 Wis. 447; Linden Land Co. *v.* Milwaukee El. Ry. & Light Co.,[4] 107 Wis. 514; In re Court of Honor of Illinois,[1, 2] 109 Wis. 626, 627; In re Stittgen,[2] 110 Wis. 629; State ex rel. Tewalt *v.* Pollard,[2] 112 Wis. 236; Seiler *v.* State,[1, 2] 112 Wis. 299; State ex rel. Cook *v.* Houser,[1, 2] 122 Wis. 552; City of Madison *v.* Madison Gas & El. Co.,[1, 2] 129 Wis. 249, 108 N. W. 66, 68.

Atty.-Gen. *v.* Railroads, *supra,* has been cited with approval ouside of the Wisconsin Supreme Court, as follows: Wheeler *v.* N. C. Irrigation Co.,[1, 2] 9 Colo. 251, 252, 253; People ex rel. Bentley *v.* McClees,[1] 20 Colo. 409, 26 L. R. A. 648; State ex rel. County Comrs. of Volusia County,[6] 28 Fla. 815; Trust Co. of Ga. *v.* State,[2] 109 Ga. 749, 48 L. R. A. 526; People ex rel. Kocourek *v.* Chicago,[1] 193 Ill. 510, 511, 512, 58 L. R. A. 840, 849, 863 notes; Hackett *v.* The State,[2] 105 Ind. 259, 55 Am. Rep. 207; L. E. & St. L. Con. Ry. *v.* Wilson,[5] 132 Ind. 526, 18 L. R. A. 109; Columbian Athletic Club *v.* State,[2] 143 Ind. 103, 28 L. R. A. 729; P. C. C. & St. L. Ry. *v.* Montgomery,[4] 152 Ind. 12, 69 L. R. A. 881; Muncie Nat. Gas Co. *v.* Muncie,[1, 2] 160 Ind. 106, 110, 60 L. R. A. 828, 830; State ex rel. *v.* Crawford,[2] 28 Kan. 733, 735, 42 Am. Rep. 186–8; Com. *v.* McGovern,[2] 116 Ky. 233, 66 L. R. A. 285; Green *v.* Knife Falls Boom Corp.,[4] 35 Minn. 157, 159; Brady *v.* Moulton,[4] 61 Minn. 186; State *v.* Wiswell,[4] 61 Minn. 466; State ex rel. Am. Sav. & Loan Assn.,[1] 64 Minn. 360; Brown *v.* Maplewood Cemetery Assn.,[2] 85 Minn. 514; State ex rel. Atty.-Gen. *v.* Schweikart,[2] 19 Mo. 517; State *v.* Ubrig,[2] 14 Mo. App. 414; Sloan *v.* Pac. Ry.,[3] 61 Mo. 33, 21 Am. Rep. 402; Stockton *v.* Central Ry.,[2] 50 N. J. Eq. 79, 80, 17 L. R. A. 108, 109; State ex rel. Goodwin *v.* Nelson Co.,[1] 1 N. Dak. 102, 8 L. R. A. 289; Anderson *v.* Gordon,[1] 9 N. Dak. 482; State ex

rel. Lord *v.* Taylor,[1] 28 Ore. 518, 519, 31 L. R. A. 478; State ex rel Dollard *v.* Comrs. of Hughes County,[1] 1 S. Dak. 371, 10 L. R. A. 590; Smith *v.* Cornelius,[2] 41 W. Va. 67, 30 L. R. A. 751; L. & N. *v.* Ry. Comrs. of Tenn.,[3] 19 Fed. 706; Nat. Foundry & Pipe Works *v.* Oconto Water Co.,[5] 52 Fed. 49; Rep. Mt. Silver Mines *v.* Brown,[1] 58 Fed. 648, 24 L. R. A. 779; U. S. *v.* Joint Traffic Assn.,[2] 76 Fed. 898; Peik *v.* C. & N. W. Ry.,[3] 94 U. S. 178; Stone *v.* Wisconsin,[10] 94 U. S. 182.

It has been cited in notes to the following cases reported in L. R. A., Am. Dec., Am. St. Rep. and two notes in the N. J. Eq. Reports, where valuable collections of authorities may also be found:

Lawyers' Reports Annotated: C. & N. W. Ry. *v.* Dey (35 Fed. 866), 1 L. R. A. 744; Chic. Mut. Life Indemnity Assn. *v.* Hunt (127 Ill. 257), 2 L. R. A. 551; Haines *v.* Hall (17 Ore. 165), 3 L. R. A. 611; Ulbricht *v.* Eufala Water Co. (86 Ala. 587), 4 L. R. A. 573; U. S. *v.* Jellico, Mt. C. & C. Co. (46 Fed. 432), 12 L. R. A. 754; W. & L. T. R. Co. *v.* Croxton (98 Ky. 739), 33 L. R. A. 189; State, Crow *v.* A., T. & S. F. Ry. (176 Mo. 687), 63 L. R. A. 764.

American Decisions: Atty.-Gen. *v.* Cohoes Co. (6 Paige Ch. 133), 29 Am. Dec. 757; Barrow *v.* Richard (8 Paige Ch. 351), 35 Am. Dec. 717; Bigelow *v.* Hartford Bridge Co. (14 Conn. 565), 36 Am. Dec. 502; Com. *v.* Pittsburgh, etc., Ry. Co. (24 Pa. St. 159), 62 Am. Dec. 376; Sandford *v.* Cataurisa, etc., Ry. (24 Pa. St. 378), 64 Am. Dec. 672; Bell *v.* Ohio, etc., Ry. Co. (25 Pa. St. 161), 64 Am. Dec. 690; Mott *v.* Pa. Ry. Co. (30 Pa. St. 9), 72 Am. Dec. 684; People *v.* A. & V. Ry. (24 N. Y. 261), 82 Am. Dec. 302; Com. *v.* Smith (10 Allen, 403), 87 Am. Dec. 678; Coal Co. *v.* Coal & Nav. Co. (50 Pa. St. 91), 88 Am. Dec. 557–8.

American State Reports: State *v.* Atchison, etc., Ry. Co. (24 Neb. 143), 8 Am. St. Rep. 200; State *v.* Cunningham (83 Wis. 90), 35 Am. St. Rep. 60.

American and English Railway Cases: Chattaroi Ry. *v.* Kinner (81 Ky. 221), 14 Am. & Eng. Ry. Cas. 33; Ex parte Koehler (30 Fed. 867), 29 Am. & Eng. Ry. Cas. 59;

Graham *v.* B. H. & E. Ry. (118 U. S. 161), 25 Am. & Eng. Ry. Cas. 69.

New Jersey Equity: Palys *v.* Jewett, 32 N. J. Eq. 312; Stanford v. Lyon, 37 N. J. Eq. 97.

The case of Atty.-Gen. *v.* The Railroads, *supra,* never reached the Supreme Court of the United States, and the objectionable Wisconsin statute was repealed two years later. (See ch. 57, laws 1876).

It is worthy of note, however, that when the State of Wisconsin nearly thirty years later enacted ch. 362, laws of 1905, embodying even more stringent provisions concerning the regulation of tolls that might be charged by public-service corporations, the law was acquiesced in by the railroads without appeal to the courts.

The so-called "Granger Cases" arising upon the laws of the States of Illinois, Wisconsin, Iowa, and Minnesota, are reported under various titles in 94 U. S. pp. 113 to 187.

Craker vs. The Chicago & Northwestern Railway Company.

January Term, 1875.

(36 Wis. 657.)

This was an action brought by a young lady, who was about twenty years of age, and a school-teacher, against The Chicago & Northwestern Railway Company to recover damages on account of the insulting and abusive treatment accorded her by one of the defendant's conductors in charge of a freight train, while she was traveling as a passenger on such train.

It appeared from the evidence that the conductor, who had never met plaintiff prior to the trip in question, forcibly and against the protests of the plaintiff kissed her several times. For this conduct the conductor was promptly discharged by the company. The main ground of plaintiff's recovery was for the "mental suffering" on account of the sense of wrong and insult resulting from the conductor's acts. She recovered judgment for $1,000.

Upon defendant's appeal, the opinion hereinafter set out was rendered by the Chief Justice.

The following are the propositions of law decided:

A master is liable for a wrong done by his servant, whether through negligence or the malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured.

It seems that the master should be liable *in all cases* for the servant's wrongful act done *in the course of his employment,* whether through negligence or malice.

A railroad company is bound to protect female passengers on its trains from all indecent approach or assault; and where a conductor on the company's train makes such an assault on a female passenger, the company is liable for compensatory damages.

Exemplary damages cannot be recovered against the principal for a wrongful and malicious act of the agent, neither authorized nor ratified by the principal.

In actions for personal torts, the "compensatory damages" which may be recovered of the principal for the agent's act, include not merely the plaintiff's pecuniary loss, but also compensation for mental suffering. An ambiguous expression on this subject in Railroad *v.* Finney, 10 Wis. 388, corrected.

In awarding compensatory damages in such cases, no distinction is to be made between other forms of mental suffering and that which consists in "a sense of wrong or insult" arising from an act really or apparently "dictated by a spirit of willful injustice or by a deliberate intention to vex, degrade or insult." A contrary intimation in Wilson *v.* Young, 31 Wis. 574, overruled.

A verdict of $1,000 damages for the insult offered by defendant's conductor to the plaintiff in this case, *held* not so excessive as to authorize the court to set it aside.

Ryan, Chief Justice. I. We cannot help thinking that there has been some useless subtlety in the books in the application of the rule *respondeat superior,* and some unnecessary confusion in the liability of principals for willful and malicious acts of agents. This has probably arisen from too broad an application of the *dictum* of Lord Holt, that "no master is chargeable with the acts of his servant

but when he acts in the execution of the authority given to him, and the act of the servant is the act of the master." Middleton *v.* Fowler, 1 Salk. 282. For this would seem to go to excuse the master for the negligence as well as for the malice of his servant. One employing another in good faith to do his lawful work, would be as little likely to authorize negligence as malice; and either would then be equally *dehors* the employment. Strictly, the act of the servant would not, in either case, be the act of the master. It is true that so great an authority as Lord Kenyon denies this in the leading case of McManus *v.* Crickett, 1 East, 106, which has been so extensively followed; and again, in Ellis *v.* Turner, 8 Term, 531, distinguishes between the negligence and the willfulness of the one act of the agent, holding the principal for the negligence but not for the willfulness. It is a similar comment on these subtleties, that McManus *v.* Crickett appears to rest on Middleton *v.* Fowler, the only adjudged case cited to support it; and that Middleton *v.* Fowler was not a case of malice, but of negligence, Lord Holt holding the master in that case not liable for the negligence of his servant, in such circumstances as no court could now doubt the master's liability. In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment, as is virtually recognized in Ellis *v.* Turner.

But we need not pursue the subject. For, however, that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be acci-

dental or willful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it.

In Railroad Company *v.* Finney, 10 Wis. 388, Dixon, C. J., says: "It was insisted by the counsel for the plaintiffs in error, that in no case could a right of action arise against the principal, for the willful and malicous misconduct of the agent, unless it was previously authorized or subsequently ratified by him. On careful examination of this position, we are satisfied that it is incorrect. The case of Weed *v.* P. R. R. Co., 17 N. Y. 362, will be found to be a clear and well reasoned case upon the subject. It was there held that it was no defense to an action against a railroad corporation, for its failure to transport a passenger with proper dispatch, that the delay was the willful act of the conductor in charge of the train. The rule established by that case, as we think with much reason, is, that where the misconduct of the agent causes a breach of the obligation or contract of the principal, there the principal will be liable in an action, whether such misconduct be willful or malicious, or merely negligent. The action, though undeniably in tort, is treated virtually as an action *ex contractu,* and governed by the same rule of damages, unless the mal-

ice or wantonness of the agent is brought home and directly charged to the principal. In this case, the contract between the plaintiff and defendant was, that in consideration of his having paid to them the fee demanded, they were carefully to transport him in their cars from Madison to Edgerton. It is no defense for their breach of this contract, that it was occasioned by the willful act of their agent. The corporation was incapable of executing it, except through the medium of its agents. If in doing so they violate it, no matter from what motive, their acts are the acts of their principals, who hold them out to the world as capable and faithful in the discharge of their duties. In no other way could the company be held to a performance of its contracts." This was, perhaps, *obiter* in that case; but, with a single qualification, presently made and not material in this connection, we fully reaffirm it in this case.

In Bass *v.* Railway Co., 36 Wis. 463, speaking of railroad officers in charge of passenger trains, we said: "They act on the peril of the corporation, and their own. Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it, of necessity, commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu,* under conditions of such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice,* is vested in these officers; and that, as to passengers on board, they are to be considered as the corporation itself; and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers, the corporation being responsible for the acts of the

officers in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety, and sanctioned by great weight of authority." We have carefully reconsidered all that was said in Bass *v.* Railway Co., and reaffirm the doctrine of that case. And what it was there said, in the passage cited, we were disposed to hold, we now hold, with a single qualification which we will presently make and need not notice here.

So far as they relate to the duties of railroad companies to their passengers, and their responsibility for the officers of their trains, Railroad Co. *v.* Finney and Bass *v.* Railway Co. are in perfect accord, though the latter case carries the principle more into detail; but both rest on the same principle.

In Bass *v.* Railway Co., we had occasion also to consider somewhat the nature of the obligations of railroad companies to their passengers under the contract of carriage; the "careful transportation" of Railroad Co. *v.* Finney. On the authority of such jurists as Story, J., and Shaw, C. J., we likened them to those of innkeepers. And, speaking of female passengers, we said: "To such, the protection which is the natural instinct of manhood towards their sex, is especially due by common carriers." In Day *v.* Owen, 5 Mich. 520, the duties of common carriers are said to "include everything calculated to render the transportation most comfortable and least annoying to passengers." In Nieto *v.* Clark, 1 Clifford, 145, the court says: "In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior,

and every immodest and libidinous approach." Long before, Story, J., had used this comprehensive and beautiful language, worthy of him as a jurist and gentleman, in Chamberlain *v.* Chandler, 3 Mason, 242: "It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil." These things were said, indeed, of passage by water, but they apply equally to passage by railroad. Commonwealth *v.* Power, 7 Met. 596.

These were among the duties of the appellant to the respondent, when she went as a passenger on its train: duties which concern public welfare. These were among the duties which the appellant appointed the conductor to perform for it, to the respondent. If another person, officer or passenger or stranger, had attempted the indecent assault which the conductor made upon the respondent, it would have been the duty of the appellant, and of the conductor for the appellant, to protect her. If a person, known by his evil habits and character as likely to attempt such an assault upon the respondent, had been upon the train, it would have been the duty of the appellant, and of the conductor for the appellant, to the respondent, to protect her against the likelihood. Stephen *v.* Smith, 29 Vt. 160; Railroad Co. *v.* Hinds, 53 Pa. St. 512; Commonwealth *v.* Power, *supra;* Nieto *v.* Clark, *supra;* and other cases cited in Bass *v.* Railway Co. We do not understand

it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would have been liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent, of the contract which he was appointed to perform for the principal: as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is, that it limits the contract. The carrier's contract is to protect the passenger against the world; the appellant's construction is, that it was to protect the respondent against all the world except the conductor, whom it appointed to protect her: reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity.

The contract of carriage was very surely the contract of appellant, not of the agent who sold the ticket. It rested with the appellant to perform it by agents of its own choice, on its own responsibility. It chose the officers of the train, with the conductor at their head, to perform its contract for it. Where was the corporation and by whom was it represented, as to this contract and this passenger? Not surely in some foreign board room, by directors making regulations and appointing agencies for the corporate

business. They could not perform this contract. Not surely in some distant office, by a superintendent or manager issuing the orders of the directors to his subordinates. He could not perform this contract. *Quoad* this contract and the passenger, the corporation was present on this train to keep it and to care for her, represented by the officers of the train, who possessed, *pro hac vice,* the whole power and authority, and were the living embodiment of the ideal entity which made the contract, was bound to keep it, and is appellant here to contend that it has no responsibility for the flagrant violation of the contract, which the respondent paid it to make and to keep, by its sole present representative appointed to keep it on its behalf. Like the English Crown, it lays its sins upon its servants, and claims that it can do no wrong. We cannot bend down the law to such a convenience. The appellant tortiously broke this contract as surely as it made it: committed this tort as surely as it made the contract.

We are unwilling to waste time or patience in discussing the conductor's violation of the appellant's contract with the respondent. Every woman has a right to assume that a passenger car is not a brothel; and that when she travels in it, she will meet nothing, see nothing, hear nothing, to wound her delicacy or insult her womanhood. It is enough to say that the appellant's contract of careful carriage with the respondent was not kept, was tortiously violated by the officer appointed by the appellant to keep it.

And so the appellant seems at the time to have regarded it. It is very certain that it had a right to dismiss the conductor, as it did promptly and most properly, rescinding his contract of employment for violation of his duty. For that person violated his contract with the appellant, by violating the appellant's contract with the respondent.

He sinned in the course of his employment, against the appellant and the respondent alike: in one and the same act broke his own contract with the appellant, and the appellant's with the respondent.

We cannot think that there is a question of the respondent's right to recover against the appellant, for a tort which was a breach of the contract of carriage. We might well rest our decision on principle. But we also think that it is abundantly sanctioned by authority. Railroad Co. *v.* Finney, Bass *v.* Railway Co., Weed *v.* Railroad Co., Nieto *v.* Clark, Railroad Co. *v.* Hinds, and Railroad *v.* Rogers, *supra;* Railroad Co. *v.* Derby, 14 How. 468; Moore *v.* Railroad Co., 4 Gray, 465; Ramsden *v.* Railroad Co., 104 Mass. 117; Maroney *v.* Railroad Co., 106 id. 153; Coleman *v.* Railroad Co., id. 160; Bryant *v.* Rich, id. 180; Railroad Co. *v.* Vandiver, 42 Pa. St. 365; Railroad Co. *v.* Anthony, 43 Ind. 183; Railroad Co. *v.* Blocher, 27 Md. 277; Railroad Co. *v.* Young, 21 Ohio St. 518; Sherley *v.* Billings, 8 Bush, 147; Seymour *v.* Greenwood, 6 Hurl. & N. 359; Bayley *v.* Railroad Co., L. R., 7 C. P. 415. There are cases, even of recent date, which hold the other way. But we think that the great weight of authority and the tendency of decision sanction our position.

II. It was not necessary to the decision of Bass *v.* Railway Co., and we were not then quite prepared, to pass upon the rule of damages in such cases as that and this. We were then aware of some apparent discrepancy between things said in that case and in Railroad Co. *v.* Finney, and purposely omitted all allusion to the latter case. In this case, as in Bass *v.* Railway Co., the rule of damages has been fully and well discussed, and is more or less involved in the decision of this case. We have again considered it, and

are now prepared to state our views of the rule in such cases.

It is said in Railroad Co. *v.* Finney, that the plaintiff in such a case is not entitled to exemplary damages against the principal, for the malicious act of the agent, without proof that the principal expressly authorized or confirmed it. Without now discussing what would or would not be competent or sufficient evidence of such authority or confirmation, we may say that we have, on very mature consideration, concluded that the rule in Railroad Co. *v.* Finney is the better and safer rule. We are aware that there is authority, and perhaps the greater weight of authority, for exemplary damages in such cases, without privity of the principal to the malice of the agent; and that reasons of public policy are strongly urged in support of such a rule. Goddard *v.* Railroad Co., 57 Me. 202; Sanford *v.* Railroad Co., 23 N. Y. 343; Railroad Co. *v.* Rogers, 38 Ind. 116, and other cases. But we adhere to what is said on that point in Railroad Co. *v.* Finney. We think that in justice there ought to be a difference in the rule of damages against principals for torts actually committed by agents, in cases where the principal is, and in cases where the principal is not, a party to the malice of the agent. In the former class of cases, the damages go upon the malice of the principal: malice common to principal and agent. In the latter class of cases, the recovery is for the act of the principal through the agent, in malice of the agent not shared by the principal; the principal being responsible for the act, but not for the motive of the agent. In the former class, the malice of the agent is actual; in the latter, it must at most be constructive. And we are inclined to think that the justice of the rule accords with public policy.

Responsibility for the compensatory damages will be a sufficient admonition to carrier corporations to select competent and trustworthy officers. And responsibility for exemplary damages, in cases of ratification, will be an admonition to prompt dismissal of offending officers, as their retention might well be held evidence of ratification. The interest of these corporations and of the public, in such matters, should be made alike as far as possible. And we hold the rule, as we have stated it, the justest and safest for both.

It was also said in Railroad Co. *v.* Finney, that the action is in tort; but that, in cases not calling for exemplary damages, the rule of damages should be as in actions *ex contractu,* the actual loss sustained by reason of the misconduct of the conductor.

This was said *arguendo,* without attempt at close connection or exact statement; and it is not altogether easy to ascertain its precise meaning. If it mean, as it may, that in such cases the recovery against the principal for the tort committed by the agent is limited to the mere pecuniary loss, we cannot sanction it. Such a rule would be in conflict with all known rules of damages in actions of tort for personal wrongs; and would be almost equivalent to a license to officers of railroad trains and steamboats to insult and outrage passengers committed to their care for courtesy and protection: mischievous alike to the companies and the public. But if it mean, as it may and probably was intended, compensatory damages as in like actions for other personal torts, we affirm and adopt it as the rule of the court. We see no reason for distinguishing such actions from others of like character, in the rule of damages.

In Wilson *v.* Young, 31 Wis. 574, Lyon, J., inadvert-

ently fell into some subtleties found in Mr. Sedgwick's excellent work, which appear to us all now to confuse compensatory and exemplary damages. The distinction was not in that case, and the passage in Sedgwick was cited and approved, as such high authorities often are, without sufficient consideration. We all now concur in disapproving the distinction.

In giving the elements of damages, Mr. Sedgwick distinguishes between "the mental suffering produced by the act or omission in question: vexation: anxiety:" which he holds to be ground for compensatory damages: and the "sense of wrong or insult, in the sufferer's breast, from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade or insult," which he holds to be grounds for exemplary damages only. Sedgwick's Meas. Dam. 35.

Mr. Sedgwick himself says that the rule in favor of exemplary damages "blends together with the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender" (ib. 38); and, following him, this court held in the leading case of McWilliams *v.* Bragg, 3 Wis. 424, and has often since reaffirmed, that exemplary damages are "in addition to actual damages."

In actions of tort, as a rule, when the plaintiff's right to recover is established, he is entitled to full compensatory damages. When proper ground is established for it, he is also entitled to exemplary damages, in addition. The former are for the compensation of the plaintiff; the latter, for the punishment of the defendant and for example to others. This is Sedgwick's blending together of the interest of society and the interest of plaintiff. And it is plain that there cannot well be common ground for the two.

The injury to the plaintiff is the same, and for that he is entitled to full compensation, malice or no malice. If malice be established, then the interest of society comes in, to punish the defendant and deter others in like cases, by adding exemplary to compensatory damages.

We need add no authority to Mr. Sedgwick's that, in actions for personal tort, mental suffering, vexation and anxiety are subject of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and intention to vex and degrade. The appearance of malicious intent may indeed add to the sense of wrong; and equally, whether such intent be really there or not. But that goes to mental suffering, and mental suffering to compensation. So it seems to us. But if there be a subtle, metaphysical distinction which we cannot see, what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental sufferings and his sense of wrong—so much for compensatory, and so much for vindictive damages? And if one cannot scrutinize the anatomy of his own, how impossible to dissect the mental agonies of another, as a surgeon does corporal muscles. If possible, juries are surely not metaphysicians to do it. And we must hold that all mental suffering directly consequent upon tort, irrespectively of all such inscrutable distinctions, is ground for compensatory damages in action for the tort.

With these views, we can see no error in the charge of the court below on the subject of damages.

III. The respondent appears to be of respectable rank in life, and of sufficient culture to qualify her for teaching in public schools. In the painful trial of character and temper of the scene which culminated in the assault, in

her action and demeanor following upon it, in the interview intruded upon her by the appellant, and in the embarrassment of her examination on the trial, she appears to have acted with great propriety, free from all exaggeration and affectation. She appears in the record to be a person who would feel such a wrong keenly. She was entitled to liberal damages for her terror and anxiety, her outraged feeling and insulted virtue, for all her mental humiliation and suffering. We cannot say that the damages are excessive. We might have been better satisfied with a verdict for less. But it is not for us, it was for the jury, to fix the amount. And they are not so large that we can say that they are unreasonable. Who can be found to say that such an amount would be in excess of compensation to his own or his neighbor's wife or sister or daughter? Hewlett *v.* Cruchley, 5 Taunt. 277. We cannot say that it is to the respondent.

By the Court.—The judgment of the court below is affirmed.

NOTE.

(Each case in this note after which is placed the figure (1) relates to the subject discussed in the foregoing opinion numbered I; those numbered (2) relate to the subject in the opinion numbered II; etc.)

The opinion in the Craker case, *supra,* is one of the most widely cited opinions to be found on the subject of compensatory damages for mental suffering. It has been cited with approval in Wisconsin as follows: Hinckley *v.* C. M. & St. P. Ry.,[2] 38 Wis. 197; Brabbits *v.* C. & N. W. Ry.,[1] 38 Wis. 299; Bass *v.* C. & N. W. Ry.,[2] 39 Wis. 641; State ex rel. Continental Ins. Co. *v.* Doyle,[1] 40 Wis. 233, 234; Walsh *v.* C., M. & St. P. Ry.,[1] 42 Wis. 29; Winn *v.* Peckham,[2] 42 Wis. 501; Smith *v.* C., M. & St. P. Ry.,[1] 42 Wis. 526; Bass *v.* C. & N. W. Ry.,[1, 2] 42 Wis. 666, 667, 672, 674, 675, 676, 678; Brown *v.* Swineford,[1]

44 Wis. 286, 288, 289; Bessex *v.* C. & N. W. Ry.,[1] 45 Wis. 483; Sorenson *v.* Dundas,[1] 50 Wis. 338; Fenelon *v.* Butts,[1] 53 Wis. 352; Brown & wife *v.* C., M. & St. P. Ry.,[1] 54 Wis. 348; Eviston *v.* Kramer,[2] 57 Wis. 578; Lawson *v.* C., St. P. M. & O. Ry.,[1] 64 Wis. 456; Schaefer *v.* Osterbrink,[1] 67 Wis. 499; Grace *v.* Dempsey,[1, 2] 75 Wis. 323; Duffies *v.* Duffies,[1, 2] 76 Wis. 386, 8 L. R. A. 425, 20 Am. St. Rep. 88 and note collecting authorities; Putry *v.* C., St. P. M. & O. Ry.,[2] 77 Wis. 227; Summerfield *v.* Western U. Tel. Co.,[1] 87 Wis. 12, 13; Reinke *v.* Bentley,[1, 2] 90 Wis. 459; Robinson *v.* Superior R. T. Ry., [1, 2] 94 Wis. 348, 34 L. R. A. 206, 207; Bryan *v.* Adler,[1] 97 Wis. 127, 41 L. R. A. 665; Vassau *v.* Madison Electric Co.,[2] 106 Wis. 306, 307; Bergman *v.* Hendrickson,[1] 106 Wis. 437, 438; Gaertner *v.* Blues,[2] 109 Wis. 171; Rueping *v.* C. & N. W. Ry.,[1] 116 Wis. 630; Cobb *v.* Simon,[1] 119 Wis. 604; Koerber *v.* Patek,[1, 2] 123 Wis. 465, 68 L. R. A. 961.

In Lienkauf & Strauss *v.* Morris, 66 Ala. 45, Craker *v.* Ry., *supra,* was cited, but not with entire approval. It has, however, been cited with approval outside of the Wisconsin Supreme Court as follows: Birmingham Ry. & El. Co. *v.* Baird,[1] 130 Ala. 348, 54 Am. St. Rep. 754; McMurray *v.* Basnett,[1] 18 Fla. 626; S. F. & W. Ry. *v.* Lulu Quo,[2] 103 Ga. 127, 40 L. R. A. 484; C. & E. Ry. *v.* Flexman,[1] 103 Ill. 551, 8 L. R. A. 358; C., R. I. & P. Ry. *v.* Barrett,[1] 16 Brad. (Ill.) 23, 24; Am. Ex. Co. *v.* Patterson,[1] 73 Ind. 435; L. E. & W. Ry. *v.* Fix,[1, 2] 88 Ind. 388, 11 Am. & Eng. Ry. Cas. 314; Smith *v.* L. E. & St. L. Ry.,[1] 124 Ind. 400; Dixon *v.* Waldron,[1] 135 Ind. 531, 41 Am. St. Rep. 450, 24 L. R. A. 487; McKinley *v.* C. & N. W. Ry.,[1] 44 Ia. 318, 322, 24 Am. St. Rep. 750, 753; Mentzer *v.* W. U. Tel. Co.,[2] 93 Ia. 764, 28 L. R. A. 76; Kan. Lumber Co. Jr. *v.* Central Bank,[1] 34 Kan. 639; L. & N. Ry. *v.* Ballard,[1] 85 Ky. 311; Richberger *v.* Am. Express Co.,[1] 73 Miss. 169, 31 L. R. A. 391; Spohn *v.* M. P. Ry.,[1] 87 Mo. 81 and note collecting authorities in 26 Am. & Eng. Ry. Cas. 256; Sira *v.* Wabash Ry.,[1] 115 Mo. 136, 37 Am. St. Rep. 390, 20 L. R. A. 176; Farber *v.* M. P. Ry.,[1] 116 Mo. 91, 20 L. R. A. 353, 354; Cornell *v.* W. U. Tel. Co.,[2]

116 Mo. 43, 20 L. R. A. 176; McNamara *v.* St. L. T. Co.,[2] 182 Mo. 686, 66 Am. St. Rep. 490; Randolph *v.* H. & St. J. Ry.,[1] 18 Mo. App. 616, 618; McGuiniss *v.* M. P. Ry.,[1] 21 Mo. App. 408; Rouse *v.* Metropolitan Street Ry. Co.,[1] 41 Mo. App. 309; Jones *v.* St. Louis N. & P. L. Co.,[1] 43 Mo. App. 409; Eads *v.* Metropolitan St. Ry. Co.,[1] 43 Mo. App. 545; Haman *v.* Omaha Horse Car Co.,[2] 35 Neb. 80; Young *v.* Tel. Co.,[1] 107 N. C. 384, 22 Am. St. Rep. 894, 9 L. R. A. 674; Purcell *v.* Ry.,[1] 108 N. C. 422; Hood *v.* Sudderth,[1] 111 N. C. 222; Daniel *v.* Petersburg R. Co., 117 N. C. 592, 4 L. R. A. (N. S.) 499; Stewart *v.* Brooklyn & C. Ry.,[1] 90 N. Y. 593, 12 Am. & Eng. Ry. Cas. 131; Dwinelle *v.* N. Y. C. & H. R. Ry.,[1] 120 N. Y. 126, 17 Am. St. Rep. 617, 8 L. R. A. 227; Krugg *v.* Pitass,[1] 162 N. Y. 162; Gillespie *v.* B. H. Ry.,[1] 178 N. Y. 357, 361, 66 L. R. A. 622, 624; Clifford *v.* Press Publishing Co.,[1] 78 App. D. (N. Y.) 81, 86; Smith *v.* Manhattan Ry.,[1] 18 N. Y. Supp. 759; Nelson B. C. *v.* Lloyd,[1] 60 Oh. St. 448, 46 Am. St. Rep. 315; Lakin *v.* O. P. Ry.,[1] 150 Ore. 233; Dillingham *v.* Russell,[1] 73 Tex. 52, 15 Am. St. Rep. 758, 3 L. R. A. 637; Stuart *v.* Western Union Tel. Co.,[2] 66 Tex. 585; T. & P. Ry. *v.* Woodall,[1] 2 Tex. Ct. App. 420; Knoxville Traction Co. *v.* Lane,[2] 103 Tenn. 383, 46 Am. St. Rep. 551; Cunningham *v.* Seattle El. Co.,[2] 3 Wash. 475; Gillingham *v.* O. R. Ry.,[1] 35 W. Va. 597, 29 Am. St. Rep. 835, 14 L. R. A. 802; State of Mo.,[1] 76 Fed. 379; Clancy *v.* Barker,[1] 131 Fed. 167, 69 L. R. A. 657, 661; N. O. & N. E. Ry. *v.* Jopes,[1] 142 U. S. 27.

It has been cited in notes, many of them collecting the authorities, to the following cases reported in Am. Dec., Am. Rep., Am. St. Rep., L. R. A. and Am. & Eng. Ry. Cas.:

Lawyers' Reports Annotated: Quinn *v.* S. Car. Ry. (29 S. C. 381), 1 L. R. A. 682; R. & D. Ry. *v.* Allison (86 Ga. 145), 11 L. R. A. 45; Lafitte *v.* N. O. C. & L. Co. (43 La. Ann. 34), 12 L. R. A. 338; Spaulding, Adm. of Baker *v.* Pa. Co. (142 Pa. St. 503), 12 L. R. A. 699; Davis *v.* Houghtelin (33 Neb. 582), 14 L. R. A. 738, note to Hagan's Petition, 5 Dill. 103.

American State Reports: Central Ry. *v.* Smith (76 Ga. 209), 2 Am. St. Rep. 40; West *v.* W. U. Tel. Co. (39 Kan. 93), 7 Am. St. Rep. 535.

American and English Railway Cases: Obrien *v.* N. Y. C. & H. R. Ry. (180 N. Y. 236), 1 Am. & Eng. Ry. Cas. 273; Galveston, etc., Ry. *v.* Dunleary (55 Tex. 256), 11 Am. & Eng. Ry. Cas. 679; L. & N. *v.* Kelley (92 Ind. 371), 13 Am. & Eng. Ry. Cas. 4; I. & G. N. Ry. *v.* Irvine (64 Tex. 529), 18 Am. & Eng. Ry. Cas. 297; Heenrich *v.* Pullman, etc., Co. (20 Fed. 100), 18 Am. & Eng. Ry. Cas. 382; Sullivan *v.* Ore. Ry. & Nav. Co. (12 Ore. 392), 21 Am. & Eng. Ry. Cas. 404; Fick *v.* C. & N. W. Ry. (68 Wis. 469), 34 Am. & Eng. Ry. Cas. 382.

American Decisions: Merrills *v.* Tariff Man. Co. (10 Conn. 384), 27 Am. Dec. 685; Ware *v.* B. & L. Canal Co. (15 La. 169), 35 Am. Dec. 201; Austin *v.* Wilson (4 Cushing, 273), 50 Am. Dec. 773; Moore *v.* Fitchburg Ry. Corp. (4 Gray, 465), 64 Am. Dec. 86; Hagan *v.* Providence, etc., Ry. Co. (3 R. I. 88), 62 Am. Dec. 385, 387; Pa. Ry. v. Vandiver (42 Pa. St. 365), 82 Am. Dec. 526.

American Reporter: N. & E. G. R. Co. *v.* Gause (76 Ind. 142), 40 Am. Rep. 227; Hoffman *v.* N. Y. C. & H. R. Ry. (87 N. Y. 25), 41 Am. Rep. 341; P. W. & B. Ry. *v.* Larkin (47 Md. 155), 28 Am. Rep. 442; N. & C. Ry. v. Starnes (9 Heisk. 52), 24 Am. Rep. 299.

Sawyer vs. The Dodge County Mutual Insurance Company.

January Term, 1875.

(37 Wis. 503.)

This was an action on an insurance policy for the loss of a quantity of wheat in stacks. Defendant had judgment in the lower court dismissing the complaint. The insurance was for the term of five years. The policy, among other things, insured plaintiff against loss or damage by fire to the extent of "three hundred dollars on his granary and wagon house; three hundred dollars on his grain therein or in stack." The application of the plaintiff on which the policy was issued contained the following specifications: "In the town of Chester, county of Dodge, state of Wisconsin." "Description of land on which buildings stand, sec. 19, town 13, range 15." Some months after the policy was issued plaintiff bought other land in the town of Chester, county of Dodge, state of Wisconsin, and it was upon this land that he harvested and stacked the wheat, which was destroyed by fire, and it was to recover for this loss that the action was brought. The cause was first argued in the Supreme Court at the June Term in 1874. Former Chief Justice Dixon appeared as counsel for the respondent Insurance Company.

Mr. Justice Lyon writing for the Supreme Court on the appeal of the Insurance Company held, in substance, that the contract of insurance in respect to the wheat in stack named in the policy was not limited by the terms thereof to wheat stacked or grown upon the land owned by the plaintiff at the time the policy was issued; but that the language of the policy was broad enough to permit a re-

covery by the plaintiff for any grain in stack belonging to him in the town of Chester, and ordered judgment for the plaintiff.

Mr. Justice Dixon moved for a re-hearing and filed a most vigorous argument in support of his motion.

Without receding from the construction which had been given to the policy the court granted the motion for a re-hearing very largely upon the ground first advanced by Mr. Dixon on the motion for re-argument, that the policy construed as the court had construed it was a wager policy. It was after the re-hearing that the opinion of Chief Justice Ryan hereafter set out was rendered.

The other material facts sufficiently appear from the opinion.

The following propositions of law were decided:

In the application upon which a policy of insurance against fire was based (which application was by the terms of the policy made a part thereof), the property to be insured, and the insured value thereof, were described as follows (a printed form furnished by the insurer being apparently used for the purpose): "Main barn, east of new barn, $500; hay therein or in stack within ten rods of the farm buildings; grain therein or in stack; farming utensils therein; live stock therein or running at large, $200; on barn No. 2; hay therein or in stack within ten rods of farm buildings grain therein or in stack; farming utensils therein; live stock therein or running at large; granary and wagon house, $300; grain therein or in stack, $300; farming utensils therein; total, $1,300. In the town of Chester in the County of Dodge, state of Wisconsin. Description of land on which buildings stand—sec. 19, town 13, range 15."

In the policy the description of the property and the insured value is: "Five hundred dollars on his main barn; two hundred dollars on his live stock therein and when running at large; three hundred dollars on his granary and wagon house; *three hundred dollars on his grain therein or in stack.*" The risk was for five years. When the policy was issued, the assured owned and occupied a farm in the town of Chester, on secs. 17, 19 and 20, being a single tract of land and containing 380 acres. A few months later he purchased an additional twenty acres in said sec. 17, but not adjoining his other lands. Afterwards he raised and stacked wheat on said additional tract; and this action was brought on the policy for the value of such stacks, which had been destroyed by fire. *Held,*

(1) That the policy is to be interpreted by the same rules which determine the effect of any other contract.

(2) That the application for the policy is to be considered a part of the contract of insurance.

(3) That at least all *latent* ambiguities in the contract may be explained by extrinsic evidence.

(4) That the maxim that "general words may be aptly restrained according to the subject matter or person to which they relate," is justly applicable to this contract; and that *some limitation* is to be put upon the words "grain in stack."

(5) That as plaintiff, when he took the policy, was engaged in the business of *raising* grain, and was not dealing in it in any other way, the risk as to grain should perhaps be limited to such as was *raised by him.*

(6) That, taking all the words and provisions of the application and policy together, and all the facts above stated, there is no ground for restricting the words "grain in the stack" further than to grain raised and stacked (by the assured) in the town of Chester.

(7) That defendant is therefore liable for the value of the stacks of grain described in the complaint.

The fact that in the printed form of application furnished by the company there is a limitation inserted as to "hay in stack," which is entirely omitted from the specification as to "grain in stack," favors the construction of the contract above given.

The specification as to "live stock running at large" cannot reasonably be limited to live stock running at large *on section 19,* and this also favors the view that the words "grain in stack" are not to be limited to grain stacked in that section.

Fire insurance, on time, by open policies, of the *future* material productions of the assured in the course of his business, in his trade or calling, are valid contracts of indemnity, and not wager policies. And the policy in suit is valid as applied to the loss for which a recovery is here sought, although the grain destroyed was raised by plaintiff upon land acquired by him *after the date of the policy.*

Ryan, Chief Justice. The eminent gentleman who represented the respondent on the motion for rehearing and on the rehearing of this appeal, seems unreconciled to our construction of his client's policy. Though the question was not left open on the rehearing, we have, in deference to his persistent dissent, again looked into the policy; and we do not see how we could have given it a different con-

struction, without disregarding old rules of construction or inventing new ones for the exigencies of the case. And, after all, it seems to us that his complaint should go to his client rather than to the court, for the gist of it is more that the policy ought not to read as we read it, than that it does not. The policy defines its own limits, which we could not change because they are said to be inconvenient. If insurance companies would exercise like skill in the manuscript of their policies as—perhaps not always fairly (Ins. Co. *v.* Slaughter, 12 Wall. 404; Fuller *v.* Ins. Co., 36 Wis. 599)—in the printed conditions, they might avoid such occasions of scolding courts for reading their risks as they write them.

We ordered a rehearing of the appeal, in order to hear discussed at the bar a difficulty first suggested on the motion: that the policy, as we construe it, is a wager policy and void. We suppose that insurance companies have a right to make that objection to their policies, at the risk perhaps—if successful—of *quo warranto.* And we shall consider the proposition, without regard to its good faith. It is grave and difficult. As Lyon, J., said in granting the rehearing: "The practice of issuing policies of insurance for long time and upon property not *in esse,* has become very common; and our determination of this question may be far reaching in its results."

The appellant is a farmer, cultivating his own land. After he took his policy, which is an open one, he purchased in the same town, but not adjoining his former land, another small piece which he also cultivated, and on which he raised and stacked the grain lost by fire. And it is claimed, that because he did not own this land at the date of the policy, he had not insurable interest in the grain; and that the policy, applying to it, is gaming insur-

ance and void. The question was argued with great learning and ability. It is not one of conflicting authorities. It turns rather on the proper application of admitted principles. The cases cited will appear in the report of the argument; and we propose to consider the principles and their application rather than the cases in detail.

A radical difficulty, perhaps, which has led to more or less confusion in distinguishing what are gaming policies, is that insurance is essentially a wager; upheld for indemnity, avoided for gaming, but always a wager; so plainly recognized in our law. R. S., ch. 169, secs. 16–18.

There has long been an effort at distinction between what are called interest policies and wager policies, which has not always been very happy. For policies have been upheld which look like mere wagers; and policies have been held for wagers, which would go only to indemnify the assured. The rule of distinction, was, perhaps, too arbitrary, and did not always operate justly. And it is, perhaps, to this cause, as well as to change in the usages of business, that later relaxation of older rules is to be attributed.

"An interest policy is one which shows by its form that the assured has a real, substantial interest; in other words, that the contract of insurance, embodied by the policy, is a contract of indemnity, and not a wager. A wager policy is one which shows on the face of it that the contract it embodies is really not an insurance, but a wager; a pretended insurance founded on an ideal risk, where the assured has no interest in the thing insured." Arn. Ins. 17.

In marine insurance, there was long disregard of the gaming character of the contract; and policies, interest or no interest, were tolerated. But in fire insurance, there was always a policy to limit the gaming character of the

contract and to confine it to indemnity, by requiring an interest or property in the thing insured, at the time of insurance and at the time of loss. Sadlers' Co. *v.* Badcock, 2 Atkyns, 554.

It will be perceived at once that this rule is not a very happy one for its object. For it avoids policies strictly for indemnity, when title happens to follow insurance in order of time; and it sanctions insurance on interest in anything; soon held to include things *in posse,* mere expectancies, little distinguishable from pure wagers.

This rule has never been wholly abandoned. Indeed, it is still constantly asserted, while its application is often relaxed and sometimes evaded. The extent, variety and intricacy of business into which insurance enters, in late times, has so greatly modified the convenience of the latter, that what is now insurable interest has become too vague and too subtle for definition by such jurists as Judge Story and Mr. Phillips, as cited by the respondent's counsel. The truth is, that the present practice of insurance, to a great extent, has outgrown and is not consistent with the broad principle of property or interest in the thing insured at the time of insurance.

Whether the present scope of fire insurance tends to public good or evil, may be doubted. In Fuller *v.* Ins. Co., decided early in his term, we had occasion to remark that: "It is little to say that the very general habit of insurance against fire has led to great carelessness. The destruction of property by fire and the consequent loss to the commonwealth have been probably increased largely by insurance." But we have no power to reform it. We can only apply to it, as it is, as well as we can, the principles governing it which we find in the books.

Whether it might be wise or unwise to recur to the strict

rule of property or interest in the thing insured at the time of insurance, need not be considered. The current of judicial decision has run too long and too strongly in favor of distinctions and evasions devised to accommodate modern usages of business, to leave that possible, as was frankly admitted by the learned counsel of the respondent.

And we are not willing, as we were invited, to apply the general principle arbitrarily to every policy, not taken out of it by some particular adjudication; blindly enforcing the rule and refusing to enforce it, in cases not distinguishable in principle. We must find, if we can, the grounds on which the exceptions rest, in order to determine whether the policy in this case be under the rule or within the exceptions.

We do not know where the rule and the reason of it are better stated than by Sewall, J., in Stetson *v.* Ins. Co., 4 Mass. 330: "It is a maxim of public policy, important to good morals and for the prevention of frauds in contracts of this nature, that gaming insurances, insurances without interest, are unlawful and of no validity. It is incumbent, therefore, on a party claiming a loss upon a policy of insurance, to show interest in the subject of it; and his demand must appear to be for an indemnity, and not for a wager, become successful, as in this instance, by a public calamity."

It may be worth notice, in passing, that in his statement of the reason of the rule, the learned judge rests it on the presence or absence of interest, not on the time of acquiring interest; not that he did not understand the importance of time in the rule, but that it did not suggest itself to his mind in giving the logic of the rule.

And when we consider what is now held for insurable interest, we see at once how the practice of insurance up-

held by the courts has outgrown the strictness of the rule of property or interest in the thing insured at the time of insurance, held in Sadlers' Co. *v.* Badcock, and the earlier cases. Says Lawrence, J., in Lucena *v.* Craufurd, 5 Bos. & Pull. 269: "Interest does not necessarily imply a right to the whole or a part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to or concern in the subject of the insurance." Says Phillips, sec. 173: "It is not requisite, however, that the thing to which the insurance relates, or the interest of the assured, should be a species of property, subject to possession or tradition, or that the interest should be that of absolute ownership, or that the subject should be such as to have a value or price, or be capable of being assigned." Says Story, J., in Hancox *v.* Ins. Co., 3 Sumner, 132: "I am not aware that any decision has been made, by which it has been established that an interest ceases to be insurable in the progress of a voyage, simply because it is subject to contingencies, or has not at the moment anything corporeal or tangible to which it is attached. What, indeed, upon such an interpretation, would become of insurance upon profits or commissions or freight, which are in the course of being earned? One difficulty of the argument is in likening an insurable interest to any other interest in property. The truth is that an insurable interest is *sui generis,* and peculiar in its texture and operation. It sometimes exists where there is not any present property or *jus in re* or *jus ad rem.*"

When insurable interest is held not to imply right in the thing insured or *jus in re* or *jus ad rem,* to be *sui generis* and unlike any other interest in property, to be not necessarily of value or assignable, it needs little consideration to perceive that the latitude of interest emasculates the rule.

Still some of the conditions might be restricted to actual things, subsisting property; the insurable interest *in posse,* but the subject *in esse.* But that limit is also rejected. Says Judge Story, *ubi supra:* "Inchoate rights founded on subsisting titles, are insurable." Says Arnould, 230; "An expectancy, coupled with a present existing title to that out of which the expectancy arises, is an insurable interest."

When it appears that the subject of insurance, once called the thing insured, may be inchoate rights, expectancies, incapable of possession or tradition, not corporeal or tangible, of no value, the question suggests itself, what does the latitude of insurable interest and the latitude of the subject of insurance, leave of the rule of interest in the thing insured at the time of insurance, or of the reason of the rule? For it appears that interest in one thing *in esse* will support insurance of another thing *in posse,* an expectancy from the thing *in esse.* There cannot be present title in nonentity. One thing may produce another; and the owner of the former become the owner of the latter, when produced and not before. Yet insurable interest, interest in the thing insured at the time of insurance, may be interest *in posse,* in a thing *in posse,* when the expectancy is founded on interest in another thing.

In this state of the law, well might the supreme court of Massachusetts exclaim, that the line where interest ends and expectation begins is almost shadowy. Putnam *v.* Ins. Co., 5 Metc. 386.

It would be waste of time to discuss the extent of this effectual evasion of the principle of Sadlers' Co. *v.* Badcock and Stetson *v.* Ins. Co.

But so far, a subsisting interest of some kind, in something, is required; and the appellant could have valid insurance on his expectancy of crop from land owned at the

time of insurance, but not from land acquired pending the policy. It is easy to understand how insurance of his future crop, ungathered, ungrown, unsown, should be held a wager policy. But when the law has made his expectancy of crop insurable interest, it is more difficult to understand how the date of his title to the land from which the crop is to come can make his insurance more or less gaming. In the ordinary sense of gaming, it is in the chance, and the chance is in the crop. And when interest is made the test of wager policies, it is interest in the thing insured: interest in the crop, which is purely speculative: equally speculative, whether title to the land come before or after policy issued, or come at all. For interest in the crop attaches only when the crop is raised, and attaches equally whenever and however the land is acquired from which it is raised. But be that as it may, if the relaxation of the rule stopped where we left it, the appellant's policy, as applicable to his loss, would be, within the authorities, a wager policy and void.

But great as is the latitude so far considered in the application of the rule of insurable interest at the time of insurance, it is manifest that it still falls short of supporting large classes of policies in the present practice of insurance. The goods of merchants, manufacturers, warehousemen and the like, often insured against fire, are necessarily and constantly changing pending the policies upon them; and the interest of the assured in them accrues only upon purchase or possession. The insured have no title in the source from which the goods proceed; not even a naked expectancy of the goods *in specie,* which may not be *in esse* at the date of insurance. And the insurance, at its date, is of a naked probability, resting on no title or interest, direct or indirect, immediate or remote, inchoate or contingent.

And such insurance would be clearly void under the general rule. May, Ins. sec. 78.

And yet, notwithstanding the *dictum* that "the bare possibility that a right to property might hereafter arise cannot be considered an insurable interest" (McCarty *v.* Ins. Co., 17 La. O. S. 365), the convenience of business requires such insurance, and open policies of that character are constantly upheld to cover subsequent purchases of goods. Phil. Ins. 491; Angell, Ins. 203; Lane *v.* Ins. Co., 12 Me. 44; Cushman *v.* Ins. Co., 34 id. 487; Hooper *v.* Ins. Co., 17 N. Y. 424; Hoffman *v.* Ins. Co., 32 id. 405; Wolfe *v.* Ins. Co., 39 id. 49; Bonner *v.* Ins. Co., 13 Wis. 677; Keeler *v.* Ins. Co., 16 id. 523; Pupke *v.* Ins. Co., 17 id. 378; Fitzsimmons *v.* Ins. Co., 18 id. 234.

It is not a little remarkable that this great change in the law of insurance seems to have come about with little struggle or attention. Courts seem to have fallen in, without hesitation, with the changed necessities of trade, and took little trouble to discuss the grounds of so great a departure from the old rule. A weak attempt was sometimes made to reconcile the rule and the exception, by the suggestion that goods added to a stock are proceeds of goods sold from it. We take it that this is not always true in fact; and as it is not required to be pleaded or proved, the change of rule cannot rest on it. The cases are a departure from the old rule, forced upon the courts by the changing usages of life, and for which the subtle evasions of the rule in previous adjudications had well prepared the way.

These cases wholly dispense with insurable interest in the goods insured at the time of insurance, and plainly stand beyond "the very borders of the line, which may be deemed almost shadowy, where interest ends and expectation begins," fulfilling the foreboding that, so far and in

that sense of wager policies, "the difference between wager policies and those coupled with an interest must cease." Putnam *v.* Ins. Co., *supra.* For the same thing may come successively under several contemporaneous policies, wholly independent of interest at the time of insurance. Wheat, for example, may be covered by the insurance of the farmer who raises it, of the produce man who buys it, of the miller who grinds it, of the merchant who sends the flour to market, of the dealer who retails it, and of the consumer till he eats it; and all their policies may precede the sowing of the crop.

This class of cases proceeds, perhaps, on the authority of Rhind *v.* Wilkinson, 2 Taunt. 237, followed in this country by such cases as Haven *v.* Gray, 12 Mass. 71; Whitney *v.* Ins. Co., 3 Cowen, 210; Dow *v.* Ins. Co., 1 Hall, 166. The rule in Rhind *v.* Wilkinson goes upon what is there stated to be every day's practice, to insure goods on a return voyage long before the goods are bought, and is, that it is enough if the interest of the assured accrue previous to the commencement of the risk. It is easy to apply this rule to new goods purchased by a dealer, in his course of business; the risk not attaching to the goods until they are brought under the policy.

Be that as it may, Rhind *v.* Wilkinson and the cases following it substitute interest at the time of the commencement of the risk for interest at the time of insurance. It is said that interest at a day previous to the commencement of the risk is immaterial. That was marine insurance. There the risk began with the voyage. In fire insurance, on movable goods, the risk begins when the goods are brought within the terms of the policy. And perhaps the cases upon fire policies of merchants, etc., go no farther in principle, though they seem to rest on interest at the time of loss.

And whatever evils may possibly arise from these relaxations of the old rule, it is not seen how they admit what are called wager policies as distinguished from interest policies; for the policies which they uphold go strictly to indemnity. And it may be doubted, after all, whether interest at the time of loss, without interest at the time of insurance, may not be as good a protection against gaming policies as both were under the old rule.

In the present case, the policy is for five years, covering grain in stacks and granary, for five successive crops. It is conceded, under the authority cited, that he had insurable interest in the five years' expectancy of grain *in posse,* to be raised on the land which he owned at the time of insurance; but it is claimed that so far as the policy covers grain to be raised from land which he did not then own, it is *pro tanto* wager insurance, void as against public policy. It is easy to understand the distinction between expectancy founded on title and expectancy not founded on title; but it is more difficult to appreciate how the two relations of the policy, to land owned and land not owned at its date, differently affect public policy, or to understand how such an insurance is distinguishable in principle from a merchant's or manufacturer's.

Insurance on the stocks of merchants, mechanics and the like, is insurance on the material of their industry, and may in some sort be regarded as insurance on the industry itself. In that light, interest in the industry might be taken as insurable interest at the time of insurance, in the expectancy of the material, although actual interest in that come after. Whether that be so or not, we find it difficult to understand how or why the law of insurance should favor one industry more than another. It is a merchant's business to buy and sell goods; a manufacturer's, to make fab-

rics from raw material; a farmer's to raise produce from the earth. The merchant may have valid insurance covering all goods he may have on hand from time to time during the life of his policy; the manufacturer, covering all the raw material he may have on hand and all the fabrics he may make from time to time during the life of his policy. These do not rest on interest in the goods at the time of insurance; but perhaps on the course of business. The merchant's goods may not yet be manufactured, and the manufacturer's raw material may be growing in forests or hidden in the bowels of mines to which he is a stranger. These policies being upheld, on what principle is an agriculturist excluded from the same protection of his industry, in his course of business; from valid insurance on the grain which he may raise and have on hand from time to time during the life of his policy, without regard to his title at the time of insurance? On what principle is his insurance on his productions to be limited by his title at time of insurance, and not the manufacturer's or mechanic's? We confess that we are unable to perceive how or why a policy in the one case should be held a wager policy, forbidden by law, and policies in the others upheld as proceeding on insurable interest.

There may be, and presumably are, mechanics and manufacturers without other capital than their skill. So there may be, and presumably are, farmers not owning land. On what principle can the former be upheld in insuring in advance, by open policies, the products of their industry, and not the latter?

It is noticeable in the policy before us, that, contrary to common usage, there is no question asked or warranty given of title. Certainly, so far as it relates to grain, the insurance does not purport to rest on the appellant's title to

realty. We cannot hold it limited by the extrinsic fact of what realty the appellant was seized or not seized at the date of the policy. And we see no reason why it should not operate as valid insurance for indemnity of grain, the product of his industry, in the course of his business as a farmer. We must, in principle, uphold such policies, if we are to continue to uphold those of merchants and manufacturers. The truth is that the authorities have made the exceptions, practically, broader than the rule; and we are disposed to hold fire insurances on time, by open policies, of the future material production of the assured, in the course of his business, in his trade or calling, within the exceptions, and valid contracts for indemnity, not wager policies.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

NOTE.

Sawyer *v.* Dodge County Mut. Ins. Co., *supra,* has been cited with approval in the Wisconsin Supreme Court, as follows: Lyman *v.* Babcock, 40 Wis. 512; Stout *v.* Weaver, 72 Wis. 150; Legor *v.* Medley, 79 Wis. 220; State ex rel. Lederer *v.* Inter.-Nat. Investment Co., 88 Wis. 520; Brandt *v.* Berlin, etc., Co., 108 Wis. 233.

It has been cited with approval outside of the Wisconsin Supreme Court, as follows: Re Denny, 156 Ind. 123, 51 L. R. A. 730; Sun Ins. Office *v.* Merz, 64 N. J. L. 301, 52 L. R. A. 339, note on page 340; Soli *v.* Farmers Mut. Ins. Co., 51 Minn. 28.

It has been cited in notes to the following cases reported in Am. Dec., containing valuable collections of authorities: Strong *v.* Mfrs.' Ins. Co. (10 Pick. 40), 20 Am. Dec. 518; Keller *v.* Niagara Fire Ins. Co. (16 Wis. 523), 84 Am. Dec. 720; Fitsimmons *v.* City Fire Ins. Co. (18 Wis. 234), 86 Am. Dec. 764; Hoffman *v.* Aetna Fire Ins. Co. (32 N. Y. 405), 88 Am. Dec. 349.

The State ex rel. Drake vs. Doyle, Secretary of State.

August Term, 1876.

(40 Wis. 175.)

This case arose upon an application for a *mandamus* to compel the Secretary of State of the State of Wisconsin to revoke the license to do business in that State of the Continental Insurance Company of New York. The petition for the writ alleged, among other things, that petitioner was a citizen of the State of Wisconsin; that the Continental Insurance Company was a foreign fire insurance company; that in May, 1874, said company had issued a policy in the State of Wisconsin under which a liability had accrued to the petitioner, and that upon action having been begun against the company in the State Court upon such liability, it had removed the cause into the United States Circuit Court for the Eastern District of Wisconsin. The petition further alleged that Peter Doyle, as Secretary of State of said State of Wisconsin, had full knowledge of the above facts, that demand had been duly made of said Doyle, as Secretary of State, to revoke the license of the insurance company, but that said Doyle, as such officer, had refused and neglected so to do.

It further appeared that the Wisconsin statute contained the same provisions considered by the Wisconsin Supreme Court in Morse *v.* Insurance Company, 30 Wis. 496, and by the Supreme Court of the United States in Insurance Company *v.* Morse, 20 Wall. 445, by which every foreign insurance company desiring to do business in the State, as a condition of being permitted so to do, was obliged to agree in writing that it would not remove any action brought against it in the State courts into the Federal courts.

Section 1, chapter 64, Laws of 1872 of the State of Wisconsin also provided that in case a foreign insurance company doing business in the State did remove a cause from the State to the Federal court, in contravention of the statutes thereof and its agreement made thereunder, it should become "the imperative duty of the Secretary of State, or other proper State officer, to revoke and recall any authority or license or certificate to such company to do and transact any business in the State of Wisconsin."

Upon the petition, reciting among other things the facts hereinbefore noted, an alternative writ was granted by the Wisconsin Supreme Court, December 22, 1875. Thereafter the respondent moved to quash the writ, and the motion was denied. Subsequently, and in June, 1876, the respondent made return to the alternative writ, in which it was stated, among other things, that the respondent was advised that the Wisconsin statute, above referred to, was unconstitutional and void and the agreement made under it not binding, and that the Supreme Court of the United States had so decided. The return further stated that upon a bill of complaint filed by said insurance company on the 28th day of September, 1875, against said Doyle, as Secretary of State, the United States Circuit Court for the Western District of Wisconsin, on the 8th day of October, 1875, had issued its writ of injunction commanding said Doyle, as Secretary of State, to refrain from revoking, annulling or cancelling the license of such insurance company. The return also stated that the license mentioned in the relation had expired on the 31st day of January, 1876, and that in February, 1876, the respondent had issued a new license to the said insurance company. The relator demurred to the return as insufficient, and the demurrer was argued on the 7th day of June, 1876.

The opinion of the Wisconsin Supreme Court, hereinafter set out, was delivered by Chief Justice Ryan.

The other facts will sufficiently appear from the opinion.

The following are the propositions of law decided:

This court will take original jurisdiction of the writ of *mandamus,* upon the mere relation of a private person, in the name of the state, to compel the secretary of state to revoke, as required by statute, a state license to a foreign corporation to transact business here, forfeited by violation of its conditions.

The jurisdiction being assumed because the subject matter of the writ affects the prerogatives of the state, and not being founded upon the private right of the relator, a subsequent settlement between him and the corporation, leaving him without further interest in the application is immaterial.

The fact that the statute requiring in a certain contingency a revocation of the license of a foreign insurance company, makes no provision for *notice* to the company, does not affect its validity.

The acts of the secretary of state in issuing and revoking licenses to foreign insurance companies under the statute, are *ministerial* and not judicial, although he is required to ascertain the existence of the facts upon which his authority in each case is founded.

Save by the voluntary license of the state, a foreign insurance company has no right to carry on its business within this state; and the state has power to make such license subject to the company's forbearance of a right, and revocable upon the exercise of such right.

Those provisions of the statutes (ch. 56 of 1870 and ch. 64 of 1872) which authorize the issue of licenses

to foreign insurance companies only upon condition of their filing a written agreement not to remove to the federal courts causes commenced against them in the courts of this state, and require the secretary of state to revoke such licenses upon a violation of that agreement, are valid. Ins. Co. *v.* Morse, 20 Wall. 445, distinguished, and certain *obiter dicta* therein criticised.

So much of the statute as requires such agreement as a condition of license being designed as a compensation for the provisions authorizing licenses, if the former were held invalid, the latter would fall with it; the secretary of state in issuing the license here in question would have acted without authority; and the court would compel him to revoke it.

Where a suit is prosecuted in a federal court by a private party against a state officer who has no personal interest or liability in the action, but is sued in his official capacity only, to affect a right of the state only, the state is the real defendant, within the prohibition of the XIth amendment to the federal constitution.

A circuit court of the United States has therefore no jurisdiction of a suit by a foreign corporation to restrain a state officer from revoking (as required by the law of the state) a license granted the plaintiff corporation to do business in the state.

Even if the federal court had authority to bind *the officer* in such a case, it could not bind *the state* in the exercise of its authority.

A valid injunction restraining a state officer from revoking a license previously issued by state authority, would be spent with the life of such license, and would not apply to a new license subsequently issued under color of the same authority.

Ryan, Chief Justice. The facts of this case were discussed at the bar, on the motion to quash the alternative writ. But as some of them did not then appear of record, we refrained from any expression of opinion in overruling the motion. All the material facts are now before us for final adjudication.

It appears by the return that the license of the insurance company in force when these proceedings were commenced, expired by limitation pending the alternative writ; and that some three days after the motion to quash the alternative writ was denied, the respondent renewed the license for another year. His doing so, under the circumstances, may have been an act of questionable propriety. But the fact itself is immaterial here, because it was agreed by counsel, if it were otherwise doubtful, that if a peremptory writ should be granted, it should cover any subsisting license issued by the respondent to the insurance company.

The motion to quash the alternative writ was argued for the respondent by the attorney general. The demurrer to the return was argued for the respondent by the learned counsel who represented the insurance company in the federal court, and a brief was afterwards submitted on his behalf by the attorney general. Different questions were raised for the respondent by the different counsel, which will be considered in proper order.

I. It was stated by the attorney general that the suit of the relator against the insurance company had been settled; that the relator has no further interest in the question, and therefore no further right to the writ. The fact does not appear of record, but it is immaterial.

So far as the private right of the relator is concerned, it is now well settled that this court would not assume original jurisdiction to enforce it. Attorney General *v.*

Railroad Cos., 35 Wis. 425; Attorney General *v.* Eau Claire, 37 id. 400; State *v.* Baker, 38 id. 71; State *v.* Supervisors, id. 554. But, as it is said in Attorney General v. Railroad Cos., "In a government like ours, public rights of the state and private rights of citizens often meet, and may well be involved in a single litigation. So it may be in the exercise of the original jurisdiction of the court." "The prerogative writs can issue only at the suit of the state or the attorney general in the right of the state." "They may go on the relation of a private person, and may involve private right." And the question before us is not upon the private right of the relator, and is independent of the accident that there is a relator in the case. The question on which the exercise of jurisdiction here must turn, is, whether the subject matter of the writ is on *"quod ad statum republicæ pertinet;* one affecting the sovereignty of the state, its franchises or prerogatives." Attorney General *v.* Eau Claire. And on this question there appears to us to be no room for doubt.

Save by the voluntary license of the state, the insurance company has no right to carry on its business within the state. The state sees fit to grant a license to it, upon condition; instantly revocable, upon condition broken. The insurance company breaks the condition; but claims the right, notwithstanding, to act under the license throughout the state; claims that the condition is void, and that the license is therefore independent of the condition on which it was granted. And it assumes to carry on its business throughout the state, under the license, in defiance of the condition. Here is very plainly a direct and proximate interest of the state affecting the state at large, in some of its prerogatives, and raising "a contingency requiring the interposition of this court to preserve the prerogatives of

the state, in its sovereign character." Attorney General v. Eau Claire.

The statute of the state devolves upon the respondent the imperative duty of revoking the license of the insurance company, upon condition broken, and prohibits a renewal of the license for three years. The respondent claims that the statute so far is void, and wholly disregards it. Upon condition broken, he refuses to revoke the subsisting license of the insurance company, and, upon its expiration, renews it. Whether the respondent be right or wrong in his view, and that is for this court and not for him to determine, it is very certain that it concerns the state at large, that one of its principal officers executes his office in positive and deliberate disregard of a public statute defining its duties.

Such a case, when presented, is one eminently calling for the exercise of our original jurisdiction; one, with or without a relator, eminently fit to be presented to the court for adjudication. The writ of *mandamus,* in such a case, eminently serves its function as a prerogative writ.

II. It was objected to the statute, by the learned counsel who argued the demurrer, that it provides for no notice to the insurance company, gives it no opportunity of being heard on the question of revocation for condition broken. It might have been more provident to have required such notice; but that rested entirely in legislative discretion. It was for the legislature alone to say whether or not the insurance company should have license to act within the state; and if so, on what conditions, and how revocable, such license should be granted. Authorizing such a license out of its mere discretion, it was competent for the legislature to impose any conditions, reasonable or unreasonable, and to provide for revocation, upon any cause or no cause, in any manner it might see fit.

It was for the insurance company to elect whether it would seek or accept the license authorized, on the very terms on which it was offered, at its own peril of the very power of revocation reserved. And, having elected to accept the license, it cannot now set up a vested right in the license, inconsistent with the license and in defiance of the terms and conditions in which it was granted. It voluntarily ran the very risk of summary revocation, *ex parte,* to which it now objects. It took the license *cum onere,* and has no just ground of complaint that the license is not more favorable to its interests.

We have carefully examined the numerous authorities cited on this point, and are unable to discover the application of any of them to the revocation of a voluntary license, in the precise manner reserved in the license itself.

III. It was likewise urged that the duty of revocation imposed upon the secretary of state, operates to confer judicial power on that officer.

We cannot think that either the power to grant a license or the power to revoke it involves the exercise of a judicial function. Both appear to us to be plainly and equally ministerial functions. The secretary, upon certain facts appearing to him, is authorized to issue a license; upon certain other facts appearing to him, is required to revoke it. This is a common condition of ministerial duty. In such a case, the ministerial officer must exercise his personal intelligence in ascertaining the fact, upon which his authority it founded; but he acts upon his peril of the fact, and can in no sense be said to exercise a judicial function. If the use of personal judgment in such cases should be held to be judicial, the distinction between ministerial and judicial functions would be very much removed.

The secretary of state is a ministerial officer, authorized by law to perform different duties, upon different

contingencies. If he make mistakes of facts in the performance of his functions, his action may be void or voidable only, in different circumstances. But he cannot judicially determine the facts on which he acts or refuses to act. This can only be done by the courts, whose duty it is in proper cases, to review his action and determine the facts and his official duty upon them.

IV. It is contended, not that the statute of the state prescribing the condition upon which license shall be granted, is a violation of the federal constitution, but that it has been so adjudged by the supreme court of the United States; and that thereupon and thereby the statute has ceased to have any force.

For the purpose, as Waite, C. J., remarks (20 Wall. 459), of putting foreign insurance companies licensed to do business in this state, upon an equal footing with its own companies, sec. 22 of ch. 56 of 1870 requires foreign companies, before license, to file an agreement in the secretary's office, not to remove causes against them from the state to the federal courts.

In Morse *v.* Ins. Co., 30 Wis. 496, the insurance company had, in violation of its agreement, petitioned the state court to remove the cause from the state to the federal court, under the act of congress. This court held the agreement to be a valid relinquishment of the right of such removal, obligatory upon the insurance company, and gave judgment against it. The judgment of this court was taken by writ of error to the supreme court of the United States; and that court, in Ins. Co. *v.* Morse, 20 Wall. 445, reversed the judgment of this court, upon the ground that such an agreement did not deprive the insurance company of the right of removal to the federal court, under the constitution and laws of the United States.

The question was certainly not free from the difficulty;

and while we think, with all due deference, that the weight of authority and sound principle sustain the views of this court, it is our duty and pleasure to submit to the decision of the federal court, on a point unquestionably within its final jurisdiction.

Under that decision, it follows that the jurisdiction of the state court in that case was ousted, upon the presentation of the petition to remove the cause to the federal court, and that all subsequent proceedings in the state courts were *coram non judice.* Gordon *v.* Longest, 16 Pet. 97; Kanouse *v.* Martin, 15 How. 198; Ins. Co. *v.* Dunn, 19 Wall. 214.

The sole question, therefore, before the federal court, upon the writ of error in Ins. Co. *v.* Morse, was, whether the right of the insurance company to remove the cause to the federal court remained, notwithstanding the agreement. Upon that point only is the judgment in that case conclusive on this court; upon that point only is the opinion of that court authoritative with this.

"This court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens *v.* The State of Virginia, 6 Wheat. 399, this court was much impressed with some portion of its opinion in the case of Marbury *v.* Madison, and Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court

is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of Ex parte Christy, 3 How. 292, and Jenness et al. *v.* Peck, 7 id. 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains." Carroll *v.* Carroll, 16 How. 275. The rule is elementary, but we choose to give it in the words of the court to whose opinion we consider it presently applicable.

Ins. Co. *v.* Morse was decided by a divided court. The opinion of the majority, delivered by Mr. Justice Hunt, applies to the agreement of the insurance company not to remove the cause to a federal court, the general and familiar rule, that parties cannot by contract oust the ordinary courts of their jurisdiction; citing to that effect several cases, English and American; and quoting the rule from Story's Eq., sec. 670, in these words: "And where the stipulation though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of any disputes, to refer the same to arbitrators, courts of equity will not, any more than courts of law, interfere to enforce that agreement, but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced."

Having held the rule to be otherwise applicable to the agreement of the insurance company, the opinion proceeds to inquire, whether the agreement gains validity from the

statute of the state requiring it; and holds that it does not, because the right of removal is given by the constitution and laws of the United States. And therefore the majority of that court reversed the judgment of this court, on the ground that the petition to remove the cause to the federal court had ousted the jurisdiction of the state court.

So far the opinion deals with the question involved in the case. Having so held, the opinion had exhausted the question before the court; had exhausted its appellate jurisdiction to this court; had exhausted its concern with the statute of the state. In its own view of he question before it, the only concern of that court with the statute of the state was, whether it could operate to take the agreement out of the general rule held to be applicable to it. The agreement was directly before the court; the statute at best was only before the court collaterally. And we may be pardoned for suggesting that, the validity of the statute not being directly involved in the decision, the declaration that it is unconstitutional overlooked the universal rule of all American courts, sanctioned by that court (Cooper *v.* Telfair, 4 Dallas, 14; Parsons *v.* Bedford, 3 Pet. 433; United States *v.* Coombs, 12 id. 72), that courts will avoid an interpretation or application of a statute rendering it unconstitutional; and will hold one so only in plain and peremptory cases. And with the domestic policy of the statute, with the right of the state to refuse license to insurance companies refusing to make the agreement, that court had no concern.

"This court has no authority to revise the act of (Wisconsin) upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, Does the act violate the constitution

of the United States, or the treaties and laws made under it?" Carpenter *v.* Pennsylvania, 17 How. 456.

The statute of the state does not assume to prohibit insurance companies taking license under it, from removing actions on its policies from state to federal courts. It only provides that no insurance company shall be licensed under it, which shall not file an agreement not to remove them. So that the question in Insurance Co. *v.* Morse, was not whether the statute was in violation of the right of removal, but whether the voluntary agreement of the insurance company was obligatory upon it. The only question upon the statute before the court was, whether it could operate to give validity to the agreement, held to be otherwise invalid. And it is sufficiently plain that the validity of the agreement, and the validity of the statute requiring the agreement, are entirely distinct questions. The invalidity of the agreement has been determined by the court of last resort on the subject; but the statute remains. And we take it that no provision in the constitution, laws or treaties of the United States, is violated by a statute of the state prohibiting the license of the state to foreign corporations to do business within it, upon any condition whatever. The right of the state to refuse such license is absolute; and being absolute, it may be exercised at absolute discretion, not to be questioned or abridged, anywhere, under any pretense. It was within the appellate jurisdiction of the federal court to refuse effect to the agreement as ousting the jurisdiction of the federal courts; but it is not within its jurisdiction to hold foreign insurance companies entitled to license without the agreement. It can hold an insurance company not bound by the agreement when made, as repugnant to the constitution and laws of the United States; but it cannot excuse the agreement

as a condition precedent to license under the state statute. So far the statute stands outside of its appellate jurisdiction to this court, raising a pure question of state policy and economy, in a matter within the absolute pleasure of the state. Conceding the invalidity of the agreement, the statute still prohibits license, within the mere discretion of the state, without the agreement, and the statutory license cannot issue without it. In authorizing voluntary licenses, with absolute right to annex any condition to them, the state may exact agreements morally although not legally binding on the licensees. It may be presumed there is some sense of decency even among corporations. It may be presumed that not every insurance company will voluntarily make such an agreement, as a condition of a voluntary and advantageous license, and then deliberately violate it, even with the sanction of the supreme court of the United States. In any view, such a violation is a scandalous breach of good faith, indicating a disposition to bad faith in all the dealings of the company. And, though the agreement be not obligatory in law, yet has the state a right to trust to it, as obligatory in conscience, and to refuse licenses to all insurance companies refusing to execute it. In that view of it, the federal court has no appellate jurisdiction to this court over the statute, and the declaration that it is unconstitutional was *brutum fulmen.* To that extent at least, the state retains power over foreign corporations seeking to do business within it. The statute is indeed inoperative to give validity to the agreement, ousting the jurisdiction of the federal courts. So the supreme court of the United States has decided. But it is operative to prescribe the conditions on which the state, in the exercise of its sovereign authority, sees fit to license foreign corporations within it. That is for this

court, not that, to determine. No foreign insurance company need come here under the agreement; coming, every foreign insurance company violating the agreement is guilty of a moral fraud upon the state. And, in upholding the statute to this extent, against the extrajudicial *dictum* of the supreme court of the United States, we may quote in our own behalf the language of one of the great chief justices of that court: "A sanction is claimed to a breach of trust, and a violation of moral principle. In such a case, the mind submits reluctantly to the rule of law, and laboriously searches for something which shall reconcile that rule with what would seem to be the dictate of abstract justice." Hannay *v.* Eve, 3 Cranch, 242.

The provision in sec. 22 of ch. 56 of 1870, requiring the agreement as a condition of license, was alone before the court in Insurance Co. *v.* Morse. And so far we have considered it by itself. But this writ is applied for, not under that section, but under ch. 64 of 1872. And the two statutes taken together put the whole subject in a view which was not before the court in that case, and could not properly be in any case of its appellate jurisdiction to a state court. The former statute requires the agreement; the latter statute provides for the revocation of any license issued, upon violation of the agreement. And, the agreement being invalid to oust the jurisdiction of the federal courts, the two provisions together are equivalent to one requiring the revocation of a license issued to a foreign insurance company upon its application to remove an action on its policy from a state to a federal court.

The statute extended to these foreign insurance companies the privilege of doing business in this state on equal footing with domestic companies. Experience showed their power to harass the citizens of the state doing business

with them, by removing actions on their policies from courts of the vicinage to distant and expensive tribunals. Hence the provisions of both statutes. And, conceding to the fullest extent the right of removal of actions commenced, we can see no pretense for questioning the power of the state, in the exercise of its absolute discretion on the subject, to revoke the license of a company exercising the right. The state has power to make its voluntary license subject to forbearance of a right, and revocable upon its exercise. The right may survive the license, but the license cannot survive its exercise. So grants are sometimes made upon condition to forbear a right. It was for the authorities of the state alone to judge that the exercise of the right is an abuse of the privilege of the license. With that question federal courts have no concern. They can hold, as they have, that the right exists in pending actions, but they have no jurisdiction over the question whether foreign corporations, exercising the right, shall be permitted by the state to do business within it. That is matter of state policy, state law, state jurisdiction.

The distinction between the validity of the agreement, and the validity of the statute, is readily illustrated. It is quite clear that the secretary of state takes no authority, under the statute, to license a foreign insurance company not executing the agreement. That is a condition precedent to his authority. This court would assuredly refuse to compel him to act in disregard of the statute which confers his authority. And we take it that the supreme court of the United States would hardly claim appellate jurisdiction to review our decision, or to compel a state officer to act officially for the state, in disregard of the letter of his authority, on the ground that the agreement, when executed, is inoperative to oust the jurisdiction of the federal court.

We have hitherto considered the agreement in the light in which it is held by the opinion in Ins. Co. *v.* Morse. But, with great deference, we are unable to consider the construction of the agreement there expressed to be correct, even within the views of the court itself. It is held to be repugnant to the constitution and laws of the United States. But an agreement not to remove a cause from a state to a federal court, though it will not be enforced as obligatory against removal, does not appear to be in itself repugnant to any law. The party may keep in good faith, without offense against the law. Courts will not indeed enforce it; but, in the language of Judge Story, leave the parties to their own good pleasure in regard to it. Had the insurance company, in that case, complied with the agreement and not removed the cause, it would have been guilty of no violation of the constitution or laws of the United States. In the view taken of it by the supreme court, it is ineffectual but not illegal. We have seen no case holding such an agreement illegal, though it has been sometimes called nugatory. In the leading case of Kill *v.* Hollister, 1 Wilson, 129, it was held that an agreement to arbitrate did not bar the action, because there had been no submission under it; the court intimating that a submission under it would have been a bar. And it has been held that, though such an agreement will not defeat an action brought under it, yet an action will lie on it for breach of it. Livingstone *v.* Ralli, 5 Ellis & Bl. 132. See also Nute *v.* Ins. Co., 6 Gray, 174; Hobbs *v.* Ins. Co., 56 Me. 417.

It appears to us to be very plain that the statute of 1870 is a valid enactment; that its validity was not involved in the decision of Ins. Co. *v.* Morse; that its validity, as a limitation upon the issue of licenses under state authority, was not within the appellate jurisdiction of the court; and that

the declaration in the opinion that it is repugnant to the constitution and laws of the United States and therefore void, is but an improvident and erroneous expression of the learned judge who delivered the opinion. With all due deference, we may be permitted to say of it what Lord Mansfield said of a dictum of Chief Justice Holt: "That is an *obiter* saying only; and not a resolution or determination of the court, or a direct solemn opinion of the great judge from whom it dropped." Saunderson *v.* Rowles, 4 Burr. 2064.

The opinion proceeds to discuss the relations of foreign corporations to the state, in a scope wholly foreign to the judgment in the case, and in a tone inconsistent with decided cases in that court; and therefore, so far, of no authority there or here. It is sufficient for this case that that great tribunal has frequently and uniformly held that the corporations of one state have no right to migrate to another, there to exercise their franchises, except upon the assent of such other state; and that such assent may be granted upon such terms and conditions as the state granting it may think proper to impose. Ins. Co. v. French, 18 How. 404; Paul *v.* Virginia, 8 Wall. 168; Ducat *v.* Chicago, 18 id. 410; Ins. Co. *v.* Massachusetts, id. 566; Osborn *v.* Mobile, 16 id. 479.

Paul *v.* Virginia was the case of an insurance company of New York, doing business in Virginia, under a statute of the latter state prohibiting foreign insurance companies from doing business there without license to be granted upon conditions precedent. It was decided as late as 1868. And the court uses this language:

"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 cannot 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." And this doctrine is expressly affirmed in Ducat *v.* Chicago, a like case in 1870.

The doctrine is so sound in itself, and so many of the decisions of that court on other subjects would be disturbed or subverted by a departure from it, that we feel safe in holding it to be the settled law of the federal supreme court, notwithstanding intimations to the contrary in the opinion in Ins. Co. *v.* Morse; another reason for regarding these as not sufficiently considered, as is apt to be the case with all *obiter dicta*.

V. But if we should be mistaken in all this, if the provision of the statute of 1870 requiring the agreement, be unconstitutional, there is another view of the case in our judgment conclusive of it.

Morse *v.* Ins. Co. was decided in 1874, and reported

in 1875. The legislature of the state has since been in session. And there is no doubt that their attention was called to the decision. Yet, though they have since enacted at least one statute, ch. 300 of 1876, amending the general insurance laws, they have not repealed or modified the provision requiring the agreement. This is a strong confirmation of our view, derived from the statute itself and its history, that the legislature would not have adopted or retained the statute authorizing licenses to foreign insurance companies, without the provision for the agreement. It is not an independent provision, to fall by itself. The other provisions of the statute in regard to license cannot be executed independently of it. It was evidently designed as a compensation for the provisions authorizing licenses, an inducement to them. And it is the settled doctrine of this court that, if it be unconstitutional, the whole statute authorizing licenses to foreign insurance companies is unconstitutional. Slauson *v.* Racine, 13 Wis. 398; Lynch *v.* The "Economy," 27 id. 69; State *v.* Dousman, 28 id. 541.

In that view of the statute, no license to foreign insurance companies would be authorized by law; the secretary of state would have acted without color of authority in issuing the license in question; the license would give no color of right to the insurance company to do business within the state; and it would be our undoubted duty to compel the secretary to undo an official act, done with authority, an infringement upon the prerogatives of the state, and a usurpation of the sovereign authority.

VI. The return pleads in bar of the peremptory writ, an injunction of the circuit court of the United States for the western district of Wisconsin, issued upon a bill filed in that court by the insurance company against the sec-

retary of state, restraining that officer from revoking the license of the state to the insurance company. And the brief of the attorney general takes the position, that the federal court had jurisdiction of the bill, and that jurisdiction of the subject matter having first attached in that court, the jurisdiction of that court is exclusive of the jurisdiction of this.

Upon the application to us for the alternative writ, the learned counsel for the relator made a statement, repeated on both arguments without contradiction, which has left a very painful impression on our minds. He stated that as early as July, 1875, the petition for the alternative writ was filed, and the writ issued, and we think served, in one of the circuit courts of this state; and that, upon the suggestion of the attorney general in September, that the petition should, for convenience, be withdrawn from that court and immediately filed in this, the relator's counsel assented, withdrew the petition from the circuit court, and sent it to the attorney general to be at once filed in this court according to the suggestion; that the relator's counsel understood it to be so filed here, and the alternative writ issued; that it was not so filed; but that in the meantime the proceeding was taken and the injunction issued in the federal court, of which the relator's counsel had no notice. It does not appear by the record of the proceeding annexed to the return, that the secretary of state or the attorney general appeared in the federal court or made any objection to the injunction. Indeed, the record implies that there was no such appearance or objection. As the facts, except perhaps the last, do not appear of record, we are without power to act upon them; but, if they are correctly stated, the present objection to our jurisdiction to issue the writ, appears to us to

come with an ill grace from the chief law officer of the state. For it would be a grave encroachment upon the sovereign authority of the state, if state officers could so transfer judicial control over their official action for the state, and the prerogative jurisdiction of this court, to an inferior federal court. But it is quite certain that the federal court has not jurisdiction to bind the state, or to foreclose the authority of the state courts, on behalf of the state, over its own officers, in their duty to it, under its own laws.

As originally adopted, the federal constitution extended the judicial power of the United States to controversies "between a state and citizens of another state," vesting in the supreme court of the United States original jurisdiction in all cases "in which a state shall be a party." This grant of original jurisdiction, in such cases, to that great court, appears to have been considered exclusive. Federalist No. 80; Story's Const. sec. 1682; 1 Kent, 298; Georgia *v.* Brailsford, 2 Dallas, 415; Cohens *v.* Virginia, 6 Wheat. 264.

The jurisdiction was probably intended to apply only to cases in which a state should be plaintiff. But it was held to embrace all controversies between states, whether plaintiffs or defendants, and citizens of other states, so far reducing a sovereign state to the condition of a private corporation. Chisholm *v.* Georgia, 2 Dallas, 419. This was probably a surprise, certainly an offense, to most—if not all—of the states. Says Chancellor Kent:

"The judicial power, as it originally stood, extended to suits prosecuted *against* one of the United States by citizens of another state, or by citizens or subjects of any foreign state; but the states were not willing to submit to be arraigned as defendants before the federal courts at

the instance of private persons, be the cause of action what it might. The decision of the supreme court of the United States in the case of Chisholm *v.* The State of Georgia, decided in 1793, in which it was adjudged that a state was suable by citizens of another state, gave much dissatisfaction, and the legislature of Georgia carried their opposition to open defiance of the judicial authority. The inexpendiency of the power appeared so great, that congress, in 1794, proposed to the state an amendment to that part of the constitution, and it was subsequently amended in this particular, under the provision in the fifth article." 1 Kent, 296.

The amendment is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The manifest object of the amendment was to preclude the federal courts from jurisdiction over a state, in any case, at the suit of private parties. And by all rules of construction, the prohibition should apply to all cases in which the interest of a state is so concerned that it ought otherwise to be a party. But the intent and letter of the amendment have been greatly narrowed by the effect given to it by the decisions of the supreme court of the United States.

The constitution designed that court to be, as it is, a great national tribunal; a court of last resort on all questions of national character; and a court of dignity and authority unequaled by any tribunal known in modern history, not, perhaps, excepting the imperial chamber at Wetzlar, to which it has been compared. Federalist No. 80; Story's Const. sec. 1679; 1 Kent, 296. And yet,

that august tribunal has no general jurisdiction, but is essentially a court of defined and limited jurisdiction, original and appellate. We speak with profound deference to that court, in saying that it should be matter of surprise to no jurist, to no student of history, that so august a tribunal, so constituted and limited, should have from the beginning proved impatient of the limited scope of its own authority, and that of the inferior federal courts on which its own jurisdiction chiefly rests; gradually and sometimes almost insensibly extending it, and signally illustrating the maxim, *ampliare jurisdictionem.* Its views of federal jurisdiction have always been aggressive. It has but illustrated a general human tendency, a common phase of judicial history, in gradually enlarging the letter of its jurisdiction by construction, until its jurisdiction by implication appears to exceed its jurisdiction by express grant; until it appears to be loaded down and impeded, we might almost say overwhelmed, by excess of jurisdiction, presumably never contemplated by the framers of the constitution.

And it was, perhaps, hardly to be expected that an amendment to the constitution, abolishing a jurisdiction originally granted by that instrument to federal courts, would be kindly regarded by so great a court so constituted, or favorably construed for the prohibition and against the jurisdiction. So it has surely proved.

The amendment appears to have been first before the court in Hollingsworth *v.* Virginia, 3 Dall. 378. The question was, the effect of the amendment upon pending suits. And the court "delivered an unanimous opinion, that, the amendment being constitutionally adopted, there could not be exercised any jurisdiction in any case, past or future, in which a state was sued by the citizens of an-

other state, or by citizens or subjects of any foreign state." But a few years later, in a cause in which a state claimed an interest but was not a party, the court used this language:

"The right of a state to assert, as plaintiff, any interest it may have in a subject which forms the matter of controversy between individuals in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant in a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case, the suit was not instituted against the state or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If the proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." United States *v.* Peters, 5 Cranch, 115. It will be presently seen that the suggestion here thrown out is the seed of great growth of jurisdiction, inconsistent with the spirit of the amendment, if not with its letter.

The amendment appears to have next come before the court in Cohens *v.* Virginia, 6 Wheat. 264. The state had prosecuted the plaintiffs in error criminally in one of her courts, and there was judgment of conviction against them. They sued out a writ of error from the federal supreme court to the state court, against the state; the state being defendant in error in that court. Notwithstanding the amendment, the court claimed jurisdiction of the cause, upon the ground that such a proceeding was not a suit within the meaning of the amendment, though it subjected the state to a judgment in that court, at the suit of a private party. And the court has hitherto adhered to that rule in numerous cases.

In Osborn *v.* U. S. Bank, 9 Wheat. 738, the court thus states the question: "The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the bank. The eleventh amendment of the constitution has exempted a state from the suit of citizens of other states or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the state, and on the property in their hands." And the court thus states its conclusion: "It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the eleventh amendment, which restrains the jurisdiction granted by the constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it

would have been construed had the jurisdiction of the court never been extended to suits brought against a state by the citizens of another state, or by aliens. The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." The court then proceeds to show that the officers of the state, who were the parties to the record, were personally liable to the bank, and therefore had a real, personal interest, under the state indeed, but distinct from the interest of the state; and upon that ground upheld the decree against them.

This is the leading case upon the subject. And it is very distinguishable from the case before us, in which the secretary of state has no interest whatever; is a mere nominal party, the state alone having the whole interest in the subject; a mere shadow of the state, set up for jurisdiction against the body, over which jurisdiction is prohibited by the constitution.

The next case which we find is Governor of Georgia *v.* Madrazo, 1 Pet. 110. That was a case in admiralty, in which the governor of the state intervened in behalf of the state. And the court uses this language:

"Previous to the adoption of the 11th amendment to the constitution, it was determined that the judicial power of the United States extended to a case in which a state was a party defendant. This principle was settled in the case of Chisholm *v.* Georgia, 2 Dal. 419. In that case, the state appears to have been nominally a party on the record. In the case of Hollingsworth *v.* Virginia, also, in 3

Dal. 378, the state was nominally a party on the record. In the case of Georgia *v.* Brailsford, 2 Dal. 402, the bill was filed by his excellency Edward Telfair, Esq., governor and commander-in-chief in and over the state of Georgia, in behalf of the said state. No objection was made to the jurisdiction of the court, and the case was considered as one in which the supreme court had original jurisdiction, because a state was a party. In the case of New York *v.* Connecticut, 4 Dal. 3, both states were nominally parties on the record. No question was raised in any of the cases respecting the style in which a state should sue or be sued; and the presumption is that the actions were admitted to be properly brought. In the case of Georgia *v.* Brailsford, the action is not in the name of the state, but it is brought by its chief magistrate in behalf of the state. The bill itself avows that the state is the actor, by its governor.

"There is, however, no case in which a state has been sued without making it nominally a defendant.

"Fowler et al. *v.* Lindsey et al., 3 Dal. 411, was a case in which an attempt was made to restrain proceedings in a cause depending in a circuit court; on the allegation that a controversy respecting soil and jurisdiction of two states had occurred in it.

"The court determined that, a state not being a party on the record, nor directly interested, the circuit court ought to proceed in it. In the United States v. Peters, the court laid down the principle, that although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction.

"In the case of Osborn *v.* The Bank of the United States, 9 Wheat. 738, this question was brought more di-

rectly before the court. It was argued with equal zeal and talent, and decided on great deliberation. In that case, the auditor and treasurer of the state were defendants, and the title of the state itself to the subject in contest was asserted. In that case, the court said: 'It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record.' The court added: 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.'

"The information of the governor of Georgia professes to be filed on behalf of the state, and is in the language of the bill filed by the governor of Georgia on behalf of the state against Brailsford.

"If, therefore, the state was properly considered as a party in that case, it may be considered as a party in this.

"The bill of Madrazo alleges that the slaves which he claims, 'were delivered over to the government of the state of Georgia, pursuant to an act of the general assembly of the said state, carrying into effect an act of congress of the United States, in that case made and provided; a part of the said slaves sold, as permitted by said act of congress, and as directed by an act of the general assembly of the said state; and the proceeds paid into the treasury of the said state, amounting to thirty-eight thousand dollars or more.'

"The governor appears, and files a claim on behalf of the state, to the slaves remaining unsold, and to the pro-

ceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the legislature of Georgia, made to give effect to the act of congress on the subject of negroes, mulattoes or people of color, brought illegally into the United States; and the proceeds of those sold to have been paid in the treasury, and to be no longer under his control.

"The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the state, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an act of congress. The possession has been acquired by means which it was lawful to employ.

"The claim upon the governor is as a governor; he is sued not by his name, but by his title. The demand made upon him, is not made personally, but officially. The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

"But were it to be admitted that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an act of congress; and has done nothing in violation of any law of the United States.

"The decree is not to be considered as made in a case in which the governor was a defendant in his personal character; nor could a decree against him in that character be supported.

"This decree cannot be sustained as against the state, because, if the 11th amendment to the constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the supreme court. It cannot be sustained as a suit prosecuted not against the state, but against the thing; because the thing was not in possession of the district court.

"We are therefore of opinion that there is error in so much of the decree of the circuit court as directs that the said slaves libelled by Juan Madrazo, and the issue of the females now in the custody of the government of the state of Georgia, or the agent or agents of the said state, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those slaves who were sold by order of the government of the said state, be paid to the said Juan Madrazo; and that the same ought to be reversed; but that there is no error in so much of the decree as dismisses the information of the governor of Georgia, and the claim of William Bowen."

Governor of Georgia *v.* Madrazo was followed and affirmed in Kentucky *v.* Dennison, Governor, 24 How. 66. This was an application for *mandamus,* by the governor of Kentucky, against the governor of Ohio, within the

original jurisdiction of the supreme court, to enforce the performance of an executive duty by the defendant governor. Of course, the *mandamus* could not go to the state, but to its officers only. And the objection was taken that it was not a case between two states, to give jurisdiction to the court under the constitution. But the court holds:

"So, also, as to the process in the name of the governor, in his official capacity, in behalf of the state.

"In the case of Madrazo *v.* The Governor of Georgia, 1 Pet. 110, it was decided, that in a case where the chief magistrate of a state is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party on the record. This was a case where the state was the defendant; the practice, where it is plaintiff, has been frequently adopted, of suing in the name of the governor in behalf of the state, and was indeed the form originally used, and always recognized as the suit of the state.

"Thus, in the first case to be found in our reports, in which a suit was brought by a state, it was entitled, and set forth in the bill, as the suit of 'The state of Georgia, by Edward Telfair, Governor of the said state, complainant, against Samuel Brailsford and others;' and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of 'His Excellency Edward Telfair, Esquire, Governor and Commander-in-Chief, in and over the state of Georgia, in behalf of the said state, complainant, against Samuel Brailsford and others, defendants.'

"The cases referred to leave no question open to controversy as to the jurisdiction of the court. They show that . . . it has been settled, that where the state is

a party, plaintiff or defendant, the governor represents the state, and the suit may be, in form, a suit by him as governor in behalf of the state, where the state is plaintiff, and he must be summoned or notified as the officer representing the state, where the state is defendant.

"We may therefore dismiss the question of jurisdiction without further comment; and it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by *mandamus* is the only mode in which the object can be accomplished."

What is said in Governor of Georgia *v.* Madrazo, and in Kentucky *v.* Dennison, of the governor of a state, applies equally to any other state officer, acting for the state, *virtute officii.* The question is not one of the dignity of the office, but of the representation of the state *pro hac vice.* "In the application of this principle, there is no difference between the governor of a state and officers of a state of lower grades. In this respect they are upon a footing of equality." Davis *v.* Gray, 16 Wall. 203.

The opinions of the court in Osborn *v.* The Bank, and Governor of Georgia *v.* Madrazo, were both delivered by Marshall, C. J.; and the opinion in Kentucky *v.* Dennison, by Taney, C. J.; two of the most illustrious jurists known in the history of jurisprudence among the great English speaking, common law people. Their doctrines were surely well and wisely considered, are entitled to the most profound deference, and not lightly to be overruled. And these cases are in entire accord upon two propositions, both conclusive of the question before us:

1. That where a suit is prosecuted in a federal court, by a private party, against a state officer, in which the state has a direct interest but cannot be made a party, the officer himself must have an interest or liability in the sub-

ject matter, upon which the jurisdiction of the court can attach; and,

2. That where such a suit is prosecuted against a state officer having no such interest or liability, in his official capacity only, to affect a right of the state, the state is the real defendant, within the prohibition of the amendment of the constitution.

These rules are vital. Where there is such an interest or liability of the officer personally, the jurisdiction of a federal court might be held to attach against him personally, upon such interest or liability, without direct violation of the constitutional amendment prohibiting jurisdiction against the state. But where there is no such personal interest or liability of the officer, and the suit is against him in his official capacity only, for the purpose of reaching an interest or liability of the state, then jurisdiction attaches on the interest or liability of the state, not of the officer; the state is the real defendant, and the officer only a nominal defendant; and jurisdiction is as much prohibited as if the state itself were defendant. To hold that jurisdiction could, in such a case, be exercised against the state, in the person of its officer, would be a direct and mere evasion of the constitutional prohibition, which the judges of all courts, federal and state, are sworn to support; which no judicial construction of any court can erase from the paramount law of the land.

The subject matter of Governor of Georgia *v.* Madrazo came again before the court, Ex parte Juan Madrazo, 7 Pet. 627, upon application to file a libel in admiralty against the state. The application was denied; the chief justice saying of it: "It is a mere personal suit against a state to recover proceeds in its possession, and in such a case no private person has a right to commence an original suit in this court against a state."

Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo, and Kentucky *v.* Dennison, are so closely connected in principle that we have considered them together, a little out of the order of the latter case. Between Governor of Georgia *v.* Madrazo and Kentucky *v.* Dennison, another case came before the court and has its place in the reports, in which the jurisdictional question might have properly arisen. This is Dodge *v.* Woolsey, 18 How. 331. It was the case of a bill filed in an inferior federal court, by a private party, against a tax collector of the state, to restrain the collection of a state tax. Several questions were raised and passed upon by the court in that case, quite foreign to the question which we are considering. The jurisdictional question before us, arising under the amendment of the constitution, appears not to have been raised at the bar or considered by the court. The jurisdiction of the federal courts over the subject matter in other respects is discussed, but not the jurisdiction over the state officer acting officially, without interest, within the constitutional prohibition. It appears quite obvious that this question was altogether overlooked. Indeed the court says of the case of State Bank *v.* Knoop, 16 How. 369: "It rules this in every particular, and to the opinion there given we have nothing to add, nor anything to take away." State Bank *v.* Knoop did indeed involve the questions passed upon in Dodge *v.* Woolsey; but it was a writ of error to a state court, and could not possibly involve the jurisdiction of a federal court, in an original suit against a state officer acting officially. The oversight is the more to be regretted, because the assumption of jurisdiction in Dodge *v.* Woolsey disregards the two conditions before noticed, as solemnly established in Osborn *v.* The Bank and Governor of Georgia *v.* Madrazo, subsequently confirmed in Kentucky *v.* Dennison. But the

rule applies to it, that a case which overlooks a point cannot be held to overrule cases expressly deciding the very point. And the positive rules of Osborn *v.* The Bank, and Governor of Georgia *v.* Madrazo, must be held to survive the silence of Dodge *v.* Woolsey. If this were otherwise, the negative authority of Dodge *v.* Woolsey, on the question of jurisdiction, must be taken to be overruled by the positive authority of the latter case of Kentucky *v.* Dennison.

Then comes Davis *v.* Gray, 16 Wall. 203, where a receiver appointed in a cause pending in an inferior federal court filed his bill in the same court against the governor and another officer of a state, to restrain them in executing the law of the state. The question of jurisdiction was raised and discussed by the court. And Mr. Justice Swayne, who delivered the opinion, says of the question:

"A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

"In Osborn *v.* The Bank of the United States, three things, among others, were decided:

"(1) A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"(2) Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record.

"(3) In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law

may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping a bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.

"Dodge *v.* Woolsey, The State Bank of Ohio *v.* Knoop, The Jefferson Branch Bank *v.* Skelly, Ohio Life and Trust Company *v.* Debolt and the Mechanics' and Traders' Bank *v.* Debolt proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendant."

And again, speaking of parties: "We feel no difficulty in disposing of the case as it is presented in the record."

This case professes to follow Osborn *v.* The Bank; but it is extraordinary that it takes no notice of the essential rule cited from that case, that defendant state officers, to give jurisdiction, must themselves have an interest or liability in the subject matter. And it is more extraordinary still that, quoting several cases with at best a very remote bearing on the question, the opinion makes no reference to Governor of Georgia *v.* Madrazo or Kentucky *v.* Dennison; with both of which the opinion is directly in conflict, as well as with the rule in Osborn *v.* The Bank. And with all due respect, we think it may be said of Davis *v.* Gray, that, instead of following the well considered and established rules in Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo and Kentucky *v.* Dennison, it rather follows, presumably by inadvertence, the blind lead of Dodge *v.* Woolsey, itself an incongruity, sandwiched in the reports between inconsistent decisions.

We cannot think the vital principle established in Osborn *v.* The Bank, or the judgments in Governor of Geor-

gia *v.* Madrazo and Kentucky *v.* Dennison, overruled by Davis *v.* Gray. These cases are too solemn and of too high authority to be set aside *sub silentio*. We cannot but think that they were overlooked; the learned judge who delivered the opinion being misled by the unconsidered and unfortunate departure from those cases of Dodge *v.* Woolsey.

Woodruff *v.* Trapnall, 10 How. 190; Curran *v.* The State of Arkansas, 15 id. 304; State Bank *v.* Knoop, 16 id. 360; Ohio Life Ins. and Trust Co. *v.* Debolt, id. 416; The Bank *v.* Debolt, 18 id. 380, and the Bank v. Skelly, 1 Black, 436, cited in the opinion to support jurisdiction in Davis *v.* Gray, were all writs of error to state courts, to be classed with Cohens *v.* Virginia. And their authority for original jurisdiction in an inferior federal court is not perceived. And it may be said, in passing, that the learned judge who delivered the opinion was in error in saying that in Woodruff *v.* Trapnall a writ of *mandamus* was issued to the proper representatives of the state. The judgment of the supreme court of the state was simply reversed in the usual form. So in Curran *v.* Arkansas the judgment of the state court was reversed; the federal supreme court simply following the state supreme court in holding that such a suit would lie against the state, by her own law, in her own courts.

When the decisions of a state court vary in interpreting state law, the supreme court of the United States makes its own election which it will follow. Gelpcke *v.* Dubuque, 1 Wall. 175. We may, with profound respect, presume here upon the like right of choice; and we prefer to hold the rules in Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo and Kentucky *v.* Dennison, as the more authoritative and well considered cases to settle the

law of that court, unless expressly overruled. When adjudications so solemn and so well considered are disregarded or forgotten in the court, none of us may presume to say, *Indignor;* but surely all of us should recall sounder and safer principles established in that great court. *Quandoque bonus dormitat Homerus.*

And the rules established in Osborn *v.* The Bank, Governor of Georgia *v.* Madrazo and Kentucky *v.* Dennison, exclude jurisdiction of the federal court of the bill and injunction pleaded by the secretary of state in this case.

Our conclusion would not be different, if we were to accept Davis *v.* Gray as overruling the earlier cases, and establishing a different rule. For that case does not go the length—no case which we have been able to find in that court does—of holding that the state would be bound in the exercise of its authority by the proceeding in the federal court against its officer. Conceding the power of the federal court to bind the officer, as between him and the plaintiff who sues him, the constitutional amendment absolutely prohibits it from binding the state, as against either the plaintiff or its own officer. In such a case the private party seeking his remedy against the officer, must be content with that, *valeat quantum.* He can have none against the state, or binding the state, or binding the officer against the state. Against the authority of the state over its own officer, against the officer's duty to the state, federal process in such a case can avail nothing. It is more than the case of one not bound by a judgment, because not a party. It is not the case of one without the jurisdiction of the court, but of one above the jurisdiction. It is the case of a sovereign state, over which the charter creating the federal courts, for grave political reasons, prohibits jurisdiction in such cases; has abrogated the

jurisdiction once improvidently granted. It would be a singular perversion of all judicial rule, to hold that the state could not be bound as a party, but is bound without being a party. And it would be a simple nullification of the constitutional amendment, to hold the state in any way bound by the judgment of a federal court against its officer, at the suit of a private party. That would be, not judicial construction, not judicial stretch of jurisdiction, but judicial revolution.

And it would involve the singular absurdity, that, while the original constitution, which expressly gave jurisdiction, at the suit of private parties, against a sovereign state, confined such jurisdiction to the supreme court of the United States, a court worthy of such jurisdiction, if any federal court be, the amendment prohibiting such jurisdiction in any federal court would subject a sovereign state, in the person of its officer, and the administration of the state government, to the process of any petty federal court which congress might see fit to establish, at the suit of any vagabond citizen or corporation of another state doing business in it.

We abide by the letter and spirit of the constitution. Unfortunately many things in its administration are tending toward centralization, which the history and temper of the American people give grave warning might be closely followed by disintegration. The integrity of the union has been tried. The integrity of the states is on trial. Much rests upon the moderation and forbearance of the federal courts; as much perhaps upon the firmness of the state courts, refusing to abdicate state authority, in state matters, to assumption of federal jurisdiction. We will faithfully try to do our part. In refusing at the last term to assume a jurisdiction properly belonging to the

federal courts, we had occasion to say, and we now repeat: "It is perhaps unfortunate that the federal constitution left any ground for concurrent jurisdiction of the federal with the state courts. It has led to some mischievous confusion of adjudication, and some vicious usurpation of jurisdiction, by both federal and state courts. In this day, this is a great and growing evil. And we propose, in this state, for the sake of judicial order, and of the integrity of the federal and state governments, to do what we may towards confining the courts of the state to state jurisdiction, and the courts of the United States to federal jurisdiction." Bromley *v.* Goodrich, 40 Wis. 131.

VII. Had the federal court had jurisdiction of the bill and injunction pleaded by the secretary, to bind the state, it could not avail him in this case. Because the license in force when the bill was filed and the injunction issued, has expired by its own limitation. And it is only to that license that the injunction can relate. The injunction is indeed very loose and general; literally broad enough to restrain the secretary from revoking any license to the insurance company, for any cause, for all time. But it must receive a reasonable construction, and be confined to the things and the condition of things existing when issued. When the license existing at the time the bill was filed, expired, the injunction was spent. The secretary might have found ground for refusing a new license, *dehors* all matters pleaded in the bill; or the legislature might have repealed or modified the statute authorizing the license. The new license, therefore, created a new relation with the state, though it may have been but the renewal of an old relation which had expired by limitation. And the federal court which issued the injunction could hardly have intended, certainly had, in any view,

no authority to bind the defendant for all time, outside of the actual condition of things pleaded in the record, or in new relations between the parties. Even federal jurisdiction, where it attaches, is not so comprehensive or prospective.

VIII. The writ in this case will issue in the right of the state, at any hazard to its officer. We apprehend, however, that there will be none. The state officer is bound to obey the state authority. And if any one, to be found within the state, should molest any officer of the state for obeying the process of this court, in the administration of the state government, and the fact should be properly brought before us, we think we should be able to afford ample and summary remedy.

We regard this matter as a grave attempt to baffle state authority in the administration of state affairs, in a way to be a temptation for the use of a somewhat unjudicial adjective. And we are thoroughly in earnest, as is our duty under our oaths, to enforce state authority, in state affairs, over state officers, and on foreign corporations who come here, *ex gratia* of state law, and then set the law at defiance. We mean to suffer no trifling here. The writ must be so framed that the secretary not only shall promptly revoke the existing license, but shall refrain from granting any other license to the insurance company for three succeeding years, and that he certify the revocation to this court within twenty-four hours after service of the writ upon him.

Let the writ issue at once in accordance with this opinion.

The following is the order made in this case, omitting the formal preliminary clause:

"It is ordered and adjudged that the said demurrer be

and the same is hereby sustained to the said return; and it is further ordered and adjudged that a peremptory writ of *mandamus* do forthwith issue out of and under the seal of this court, to be directed to the said respondent, commanding him, and in his absence the assistant secretary of state, forthwith, within twenty-four hours after service of the writ, to vacate, revoke and recall the authority, license or certificate mentioned in the respondent's return, and every other existing authority, license or certificate made, executed or given by the respondent to the Continental Insurance Company of the city of New York, to do or transact any business in this state, and absolutely to refrain and abstain, to the full period of three years, from granting, giving or issuing the same or any other authority, license or certificate, to the said Continental Insurance Company of the city of New York to do or transact any business in this state, and to file with the clerk of this court, on the day next succeeding the service of this writ, a certified copy of the record or paper whereby such authority, license or certificate shall have been and be so vacated, revoked and recalled. Which writ shall be returnable on the 5th day of September next."

On the 16th of August, 1876, the respondent filed with the clerk of the Wisconsin supreme court a certified copy of an entry made that day in the Insurance Record kept in his office, showing that he had on that day revoked the license of the Continental Insurance Company of the city of New York, and had mailed an authenticated copy of the order revoking such license to the secretary of the company, and a similar copy to each of the agents of said company in this state. On the 24th of the same month, the respondent made due return of the peremptory writ, showing his compliance therewith.

NOTE.

(Each case in this note after which is placed the figure (1) relates to the subject discussed in the foregoing opinion numbered I; those numbered (2) relate to the subject in the opinion numbered II; etc.)

The foregoing cause having been taken on writ of error to the Supreme Court of the United States, and a *supersedeas* bond given, it was moved in that court that all proceedings in execution of the judgment of the State court had within ten days after its rendition might be vacated and set aside, and all further process in that court be stayed. This application was denied on the ground that the provision of the Federal statutes, to the effect that where a writ of error may operate as a *supersedeas* execution shall not issue until the expiration of ten days after the rendition of the judgment, refers only to the judgments of the United States courts. (Doyle *v.* Wisconsin, 94 U. S. 50).

Shortly after the decision of the Wisconsin Supreme Court, *supra,* in State ex rel. Drake *v.* Doyle, the same question was presented to the Supreme Court of the United States on appeal from the decision of the Circuit Court of the United States for the Western District of Wisconsin, perpetually enjoining Doyle, the Secretary of State, from revoking the license of the said Continental Insurance Company. (See Doyle *v.* Continental Insurance Company, 94 U. S. 535).

In the Doyle case, *supra,* the Supreme Court of the United States recedes from so much of the doctrine announced in Insurance Company *v.* Morse, 20 Wall. 445, as declared the Wisconsin statute in question wholly void, and admits the duty of the Secretary of State to obey the mandate of the statute by revoking the license of foreign insurance companies when they remove causes from the State to the Federal courts in violation of said statute.

A dissenting opinion was filed in the Doyle case in the Supreme Court of the United States by Mr. Justice Bradley, with whom concurred Mr. Justice Swayne and Mr.

Justice Miller. The opinion of the dissenting justices was to the effect that the whole question had been decided in the case of Insurance Company *v.* Morse, *supra.*

The effect of these decisions is, and such has now become the settled law of the country, that the State may compel a foreign corporation to abstain from the Federal courts or cease to do business in the state. The act of the foreign corporation in removing the action from the State to the Federal court is upheld and so also is the act of the state in revoking the license of such foreign corporation on account of such removal.

State *v.* Doyle, *supra,* has been cited, with approval, in Wisconsin, as follows: State ex rel. Contl. Ins. Co. *v.* Doyle,[2] 40 Wis. 230; In re Ida Louisa Pierce,[1] 44 Wis. 438, 456; Gallinger *v.* Lake Shore Traffic Co.,[6] 67 Wis. 535; State *v.* U. S. Mut. Acc. Assn.,[2, 4] 67 Wis. 629, 630; State *v.* U. S. Mut. Acc. Assn.,[2] 69 Wis. 81; State ex rel. Atty.-Gen. *v.* Cunningham,[1] 81 Wis. 489, 492, 15 L. R. A. 569; State ex rel. Lamb *v.* Cunningham,[1] 83 Wis. 120, 159, 17 L. R. A. 161, 163, 173; Wyman *v.* Kimberly-Clark Co.,[4] 93 Wis. 559; State ex rel. Burnham *v.* Cornwall,[1] 97 Wis. 568; Lewis *v.* Am. Savings & Loan Assn.,[4] 98 Wis. 221, 39 L. R. A. 566; Travelers' Ins. Co. *v.* Fricke,[2] 99 Wis. 371, 51 L. R. A. 561; In re Ct. of Honor of Ill.,[1] 109 Wis. 626, 628–9; Ashland Lumber Co. *v.* Detroit Salt Co.,[4] 114 Wis. 78.

It has been cited with approval outside of the Supreme Court of Wisconsin, as follows: Eastman *v.* The State,[2] 109 Ind. 282; Ins. Co. *v.* Raymond,[1] 70 Mich. 502; Nebraska ex rel. Sch. Dist. of Omaha *v.* Cummings,[1] 17 Neb. 313; N. Dak. ex rel. Dak. Hail Assn. *v.* Carey,[1, 2] 2 N. Dak. 45; State *v.* Brown,[3] 10 Ore. 228; Lynn v. Polk[6] (Tenn.) 8 Lea, 284; Wisconsin *v.* Pelican Ins. Co.,[2] 127 U. S. 277; Bankers' Life Ins. Co. *v.* Howland,[1] 73 Vt. 18, 57 L. R. A. 379.

Valuable collections of authorities will be found in notes to the following cases cited in L. R. A.: Fleming *v.* Guthrie (32 W. Va. 1), 3 L. R. A. 54; People *v.* Kocourek (193 Ill. 507), 58 L. R. A. 864.

Diedrich vs. The Northwestern Union Railway Company.

August Term, 1877.

(42 Wis. 248.)

It appears in this case that plaintiff, Diedrich, was the owner of certain lots in the City of Milwaukee designated upon the recorded plat of the city made by Martin and Juneau in 1837, and that along the east side of the plat and immediately between the lots in question and the waters of Lake Michigan was a vacant strip of land, and there was nothing upon the plat to show for what purpose this strip was intended by the original proprietors, or, indeed, to show any intention to include it within the plat. When the above plat was made the strip of land in question between the block in which plaintiff's land was located and the lake was about seventy or eighty feet in width and about sixty or seventy feet above the level of the lake and descended precipitously to the lake beach. Plaintiff in about 1859 built a series of cribs filled with stones sunk into the lake about eighty-five feet from the shore opposite the block in which his lots were located, and filled the intervening space with earth and terraced and graded the land to the cribs.

In 1872 the defendant railway company having located its route across the eastern portion of the land made in the lake in front of plaintiff's lots, instituted proceedings to condemn so much of the land as it required for its track. The Commissioners of Appraisal awarded the plaintiff $7,000 as compensation for the value of the land taken and damages to the remainder of the tract.

Plaintiff appealed to the Circuit Court, where the jury

by special verdict found that plaintiff was the owner of land condemned by the defendant railway company, and assessed his damages for the land taken at something over $13,000. It was on appeal to the Supreme Court from the judgment entered upon this verdict that the opinion hereinafter set out of Chief Justice Ryan was delivered reversing the judgment of the Circuit Court.

Two main questions were presented in the case. First, whether the land, of which plaintiff claimed to have been deprived by the condemnation proceedings instituted by the railway company, had in fact been dedicated to the public by the plat above referred to, so that plaintiff had no title to it; and second, if it had not been dedicated to the public, whether the title asserted by the plaintiff to the made land upon the bed of the lake was good.

The first question had been considered by the court in the case of Emmons *v.* Milwaukee, 32 Wis. 434, wherein the court, Chief Justice Dixon concurring, held that there was nothing in the recorded plat of Martin and Juneau which showed a dedication to the public of the strip of land here in question adjacent to the lake.

In the Emmons case Mr. Ryan, who appeared as counsel, strongly contended that the land in question was by the plat dedicated to the public.

In the present case former Chief Justice Dixon appeared as counsel and argued that the contention of Mr. Ryan in the Emmons case (who had in the meantime become Chief Justice), was correct.

As appears by the opinion of Chief Justice Ryan hereinafter set out, however, he adhered to the rule of the Emmons case.

All the other facts necessary to an understanding of the opinion sufficiently appear in it.

The following are the propositions of law decided:

The previous decision of the court that the recorded plat of the city of Milwaukee made by Martin and Juneau in 1837, does not show any dedication to the public use of the strip of land adjacent to the lake shore not therein platted into lots and blocks (with a certain exception there named), adhered to, as a rule of property deliberately adopted after a full argument on both sides.

While land reserved to the proprietors by their plat may be dedicated to the public by a subsequent and independent act *in pais,* the operation of the plat itself cannot be enlarged by the parol construction thereof by such proprietors or by the public.

Navigable waters, in this state, are such as are navigable in fact, though not affected by the ebb and flow of the tide.

Although, by the settled doctrine of this court, a riparian owner upon a river or stream, navigable or unnavigable, takes, in the absence of express limitation in his title, *usque ad medium filum aquæ* such owner upon a natural lake or pond takes only to the natural shore thereof.

Riparian rights proper rest upon title to the *bank* of the water, and are the same whether the riparian owner own the soil under the water or not. And, distinguished from the right arising in case of gradual and insensible accretion, or reliction, the general right of appropriating and occupying the soil under the water, when such right exists, is not properly a riparian right resting not upon title to the bank only, but more directly upon title to the soil under the water.

Distinguished from appropriation and occupation of the soil under the water, a riparian owner upon navigable water, whether or not he own the soil to the thread of the stream, has a right (unless prohibited by local law) to construct, in shoal water in front of his land, proper wharves or piers, in aid of navigation, and at his peril of obstructing navigation, through the water far enough to reach actually navigable water.

As a right of necessity, when water, navigable or not navigable, is by natural causes wearing away and intruding upon its banks, the riparian owner, whether or not he own the soil to the thread of the stream, may as against the public, at his peril of obstructing the public use when the water is navigable, and at his peril of the necessity, intrude into the water for the construction of work necessary to the protection of his land against the action of the water.

In the case of navigable waters, any extension of possession, or intrusion, into the water, beyond the natural shore, other than those mentioned in the foregoing propositions, whether by the riparian owner or a stranger, without express and competent grant from the public, is a pourpresture, vesting no title in the person who makes it.

In a proceeding to obtain compensation for land condemned by a railroad company, on appeal to the circuit court from the appraisal of commissioners, plaintiff can recover only upon proof of title in himself to the land taken.

A riparian proprietor who has lawfully intruded into the water for the construction of a breakwater, cannot thereby acquire title in fee to land occupied by such breakwater beyond his original boundary; nor can he,

in a proceeding for compensation for the alleged taking of such land, recover for any injury done to the breakwater.

Time under Rule XX of this court (relating to motions for a rehearing), can be enlarged by order of the court only, and not by mere stipulation.

Ryan, Chief Justice. I. A strong appeal was made to us by one of the counsel of the appellant, to change, in this case, the rule of property arising upon one of the plats of the city of Milwaukee, established by this court in Emmons *v.* Milwaukee, 32 Wis. 434. And some of the authorities cited by the distinguished gentleman lent great force to his argument. Rowan *v.* Portland, 8 B. Mon., 232; Alves *v.* Henderson, 16 id. 131. The court was not referred to those cases in Emmons *v.* Milwaukee; and it is now impossible to say, had they been then cited, what influence they might have had on the judgment in that case. It is not impossible that, if the construction of the plat now again relied upon, had been as well presented in that case as in this, it might have been adopted by the court. The present chief justice could have hardly expected his views of that case, then overruled by the court, to be now adopted by the then chief justice. But, whatever the former may have thought or still think of the reason of the rule in Emmons *v.* Milwaukee, he quite agrees with his brethren that it is now too late to disturb that case. Such a rule of property, once deliberately established, should be sure and stable. It would be an evil worse than any error in the reason of the rule itself, that it should be open to review and change as often as doubts might be suggested of its original soundness. Broom's Legal Max., 111.

It was also suggested that the construction of the plat

given in Emmons *v.* Milwaukee was not essential to the judgment in that case, and was therefore *obiter dictum.* But it is within the memory of us all, that the counsel on both sides in that case pressed the court to determine upon that appeal the true construction of the plat, whatever might be the judgment of the court. This the court accordingly did; and so the rule laid down became *res adjudicata* in that case. The judgment was in favor of the city, though the rule of construction was against it. Therefore the city moved for a rehearing upon the sole ground that the construction of the plat given in the opinion of the court was erroneous; and the motion was elaborately argued on both sides upon that question. The court overruled the motion, thereby again affirming the construction of the plat. It might have been more provident not to have determined the rule until the record presented the question directly. But it is now too late to hold that the rule affirmed and reaffirmed in that case, and which determined finally the rights of the parties to it, is, as to other cases, mere *obiter dictum.* As to all cases involving it, it must be taken as the settled construction of the plat by this court.

It was contended that some parol evidence distinguishes this case from Emmons *v.* Milwaukee, and tends to establish a dedication *in pais* of the strip of land upon the margin of the lake. Undoubtedly the owners of the land who made the recorded plat, might, by a subsequent and independent act *in pais* dedicate to the public land reserved to themselves by the plat. But we cannot think the evidence in question tends to establish any such independent act. We think that it tends rather to put a construction on the plat, that the plat itself had operated as a dedication of the strip in question. And, notwithstanding some things which might be implied from Barclay *v.* Howell, 6 Peters, 498,

and perhaps from Gardiner *v.* Tisdale, 2 Wis. 153, it would be wild heresy in law to enlarge the operation of the plat by the parol construction of those who made it, or of the public who may have claimed under it. When the plat was recorded, it furnished the exclusive rule for its own construction for all time, unless reformed by judicial decree.

We are therefore obliged to affirm the title of the respondent, so far as it is within the rule of Emmons *v.* Milwaukee, that is, within the strip of land to the natural shore of lake Michigan.

II. But the title asserted by the respondent in this case is not within the strip of land bounded by the natural shore of the lake; but is land made outside and in front of it, upon the natural bed of the lake.

It appears that, several years ago, the respondent, or some one under whom he claims, built an embankment into the lake, extending some eighty-five feet from the natural shore, in front of the land which he owns within this strip. And it is upon his title to this embankment that the respondent's recovery in this case directly rests.

The title of the respondent, and of all persons under whom he claims, as riparian owners of land bounded by the lake, went to the natural shore of the lake, and was limited by it. To the bed of the lake within its natural shore, neither they nor he took any title as riparian owners. The title, as well as the use, of the bed of the lake is in the public.

Several cases involving several questions of riparian right have been considered by the court with this, and are decided at the same time. Boorman *v.* Sunnuchs; Delaplaine *v.* C. & N. W. Railway Co.; Olson *v.* Merrill. These cases presented questions of riparian right upon lake Mich-

igan, upon lesser navigable lakes, upon mere ponds not navigable, and upon running streams. They were argued at the bar with much learning and ability, and have been thoroughly investigated and considered by the court. In these cases, we have reached, amongst other, the following conclusions, having more or less bearing on our judgment in this case.

First. Adhering to the uniform rule of decision in this court, as will be seen in Olson *v.* Merrill (42 Wis. 203), that a riparian owner upon a river or stream, navigable or unnavigable, takes, in the absence of express limitation in his title, *usque ad medium fillum aquæ,* the court holds, in Boorman *v.* Sunnuchs (42 Wis. 233), and Delaplaine *v.* Railway Co. (42 Wis. 214), as in this case, that upon a natural lake or pond, the riparian owner, as such, takes only to the natural shore of the lake or pond.

Second. Riparian rights proper are held to rest upon title to the bank of the water, and not upon title to the soil under the water; riparian rights proper being the same whether the riparian owner owns the soil under the water or not. And, distinguished from the right arising in case of gradual and insensible accretion or reliction, the general right of appropriating and occupying the soil under the water, when such right may exist, is not properly a riparian right; resting not upon title to the bank only, but more directly upon title to the soil itself under the water.

Third. Distinguished from appropriation and occupation of the soil under the water, a riparian owner upon navigable water, whether or not he own the soil *usque ad medium filum aquæ,* and unless prohibited by local law, has a right to construct in shoal water, in front of his land, proper wharves or piers, in aid of navigation, and at his peril of obstructing navigation, through the water far

enough to reach actually navigable water; this being held to further the public use of the water, to which the public title under the water is subordinate; and therefore to be, in the absence of prohibition, passively licensed by the public, and not a pourpresture.

Fourth. As a right of necessity, when water, navigable or not navigable, is by natural causes wearing away and intruding upon its banks, the riparian owner, whether or not he own the soil *usque ad medium filum aquæ,* may, as against the public, at his peril of obstructing the public use when the water is navigable, and at his peril of the necessity, intrude, as far as may be necessary, into the water, for the construction of works necessary to the protection of his land against the action of the water.

Fifth. Without express and competent grant from the public, the rights declared in the foregoing third and fourth conclusions, are the only rights of a riparian owner, upon navigable water, to extend his possession beyond or intrude within the natural shore of the water. Any other extension or intrusion into the water, beyond the natural shore, whether made by the riparian owner or a stranger, is a pourpresture, vesting no title in him who made it.

It is well to explain here that in speaking of water as navigable or not navigable, we do not use the words in their sense at the common law. Waters at the common law were called navigable, only when affected by the ebb and flow of the tide. Of course in this state, bounded on one side by a great fresh water sea, and on another by a great river, which with its confluents constitutes perhaps the most extensive inland navigation in the world, and having within it many streams and bodies of water capable of navigation and actually navigated, there is no water subject to the ebb and flow of the tide, or called naviga-

ble at the common law. Here, therefore, the restricted sense of the word, navigable, at the common law, is wholly inappropriate to the actual condition of things. Waters are here held navigable when capable of navigation in fact, without other condition. And when we use the terms, navigable or unnavigable, we mean capable or incapable of actual navigation. The confusion on this subject which sometimes occurs by the misapplication of the common-law sense of terms to the very different geographical conditions of this country, and the true sense here of the term, navigable, are well stated in S. B. Magnolia *v.* Marshall, 39, Miss. 109.

The rule that the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore, appears to be very generally, almost universally recognized, and is discussed by Cole, J., in Delaplaine *v.* Railway Co., *supra.* It is unnecessary to repeat here what is there said, and in which we all concur. Indeed, the position was affirmed in this court as far back as Mariner *v.* Schulte, 13 Wis. 692.

The rule that riparian rights rest upon the title to the bank and not to the bed of the water, is also discussed in the same opinion of Cole, J., in which it enters into the judgment of the court more directly than it does in this case, and need not be noticed here at any length. We take it to rest on sound principle, and to be affirmed or implied in a great majority of adjudged cases involving the point. It is distinctly recognized in Chapman *v.* O. & M. River R. R. Co. 33 Wis. 629. The authority of the latter case was assailed at the bar in Delaplaine *v.* Railway Co., *supra.* The criticism, however, failed to disclose to us any error in the principles of the decision or in the reasoning of the opinion. We think it amply sustained by the au-

thorities cited in it; and fully supported, if need were, by the later and very able case in the English House of Lords, of Lyon *v.* Fishmongers' Co., L. R., 1 Appeal Cas. 662, which is a direct and most satisfactory authority in support of the rule under consideration.

The rule that the right of appropriation and occupation of the bed of the water, where such right exists, rests upon title to the bed of the water itself, and not upon title to the bank only, appears to be in principle nearly self-evident. When the riparian owner is seized also of the soil under the water, his title is subject only to public use of the water, and to private rights of other riparian owners. When the water is not navigable, the public has no easement; and the riparian owner may, in general, put his estate under the water to any proper use he may please, not infringing upon the rights of other riparian owners, and not violating any public law. When the water is navigable, he may in general make like use of his estate under the water, subject to the like limitations, and not infringing upon the paramount right of use in the public.

These views are too familiar to call for examination of authorities at length. The principles on which they rest have been recognized in many cases in this court. Walker *v.* Shepardson, 2 Wis. 384, S. C. 4 id. 486; Carpenter *v.* Mann, 17 id. 155; Yates *v.* Judd, 18 id. 118; Milwaukee Gaslight Co. *v.* Gamecock, 23 id. 144; Wisconsin River I. Co. *v.* Lyons, 30 id. 61; Arimond *v.* Canal Co., 31 id. 316; Chapman *v.* Railroad Co., 33 id. 629; and perhaps other cases.

The rule giving to the riparian owner, and limiting, the right to construct wharves and piers into navigable water to the point of actual navigability, is fully sanctioned by Walker *v.* Shepardson, *supra,* in this court, and Strong

v. Dutton and Atlee *v.* Packet Co., *infra,* in the federal supreme court.

The rule permitting a riparian owner, as against the public, to intrude as far as may be absolutely necessary in the construction of works necessary to protect his land against the action of the water, without impairing any public use, appears to us to go little, if any, beyond the rule at the common law. The King *v.* The Commissioners, etc., 8 Barn. & Cress. 355; Trafford *v.* The King, 8 Bing. 204. So far as it may appear to enlarge the common-law right, we believe it to be necessary to the rights of property on some of the waters of this state, especially on Lake Michigan; and we hold it to be one of many rights founded on the necessities of self preservation. See Miller *v.* Milwaukee, 14 Wis. 642. It may aid in preserving much valuable property; and, guarded as we have guarded it, can work no injury to the public. Whether and how far one riparian owner may exercise this right to the injury of another, or, exercising it, be liable for such injury, are questions on which we indicate no opinion.

It is unnecessary here to discuss these two last rules at any length; because there is no pretense in this case that the respondent's embankment was constructed as a wharf or pier in aid of navigation, and none worth serious consideration that it was designed, and none whatever that it was necessary, to protect his estate bounded by the shore of the lake against the wash of the water. It seems to have been built and used for the sole purpose of extending into the lake his possession bounded by the lake. We have stated these rules here, chiefly that our general conclusions upon the general subject, here grouped together, may fully and clearly appear, without risk of misapprehension.

The rule that where the fee of the bed of the water is in the public, the general right of the riparian is confined to

legitimate uses of the water only, appears to follow of necessity from the principles already stated. It is difficult to perceive, how, in that case, the riparian owner could take right to intrude upon the public fee under the water, which he might not take to intrude upon the private fee bounding his estate upon the land side. This is especially apparent when the water is navigable, and the use of the water, as well as the fee in its bed, is in the public. In that case, all riparian right is subject both to the fee and to the use; and the riparian owner takes no right to intrude upon either.

And the reason of the rule applies equally, whether the water immediately next the shore be shoal or deep. For the feet is equally in the public; even the shoal water next the shore may aid the public use, and may deepen or be deepened, so as to become practically capable of navigation. It is difficult to perceive on what principle the right of public use in shoal water next the banks is to be distinguished from the right of public use in shoal water on bars or other natural obstructions in the channel of navigable waters. The public has a right to extend the actual capacity of use everywhere within the banks; making the public use co-extensive with the fee. Wis. R. I. Co. *v.* Lyons, 30 Wis. 61.

Practically, in such a case as this, if a riparian owner might appropriate to himself, by embankment, the public fee under shoal water next the bank, his embankment might well in time cause the navigable water outside of it to become shoal in its turn, as seems to have happened in this case; whereupon the right to intrude upon the public fee would again accrue, and so on from time to time indefinitely; thus equally intruding upon the public fee and impairing the public use.

Be that as it may, it is conclusive against the right of

private appropriation claimed, that, in such a case, the riparian owner takes neither fee nor use in the bed of the water adjoining his riparian possession.

These views are so clearly founded on principle, that we think we could entertain no doubt of them, even if they had not been expressly adjudicated. But there are cases upon the point, adjudged by very high authority, and quite satisfactory to us.

The limitation of the right of the riparian owner upon navigable water to intrude through shoal water upon the bed of the water, for the erection of wharves or piers in aid of navigation only, is clearly implied by the whole discussion of the court in Strong *v.* Dutton, 1 Black, 23. The point was not directly involved in that case; but appears to have been in the subsequent case of Atlee *v.* Packet Co., 21 Wall. 389.

In the latter case the riparian owner had sawmills on the bank of the Mississippi river; and, as part of a boom for receiving and retaining saw logs, had built a pier in the river, disconnected with the shore, in water ten or twelve feet deep. Of this pier, it is said in the opinion of the court; "Some kind of a boom was necessary to enable him (the riparian owner) to keep these logs safely and economically. No question is made but that if he had a right to build a pier at that place, it was built with due skill and care."

After discussing the rights which a state may confer upon municipal corporations to construct landings upon navigable waters, the court proceeds thus:

"The wharves or piers are generally located by lines bearing such relation to the shore and to the navigable water as to present no danger to vessels using the river, and the control which the state exercises over them is such as to secure at once their usefulness and their safety.

"These structures are also allowable in a part of the water which can be used for navigation, on the ground that they are essential aids to navigation itself.

"The navigable streams of the country would be of little value for that purpose, if they had no places where the vessels which they floated could land, with conveniences for receiving and discharging cargo, for laying by safely until this is done, and then departing with ease and security in the further prosecution of their voyage. Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce. But to be of any value in this respect, they must reach so far into deep water as to enable the vessels used in ordinary navigation to float while they touch them and are lashed to their sides. They must of necessity occupy a part of the stream over which a vessel could float if they were not there."

Having stated that the riparian owner had no statutory or municipal authority, the court proceeds:

"Nor is there any claim or pretense that this pier is in aid of navigation. No vessel or watercraft is expected to land there, nor are there any arrangements by which they can land or be secured or fastened. The size of the pier, its sharp corners, its elevation from the water, and its want of connection with the shore, forbid any such use of it. It is intended to receive nothing that floats but rafts, and no rafts but such as its owner designs to keep there permanently for his own use.

"He rests his defense solely on the ground that at any place where a riparian owner can make such a structure useful to his personal pursuits or business, he can, without license or special authority, and by virtue of this ownership, and of his own convenience, project a pier or road-

way into the deep water of a navigable stream, provided he does it with care, and leaves a large and sufficient passway of the channel unobstructed.

"No case known to us has sustained this proposition, and we think its bare statement sufficient to show its unsoundness. * * *

"We are of opinion that the pier against which libellant's barge struck, was placed by him (the riparian owner) in the navigable water of the Mississippi river without authority of law, and that he is responsible for the damages to the barge and its contents."

The rule of that court, when not controlled by state decision, is, that riparian owners upon navigable streams take only to the shore, and not *usque ad medium filum aquæ*. That makes the conditions of that case, in their view, so far the same as in this. The principle on which the decision rests is perhaps not very clearly stated; but it appears to us that it rests, and the reasoning of the court throughout goes to show that it does rest, on the principle that a riparian owner upon navigable water can not intrude upon the bed of the water, save only by piers or wharves in aid of navigation. If, in that case or in this, the riparian owner could of right appropriate to his own use the bed of the water under shoal to navigable water, it would be immaterial whether he should build outwards from the shore, or, as in that case and in this, first construct a pier reaching navigable water, and then, as in this case, connect it by embankment with the shore. The pier in that case was held to be a pourpresture, because it was there, not in aid of navigation, as the bridge pier in Strong *v.* Dutton, but in aid of the riparian owner's convenience on the bank; not in aid of the public use of the water, but in aid of the private uses of the land. Surely,

after the judgment in that case, the riparian owner could not have legalized his pier by connecting it with the shore by embankment. The court does not rest its judgment upon the disconnection of the pier from the shore. The pier was held to be unlawful, not because it was disconnected with the shore, but because the riparian owner had no right to intrude where it was, upon the public fee and the public use. The court puts the pier upon the same ground as a roadway to the same point; clearly covering such an intrusion as that in the case before us. It appears in that case that part of the water was shoal between the pier and the shore; and we apprehend that it would not have changed the view of the court, had the water been shoal the entire distance. For the court very plainly intimates that a pier in aid of navigation, in the same place, would have been a lawful structure within the rule of Strong *v.* Dutton.

A still more satisfactory case in support of our views, is Austin *v.* Rutland R. R. Co., 45 Vt. 215. That case arose in regard to land bounded by Lake Champlain, in which the court held that the riparian owner took no title in the bed of the lake beyond the shore. A stranger made land upon the bed of the lake, in front of the riparian owner's estate, into navigable water, with wharves upon the lake side. The riparian owner brought ejectment for the land so made in front of him. The court appears to have assumed that, had the riparian owner himself, as such, a right in the bed of the lake, to intrude such an embankment upon it into navigable water, the embankment built by a stranger would enure to him, as a house built by a stranger enures to the owner of the land. The court therefore considers the right of the riparian owner to extend his possession to navigable water; and holds that "all that

could be claimed for the riparian owner is the exclusive right to pass to and from the shore, as it originally was, from and to the lake, but no peculiar or additional right to the lake itself." "There is no common law of Vermont by which the owner of land bounded on Lake Champlain has a right beyond low-water mark to appropriate as his own the bed of the lake." The court suggests that the riparian owner may have a remedy against the land intruded between him and the lake, as a nuisance; but holds against him in the ejectment, for want of title in land made on the bed of the lake.

The opinion of the court is able and learned, discussing at some length the English and American authorities on the subject. And we are quite satisfied that it states the true rule which should prevail in this state.

There are, indeed, cases more or less conflicting with this view, of which we shall notice but one or two.

The true ground of the rule in Rice *v.* Ruddiman, 10 Mich. 125, that the riparian owner takes *usque ad medium filum aquæ* upon Muskegon lake, is that the lake is only a widening of the river. With the same view of the lake, we should hold the same view of the law. It is true that some of the opinions speak of extending the same rule of ownership *usque ad medium filum aquæ* to all small lakes within the state; but not so to lake Michigan. It is also true that some of the opinions speak, and we cannot help thinking somewhat loosely, of some measure of riparian right of use, "not exclusive or unrestricted," of the bed of navigable waters, under shallow water by the shore. We have considered what is there said, with great attention and the deference due to the great learning and ability of the court. But we cannot help thinking that even such a

qualified right of intrusion into the shoal water of navigable streams or bodies would tend to the result accomplished in Yates *v.* Milwaukee, 10 Wall. 497, where it was held that the public authorities, in the process of rendering navigable to its full width a public river, could not, whether the fee under the water were in the public or in the riparian owner, remove a solid pier or embankment intruded by the riparian owner in shoal water into the river and upon the public use, without making compensation for it. Such a result of permissive private intrusion upon public right is pregnant with warning against the permission. We cannot help regarding the latter case as an exceptional one, inconsistent with many better considered cases in the same court. We think that the true measure of right is the rule in Strong *v.* Dutton, and we are not sure that the supreme court of Michigan meant anything more.

We have here taken no notice of the exact line of boundary upon lakes or ponds; whether it be high water or low water, or the water's edge; the exact line of boundary being immaterial in the case of so extended an intrusion.

With these views, it is hardly necessary to add that, in our judgment, the respondent wholly failed in sustaining his title to the *locus in quo.*

III. If the railroad had been constructed in front of the respondent's estate in the strip of land upon the natural shore of the lake, so as injuriously to affect his riparian right, we admit that he would be entitled to damages for the injury. Delaplaine *v.* Railway Co., *supra.* But that is not the respondent's claim in this proceeding. He claims, not for the injury to his riparian right, but for land taken of which he is seized. Whether or not he had lost or impaired his riparian right, by the construction of

the embankment in front of it, is a question not before us in this case, and on which we indicate no opinion.

IV. We have not considered the right of the railroad to go where it does. As in ejectment, a party seeking compensation in such a proceeding as this, must recover on the strength of his own title; and until he prove title in himself, is in no condition to question the right of the other party.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

On a motion by the respondent for a rehearing, the following opinion was filed:

Ryan, Chief Justice. The argument of the learned counsel for the respondent, upon the motion for a rehearing of this appeal, imputes to the former opinion in this case error of fact, and not of law.

The counsel reproves us for calling the respondent's structure in the lake, an embankment; and says that it is only a breakwater to protect the respondent's land abutting on the lake. If there really be such error in fact, we think that it is in the case made, and not in the judgment of the court. The respondent, in his notice of appeal to the court below, describes what we call an embankment as "a piece or parcel of land," etc. And our reading of the testimony has led us to believe that description to be correct in calling the *locus in quo* land; land made by embankment in the lake.

But if we be mistaken in this, and if the track of the railroad be not over an embankment made to extend the respondent's possession into the lake, but over a break-

water only, made to protect his possession in the land bounded by the natural shore of the lake, we do not see how it can avail the respondent.

For, whatever it be, the respondent in his notice claims as the owner of it in fee simple. Pretermitting the question of the respondent's right to construct a breakwater for the protection of his land, some eighty-five feet into the lake, without proof of the necessity of so great or any intrusion upon the public fee under the lake, we are wholly at a loss to comprehend how the respondent could acquire a fee by a breakwater, which it appears to be now conceded that he could not by embankment. Indeed, the claim of private confiscation of the public fee appears to us to be more plausible by embankment, than by breakwater. For the former would appear to be the more permanent of the two, and more clearly to imply a possessory right.

In the respondent's notice of appeal, he does not claim that the appellant has destroyed or impaired a breakwater, but that it has taken a strip of land. Passing by the variance between the respondent's claim and his counsel's brief, we are unable to perceive an injury to the respondent for which he could recover in this proceeding, by the railroad's passing over the breakwater of the brief, without injury to it as a breakwater in the protection of the land bounded by the shore of the lake.

By the Court.—A rehearing is denied.

NOTE.

(Each case in this note after which is placed the figure (1) relates to the subject discussed in the foregoing opinion numbered I; those numbered (2) relate to the subject in the opinion numbered II; etc.)

Diedrich *v.* The Northwestern Union Railway Company, *supra,* has been cited with approval in the Wisconsin Supreme Court, as follows: Delaplaine *v.* C. & N. W. Ry.,[2] 42 Wis. 226; Boorman *v.* Sunnuchs,[2] 42 Wis. 242; Stevens Point Boom Co. *v.* Reilly,[2] 44 Wis. 304, 305; Stevens Point Boom Co. *v.* Reilly,[2] 46 Wis. 242, 243, 244; Cohn *v.* Wausau Boom Co.,[2] 47 Wis. 322, 324; Diedrich *v.* N. W. U. Ry.,[2] 47 Wis. 662; Larson *v.* Furlong,[2] 50 Wis. 689, 691, 692; Lawson *v.* Moury,[3] 52 Wis. 235; Winchester *v.* City of Stevens Point,[4] 58 Wis. 355, 368; State *v.* St. Croix Boom Corp.,[2] 60 Wis. 570; Union Mill Co. *v.* Shores,[2] 66 Wis. 480; Walton *v.* Green Bay, etc., Ry.,[4] 70 Wis. 417; Conn. Co. *v.* L. S. Lumber Mfg. Co.,[2] 74 Wis. 670; McLennan *v.* Prentice,[2] 85 Wis. 442; Priewe *v.* Wis. State Land & Imp. Co.,[2] 93 Wis. 546, 33 L. R. A. 650; Slauson *v.* Goodrich Trans. Co.,[2] 94 Wis. 645; Nepre-nauk Club *v.* Wilson,[2] 96 Wis. 295; Mendota Club *v.* Anderson,[2] 101 Wis. 492; McCarthy *v.* Murphy,[2] 119 Wis. 162; Murray Hill Co. *v.* Mil., etc., Co.,[2] 126 Wis. 20, 21.

It has been cited with approval outside of the Supreme Court of Wisconsin, as follows: Boardman *v.* Scott,[2] 102 Ga. 404, 51 L. R. A. 181; Fuller *v.* Shedd,[2] 161 Ill. 483, 33 L. R. A. 158; State *v.* Portsmouth, etc., Bank,[2] 106 Ind. 452; Noyes *v.* Collins,[2] 92 Ia. 569, 26 L. R. A. 610; People *v.* Silberwood,[2] 110 Mich. 107, 32 L. R. A. 696; Lake Sup. Land Co. *v.* Emerson,[2] 38 Minn. 408; Lamprey *v.* State,[2] 52 Minn. 195, 18 L. R. A. 677, 38 Am. St. Rep. 547; Concord Co. *v.* Robertson, etc., & Co.,[2] 66 N. H. 18, 18 L. R. A. 689 and note; Gouverneur *v.* Nat. Ice Co.,[2] 134 N. Y. 362, 18 L. R. A. 700, 30 Am. St. Rep. 672; Shaw *v.* Oswego Iron Co.,[2] 10 Ore. 382, 45 Am. Rep. 154; Steam Engine Co. *v.* Steamship Co.,[2] 12 R. I. 366; Hayward *v.* Farmers Mining Co.,[2] 42 S. C. 154, 28 L. R. A. 52.

It has been cited in notes to the following cases reported in L. R. A., Am. Dec., Am. St. Rep., and Am. & Eng. Ry. Cas., in which the authorities are collected:

Lawyers' Reports Annotated: Case *v.* Loftus (30 Fed.

730), 5 L. R. A. 689; Swanson *v.* Miss. & Rum River Boom Co. (42 Minn. 532), 7 L. R. A. 673; Lembeck *v.* Nye (47 Oh. St. 336), 8 L. R. A. 579; State ex rel. Denny *v.* Bridges (20 Wash. 146), 40 L. R. A. 597; Madison *v.* Mayers (97 Wis. 399), 40 L. R. A. 637; Willow R. Club *v.* Wade (100 Wis. 86), 42 L. R. A. 318.

American Decisions: State *v.* Trask (6 Vt. 355), 27 Am. Dec. 568, 569; Gardiner *v.* Tisdale (2 Wis. 253), 60 Am. Dec. 422; Walker *v.* Shepardson (2 Wis. 384), 60 Am. Dec. 426; Walker *v.* Shepardson (4 Wis. 486), 65 Am. Dec. 330.

American State Reports: Miller *v.* Mendenhall (43 Minn. 95), 19 Am. St. Rep. 229, 233.

American & English Raliway Cases: Ry. Co. *v.* Renwick (102 U. S. 180), 5 Am. & Eng. Ry. Cas. 94.

Marsh and others vs. The Board of Supervisors of Clark County and another.

August Term, 1877.

(42 Wis. 502.)

This was an action brought against the Supervisors of Clark County to have certain taxes assessed in 1870 on certain real estate belonging to the plaintiffs in that County and also the sales of said land for taxes and the certificates of such sales declared void, and to restrain the issue of tax deeds based upon such sales. The statute in force at the time the taxes were levied, being chapter 130, Laws of 1868, provided, among other things, that all real estate should be valued by the assessor, for purposes of taxation, upon actual view, and that the assessor in arriving at the actual value of such real estate should consider the advantage and disadvantage of each parcel, according to its location, quality of soil, quantity and quality of timber, etc. The statute also required the assessor upon the completion of his assessment roll to annex to it his affidavit stating in detail that he had performed his duty in the several particulars enumerated in the statute.

It appeared at the trial, without dispute, that in the above mentioned particulars the statute was not complied with by the assessor, but the trial court found that the assessor did not intentionally or fraudulently make a distinction in the assessment of the property in question belonging to the plaintiffs, who were non-residents, and found generally against the plaintiffs. From the judgment in favor of the Supervisors of Clark County, plaintiffs appealed.

The opinion hereinafter set out by Chief Justice Ryan contains all the other facts material to an understanding of the questions discussed.

The following are the propositions of law decided:

That provision of our state constitution which declares that the rule of taxation shall be uniform, requires a uniform *assessment* of value; and no tax upon property can be supported which does not proceed upon valid assessment, legally made, upon a uniform rule.

Violations or evasions of duty imposed by law to secure a just and uniform rule of assessment, whether occurring by mistake in law or by fraud in fact, which go to impair the general equality and uniformity of the assessment, and thereby to defeat the uniform rule of taxation, vitiate the whole assessment as the foundation of a valid tax. Kelly *v.* Corson, 11 Wis. 1; and Miltimore *v.* Supervisors, 15 id. 9, as to this point overruled.

Under ch. 130, Laws of 1868, the act of the assessor in making, and annexing to and filing with the assessment roll, an affidavit that he has performed his statutory duty in the several particulars there enumerated, including the valuation of each parcel of real property from *actual view* of it, is essential to the validity of the assessment; and when such affidavit has not been made, the facts which should appear by it can not be shown *aliunde;* nor can the rule of the statute be relaxed by showing that compliance with it was impossible.

Equity will restrain the issue of a deed upon a sale of land as for a delinquent tax, where there was no valid assessment, without requiring other proof of injury to the plaintiff from the pretended tax.

Ryan, Chief Justice. I. Doubtless taxes are a debt due to the state by its citizens for protection in life, liberty and property. Warden *v.* Supervisors, 14 Wis. 618. But the debt is liquidated and matures only upon a valid exercise of the taxing power. Here, the exercise of the taxing power must be upon a uniform rule; and it is only upon an equal assessment, as the foundation of uniform apportionment, that the taxing power can be put in operation. The statutes of the states generally provide for assessment, as "an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation;" and, when they so provide, the assessment becomes an essential part of the process in the collection of taxes. Cooley on Tax. ch. XII. But, under our constitution, the assessment is not only an essential part of the process, but seems to be jurisdictional. For in no other way does it appear possible to collect taxes upon property by uniform rule. Indeed, the constitution so clearly implies uniform assessment of values as an essential prerequisite to taxes upon property, that it is not unsafe to hold that the constitution itself makes such assessment jurisdictional. It is certainly so by statute. And such a tax, to be valid under the constitution, must proceed upon a regular, fair and equal assessment of the property to be taxed, made by the officers, in the manner and with the securities and solemnities provided by statute. These last the legislature may make and alter at pleasure; but no statute can dispense with assessment, or with its essential fairness and equality. Smith *v.* Cleveland, 17 Wis. 556. For, without these, taxes cannot go upon a uniform rule. The uniformity of the rule may be broken, as well by inequality of assessment of values to be taxed, as by inequality of rule in the tax itself.

And no tax upon property can be supported which does not proceed upon valid assessment, legally made upon uniform rule.

Of course, assessments are as liable to error as other processes. Assessors may commit errors of judgment and mistakes of fact. So that these are exceptional and happen in good faith, not affecting the principle or the general equality of the assessment, they will not vitiate it. So this court has frequently held. Weeks *v.* Milwaukee, 10 Wis. 263; Dean *v.* Gleason, 16 id. 1; Hersey *v.* Supervisors, id. 185; Smith *v.* Smith, 19 id. 615. But, as will be seen by cases cited *infra,* the court has also frequently held that violations or evasions of duty imposed by law to secure a just and uniform rule of assessment, whether occurring by mistake in law or by fraud in fact, which go to impair the general equality and uniformity of the assessment, and thereby to defeat the uniform rule of taxation, vitiate the whole assessment as the foundation of a valid tax.

It is with a view to the general justice of assessments, that various statutes have defined the duties of all officers having part in making or correcting them. And it is time that these officers should be reminded of the language of this court, in the first case upon the subject, that they must not disobey positive mandates of the law and so make assessments in their own wrong. State *v.* Assessors, 1 Wis. 345.

These views seem to be almost self-evident. The principle on which they rest has been recognized in this court, in particular cases, by *mandamus* to correct errors in assessment rolls: State *v.* Assessors, *supra;* State *v.* Supervisors, 3 Wis, 816; State *v.* Portage, 12 id. 562; *S. C.,* 14 id. 550; by *certiorari* to review the action of boards

of review: Milwaukee I. Co. *v.* Schubel, 29 Wis. 444; Spensley *v.* Valentine, 34 id. 154; and in actions turning upon alleged abuses: Head *v.* James, 13 Wis. 641; Janesville *v.* Markoe, 18 id. 350; State *v.* Williston, 20 id. 228; Crane *v.* Janesville, id. 305; Lefferts *v.* Supervisors, 21 id. 688; Curtis *v.* Supervisors, 22 id. 167; White *v.* Appleton, id. 639; Orton *v.* Noonan, 23 id. 102; Van Slyke *v.* State, id. 655; Delorme *v.* Ferk, 24 id. 201; Ketchum *v.* Mukwa, id. 103; Wauwatosa *v.* Gunyon, 25 id. 271; Hamilton *v.* Fond du Lac, id. 490; *S. C.*, id. 496; Phillips *v.* Stevens Point, id. 594; Orton *v.* Noonan, id. 672; Siegel *v.* Supervisors, 26 id. 70; Merton *v.* Dolphin, 28 id. 456; Hale *v.* Kenosha, 29 id. 599; Sprague *v.* Coenen, 30 id. 209; Dolan *v.* Trelevan, 31 id. 147; Oberich *v.* Gilman, id. 495; Whittaker *v.* Janesville, 33 id. 76; State *v.* Gary, id. 93; Hersey *v.* Supervisors, 37 id. 75; Matteson *v.* Rosendale, id. 254; Massing *v.* Ames, id. 645; Cramer *v.* Stone, 38 id. 259, and many other cases.

From such of these cases as correct or give relief against errors in detail, affecting only particular property in the assessment, it appears to follow logically that where a valid objection is common to all or much of the property, or goes to the rule or to the whole process of assessment, it must operate to avoid the whole tax levied on the assessment. And so this court has repeatedly held. Knowlton *v.* Supervisors, 9 Wis. 410; Weeks *v.* Milwaukee, 10 id. 242; Mills *v.* Gleason, 11 id. 470; Slauson *v.* Racine, 13 id. 398; Warden *v.* Supervisors, 14 id. 618; Kneeland *v.* Milwaukee, 15 id. 454; Hersey *v.* Supervisors, 16 id. 185; Smith *v.* Smith, 19 id. 615; Lefferts *v.* Supervisors, 21 id. 688; Milwaukee I. Co. *v.* Hubbard, 29 id. 51; Hale *v.* Kenosha, id. 599; Dean *v.* Borchsenius, 30 id. 236; Oberich *v.* Gilman, 31 id. 495; Whittaker *v.*

Janesville, 33 id. 76; Hersey *v.* Supervisors, 37 id. 75, and other cases.

It would be tedious and unprofitable to review these cases in detail. The general principle underlying them all has been already sufficiently explained. They undertake to provide a rule which will neither tolerate illegal and oppressive taxation nor defeat the collection of the public revenue for technical errors, by distinguishing between the latter and objections which go to the *groundwork* of the tax, affecting the established principle of taxation and so rendering it essentially illegal. Mills *v.* Gleason; Warden *v.* Supervisors, *supra.* As already seen, the groundwork spoken of in these and other cases, necessarily includes a valid assessment, made in substantial compliance with law, and proceeding upon a just and equal rule of valuation. This appearing, there is foundation so far to support a tax. Failing this, there is nothing for a tax to rest upon; no groundwork or foundation.

There are, in some of the cases, *dicta* upon the distinction between formal and substantial defects in assessments, which may not be wholly consistent with the general principle; as in Hersey *v.* Supervisors, 16 Wis. 185; Dean *v.* Gleason, id. 1; Bond *v.* Kenosha, 17 id. 284; and elsewhere. But we are able to recall two cases only, where the judgment of the court at all conflicts with it. And these cases, with any others of the like purport, must be considered so far overruled.

In Kelly *v.* Corson, 11 Wis. 1, it appears to have been held that a mistake in law by the supervisors, acting as a board of equalization, which materially affected the uniform rule of assessment, would not avoid it, because it was "an error of judgment upon the part of the county board, as to their power under the statute, and they were en-

deavoring in good faith to discharge their duties according to law." But, *ignorantia legis neminem excusat;* far less an officer appointed under the law to execute *quod quis tenetur scire;* a maxim laid up among the earliest rudiments of the law, as Story, J., says in Arnold *v.* Maynard, 2 Story, 349. The rule in Kelley *v.* Corson is obviously an inadvertence, not unnaturally growing out of a previous decision of the same cause, Kelley *v.* Corson, 8 Wis. 182. For the mistake in law of the supervisors in that case was not made more obviously in good faith, than the mistake in law of the common council held to be fatal to the whole assessment in Weeks *v.* Milwaukee, *supra,* ever since followed, and decided between the two reports of Kelley *v.* Corson.

In Knowlton *v.* Supervisors, *supra,* the court held the assessment and the tax levied upon it to be void, for violation of the rule of uniformity, in favor of one whose tax appeared to be greater in consequence of the violation. In Miltimore *v.* Supervisors, 15 Wis. 9, in a suit by one whose tax upon the same tax roll appeared to be less in consequence of the violation, the court refused to interfere, "because the taxing officers demanded of her less than her due proportion of the public revenue." But the court could not know what her due proportion would be. This we take to be a mistake of fact, rather than of law, such as might have excused the officers in Kelley *v.* Corson, but cannot excuse the rule laid down. For, granting the invalidity of the assessment upon the ground stated, it could not found a valid tax for either class of persons. There was, in the phrase of Mills *v.* Gleason, no groundwork for a tax, and therefore no tax. The void assessment could no more create a debt or obligation for Miltimore at the less rate, than for Knowlton at the

greater rate. Failing assessment, the tax failed as a whole. And property of both classes still remained chargeable, not yet charged, with due and unliquidated apportionment of the public charges, for which the ineffectual attempt at taxation had been made. That proportion could be ascertained by new and valid assessment only. And in advance of that, it was inequitable to enforce the less as the greater rate. The court seems to have held the unlucky Miltimore accountable for the void assessment, and inclined to rebuke her constructive effrontery in asking relief against it. But the principle, as now stated, is too certain in itself, and too clearly recognized in numerous cases, to suffer any doubt from these or other exceptional cases; far less from mere *dicta* scattered through the reports. A valid assessment only can support a valid tax.

Following closely upon the decisions of this court above cited, came various statutes providing for reassessment and retaxation, both in cases of particular and of general failure of previous taxes. Such statutes have been always upheld by this court. Tallman *v.* Janesville, 17 Wis. 71; Cross *v.* Milwaukee, 19 id. 509; Dill *v.* Roberts, 30 id. 178; Whittaker *v.* Janesville, 33 id. 76. And they go further and more directly to meet the dilemma suggested in Mills *v.* Gleason and Warden *v.* Supervisors, than any rule which this court has power to adopt. Except when taxing officers are afflicted with chronic lawlessness, they serve to secure at once the collection of the public revenue and the just and equal taxation of property.

The assessments in the towns of Lynn and Weston in the respondent county, in question here, were made under ch. 130 of 1868. That statute is replete with provisions in detail, to insure an equal and faithful assessment of all property subject to taxation. It requires all real estate to

be valued by assessors upon actual view, and all personal estate upon actual view as far as practicable. It requires the assessor, in the valuation of real estate, to consider the advantage and disadvantage of each parcel, by location, quality of soil, quantity and quality of timber, water, etc. It also requires each assessor, upon the completion of his assessment roll, to annex it to his affidavit, stating in detail that he has performed his duty in several enumerated particulars, in the manner prescribed by the statute. The affidavit must set forth, amongst other things, that the assessor believes the assessment roll to contain a complete list of all real property liable to assessment; the name of each person liable to personal tax; that he has valued each parcel of realty from actual view of it; that he has, as far as practicable, viewed each article of personal property assessed; and that each valuation is the full value which could ordinarily be obtained for the property assessed, and which the assessor believes that the owner, if disposed to sell, would accept. The statute goes on to provide that the affidavit so made and annexed shall be returned, filed and preserved with the assessment roll; thus apparently making the affidavit essential to the assessment roll, and indeed a part of it.

It is, in this connection, worthy of notice, that ch. 166 of 1873 so varies the oath of the assessor as to declare, alike of personal and real property, that he has assessed them upon actual view, as far as practicable, only. The assessment passed upon in Hersey *v.* Supervisors, 37 Wis. 75, was made under the act of 1873.

The statute is a just and wise enactment to secure the integrity of assessments, and so to fulfill the constitutional rule; quite adequate to those ends, when the official integrity of assessors reaches the standard of the statute under

which they hold their offices. The policy and justice of the provisions recited are obvious; and it would be idle to enlarge upon their necessity to such just and equal rule of assessment as will satisfy the uniform rule of taxation. The oath required of assessors, that they have made the assessment in strict compliance with the statute, is manifestly intended to secure the fundamental rule of taxation against indolence, carelessness, evasion and willfulness, as well as against partiality and fraud, of those officers. The affidavit is the evidence, and the only evidence, accompanying the assessment, that values have been arrived at justly and properly, in compliance with the statute, and to fulfill the rule of the constitution. And the affidavit therefore appears to be made by the statute of the substance, and not of the form, of the assessment roll.

There appears to be, indeed, no other check upon the conscience of the assessor. Few other ministerial officers have opportunity to disregard a great constitutional principle, or to violate grave private rights, with so much impunity. And the statute therefore puts this check upon him, bringing his official duty directly to the test of his personal truth and integrity. An assessor who has faithfully performed his duty, as the statute gives it to him to perform, cannot hesitate to make the affidavit. An assessor who hesitates to make the affidavit, hesitates because he has not performed his duty; because he has not followed the process given by the statute, to secure the fair and uniform rule of assessment essential to a just and constitutional tax. In other words, an assessor who fails to make the affidavit impeaches the integrity of his own assessment.

The assessment rolls in question here, in both of these towns, are impeached upon their face by want of the statutory affidavit. There is no pretense that the assessor of

the town of Weston ever made the affidavit. He himself testifies that he would not and did not make affidavit that he had valued each parcel of real estate from actual view, because it would not have been true. In the town of Lynn, a paper in the form of the assessor's statutory affidavit was at some time annexed to the assessment roll; at what time, may, under the peculiar evidence of the assessor and the clerk who signed the *jurat,* be considered doubtful. It was at some time signed by the assessor; it is difficult to say when. He states that he swore to it before the clerk when he signed it, but that he does not know when he signed it. The clerk testifies that the assessor made oath to the affidavit before him, but does not state at what time; intending probably to imply that the oath was taken when the assessment roll was returned. He positively states, however, that he himself signed the *jurat* to the affidavit several years after the levy and collection of the tax. Taken together, this is evidence of a very suspicious character; the more so, that the assessor's testimony in the cause shows that the affidavit, if made, would have been untrue. It may well be doubted whether the affidavit was ever made. It appears plainly enough that perjury could not be well assigned on the affidavit, upon the evidence before us. Be that as it may, certain it is that, when the assessment roll was returned, when the tax was levied, and when the tax sale took place, the assessment roll had no affidavit annexed to it, bore no evidence that the assessor's affidavit had ever been made to verify it. It rather bore evidence, perhaps, in the unsigned *jurat,* that this assessor, like the other, dare not make the affidavit.

It is apparent that the failure of an assessor to annex his affidavit and return it with the assessment roll, is in disregard of a material provision of the statute, and de-

feats a material safeguard provided for the integrity of the assessment. When the affidavit is omitted in fraud of the statute, because the assessment was not made in compliance with the statute, as is the case here beyond reasonable doubt, there could be little difficulty in holding the assessment void for the want of it. For the statute does not authorize an unverified return, and the assessment roll is *prima facie* positively valid or void, when returned. And the verification of the affidavit cannot be supplied by evidence *aliunde*. The assessment may be impeached by evidence *aliunde*, against the affidavit, when annexed. Hersey *v.* Supervisors, 37 Wis. 75. But the affidavit cannot be supplied. Iverslie *v.* Spaulding, 32 Wis. 394. We were at first disposed to express a doubt, in this case, whether, when the affidavit is omitted by accident, and evidence is given, to supply its place in support of the assessment, that it was made in good faith, in the manner which the affidavit should have verified, the assessment might not be upheld. But the statute authorizes no assessment roll without the affidavit, sanctions none. And it is dangerous to relax statutory rules in a matter so vital, going to the very integrity of the assessment and its compliance with the constitution. The door, once opened to cases of mere mistake, might well admit cases of fraud wearing the disguise of mistake; assuming to the courts the power of verifying assessments, which the assessors did not verify for themselves. And, after very mature consideration, we feel bound to stand upon the letter, and what we believe to be the spirit, of the statute itself; and to apply the rule of Iverslie *v.* Spaulding, *supra*. See also Jarvis *v.* Silliman, 21 Wis. 599; Matteson *v.* Rosendale, 37 id. 254; and Cotzhausen *v.* Kaehler (42 Wis. 332). An assessment, not verified by the statutory affi-

davit of the assessor, cannot be otherwise verified, is not within the statute, and is valid for no purpose.

We may remark that, had we not come to this conclusion, we should have found no difficulty in holding void the assessments in question here, under the rule of Hersey *v.* Supervisors, 37 Wis. 75. The whole process of the assessors is clearly shown by their own testimony to have been a fraud upon the statute.

The learned counsel of the respondent contended that, in the towns in question, a compliance with the statute is impossible; and there is evidence in the case supporting his argument. But if the statute prescribed an impossible duty, courts cannot hold the duty performed, because it is impossible. We cannot hold an assessment valid, because it was impossible to make a legal assessment. The statute is peremptory, taking the case out of all rule of what is called reasonable construction. We cannot interpolate exceptions in it. Such an argument, which can have no force with courts, ought to have great weight with the legislature. It was probably in view of some such difficulty, that the affidavit was changed by the statute of 1873. But we surely have no power to antedate that provision.

And we have no choice but to hold that no legal tax was levied on the lands of the appellants in these towns, in the year in question.

II. In such a case, the equitable jurisdiction of the circuit courts is too well established, by repeated adjudication of this court, to be in any doubt. Dean *v.* Madison, 9 Wis. 402; Weeks *v.* Milwaukee, 10 id. 242; Soens *v.* Racine, id. 271; Mills *v.* Gleason, 11 id. 470; Foster *v.* Kenosha, 12 id. 616; Rogers *v.* Milwaukee, 13 id. 610; Warden *v.* Supervisors, 14 id. 618; Jenkins *v.* Supervisors, 15 id. 11; Knowlton *v.* Supervisors, id. 600; Her-

sey *v.* Supervisors, 16 id. 185; Bond *v.* Kenosha, 17 id. 284; Myrick *v.* La Crosse, id. 442; Mills *v.* Johnson, id. 598; Smith *v.* Milwaukee, 18 id. 63; Mitchell *v.* Milwaukee, id. 92; Kneeland *v.* Milwaukee, id. 411; Kimball *v.* Ballard, 19 id. 601; Wells *v.* Burnham, 20 id. 112; Crane *v.* Janesville, id. 305; Pierce *v.* Schutt, id. 423; Howes *v.* Racine, 21 id. 514; Lefferts *v.* Supervisors, id. 688; May *v.* Holdridge, 23 id. 93; Hamilton *v.* Fond du Lac, 25 id. 490; Siegel *v.* Supervisors, 26 id. 70; Dean *v.* Charlton, 27 id. 522; Dean *v.* Borchsenius, 30 id. 236; Whittaker *v.* Janesville, 33 id. 76; Quinney *v.* Stockbridge, id. 505; Dayton *v.* Relf, 34 id. 86; Morgan *v.* Hammett, id. 512; Hersey *v.* Supervisors, 37 id. 75; Massing *v.* Ames, id. 645; Pier *v.* Fond du Lac, 38 id. 470; Johnson *v.* Milwaukee, 40 id. 315; and many other cases.

These cases establish the jurisdiction of courts of equity to enjoin the issue of tax deeds, to become a cloud upon the title, which are about to issue upon tax sales, where, in the language of the court, the groundwork for a valid tax is wanting.

The learned counsel for the respondent did not seriously question the general jurisdiction. He denied it only, as we understood him, as applicable to some technical objections urged in this case, which we have not found it necessary to notice.

The learned counsel also pressed upon us the rule that he who seeks equity, should do equity; and that the appellants should pay their fair taxes, before they could have relief against the tax sale. And he insisted that the appellants could not have relief without showing injustice done to them by the tax for which the deed was about to issue. We should not of course question either of these positions, in a case in which they could properly arise.

The difficulty of applying either rule in the present case is obvious, and has been already indicated. The trouble is that there is no tax; therefore no apportionment of the appellants' share of a tax. It is thus impossible for the appellants or for the court to say what would be their proportion of a valid tax. And it is surely sufficient injury, and sufficiently inequitable to support this suit, that a tax deed of the appellants' land will issue, unless they will pay a sum as a tax, for which no tax has been assessed. An illegal tax is none the less illegal because it may happen to be the same or even less than a legal tax might have been. When, as in this case, the whole assessment is a fraud upon the law and an evasion of the constitution, every exaction of a tax purporting to be levied upon it, is a wrong; an unlawful exaction of money, not legally or equitably payable, under false color of a legal proceeding.

This appeal and several kindred appeals submitted with it, were argued by the counsel on both sides with learning and ability which greatly aided us in considering them. We regret to add that all of the cases in them were printed and presented in entire disregard of the rule; so as to be rather a hindrance than a help in the examination of the facts. For this reason, no allowance must be taxed for any of the printed cases in this and the kindred appeals.

By the Court.—The judgment is reversed, and the cause remanded to the court below with directions to render judgment according to the prayer of the complaint.

NOTE.

(Each case in this note after which is placed the figure (2) relates to the subject discussed in the foregoing opinion, numbered II. The other cases relate to the questions considered in the other portion of the opinion).

Marsh *v.* Supervisors of Clark County, *supra,* has been

cited with approval in the Wisconsin Supreme Court, as follows: Philleo *v.* Hiles and others,[1] 42 Wis. 530; Schettler *v.* City of Fort Howard,[1] 43 Wis., 49, 51; Goff *v.* Supervisors of Outagamie County,[1] 43 Wis. 59; Green Bay & Miss. Canal Co. *v.* Sup'rs of Clark County,[1] 43 Wis. 254; McIntyre *v.* Town of White Creek,[1, 2] 43 Wis. 627; Hart *v.* Smith,[1] 44 Wis. 217; Salscheider *v.* City of Fort Howard,[1] 45 Wis. 521; Bound *v.* Wis. Central Ry.,[2] 45 Wis. 566; Plumer *v.* Board of Sup'rs of Marathon County,[1, 2] 46 Wis. 175, 177, 179, 181, 182, 183; Oconto Co. *v.* Jerrard,[1] 46 Wis. 324, 325; Tierney *v.* Union Lumbering Co.,[1] 47 Wis. 250; Southmayd *v.* Watertown Fire Ins. Co.,[1] 47 Wis. 522; Flanders *v.* Town of Merrimack,[1] 48 Wis. 568, 569; Scheiber *v.* Kaehler,[1] 49 Wis. 301; Pier *v.* Fond du Lac County,[2] 53 Wis. 429; Branns *v.* City of Green Bay,[1] 55 Wis. 115; Bradley *v.* Lincoln County,[1] 60 Wis. 73, 75; Bass *v.* Fond du Lac,[1] 60 Wis. 521; Baker *v.* City of Madison,[2] 62 Wis. 153; Fifield *v.* Marinette County,[1] 62 Wis. 535, 537, 539; Beebe *v.* Marinette County,[1] 62 Wis. 535, 537, 539; Ruggles *v.* Fond du Lac County,[1] 63 Wis. 210; Wisconsin Central Ry. *v.* Lincoln County and others,[1] 67 Wis. 481; Semple *v.* Langlade County,[2] 75 Wis. 358; Hixon *v.* Oneida County,[2] 82 Wis. 531; Hayes *v.* Douglas County,[1] 92 Wis. 444, 31 L. R. A. 218; Wells *v.* W. P. & S. Co.,[2] 96 Wis. 120.

It has been cited with approval outside of the Wisconsin Supreme Court, as follows: Re Page,[1] 60 Kan. 842; 47 L. R. A. 70; State ex rel. Harvey *v.* Cook,[1] 82 Mo. 188; State ex rel. Lewellen *v.* Schooley,[1] 84 Mo. 451; Brevoort *v.* City of Brooklyn,[1] 89 N. Y. 134; Peck *v.* Comstock,[1] 6 Fed. 24, 25; Griggs *v.* St. Croix Co.,[1] 20 Fed. 342.

Marsh *v.* Supervisors, *supra,* has been cited in notes to the following cases in L. R. A., Am. Dec., Am. & Eng. Ry. Cas., and the Nat. and Fed. Rep., including valuable collections of authorities:

Lawyers' Reports Annotated: State ex rel. McCardy *v.* Nelson (41 Minn. 25), 4 L. R. A. 300; Chester *v.* Black

(132 Pa. St. 568), 6 L. R. A. 802; Russell *v.* Tate (52 Ark. 541), 7 L. R. A. 182; West *v.* People's Bank (67 Miss. 729), 8 L. R. A. 729; Miller *v.* Cook (135 Ill. 190), 10 L. R. A. 293; Odlin *v.* Woodruff (31 Fla. 160), 22 L. R. A. 705, 706, 707.

American Decisions: Holland *v.* Mayor of Baltimore (11 Md. 186), 69 Am. Dec. 261; Mills *v.* Gleason (11 Wis. 470), 78 Am. Dec. 729; Hersey *v.* Bd. of Sup'rs (16 Wis. 185), 82 Am. Dec. 719; Kimball *v.* Ballard (19 Wis. 601), 88 Am. Dec. 707; Smith *v.* Smith (19 Wis. 615), 88 Am. Dec. 711.

American & English Railway Cases: County of San Mateo *v.* So. P. Ry. Co. (8 U. S. Ct. Rep. 9th Cir. 238), 8 Am. & Eng. Ry. Cas. 58; Worth *v.* W. & W. Ry. Co. (89 N. C. 291), 13 Am. & Eng. Ry. Cas. 293.

Federal Reports: "Head Money" Cases, 18 Fed. 145; foot-note 5; Guthrie *v.* Harker, 27 Fed. 589; R. I. B. & M. Co. *v.* County of Otoe, 27 Fed. 806.

National Reporters: 1 Atl. 645; 25 N. W. 125; 25 N. W. 855; 2 N. E. 861.

Dorsey vs. The Phillips & Colby Construction Company.

August Term, 1877.

(42 Wis. 583.)

This was an action brought by the plaintiff against the defendant company to recover damages for injuries sustained by the plaintiff while in defendant's employ as the conductor of a freight train upon its railroad.

Plaintiff was injured, while climbing up a ladder on the side of one of the cars on defendant's road in the discharge of his duties, by being swept from the side of the car by a cattle chute at a station on defendant's road.

The cattle chute, it appeared from the testimony, was so near the track that a person climbing or standing on the ladder on the side of the freight car when the car passed the chute would be certain to be swept from the car. Had the chute been located a foot further from the track the danger would have been obviated. Plaintiff had been in defendant's employ for some time, had frequently passed the same station, knew in a general way of the existence of the chute, but did not know its exact location in reference to the track.

There was a special verdict and judgment for plaintiff thereon for $5,000 damages. The defendant company appealed. The appellant was represented by Mr. Dixon, former chief justice of the court, and the opinion hereafter set out was rendered by Chief Justice Ryan upon such appeal.

The other material facts appear from the opinion.

The following propositions of law were decided:

Whether a uniform custom of railroad companies to use structures unnecessarily dangerous to persons in their employ would excuse the danger, *quære*. Upon the evidence in this case, it was a question for the jury, whether there is a universal or general custom of such companies to build cattle chutes as near to the track as was that which is alleged to have caused the injury here complained of.

If plaintiff knew, or ought reasonably to have known, the precise danger to him of the cattle chute in question, and still continued in his employment, he might be held to have assumed the extraordinary risk thus created; but this consequence of acquiescence must rest upon positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed, and not on vague surmises of the possibility of danger. And, upon the evidence in this case, it was for the jury to determine whether he had, or ought to have had, such knowledge.

The question of plaintiff's contributory negligence, being fairly debatable upon the evidence, was also for the jury.

The refusal of an instruction asked by the defendant, going upon the theory that, if plaintiff had, in the course of his employment (as a conductor on one of defendant's freight trains), sufficient opportunity to know the general position of the cattle chute, he was charged with knowledge of its dangerous character, was not error; such mere general knowledge, without opportunity for *accurate* knowledge, not being sufficient to so charge him.

A judgment will not be reversed for an instruction, incorrect in itself, so given or qualified that it could not mislead the jury; nor because the charge is not so full as might have been desirable upon some point on which the appellant did not ask an instruction.

The jury found specially a negative answer to the question, whether plaintiff knew or had means of knowing "the *existence and location* of the cattle chute in question." *Held,* that both the words, *existence* and *location,* being used in the question, it must be taken to refer to *exact* location or distance from the track; and the verdict is sustained by the evidence, although it clearly appears from plaintiff's own testimony that he had a general knowledge of the existence of the cattle chute.

Ryan, Chief Justice. I. The nonsuit was properly denied. The case was one for the jury on all the points made.

First: Of the appellant's negligence.—If a uniform custom of railroad companies to use structures unnecessarily dangerous to persons employed in operating trains, had been proved, we should hesitate gravely before holding that the custom could excuse the danger. A positive acquiescence, *scienter,* of one so employed, might indeed take away his right of action for injury incurred by such a structure. But there is public as well as private interest. The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate, the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the state, concerned in the welfare of its

citizens. And no custom, however uniform or universal, which unnecessarily exposes railroad employees to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters. We use the word unnecessary, advisedly; distinguishing necessity from convenience. A convenience may be so great as to be regarded as a practical necessity. But a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle chutes to the track as to jeopardize life and limb of persons operating trains.

But we need not pursue this inquiry. For a careful examination of the evidence has satisfied us that no such custom is established; much if not all of the evidence on both sides tending to show that no uniform custom exists. It rather appears to be a fair conclusion from the evidence, as far as it goes, that cattle chutes are built at varying distances from the track, according to varying notions of convenience of use in driving cattle into cars. So far as a custom is involved in the case, it was a question for the jury. The evidence affords no warrant for holding, as a matter of law, that the custom relied on by the appellant is established.

And there certainly was evidence to go to the jury, of the dangerous proximity to the railroad of the cattle chute in question; enough, in our judgment, to warrant the finding that it was unnecessarily dangerous. We do not propose to review the evidence. But there is a presumption of fact running through the whole printed case, that the structure was positively dangerous to operatives on moving trains, whose duty might take them to car ladders on that side; and that its dangerous relation to the track was due to one of two causes. It may be that the cattle chute

was constructed with a view to the exclusive use of cars having ladders on the ends only; in which case it might have involved no special danger. In that view, it might have become dangerous by the use of cars having ladders on their sides only. The use of cars of the latter description, assuming the consequent danger of the cattle chute, made it an immediate duty to remove the cattle chute or change its structure. It may be that it was built with a view to the use of cars of both descriptions. In that case, its dangerous relation to the track was due to a paltry convenience, furnishing no color of legal excuse. A greater distance from the track might have made it more troublesome to load cattle from it, but would have insured operatives of the road from danger of life and limb. Human life is too precious in the eye of the law to be so lightly hazarded. Railroad companies owe a higher measure of duty to those who operate their trains, and to the public.

Second: Of the respondent's acquiescence.—If he knew, or ought reasonably to have known, the precise danger to him, in the course of his employment, of the cattle chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to have assumed the extraordinary risk, as well as the ordinary risks, of his service. The authorities cited by the learned counsel for the appellant all agree in the general proposition. But it appears to us that this consequence of acquiescence ought to rest upon positive knowledge, or reasonable means of positive knowledge, of the precise danger assumed; not on vague surmise of the possibility of danger. And there might be serious difficulty in applying the principle to a case like this.

The safety of railroad trains depends largely upon the exclusive attention of those operating them, to the track,

and to the trains themselves. It is not for the interest of railroad companies, or of the public—with like, if not equal, concern in the safety of trains—that persons so employed should be charged with any duty or necessity to divert their attention. And it appears to us very doubtful whether persons operating railroad trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof or knowledge, to be charged with notice of the precise relation of such objects to the track. And even with actual notice of the dangerous proximity of adjacent objects, it may well be doubted whether it would be reasonable to expect them, while engaged in their duties, to retain constantly in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects. In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention from their duty on the train, to their own safety in performing it. Notwithstanding some things said in some cases cited for the appellant, we should be rather inclined to think that, in the absence of express notice of immediate danger, employees operating trains may perform their duties under an implied warrant that they may do so without exposing themselves to extraordinary danger; that is, danger not necessarily incident to the course of their employment.

Be that as it may, the question can not well be considered as arising here. For though it certainly appears that the respondent know of the general relation of the cattle chute to the track, it does not appear that he knew, or had such means of information as would charge him with

knowing, its precise relation to the track, its distance and its danger. There is indeed evidence tending to show that he had some impression of its dangerous proximity; perhaps not more than the vague idea of danger suggested by adjacent objects generally. Even this we understand him to deny. The court could not say, as matter of law, that he knew of the extraordinary danger, and continued his employment at his own risk of it. There was enough in the evidence to make his knowledge and acquiescence a proper question for the jury.

Third: Of the respondent's contributing negligence.—"What constitutes negligence, or that want of care on the part of the person receiving the injury, which deprives him of any remedy, and neutralizes, as it were, the wrong of the party by whom the injury is inflicted, is a question depending on various circumstances. What may be negligence under some circumstances and conditions, may not under others. As observed by counsel, it is not a fact to be testified to, but can only be inferred from the *res gestae*—from the facts given in evidence. Hence it may, in general, be said to be a conclusion of fact to be drawn by the jury under proper instructions from the court. It is always so where the facts, or rather the conclusion is fairly debatable, or rests in doubt. It is only where there is an entire absence of evidence tending to establish the case, or where, as in Achtenhagen *v.* Watertown, 18 Wis. 331, the negligence of the party injured or killed is affirmatively and clearly proved by the plaintiff, so as to admit of no doubt or controversy, that a nonsuit may properly be ordered." Langhoff *v.* Railway Co., 19 Wis. 489.

Under this rule, it appears quite manifest that the court could not hold the respondent, as matter of law, guilty of contributory negligence. It was a question for the jury

whether, under all the circumstances, he could have avoided the accident by the exercise of reasonable care. His general knowledge of the position and danger of the cattle chute, his means of knowledge, at the time, of its nearness to him, his necessity of being where he was when he was injured, and his care or want of care for his own safety, under all the circumstances, were proper questions for the jury.

There is evidence tending to show that all collateral objects which could make the ascent and descent of the car ladders dangerous, were on the outside of the track, and that the inside was free from such objects. Such adjacent objects on the outside certainly implied possible danger, rendering the inside of the track safer. And it is remarkable that persons engaged in operating trains there should not confine themselves to that side. It might perhaps be difficult to account for it, except upon the view that familiar dangers lose their terror. But there is also evidence tending to show that the respondent could not well have discharged the duty in which he was engaged, on the inside ladder, at the other end of the car. Under a sudden pressure of duty, we cannot say that the respondent was bound to exercise the same measure of judgment which we do now in reviewing his conduct. That would appear to require of him a deliberation and circumspection which the necessity of his duty might preclude. "What may be negligence under some circumstances and conditions, may not under others." The question of his negligence "is fairly debatable, and rests in doubt." It was submitted to the jury, and there certainly is evidence to support the verdict. We cannot reverse their conclusion, even though we were inclined to come to a different one.

II. The difficulty which pervades the views taken for the appellant throughout, enters into the only instruction asked. It goes upon the theory that if the respondent had, in the course of his employment, sufficient opportunity to know the general position of the cattle chute, he was charged with knowledge of its dangerous character. We have sufficiently indicated our dissent from this. We think that it is contrary to the experience of human life, that one, knowing generally of a thing, without opportunity of ascertaining its precise relations and conditions, is to be charged with notice of them. And the instruction, which goes upon general knowledge only, and ignores all opportunity of accurate knowledge, to charge the respondent with notice of the dangerous proximity of the cattle chute to the track, was properly refused.

III. Exceptions were taken to two passages of the charge, which were made the subject of criticism here. Either would be sufficiently erroneous, considered by itself, to reverse the judgment. But it is our duty to consider them in connection with the whole charge, and to determine whether they could mislead the jury. This court always reverses upon a charge correct in law, but so given that it might mislead the jury; and affirms upon a charge incorrect in itself, but so given or qualified that it could not mislead the jury.

The first passage of the charge in this case to which objection is taken, is the statement that the employment and injury of the respondent at the time and in the manner claimed by him, were admitted by the appellant. It is claimed that this imports the appellant's admission of the respondent's right of recovery. But the charge proceeds immediately to state the grounds of the defense at large. And, taken in connection with what follows, the sentence

complained of imports no more than that the respondent's employment and his actual injury were not denied upon the trial, as appears to have been the truth. We cannot doubt that it must have been so understood by the jury.

The second passage is to the effect that, if the respondent had no knowledge, or means of knowledge, of the cattle chute and its danger, he must recover. The learned judge was explaining to the jury what knowledge of the cattle chute was necessary to charge the respondent with acquiescence in its danger. Elsewhere in the charge, all the conditions necessary to the respondent's recovery are stated. And, in the light of the whole charge, the passage in question signifies but this: that, on the question immediately under consideration, the want of knowledge on the part of the respondent stated would not, so far, defeat his right to recover.

Neither passage could have misled the jury. The general charge is too full and too clear.

The charge of the court below, quite full on other points, contains no very specific instruction on the doctrine of contributory negligence. We must confess that, if the doctrine of contributory negligence had been given to the jury, the verdict would have been more satisfactory to us. But if the appellant had desired it, it was incumbent on it to pray for proper instruction. And we cannot reverse a judgment because, on some point, the charge is not so full as might have been desirable.

IV. The verdict of the jury gave us more trouble than the rulings of the court.

The statute authorizing special verdicts appears designed to guard against willful or mistaken verdicts, and to enable the court to review the precise grounds on which verdicts are found. And we have lately, more than once,

reversed judgments upon apparently willful or evasive verdicts.

In the verdict before us, the jury found that the respondent did not know of the dangerous proximity of the cattle chute to the track. They also found that he did not know, and had no means of knowing, "the existence and location of the cattle chute in question, with reference to the side of the track."

If this answer could import that the respondent had no general knowledge, it would be clearly inconsistent with the evidence. And the finding that he had no knowledge of the danger of the cattle chute might, in that case, well rest upon the finding that he had no knowledge of it at all. If such were the construction of the verdict, it could not be supported. And we confess that such was our first impression.

If the question put to the jury had been confined to the *location* of the structure with reference to the track, we might probably have had no difficulty in holding that the question called only for his knowledge of the general relation of the cattle chute to the track; the word, location, not necessarily implying their exact relation. The question would then have had substantially the same meaning as if it had inquired only of the *existence* of the cattle chute in reference to the track. But both words are used, and effect must be given to each. Location, by itself, as used in the question, would have imported substantially the same as existence, by itself. Each word being used in the question, must be taken in a different sense from the other; both words implying a greater extent of knowledge than either alone. General location is implied in the question by the word, existence; and the word, location, used with it, must signify more than mere existence, more

than general location, in reference to the track. It must mean exact location, or distance from the track. We can see no other distinctive meaning to be given to it as it is used.

This was, presumably, the construction of the jury, who could hardly have found that the respondent had not the general knowledge to which he himself frankly testified. In this view, each answer is almost equivalent to the other.

We did not understand it to be claimed, upon the argument, that the questions considered bore a different construction. They gave us, however, the greatest doubt we had of our duty to affirm the judgment.

We are glad to acknowledge our obligation to counsel on both sides for thorough preparation and intelligent argument of this appeal, leaving little labor of investigation for us.

By the Court.—The judgment of the court below is affirmed.

NOTE.

(Each case in this note after which is placed the figure (1) relates to the subject discussed in the foregoing opinion numbered I; those numbered (2) relate to the subject in the opinion numbered II; etc.)

Dorsey *v.* The Phillips & Colby Construction Company, supra, has been cited with approval in the Wisconsin Supreme Court, as follows: Bessex *v.* C. & N. W. Ry.,[1] 45 Wis. 482; Kidd *v.* Fleek,[1] 47 Wis. 445; Zielke *v.* Morgan,[3] 50 Wis. 567; Ballou *v.* C., M. & St. P. Ry.,[3] 54 Wis. 270, 5 Am. & Eng. Ry. Cas. 504 and note; Hoth *v.* Peters,[1] 55 Wis. 410; Hulehan *v.* Green Bay, etc., Ry.[1] 58 Wis. 322; Peschel *v.* C., M. & St. P. Ry.,[1] 62 Wis. 346; Hulehan *v.* Green Bay, etc., Ry.,[1, 2] 68 Wis. 526; Toner *v.* C., M. & St. P. Ry.,[1] 69 Wis. 195; Nadau *v.* White River Lumber Co.,[1] 76 Wis. 127, 132; Goltz *v.* Mil., etc., Ry.,[1] 76 Wis. 144; McClarney *v.* C., M. & St.

P. Ry.,[1] 80 Wis. 280; Kelleher *v.* M. & N. Ry.,[1] 80 Wis. 588; Haley *v.* Jump River Lumber Co.,[1] 81 Wis. 421, 426; Peffer *v.* Cutler,[1] 83 Wis. 285; Colf *v.* C., M. & St. P. Ry.,[1, 3] 87 Wis. 275; Luebke *v.* Berlin Machine Works,[1] 88 Wis. 448; Peterson *v.* Sherry Lumber Co.,[1] 90 Wis. 93; Kennedy *v.* L. S., etc., Co.,[1] 93 Wis. 39; Simonds *v.* City of Baraboo,[1] 93 Wis. 43; Curtis *v.* C. & N. W. Ry.,[1] 95 Wis. 468; Hennesey *v.* C. & N. W. Ry.,[1] 99 Wis. 121; Whitty *v.* City of Oshkosh,[1] 106 Wis. 91; Renne *v.* U. S. Leather Co.,[1] 107 Wis. 312, 317, 318, 319; Boyce *v.* Wilbur Lumber Co.,[1] 119 Wis. 647; Hocking *v.* Windsor Spring Co.,[1] 125 Wis. 579.

It has been cited with approval outside of the Wisconsin Supreme Court, as follows: L. & N. Ry. *v.* Hall,[1] 87 Ala. 720, 4 L. R. A. 714, 13 Am. St. Rep. 88; Birmingham R. & E. Co. *v.* Allen,[1] 99 Ala. 370, 20 L. R. A. 460; Magee *v.* N. P. C. Ry.,[1, 2] 78 Cal. 436, 12 Am. St. Rep. 73; Giraudi *v.* E. I. Co.,[1] 107 Cal. 126, 28 L. R. A. 598; Central Ry *v.* DeBray,[1] 71 Ga. 424; McKee *v.* C., R. I. & P. Ry.,[1] 83 Ia. 634, 13 L. R. A. 284; St. L., Fort S. & W. Ry. *v.* Irwin,[1] 37 Kan. 710, 1 Am. St. Rep. 270; Robel *v.* C., M. & St. P. Ry.,[1] 35 Minn. 86, 88; Flynn *v.* K. C., etc., Ry.,[1] 78 Mo. 211; Blanton *v.* Dold,[1] 109 Mo. 76; Thomas *v.* M. P. Ry.,[1] 109 Mo. 211; Cunningham *v.* U. P. Ry.,[1] 4 Utah, 215; N. & W. Ry. *v.* Ward,[1] 90 Va. 691, 24 L. R. A. 719.

It has been cited in notes to the following cases reported in Am. Dec., and Am. & Eng. Ry. Cas., containing valuable collections of authorities:

American Decisions: Buzzell *v.* Laconia Mfg. Co. (48 Me. 113), 77 Am. Dec. 220; Achtenhagen *v.* City of Watertown (18 Wis. 331), 86 Am. Dec. 772.

American & English Railway Cases: Walker et al. *v.* B. & M. Ry. (128 Mass. 8), 1 Am. & Eng. Ry. Cas. 144; Wilson *v.* Denver, etc., Ry. (7 Colo. 101), 15 Am. & Eng. Ry. Cas. 196; L. N. A. & C. Ry. *v.* Wright (115 Ind. 378), 33 Am. & Eng. Ry. Cas. 383; Gardner *v.* Mich. Cent. Ry. (150 U. S. 349), 59 Am. & Eng. Ry. Cas. 252.

Wight vs. Rindskopf.

August Term, 1877.

(43 Wis. 344.)

This action was brought by plaintiff, Wight, an attorney at law of Milwaukee, to recover of defendant the sum of $3,000 for professional services. It was claimed by plaintiff that $1,000 had been paid upon the contract, and upon the part of the defendant it was asserted that the $1,000 which had been paid was in full for the services. Neither the complaint nor the answer stated the nature of the services. There was a verdict and judgment for the plaintiff for the amount claimed. It was upon the final appeal from such judgment that the opinion, which is hereinafter set out, was rendered.

It appeared from the evidence that the contract sued upon was, in substance, one by which the plaintiff was to procure immunity or the lowest punishment for defendant in certain criminal proceedings pending against him in the Federal Court in Milwaukee for violation of the Internal Revenue Laws, in consideration of defendant giving certain testimony in behalf of the State to aid in other prosecutions. The defendant's evidence for the United States on indictments against other persons was the condition of the immunity, which plaintiff agreed to procure for defendant and certain other persons. The agreement for clemency was made between the plaintiff, Wight, acting as attorney for defendant, Rindskopf, and others, and the representatives of the Government in the prosecutions, who were former Chief Justice Dixon and J. C. McKenney.

When the case reached the Supreme Court of Wisconsin, that court on its own motion, held that the contract sued upon was contrary to public policy and void. Thereafter a motion for rehearing was made, and Mr. Dixon and Mr. McKenney also filed a writing with the court setting forth, among other things, that the court had overlooked the provisions of section 3229 of the Revised Statutes of the United States, which specifically authorized the agreement in question. That section of the statute is as follows:

"The commissioner of internal revenue, with the advice and consent of the secretary of the treasury, may compromise any civil or criminal case arising under the internal revenue laws, instead of commencing suit thereon; and, with the advice and consent of the said secretary and the recommendation of the attorney general, he may compromise any such case after a suit has been commenced thereon."

The opinion upon the motion for rehearing, which is also herein set out, while it admits that the statute in question must modify to some extent the reasoning in the first opinion, denies that it can affect the conclusions there arrived at.

The following are the propositions of law decided:

Courts will always refuse to enforce contracts which are contrary to public morality or policy, whenever and however, in actions upon them, that fact may be made to appear.

The admission of an accomplice as a witness for the government upon implied promise of pardon, in any case, is not at the pleasure of the public prosecutor, but rests in the sound judicial discretion of the court.

If an accomplice in one crime be also indicted for another, and the fact be within the knowledge of the court, he will not, in general, be admitted as a witness; but if admitted, though he testify in good faith against his accomplices upon one indictment, he will be put upon his trial on the other and punished upon conviction.

An agreement of the public prosecutor, unsanctioned by the court (if such sanction could be given in such a case), for immunity or clemency to several defendants, in several indictments, upon *one of them* becoming a witness for the prosecution upon still other indictments, would be a fraud upon the court, and an obstruction of public justice.

A witness, as such, cannot have an attorney; and though an accomplice may act by advice of his attorney on the question whether he will become a witness for the prosecution, when he once becomes such a witness, the relation of the attorney and client ceases *quoad hoc.*

The federal statute which authorizes the commissioner of internal revenue, with the consent of the secretary of the treasury, to compromise any civil *or criminal* case under the internal revenue laws, instead of commencing suit thereon, and, with like consent, and on the recommendation of the attorney general, to compromise any such case after suit commenced thereon (R. S. of U. S., Sec. 3229), being, in the judgment of this court, essentially immoral, so far as it authorizes a compounding of crimes, any collateral contract, looking towards, in aid of, or subordinate to, such an agreement to compound a crime, under that statute, will not be enforced in the courts of this state.

While several indictments were pending in a federal court against defendant and six other persons for violation of the revenue laws, plaintiff told defendant that his relations with the prosecuting attorneys were such that he thought he could render these parties essential service. Thereupon it was agreed between defendant and plaintiff that the former should give evidence for the United States, under the counsel and direction of the latter, against persons, other than those included in the agreement, against whom still other indictments for violations of the revenue laws were pending in the same court; and plaintiff undertook that defendant and the other six persons above mentioned should be permitted severally to plead guilty to those counts only, in the several indictments against them, involving the least punishment, and receive upon those the lowest punishment of the law; and for this service, if successful, defendant was to pay plaintiff a large sum for each person mentioned. The agreement required no disclosure, evidence or other aid to the government from any other person than defendant, and did not require him to make full disclosure to the prosecuting attorneys, or to put himself in their hands as their witness. *Held,* that the services on plaintiff's part thus stipulated for were not within the legitimate scope of a professional retainer of an attorney-at-law, and a contract therefor is void as against public morality and policy.

The complaint in this action being general for professional service, and it not appearing that plaintiff may not be able to give evidence under it of legitimate professional service, the cause, on reversal of a judgment in his favor based upon evidence of such agreement, is sent back for a new trial.

Ryan, Chief Justice. The learned counsel for the respondent contended that the question of the invalidity of the contract, as against public policy, relied on by the appellant, is not in the case, because the answer does not raise it. And he cited some cases here and elsewhere, to sustain the position. But we do not think that they do so. They recognize a general doctrine, that when a contract, valid on its face, is impeached for fraud, the extrinsic facts going to the consideration only, must be specially pleaded. They do not hold, we know of no case which does, that when a contract is in terms *contra bonos mores,* it is necessary for the defendant to plead the objection; or that a court will proceed to judgment upon it, both parties even assenting. If the objection be not made by the party charged, it is the duty of the court to make it on its own behalf. Courts owe it to public justice and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear.

In the present case, the nature of the contract does not appear either in the complaint or in the answer. The pleadings of both parties appear to acquiesce in its validity. But if the contract, as proved, be essentially against public policy, it was the duty of the court below promptly to exclude it and all evidence under it, from the consideration of the jury. The acquiescence of the defendant could not purge it, or afford excuse to the court to enforce it. And the question here is, the nature of the contract itself.

It appears to have been early held by a great authority, than an accomplice with promise of pardon for his evi-

dence, is not a competent witness against his codefendents in an indictment. Says Sir Matthew Hale: "If a reward be promised to a person for giving his evidence before he gives it, this, if proved, disables his testimony. And so for my own part I have always thought, that if a person have a promise of pardon if he gives evidence against one of his own confederates, this disables his testimony if it be proved upon him." 2 P. C. 280. But a contrary practice has long prevailed, by unanimous consent of all courts, English and American. "The admission of accomplices, as witnesses for the government, is justified by the necessity of the case, it being often impossible to bring the principal offenders to justice without them." 1 Greenleaf's Ev. sec. 379. But this use of an accomplice, upon implied promise of pardon, is not at the pleasure of the public prosecutor, but rests in the sound judicial discretion of the court. A justice of the peace, before whom prisoners are brought for examination, cannot exercise such a discretion, to bind the court in which the prisoners are indicted and tried; and the judges of the court itself cannot exercise it, to bind the pardoning power; though in the latter case, if the accomplice make full disclosure in good faith upon the trial, the implied promise of pardon is respected. And it is not matter of course for the court to admit the accomplice as a witness; application for the purpose must always be made to the court, which admits or refuses to admit him, in view of the particular circumstances of the case. Rex *v.* Rudd, 1 Leach, C. C. 115; 1 Cowper, 332; 1 Waterman's Archbold, 376; 3 Russell on Crimes, 596; 1 Edwards' Phillips' Ev. 108; Sharswood's Roscoe's Crim. Ev. 127; People *v.* Whipple, 9 Cow. 707. And if the accomplice, being admitted as a witness, fail to testify to the whole truth in good faith,

the implied promise of pardon is revoked, and the accomplice tried and punished for his own crime. Rex *v.* Rudd, *supra;* Moore's Case, 2 Lewin, 37; Rex. *v.* Brunton, Rus. & Ry. 454. If an accomplice in one crime be also indicted for another, and the fact be within the knowledge of the court, the accomplice will not, in general, be admitted as a witness. Anon., 2 Car. & P. 411. The reason of this rule is not given. It may be because the accomplice might be misled by expectation of general pardon, or because one indicted for several crimes ought not to be admitted as a witness to any of them, or perhaps for both reasons. But if he be so admitted, though he testify in good faith against his accomplice upon one indictment, he will nevertheless be put upon his trial on the other, and punishment upon conviction. Rex *v.* Lee, Rus. & Ry. 361; Rex *v.* Brunton, id. 454.

So it is seen that courts jealously reserve to themselves, and cautiously exercise, the discretion to admit accomplices as witnesses, upon implied promise of pardon; and that a public prosecutor has no authority to make any such agreement with a defendant in an indictment. It is for the court alone to countenance the escape of an accomplice from punishment, for giving evidence against those indicted with him. In a proper case, it is doubtless the duty of a public prosecutor to move for leave to use the accomplice as a witness. But there his discretion stops. And though courts must necessarily trust largely, in such cases, to the view of the public prosecutor, yet they do not lightly give leave; and are always presumed to exercise their own judgment in view of all the circumstances. A public prosecutor may propose to an accomplice to become a witness for the prosecution; but an agreement to use him as a witness, upon any condition, without the sanction of

the court, is a usurpation of authority, an abuse of official character and a fraud upon the court.

In this state of the law, we are not prepared to say that the attorney or counsel of one indicted with others, might not render proper professional service for his client, in negotiating with the prosecuting officer for his admission as a witness against his accomplices, under an implied promise of pardon. We are, however, far from being clear, that such an interference with the duties of the public prosecutor would be within the legitimate scope of professional retainer.

But such was not the nature of the respondent's retainer here. There appear to have been many indictments pending in the federal court, for violations of the federal revenue law. Amongst these, there appear to have been indictments severally found and pending, against the appellant, his four brothers, his brother-in-law, and a servant of some of them. The respondent told the appellant that his relations with the prosecuting attorneys were such, that he thought he could render these parties essential service. It does not appear whether the relations thus suggested were personal or professional; and it is immaterial. No relation of any public officer, charged with any function in the administration of justice, can be tolerated in any influence upon its course. Corruption is a hard word, not always accurately understood; covering a multitude of official delinquencies, great and little. But it is strictly accurate to apply it to any color of influence, of mere relation of any kind, on the administration of justice.

The appellant appears not to have trusted to the respondent's suggestion of his relations with the prosecuting officers, but to have verified them himself. Thereupon it was agreed between the appellant and the respondent, that

the former should give evidence for the United States, under the counsel and direction of the latter, presumably against parties indicted under the revenue law, other than those included in the agreement; that the respondent thereupon understood that the appellant and the other parties mentioned, should be permitted severally to plead guilty to those counts only in the several indictments against them, involving the least punishment, and receive upon those the lowest punishment of the law; and that for this service, if successful, the appellant should pay to the respondent a large sum for each person mentioned, or if unsuccessful, nothing. This was the whole agreement. It provided for no disclosure, no evidence, no aid in any shape to the United States, of any of the parties included in the agreement, other than the appellant. The appellant's evidence for the United States on indictments against other persons, was the only condition of the clemency which the respondent agreed to secure for the seven parties named.

It is important to notice that the agreement almost necessarily presumes each of the parties for whose benefit it was made, to be not only liable to conviction on the indictment against him, but likely to receive a higher degree of punishment than that limited by the agreement.

It is also to be noticed that, while one only of the persons for whom the agreement stipulates to secure clemency, was to be a witness for the United States, even he was not bound to make full disclosure to the prosecuting attorneys, or to put himself in their hands, as their witness; but was only to testify as he might be advised and directed by his own attorney. We cannot believe that any court ever accepted, ever could accept, an accomplice as a witness, upon an implied promise of pardon, on such terms. Indeed no court could decently accept any witness, in any cause, to

testify, not as the court should direct, but as he should be advised and directed by his own attorney. A witness, as a witness, cannot have an attorney. It is the duty of the court in which he testifies to advise him of his rights as a witness, to protect him against improper inquiries, and to enforce his answer to proper inquiries. An accomplice may act by the advice and direction of his attorney, in his defense upon the indictment against him; he may act by advice and direction of his attorney on the question whether he will become a witness; but when he once becomes a witness for the prosecution, the relation of attorney and client ceases *quoad hoc.* No professional advice can limit his testimony or prompt it or guide it. No advice bearing on his testimony is proper to be given, or within the scope of professional duty to give.

The respondent testified that he fully and effectually performed the agreement on his part, in all its details and as to all of the parties.

Had all these parties been indicted together, no case in the books, no principle in the law, would sanction any advantage to the accomplice becoming a witness for the prosecution, except the implied promise of pardon to himself; would sanction any immunity or clemency, in consideration of his giving evidence, to any other persons indicted with him. Any agreement of a public prosecutor with an accomplice becoming a witness, for any advantage to the accomplice beyond his immunity upon the indictment upon which he testifies, or for immunity or clemency to other persons indicted with him, on the same or any other indictment, would not only be beyond the official authority of a public prosecutor, but would be an obstruction of the administration of public justice which no court could sanction or countenance. When indictments are sev-

eral, for several offenses, we know of no practice, of no case in the books, to sanction or countenance any suggestion of the public prosecutor for immunity or clemency to the defendant on one indictment, on condition of his giving evidence for the prosecution on others; far less for immunity or clemency to several defendants, in several indictments, upon one of them becoming a witness for the prosecution upon still other indictments. We are not prepared absolutely to say that there might not be extraordinary circumstances in which judicial sanction might be given to an understanding with the defendant in several indictments, becoming a witness for the prosecution on one, with promise of pardon on all; in order to secure conviction for great crime, by suffering less crime to go unpunished. We are strongly inclined to think, however, that any such agreement should be regarded as working corruption in the administration of public justice, beyond justification by any exigency. But if any sanction could be given to such an understanding, it could be given only by the court in which the indictments are pending, upon fullest and most explicit knowledge of the understanding and of the circumstances leading to it. Any such agreement of a public prosecutor with a person under indictment, unsanctioned by the court, would be a fraud upon the court and an obstruction of public justice. A public prosecutor making it would be unworthy of his office and of his profession.

A public prosecutor is a *quasi* judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty; never voluntarily to acquiesce in an acquittal upon certain presumption of guilt, or in

conviction upon doubtful presumption of guilt. So, in suggesting to the court the use of an accomplice as a witness for the prosecution, he acts upon his own view of the necessity and of the comparative guilt of the persons indicted; and the court will generally pay great respect to his opinion. He is trusted with broad official discretion, generally subject, however, to judicial control. And if, in the exercise of his discretion, a public prosecutor has none to make an agreement of the character in question, it is surely not within the legitimate scope of private professional retainer, to induce him, by personal influence or persuasion or otherwise, to abuse and indeed to exceed his discretion, to violate his duty, and to obstruct the administration of public justice which it is his office to promote.

Any agreement of the character here in question, unsanctioned by the court in which the indictments are pending, between a public prosecutor and the attorney of the defendant in an indictment, is an assumption of judicial function, a bargain for judicial action and judgment; hardly, if at all, distinguishable in principle from a direct sale of justice. Without the sanction of the court, it is difficult to understand how such an agreement could be kept. For while the court is not privy to the bargain, the fulfillment of it largely depends upon the court. Such a bargain, unsanctioned by the court, could not be kept by any proper exercise of proper professional function, in any court not willing largely to abdicate its proper functions in favor of its officers.

It appears by the evidence below, that the judgments of the federal court on the indictments were such as, in fact, to fulfill the respondent's agreement. How that came about does not appear. But because it was in fact brought about, the learned counsel for the respondent contended

that we must assume that the federal court was privy to the agreement and sanctioned it. In the absence of all evidence on the point, we are not at liberty to come to any such conclusion. We have too high a respect for the eminent judges of that court. We cannot believe that they would lend any sanction to such an agreement. But even if unhappily the record disclosed that they did, we might deplore the fact, but could not permit it to influence us. Such a sanction in another jurisdiction could not change the rule of public morality or public policy in this jurisdiction. No judicial sanction elsewhere could control the rule here; or justify courts here in upholding contracts against the public morality or public policy of this state. In such a case, the validity of the contract is determined by the *lex fori.* Story's Conflict, Sec. 244.

Agreements tending to obstruct the administration of justice in far less degree have been always, by all courts, everywhere, held void in law. We do not, however, hold this agreement void upon the special authority of any case or class of cases, but upon principles running through all the cases and of higher obligation than any. We might cite many; but we could not bend down this court to the sanction of such an agreement, if there were not a precedent in the books to sustain us.

If a professional retainer so to influence a public prosecutor could be sanctioned, we see no reason why a retainer might not be upheld so to influence an attorney or counsel in the direction of his private client's interest; nay, so to influence a jury in the box or a judge upon the bench. All such things are not mere violations of professional ethics; they are outside of professional function.

The profession of the law is not one of indirection, circumvention or intrigue. It is the function of the profes-

sion to promote, not to obstruct, the administration of justice. In litigation, a lawyer becomes the *alter ego* of his client; and professional retainer rests in absolute and sacred confidence. But the duty imposed by professional retainer is direct and open. Professional function is exercised in the sight of the world. Professional learning and skill are the only true professional strength. Forensic ability is the only true professional influence on the course of justice. Private preparation goes to this, only as sharpening the sword goes to battle. Professional weapons are wielded only in open contest. No weapon is professional which strikes in the dark. The work of the profession is essentially open, because it is essentially moral. No retainer in wrong is professional. A lawyer may devote himself professionally to the legitimate business of his client; but he cannot be retained in whatever may not be rightfully and lawfully done. He may defend a wrong done in the past, but he cannot be privy to the doing of a wrong in the present. The profession is not sinless, but its sins are all unprofessional. When a member of the bar is privy to the wrong-doing of his client, he is his client's accomplice, not his lawyer. In courts or other casual tribunals, before the great tribunal of public opinion, a lawyer may openly, upon open retainer, advocate his client's cause, however bad, and be within the function of his profession. But a lawyer who otherwise uses personal or professional influence to bend justice in favor of his client; who uses any influence for his client upon the administration of justice, except open professional service and advocacy; who seeks by device or intrigue advantage for his client in litigation; is outside of professional duty and function; is acting in his personal and not in his professional

capacity. Justice will always bear litigation; litigation is, in practice, presumed to be the safest test of justice. And the administration of justice is promoted, not obstructed, by direct, open, professional advocacy. But it may well be obstructed by private influence. It is therefore the duty of all courts, upon all proper occasions, to see that the profession is confined to professional service, by professional means; and to lend no sanction to unprofessional service, or unprofessional retainer; no sanction to influence on the course of justice *per ambages*. And, if there were no other objection to this agreement, we should hold it outside of the scope of professional employment, outside of the professional right of a lawyer; and service under it, not professional—not calling for professional compensation.

We could not falter in the recognition or application of the principles underlying this judgment, without violating our duty and prevaricating with God and our consciences. But we apply them to the present case with peculiar pain. We impute no conscious *mala fides* to the distinguished gentleman who is respondent here. The profession is too comprehensive and difficult for a safe short cut, even to precise appreciation of its duties and scope, even by persons of the most eminent abilities and general accomplishments. We attribute the respondent's misconception of professional function to want of professional training and experience. And the record tends to show special excuse for the respondent in the misconception.

If the complaint had set out the agreement and gone only upon it, we should direct its dismissal. It does not, however, but is general for professional service. We therefore cannot assume that the respondent may not be able to

give evidence under it of legitimate and meritorious professional service. We shall therefore send the case down for retrial.

By the Court.—The judgment is reversed, and the cause remanded to the court below for a new trial.

On motion for rehearing, the following opinion was filed:

Ryan, Chief Justice. It appears that this appeal was decided in ignorance of a federal statute, which has been now first called to the attention of the court, and which, it is claimed, should govern this appeal in favor of the respondent.

This statute authorizes the commissioner of internal revenue, with the assent of the secretary of the treasury, to compromise any civil or criminal case under the internal revenue law, before judicial proceedings taken; and, with like consent and on the recommendation of the attorney general, to compromise any such case, after judicial proceedings taken. U. S. R. S., sec. 3229.

To appreciate the character of this provision, some reference to a few of the other provisions of the internal revenue law is necessary.

Sec. 3167 punishes by fine or imprisonment or both, dismissal from office and incapacity to hold office, specified violations of duty by revenue officers. Sec. 3169 punished by fine and imprisonment, specified violations of duty by revenue officers, including extortion, conspiracy, fraud, bribery, false entries and returns, etc. Sec. 3170 punishes by fine and imprisonment, compounding violations of the law, by certain unauthorized officers. Sec. 3179 punishes by fine or imprisonment or both, the return to certain rev-

enue officers of false lists, accounts or statements, many of which are required to be made under oath by secs. 3307, 3338, 3358, 3387, 3390, 3414; such false oaths being made perjury, punishable by fine and imprisonment and incompetency to give testimony, by sec. 5392. Sec. 3305 punishes by fine and imprisonment and forfeiture of realty and personalty, the making of false entries in books of distillers. Sec. 3306 punishes by fine and imprisonment, the use of false weights and measures. Sec. 3326 punishes by fine and imprisonment, alterations of revenue stamps, marks and brands. Sec. 3342 punishes by fine and imprisonment the use of forged revenue stamps. Sec. 3346 punishes by imprisonment the making, selling or using, of counterfeit revenue stamps and permits, and dies for making them. Sec. 3375 declares the use of forged or canceled revenue stamps felony, punishable by fine and imprisonment. Sec. 3423 punishes by fine or imprisonment or both, forgery, larceny or embezzlement of revenue stamps. Sec. 3429 punishes by fine and imprisonment, forgery of revenue stamps, dies, plates, etc., and effacing the cancellation of revenue stamps. Sec. 3451 punishes by imprisonment, forgery of bonds, permits, entries or other documents under the law.

It is not for us to criticise any disregard or confusion of the distinction between civil and criminal processes, or of the essential distinction between misdemeanor and felony, or of the degrees of moral turpitude, which may be found in these provisions. But it is our duty to notice that the statute, upon which this motion is chiefly founded, expressly authorizes the compounding of misdemeanors of a purely public character, of crimes ranking as felony at the common law, and of crimes made felony by the statute itself.

Pending this motion, besides the argument of the respondent, we received a paper signed by two distinguished members of this bar, criticising the opinion delivered on the appeal. In this paper, a regret seems to be implied that we had not looked into the federal revenue law for "the gladsome light of jurisprudence" to guide us in considering this appeal. We confess that we never thought of it. It is suggested that we should have searched it for the chance of finding some such provision as that now relied on. We venture to suggest in return, that we were educated, politically and professionally, in too high a reverence for federal authority in its sphere, to have thought possible such a provision in a federal statute.

It is supposed by some that compounding an offense was anciently an offense of equal grade with the offense compounded. However that may be, compounding a felony has been so long a crime as to have come down to us with its Saxon name of *theft-bote;* and compounding a misdemeanor of an essentially public nature has almost as long been an indictable obstruction of the course of public justice. 1 Russell on Cr., 194–5. Compounding a public offense, felony or misdemeanor, is essentially immoral, not *malum prohibitum,* but *malum in se;* proceeding upon "a wicked consideration;" "to gild over and conceal the truth. And whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light; that is, an agreement to stifle a prosecution." Collins *v.* Blantern, 2 Wils. 347; Edgcombe *v.* Rodd, 5 East, 294. "The compounding of penalties is an offense at common law, of dangerous tendency, highly derogatory to public example; and prosecutions are no more to be improperly suppressed by public informing officers, than by common informers.

. . . It is *contra bonos mores,* and of dangerous tendency, that any prosecuting officer may induce such settlement by using his official influence and power, to threaten with other prosecutions, and to offer to suppress them, in order to procure a settlement of those already commenced and pending." Hinesburgh *v.* Sumner, 9 Vt. 23. And we should no more have thought of looking into the legislation of congress for a statute licensing the compounding of public crimes, than for a statute licensing the crimes themselves; or, to speak more accurately, licensing any other public crime. It might well be suggested, in the paper mentioned, that such a statute would shock ears accustomed to listen to the morality of the common law.

The respondent has been at pains to cite federal decisions to the familiar proposition, that all offenses against the United States are statutory, and that federal courts take no jurisdiction of crimes at the common law. He has, however, cited no case, we trust that the youngest of the profession may not live to cite one, tending to absolve federal courts, in the administration of criminal law, from the rules of public morality and decency taught by the common law.

But it is said that it was the policy of congress to treat offenses under the revenue law, not strictly as crimes to be prosecuted and punished always, but rather as a system of penalties and forfeitures in aid of the collection of revenue, satisfied when that end is attained. It is humiliating to confess that such appears to be a fair construction of the statute; that federal revenue officers may exact from iniquity the wages of impunity; that the federal treasury may swallow the price of unpunished public guilt, indulged for a "wicked consideration"—fraud, extortion, bribery, larceny, forgery, perjury; that the secretary of the treas-

ury must accept the price of the indulgence, perhaps reconciling his conscience to the duty by saying, as was said of old, *non olet:* the United States of America, example and hope of the nations, playing *theft-bote.* The provision for compounding public offenses is essentially immoral, beyond all statutory power to purge it; tainting the whole statute. Immorality is essentially contagious. A corrupt part is apt to corrupt the whole. An immoral particular in a general system of procedure has a tendency to poison the entire system, as some diseases do all the functions of the natural body. And so it seems to have proved with this statute. What wonder that, when one class of revenue officers is authorized to compound crimes after they are committed, another class of them should take it upon them to compound crimes before they are committed; as indulgence for past sin is said to have insensibly degenerated into indulgences for future sin? What wonder that, when one set of revenue officers is authorized to compound crime on behalf of the public, another set should assume to compound crime on their own behalf? The common estimate of revenue officers is not such as to place them generally above the influence of bad example. It seems rash faith to trust inferior revenue officers in such matters, when their superiors are authorized, by the statute of their being, to receive a price for the commission of crimes, infamous in all the world and in all time; a price for restoring perjurers to competency as witnesses; a price for the inferior officers themselves to purchase continuance in office and capacity to hold other office, forfeited by crime. That is the statute as it is written.

It is said that the federal courts submit to this statute, and suffer revenue officers to compound crimes for which indictments are pending, without their consent; as it is

said, "in spite of them." This may be so, though we should hope not, and we are referred to no case and know of none to show it. It is not for us to consider whether the federal judiciary is bound by such a statute, to surrender the exercise of judicial power, or to submit to such tyranny of immorality. It may be that paltry officers of the revenue service may arrest the proceedings of the federal courts, may loose the judicial hold upon extortioners, thieves, forgers and perjurers; baffling justice and defying punishment in open court, upon the ground that the guilty have paid a price for the privilege of guilt, a sordid substitute for benefit of clergy; nay, possibly, that federal courts submit to see a price paid, effectual to annul their convictions and set at large their condemned prisoners, assoiled of all guilt and restored to all rights by bribes to the federal treasury.

But these considerations are for the federal courts alone. *Non nostrum tantas componere lites.* We have considered the statute solely for the purpose of determining the morality of contracts made under it. Such contracts may be held lawful in the federal jurisdiction, though we hope not. But in this jurisdiction they must be held to ignore all sense of the natural morality; to violate essential and fundamental principles of jurisprudence, to be against public policy and offensive to judicial integrity; tending to corrupt public morals and to promote obstruction of public justice.

We could not, in judicial propriety, sanction recovery here on any such contract. We should be conscious of prostituting the justice of this court, as well in upholding a contract to compound crime, made under the statute for the benefit of the general government, as in upholding a contract to compound a crime made in violation of the

statute, for the benefit of the officer making it. The turpitude of the two would be the same in nature, though different in degree. The same principle would govern both. We cannot stoop to justify a doctrine universally recognized, and exhausted in the brief maxim, *ex turpi contractu non oritur actio.* And, in reason and by all the cases, the principle applies not only to the main contract compounding crime, but to all collateral contracts looking towards it, in aid of it or subordinate to it. We could no more enforce contracts compounding or tending to compound crime coming from the federal jurisdiction, than contracts of polygamy from the jurisdiction of Utah or of Turkey.

The respondent seems to think that we erred in applying the *lex fori* to a contract coming from another jurisdiction. The authorities are numerous and we think unanimous on the point. The rule as it is understood in England, is happily stated by Best, J., in Forbes *v.* Cochrane, 2 B. & C. 448: "The plaintiff, therefore, must recover here upon what is called the *comitas inter communitates;* but it is a maxim that that cannot prevail in any case where it violates the law of our own country, the law of nature or the law of God. The proceedings in our courts are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognize it. I take it that that principle is acknowledged by the laws of all Europe." The supreme court of New Hampshire gives the rule in similar language, and applies it to a contract coming from a sister state, in Smith *v.* Godfrey, 28 N. H. 379. And Parsons, C. J., in the famous case of Greenwood *v.* Curtis, 6 Mass. 358, says of the *comitas inter communitates:* "The rule is subject to two exceptions. One

is when the commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts. . . . Another exception is when the giving of legal effect to the contract would exhibit to the citizens of the state an example pernicious and detestable." One jurisdiction cannot impose rules of public policy or morality upon another jurisdiction essentially different from its own. If such a contract as the respondent's is sanctioned by federal law, he may be able to find a remedy in a federal court: but not in the courts of this state.

In the former opinion, it was held that the respondent's contract is extra-professional. And it is noticeable that both the papers before us appear to overlook one becoming feature in the federal provision for compounding crime. When a criminal prosecution is pending in court, the assent of the attorney general is required to compound the offense: though it is hard to imagine the nominal head of the American bar giving it, if at all, with good grace. But otherwise the section delegates no duty to the bar. It commits the power exclusively to revenue officers; fitter, it seems to be assumed, for such a function than members of a profession educated in the morality of the common law. The section imposes none of its dirty work upon the bar. It authorizes no member of the profession to negotiate or contract with criminals for compounding their crimes. That seems to be taken as more in the way of revenue officials. And so the statute leaves the power exclusively with the commissioner of internal revenue; to be executed, it is presumed, by that officer or some of his army of subordinates, supervisors, collectors and the like. But it spares the federal district attorneys all part in such negotiations and contracts. If such part be imposed upon them by treasury officials, it is imposed without color of authority in the

statute. With the single exception mentioned, the section seems to have been framed in our view of the character and function of the profession of the law. Surely it needs no argument to show that it is unprofessional to compound crime, unprofessional to advise in or be privy to the compounding of crime. One compounding for his crime can have no professional aid. It may be doubted whether the service which the respondent agreed to render was in aid of such compounding as the statute contemplates. We need not inquire too curiously into that. Either way, within or without the statute, we cannot hold the respondent's contract a contract for professional service.

Had we been cited to the statute or aware of it, when we passed upon this appeal, it could not have affected our judgment, though it would unquestionably have somewhat controlled the course of reasoning of the opinion. The statute undoubtedly gives such palliation as such a statute can, to some things criticised in the opinion. For that reason we regret that our attention was not then called to it. We, of course, desire all such criticisms understood as more or less qualified, as the statute bears more or less upon them. It would be tedious and is unnecessary to review them in detail. The two opinions will be taken together; and, as far as it may, the statute *ex proprio vigore* will play its part of scapegoat.

Pending this motion, as already intimated, we received a printed paper from two members of this bar, who happened to be employed in the prosecution of the federal indictments mentioned in the record. This paper gives their statement and view of their part bearing on the respondent's contract and service, and asks that it be published with the report of this case. One of these gentlemen was examined as a witness in the court below; and something

like complaint is suggested, because we did not refer to his testimony. We rested our judgment, however, solely on the respondent's contract just as he stated it; referring but slightly and incidentally to his other testimony, and not at all, we think, to the testimony of any other witness. Some complaint it made that the opinion does these gentlemen personal and professional injustice. We trust not. Surely none was intended. A more careful reading of the opinion, it is hoped, will satisfy them of the fact that we abstained *ex industria* from any comment on their action. We endeavored to avoid allusion to it, because it was immaterial, and out of regard for gentlemen who could not then be heard. We cheerfully give them the hearing they now ask, and direct their petition to go with the report of this appeal. It is for them, not for us, to judge of its necessity, and of the ground of their action. The court has deep interest in the reputation of its bar. If these gentlemen erred in connection with the prosecutions in the federal court, a question not before us, we cannot doubt that they erred unconsciously, perhaps in undue deference to federal authority and federal practice in such matters. If we have inadvertently done them harm or given them offense, we can only deplore it. One of them is distinguished for ability in his profession, and has done nothing here to impair his standing or to forfeit the regard which the court owes to members of its bar. We should be most reluctant to do him disservice. The other has peculiar claim upon the respect of this court, of which he was so late and so long the honored chief. His voluntary withdrawal to resume his place at the bar was the occasion of great and just regret to his associates and to the profession. The reports of the court bear witness to his great work in it; to the eminent ability, high character, professional

learning, judicial tone of mind, and love of justice, which he brought to it. His absence is still felt here. His office in the court is filled, not his place. Surely no member of this court could willingly expose him, could fail to regret to see him exposed, to any censure, personal or professional.

By the Court.—The motion is overruled.

NOTE.

Wight *v.* Rindskopf, *supra,* has been cited with approval in the Wisconsin Supreme Court, as follows: Fulton *v.* Day, 63 Wis. 116; State *v.* Russell, 83 Wis. 334; Mil. M. & B. Assn. *v.* Niezerowski, 95 Wis. 137, 37 L. R. A. 130.

It has been cited with approval outside of the Wisconsin Supreme Court, as follows: Morrill *v.* Nightingale, 93 Cal. 458, 27 Am. St. Rep. 211; Jones *v.* Danneberg Co., 112 Ga. 426, 52 L. R. A. 274; Critchfield *v.* Bermuda Asphalt Co., 174 Ill. 466, 42 L. R. A. 353; Reed *v.* Johnson, 27 Wash. 55, 57 L. R. A. 409; Wilde *v.* Wilde, 37 Neb. 896; Thomas *v.* Brownsville, etc., Ry., 1 McCr. 397; Cook *v.* Sherman, 4 McCr. 25; Bierbauer *v.* Wirth, 10 Biss. 62; W. U. Tel. Co. *v.* U. P. Ry., 3 Fed. 10; W. U. Tel. Co. *v.* U. P. Ry., 20 Fed. 170.

It has been cited with copious notes to cases reported in L. R. A., as follows: People *v.* North River, etc., Co. (121 N. Y. 582), 2 L. R. A. 34; McClintock *v.* Loisseau (31 W. Va. 865), 2 L. R. A. 817; Austin *v.* Davis (128 Ind. 472, 12 L. R. A. 122; Goodrich *v.* Tenney (144 Ill. 422), 19 L. R. A. 371. Also see note to Smilbie *v.* Smith, 32 N. J. Eq. 56.

Prideaux and Wife vs. The City of Mineral Point.

January Term, 1878.

(43 Wis. 513.)

This was an action brought by plaintiffs, husband and wife, against the City of Mineral Point to recover damages for injuries to the wife alleged to have been caused by a defective street in defendant city.

The nature of the defect in the street and the other facts necessary to an understanding of the opinion sufficiently appear in the opinion.

The propositions of law decided are as follows:

In an action for injuries from a defective highway, proof in behalf of the defendant city that its authorities, upon actual view, were satisfied with the condition of the highway, is inadmissible.

Sec. 5, ch. 237 of 1873 (the charter of the defendant city) does not, if it could, make the judgment of the common council conclusive of the sufficiency of the street.

There being a depression in one of the traveled streets of a city, the authorities raised one-half in width of the street over the depression, by embankment some six feet high in the middle and gradually lessening towards each end; and the side of the embankment, next to that half of the street which was left in its natural state, was precipitous and without railing or barrier. *Held,* that the street was unsafe, as a matter of law, even though *each half* was safe by itself.

Proof in such a case that the defendant municipality has expended all the means at its disposal in repair-

ing its streets, will not excuse it, every municipality being bound, at its peril, to keep its highways in sufficient repair, or to take precautionary means to protect the public against danger of insufficient highways.

The injuries complained of having resulted from the overturning of a livery carriage, in which plaintiffs were riding, the declarations of the driver to the owner of the carriage and team, after his return to the stable without the injured person, were not admissible in chief as part of the *res gestæ,* though admissible, upon proper foundation, to contradict the driver.

The driver of a *private* conveyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person s caused by a defective highway, will defeat the action.

Instructions in this case which the jury might naturally, and probably did, understand as meaning that the driver's want of ordinary care, to defeat the action, must have been *gross,* held erroneous.

The doctrine of Hoyt *v.* Hudson, 41 Wis. 105, as to proof of contributory negligence, explained.

It was error to instruct the jury that contributory negligence, to defeat the action, must be proven *conclusively* to their minds.

Ryan, Chief Justice. I. There is no error in the admission or exclusion of evidence, to disturb the judgment.

Notice of the insufficiency of the highway, or reasonable opportunity of knowing it, was necessary to charge the appellant. Express notice to the authorities of the city

was plainly proper. Harper *v.* Milwaukee, 30 Wis. 365. And the evidence offered that the authorities of the city, upon actual view, were satisfied with the condition of the highway, was clearly inadmissible to excuse the appellant. Sec. 1 of chap. 5 of the charter, chap. 237 of 1873, does not, if it could, make the judgment of the common council conclusive of the sufficiency of the street.

The evidence offered that the appellant had expended all the means at its disposal in repairing its streets, had no tendency to excuse it. Every municipality is bound, at its peril, to keep its highways in sufficient repair, or to take precautionary means to protect the public against danger of insufficient highways. Seward *v.* Milford, 21 Wis. 485; Ward *v.* Jefferson, 24 id. 342; Burns *v.* Elba, 32 id. 605; Green *v.* Bridge Creek, 38 id. 449.

The *res gestæ* of this accident did not go with the team to the livery stable, but remained in the *locus in quo* with the injured woman. And the declarations of the driver to the liveryman, were a subsequent narrative of the *res gestæ,* not admissible in chief as offered; though admissible, upon proper foundation, to contradict the driver. Sorenson *v.* Dundas, 42 Wis. 642.

II. The charge of the learned judge who presided at the trial in the court below, was severely criticised by the learned counsel of the appellant. And it must be confessed that some parts of it are unaccountably confused and inaccurate.

So far as it relates to the negligence of the appellant, it is unnecessary to review it. It may be doubted whether any inaccuracy of the charge on that point would warrant the reversal of the judgment. For there is no controversy or doubt as to the condition of the highway. It was such that the court would have been warranted in holding it

unsafe as a matter of law. There was a depression in one of the traveled streets of the city. The authorities raised one-half in width of the street over the depression, by embankment some six feet high in the middle and gradually lessening towards each end. The side of the embankment next the other half of the street, left on its natural level, was precipitous and rough, without railing or barrier to protect travelers from being precipitated over it. It is claimed that each half of the street was sufficient for travel; and that because each half was safe by itself, the whole street was safe. This is a great and mischievous error. A traveled highway must be reasonably safe for travel over its whole surface. Cremer *v.* Portland, 36 Wis. 92. A road cut in two by a precipice is almost equally unsafe in fact, is equally insufficient in law, whether the precipice be across or along the highway. Although towns are not generally bound to keep the full width of their highways fit for travel, but only a sufficient width, yet a country road passing along an embankment of the width of that in this case, with a side or sides as precipitous and as unprotected, would under all ordinary circumstances be held dangerous. Houfe *v.* Fulton, 29 Wis. 296, S. C. 34 id. 608; Jackson *v.* Bellevieu, 30 id. 250; Kelley *v.* Fond du Lac, 31 id. 179, S. C. 36 id. 307; Burns *v.* Elba, *supra;* Hawes *v.* Fox Lake, 33 Wis. 438. *A fortiori,* a traveled street in an incorporated city. Wheeler *v.* Westport, 30 Wis. 392. In this case the rule applies with peculiar force; for the dangerous character of the street did not come by nature or by accident, but by the willful act of the city authorities. Milwaukee *v.* Davis, 6 Wis. 377; Harper *v.* Milwaukee, *supra.*

But as they bear upon the question of contributory negligence, the inaccuracies of the charge are important.

The learned judge did not correctly state the rule of proof of contributory negligence, in actions for negligence, settled in Hoyt *v.* Hudson, 41 Wis. 105. It does not put the *onus probandi,* in all cases upon the defendant, as the learned judge appears to have stated. The rule intended in that case is, that a plaintiff, giving evidence of the negligence of the defendant and the resulting injury to himself, without showing any contributory negligence, is bound to go no further; he is not required to negative his own negligence. If, however, the plaintiff, in proving the injury, shows contributory negligence sufficient to de feat the action, he disproves his own case of injury by the negligence of the defendant alone. If the plaintiff's evidence leave no doubt of the fact, his contributory negligence is taken as matter of law to warrant a non-suit. If the plaintiff's evidence leave the fact in doubt, the evidence of contributory negligence on both sides should go to the jury. This was perhaps not as clearly stated as it might have been, and has been criticised. Properly understood, the rule in Hoyt *v.* Hudson makes no confusion between the burden of proof and the weight of evidence; is sounder in principle and easier in practice than the rule in Massachusetts which, with great deference for that court, this court then declined to adopt. The true ground of reversal in Hoyt *v.* Hudson was, that the charge of the court submitted the question of contributory negligence to the jury, when there was no evidence of contributory negligence on either side; giving the jury to believe that the plaintiff was bound affirmatively to disprove it.

The learned judge instructed the jury that if the driver of the carriage was so grossly negligent or careless as to contribute to the injury, the respondent could not recover. Travelers are always held to the exercise of ordinary care.

Slight want of ordinary care will defeat an action for injury caused by defect in a highway. This was perhaps what the charge intended. The learned judge told the jury elsewhere that the driver was held to ordinary prudence; but said, in the same connection, that if this person was driving as one ordinarily drives, not thinking of danger, and thus met the accident, he was guilty of no negligence. All this, taken together, is not very clear. Ordinary care in such a case, is care against danger. It is carelessness, not care, which in such a case has no thought of danger. Driving in the dark without thinking of danger, as one "whistling for want of thought," is surely not ordinary care. The fair inference, perhaps, from the somewhat loose *dicta* of the charge, the inference which the jury probably drew, is, that want of ordinary care to defeat the action must be gross; dealing with gross negligence as gross want of ordinary care. The degree of contributory negligence which will defeat an action has been repeatedly settled by this court, and may be given to juries without difficulty in plain and unambiguous terms. Dreher *v.* Fitchburg, 22 Wis. 675; Ward *v.* Railway Co., 29 id. 144; Wheeler *v.* Westport, *supra;* Hammond *v.* Mukwa, 40 Wis. 35; Griffin *v.* Willow, 43 Wis. 509.

The charge is still more unhappy in giving the measure of proof to establish contributory negligence on the part of the driver. The learned judge tells the jury, in effect, that contributory negligence must be proved conclusively to their minds. Conclusive presumptions relate rather to matters of law than matters of fact. When a judgment determined a fact, the fact is conclusively established between the parties. But it is conclusive, by force of the judgment, not by force of the evidence on which the judgment proceeds. Evidence cannot well establish litigated

questions of mere fact conclusively. Juries are never held to find mere matters of fact on conclusive evidence. In civil cases, preponderance of evidence is sufficient. In criminal prosecutions, guilt is to be proved not conclusively, but only beyond reasonable doubt.

There is nothing elsewhere in the charge to obviate or qualify this error. Taken with the rule of the burden of proof, as the jury must have understood it, the charge is, that the evidence given by the appellant must conclusively satisfy the jury of contributory negligence to defeat the action. It may be, as was urged, that the verdict would not have been different, had the rule of contributory negligence, and of the evidence sufficient to establish it, been correctly given to the jury. This court cannot usurp the function of the jury to say so. There was some evidence —it would be improper to say of what weight—tending towards contributory negligence. And the verdict cannot be sustained under the charge, if the respondents are answerable for the negligence of the driver.

III. The case appears to have been tried in the court below upon the theory that the right of the respondent to recover would be defeated by contributory negligence of the driver, without personal negligence of the female respondent; as seems to have been taken for granted by this court in Houfe *v.* Fulton, *supra.* But the learned counsel for the respondents takes the position here, that his clients are entitled to recover, notwithstanding negligence of the driver; no evidence in the case tending to attribute personal negligence to the injured woman herself. And there is some authority for his position.

When injury is caused by the concurring negligence of two common carriers, it has for many years been a question, whether the negligence of the carrier by which a

passenger is carried can be imputed to him as contributory negligence in an action against the other carrier. There appears to be no uniform rule of decision. In England it seems to have been held that the negligence of his own carrier will defeat the action of a passenger against the other carrier. Bridge *v.* G. J. Railway Co., 3 M. & W. 244; Thorogood *v.* Bryan, 8 C. B. 115; Cattlin *v.* Hills, id. 123. In New York, the rule appears to be that the injured passenger may recover in such a case against either or both of the carriers. Chapman *v.* N. H. Railroad Co., 19 N. Y. 341; Colegrove *v.* N. Y. & N. H. Railroad Co. & N. Y. & H. Railroad Co., id. 492. So it has been held in New Jersey that negligence of a carrier cannot be imputed to a passenger carried by it to defeat his recovery against the other carrier. Bennett *v.* N. J. Railroad Co., 36 N. J. 225; Lockwood *v.* Lichtenthaler, 46 Pa. St. 151. In this case, Thompson, J., cites a Michigan case[1] which we have not been able to find, apparently favoring the New York rule; and intimates that the doctrine of Smith *v.* Smith, 2 Pick. 621; C., C. & C. Railroad *v.* Terry, 8 Ohio St. 570, and Puterbaugh *v.* Reasor, 9 id. 484, are in accord with the rule of the English Common Pleas, which we confess we are not quite able to perceive.

Aside from questions of public policy affecting the duty and liability of common carriers, which enter into some of these cases, the question appears to be how far common carriers can be considered as agents of passengers carried by them. We think that there is no case in this court bearing on this question, and it is unnecessary here to indicate an opinion upon it. It is proper to say, however,

[1] Since this opinion was written, this case was found to be incorrectly quoted. It is D. L. & N. Turnpike Co. *v.* Stewart, 2 Metc. Ky. 119.

that, in the present state of society, it is a substantial necessity for all or most travelers to avail themselves of public conveyances; and that there might be great difficulty in applying to them the rule of personal trust and agency applicable to private conveyances.

In the latter case, when the agency of a person in control of a private conveyance is express, there is no difficulty in the rule. The contributory negligence of the servant will defeat the master's action for negligence against a third person. And it seems that there ought to be as little difficulty in the rule when the agency is implied only. One voluntarily in a private conveyance, voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice,* the master of a private yacht or the driver of a private carriage is accepted as agent by every person voluntarily committing himself to it. When *paterfamilias* drives his wife and child in his own vehicle, he is surely their agent in driving them, to charge them with his negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases, which implies an agency. So several persons voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill and care of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the discretion of each against negligence affecting the common safety. One enters a public conveyance, in some sort, of moral necessity. One generally enters a private conveyance of free choice; voluntarily trust-

ing to its sufficiency and safety. It appears absurd to hold that one voluntarily choosing to ride in a private conveyance, trusts to the sufficiency of the highway, to the care and skill exercised in all other vehicles upon it, to the care and skill governing trains at railroad crossings, to the care and skill of everything except that which is most immediately important to himself; and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels, nothing to the care or skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law, accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appear to sanction this view.

Beck *v.* E. R. Ferry Co., 6 Roberts, 82, turned upon the liability of a steam vessel for the death of one of a party in a small boat, apparently a pleasure boat. Contributory negligence of the party in the boat was a question in the case. And it is said: "The deceased was undoubtedly chargeable with any neglect of his comrades, as well as his own, to do every act to avoid danger and insure safety, at least unless he did all he could to repair the deficiency. None of them stood in the light of either employer or employed to the other; it was a joint expedition, in which each was liable for the acts and omissions of the other, unless he took some separate steps to repair or prevent the result of the negligence of the others."

This case is not expressly overruled, but seems rather to be approved in Robinson *v.* N. Y. C. Railroad Co., 66 N. Y. 11. But the two cases appear none the less to conflict in principle. Robinson *v.* Railroad Co. turned upon liability for injury by a railroad train to a female, voluntar-

ily riding with a male friend on his invitation. The court holds that the action was not defeated by the man's contributory negligence. The court remarks that the man and woman were not engaged in a joint enterprise, in the sense of mutual responsibility for each other's acts, as in Beck *v.* Ferry Co. It is difficult to comprehend the distinction. The court says that it was the case of a gratuitous ride, by a female, upon the invitation of the owner of a horse and carriage. Doubtless; but there was the same mutual agreement of the two to travel together, as of the several to sail together, in Beck *v.* Ferry Co. These were, in contemplation of law, as much in the same boat as those. A woman may and should refuse to ride with a man, if she dislike or distrust the man, or his horse, or his carriage. But if she voluntarily accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but as to third persons, the man is her agent to drive her—she takes man and horse and carriage for the jaunt, for better, for worse.

Speaking of the position of counsel, that the woman voluntarily entrusted her safety to the man's care and prudence, and exposed herself to risk from his negligence or want of skill, the court says: "If this argument is sound, why should it not apply in all cases to public conveyances as well as private? The acceptance of an invitation to ride creates no more responsibility for the acts of the driver, than the riding in a stage coach, or even a train of cars." The same court in another case truly declares that traveling by public lines of carriage has become a practical necessity. And this question appears to be briefly but sufficiently answered by itself in Chapman *v.* N. H. Railroad Co., *supra.* Speaking of the plaintiff in that case, it is

said: "He was a passenger on the Harlem cars . . . bound to submit to the regulations of the company and the directions of their officers. . . . He had no control, no management, even no advisory power, over the train on which he was riding. Even as to selection, he has only the choice of going by that railroad or by none." Indeed, it seems little less than idle to compare the relation of a woman voluntarily riding for her pleasure with her lover, friend or relative in his carriage, with the relation of a passenger to the carrier on whose cars or vessel he is practically obliged to travel.

To the same effect are Knapp *v.* Dagg, 18 How. Pr. 165, and Metcalf *v.* Baker, 11 Abbott, N. S. 431, also cited by the respondent's counsel, on which particular comment is unnecessary.

These are all the cases cited by counsel. The question was suggested rather than argued on one side, and not mentioned on the other. We have had brief opportunity to search for adjudications on the subject: another instance of the dependence of the court on the bar. We have found but one other case, a very elaborate one, though this point is decided rather than discussed, as in Houfe *v.* Fulton, *supra.* The facts of the case make it a very strong one. A female servant was riding with her master in his wagon, which was wrecked by a railroad train. The master was guilty of contributory negligence, against which servant appears to have warned him. Yet his contributory negligence was held to defeat her action against the the railroad company. L. S. & M. S. Railroad Co. *v.* Miller, 25 Mich. 274.

This view appears to be sounder in principle and safer in practice than the rule in Robinson *v.* Railroad Co. And

this court adheres to the rule of decision in Houfe *v.* Fulton.

By the Court.—The judgment is reversed, and the case remanded to the court below for a new trial.

NOTE.

(Each case in the note after which is placed the figure ([1]) relates to the subject discussed in the foregoing opinion numbered I; those numbered ([2]) relate to the subject in the opinion numbered II; etc.)

Prideaux *v.* City of Mineral Point, *supra,* has been cited with approval by the Supreme Court of Wisconsin, as follows: Curry *v.* C. & N. W. Ry.,[2] 43 Wis. 675; Benedict *v.* City of Fond du Lac,[2] 44 Wis. 496; Krueger *v.* Bronson,[2] 45 Wis. 199; Otis *v.* Town of Janesville,[3] 47 Wis. 422; James *v.* City of Portage,[1] 48 Wis. 679; Mutcha *v.* Pierce,[1] 49 Wis. 234; Fitzgerald *v.* Town of Weston,[1] 52 Wis. 357; Randall *v.* N. W. Tel. Co.,[2] 54 Wis. 147; Stilling *v.* Town of Thorp,[3] 54 Wis. 537; Lockwood *v.* C. & N. W. Ry.,[3] 55 Wis. 66; Hoth *v.* Peters,[2] 55 Wis. 410, 411; Heth *v.* City of Fond du Lac,[1] 63 Wis. 233; Seymer *v.* Town of Lake,[2] 66 Wis. 657; Adams *v.* City of Oshkosh,[2] 71 Wis. 52; Koenig *v.* Town of Arcadia,[1, 2] 75 Wis. 66; Goeltz *v.* Town of Ashland,[2] 75 Wis. 645; Grisim *v.* Milwaukee City Ry.,[1] 84 Wis. 22; Duthie *v.* Town of Washburn,[2] 87 Wis. 233; Shillinger *v.* Town of Verona,[1] 88 Wis. 321; Ritger *v.* City of Milwaukee,[3] 99 Wis. 197; Nass *v.* Shulz,[2] 105 Wis. 151; Whitty *v.* City of Oshkosh,[2] 106 Wis. 91; Morrison *v.* Eau Claire,[1] 115 Wis. 545; Schrunk *v.* St. Joseph,[2] 120 Wis. 229; Lightfoot *v.* Winnebago Traction Co.,[3] 123 Wis. 487.

It has been cited approvingly outside of the Wisconsin Supreme Court, as follows: Behrens *v.* K. P. Ry.,[2] 5 Colo. 404; Gould *v.* City of Topeka,[1, 2] 32 Kan. 491; City of Lincoln *v.* Walker,[2] 18 Neb. 247, 264; O. & R. Ry. *v.* Talbot,[3] 48 Neb. 635.

It has been cited disapprovingly outside of the Wisconsin Supreme Court, as follows: Follman *v.* City of Mankato,[3] 35 Minn. 524, 57 Am. Rep. 488; Noyes *v.* Boscawen,[3] 64 N. H. 363, 10 Am. St. Rep. 411; Transfer Co. *v.* Kelly,[3] 36 Oh. St. 92, 38 Am. Rep. 560; St. Clair Ry. Co. *v.* Eadie,[3] 43 Oh. St. 97, 54 Am. Rep. 145; Dean *v.* Pa. Ry.,[3] 129 Pa. St. 522, 15 Am. St. Rep. 736, 6 L. R. A. 144; N. Y. P. & N. Ry. *v.* Cooper,[3] 85 Va. 942.

In some states a distinction seems to have been made between cases in which the conveyance was a private one hired by the injured party, and those in which the conveyance was a public one; the doctrine of agency being held to apply only to the former case. See Payne *v.* C. R. I. & P. Ry.,[3] 39 Ia. 523; Cuddy *v.* Horn,[3] 46 Mich. 596; Prideaux *v.* City of Mineral Point,[3] *supra.*

The doctrine of the Prideaux Case, *supra,* has been rejected in the following decisions (only those marked with a star citing Prideaux *v.* Mineral Point, *supra:* Tompkins *v.* Clay St. R.,[2, 3] 66 Cal. 163; W. St. L. & P. Ry. *v.* Shacklet,[2, 3] 105 Ill. 364; D. L., etc., Co. *v.* Stewart,[3] (Ky.) 12 Metc. 122; L. C. & L. R. Co. *v.* Case,[3] 72 Ky. 728; State *v.* B. & M. Ry.,[2, 3] 80 Me. 430; P. W. & B. Ry. *v.* Hogeland,[2, 3] 66 Md. 149; Cuddy *v.* Horn,[3] 46 Mich. 596; *Follman *v.* Mankato,[3] 35 Minn. 522; Bennett *v.* N. J., etc., Co.,[3] 36 N. J. L. 225; N. Y., etc., Co. *v.* Steinbrunner,[3] 47 N. J. L. 161; *Noyes *v.* Boscawen,[3] 64 N. H. 361; Robinson *v.* New York Central,[3] 66 N. Y. 11; Dyer *v.* Erie Ry.,[3] 71 N. Y. 228; Masterson *v.* New York Central,[3] 84 N. Y. 247; Bergold *v.* Nassau El. Co.,[3] 30 A. D. 445; Venuta *v.* N. Y., etc., Co.,[2, 3] 87 A. D. 566.

The doctrine of the Prideaux Case, *supra,* to the effect that the driver of a private conveyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person, as caused by a defective highway, will defeat the action, has been recognized and sustained in the following decisions: Payne *v.* C. R. I. & P. Ry.,[3] 39 Ia. 523; Nesbit v. Town of Garner,[3] 75 Ia. 316, 1 L. R. A. 153; (Doctrine approved in

Barnes *v.* Town of Marcus,[3] 96 Ia. 677); Carlisle *v.* Sheldon,[3] 38 Vt. 440; Boyden *v.* Fitchburg Ry.,[3] 72 Vt. 99.

Valuable notes to cases reported in L. R. A., Am. Dec., Am. St. Rep., Am. Rep. and Am. & Eng. Ry. Cas., collecting the authorities will be found as follows:

Lawyers' Reports Annotated: Harrah *v.* Jacobs (75 Ia. 72), 1 L. R. A. 153; Rodger *v.* Lees (140 Pa. 475). 12 L. R. A. 217; L. N. A. & C. Ry. *v.* Creek (130 Ind. 139), 14 L. R. A. 733; Ely *v.* Des Moines (86 Ia. 55), 17 L. R. A. 126; O. & M. Ry. *v.* Stein (133 Ind. 243), 19 L. R. A. 751; Stone *v.* Seattle (30 Wash. 65), 67 L. R. A. 266.

American Decisions: Dreher *v.* Town of Fitchburg (22 Wis. 675), 99 Am. Dec. 96; People *v.* Vernon (35 Cal. 49), 95 Am. Dec. 53; Flournoy *v.* City of Jeffersonville (17 Ind. 169), 79 Am. Dec. 476.

American State Reports: Nesbit *v.* Town of Garner (75 Ia. 314), 9 Am. St. Rep. 491; Bouldin *v.* McIntire (119 Ind. 574), 12 Am. St. Rep. 460.

American Reports: Cassidy *v.* Angell (12 R. I. 447), 34 Am. Rep. 691; Masterson *v.* N. Y. C. & H. R. Ry. (84 N. Y. 247), 38 Am. Rep. 515; Buesching *v.* St. Louis Gaslight Co. (73 Mo. 219), 39 Am. Rep. 511; B. & L. Turnpike Co. *v.* Cassell (66 Md. 419), 59 Am. Rep. 179.

American & English Railway Cases: Toledo, etc., Ry. *v.* Brannagan (75 Ind. 490), 59 Am. & Eng. Cas. 634; Gray *v.* P. & R. Ry. (24 Fed. 168), 22 Am. & Eng. Ry. Cas. 359.

Thorogood *v.* Bryan, 8 C. B. 115 (affirmed in Armstrong *v.* Ry. Co., L. R. 10 Exch. 47), cited in Prideaux *v.* Mineral Point, *supra,* and relied on for the doctrine that the driver of a conveyance, even a public one, is the agent of a passenger, so that his contributory negligence will defeat the claim of the passenger for injuries sustained as the result of a collision, has been most widely commented on, and in the great majority of cases with disapproval. Justice Field remarked in Little *v.* Hackett, 116 U. S. 366, "The decision in Thorogood *v.* Bryan, rests upon indefensible grounds." Together with Armstrong

v. Ry., *supra,* it was overruled in "The Bernina," L. R. 12 Prob. Div. 58, Lord Esher saying in the course of his opinion, after quoting Justice Field in Little *v.* Hackett, *supra,*" * * * having considered the case of Thorogood *v.* Bryan we cannot see any principle on which it can be supported." The case is mentioned at such length here because it has been largely responsible for the adherence to the agency doctrine in the courts of certain of the states.

Curry v. Chicago & Northwestern Railway Company.

January Term, 1878.

(43 Wis. 665.)

This was an action brought in the circuit court of Sauk County for the value of a cow alleged to have strayed upon defendant's railroad track at a point where the same had never been fenced, and to have been there killed by one of defendant's trains, without fault on plaintiff's part. It was admitted at the trial that there were about 300 or 400 acres of uninclosed land near the station of Ableman. Plaintiff's cow was running at large and pasturing on such uninclosed land. It was admitted that defendant's road had been in operation for a number of years; that its track was not fenced as the statute required through the lands in question and at the place of the injury. It was agreed that plaintiff was guilty of no negligence unless permitting his cow to be at large under the circumstances was negligence, and that defendant was guilty of no negligence, unless its failure to fence was, under the circumstances, negligence. The trial judge refused to direct a verdict for the defendant but submitted the case to the jury. The plaintiff had a verdict and judgment and the defendant appealed. The other facts are sufficiently stated in the opinion.

The following are the propositions of law decided:

Secs. 30 and 31, ch. 119, of 1872 (requiring railroads to be fenced, and declaring the liabilities of companies for injuries to domestic animals occasioned by failure to fence), are not repealed or modified by

ch. 248 of 1875; but the provisions of the latter are *cumulative* to those of the former.

In an action against a railroad company for injury occasioned by failure either to *erect* or to *maintain* fences on the line of its road, as in other actions for negligence, contributory negligence of the plaintiff is a defense. The cases in this court on the subject reviewed.

In such action, for injury to a domestic animal, the mere fact that the animal was a trespasser on defendant's road, or that it passed thereon from land not belonging to the plaintiff, will not defeat a recovery.

Plaintiff, living about three-fourths of a mile from defendant's track, which he knew to be unfenced, permitted his cow to pasture, in summer (presumably with other cattle), on a large tract of uninclosed grass land, extending from the neighborhood of his residence to the track; and she passed upon the track from said land, and was injured. *Held,* that upon these facts the question of contributory negligence, being open to doubt and debate, was *for the jury.* Lawrence *v.* Railway Co., 42 Wis. 322, distinguished.

RYAN, C. J. I. Ch. 248 of 1875 cannot be taken to repeal or modify secs. 30 and 31 of ch. 119 of 1872.

"This is a question of constructive repeal. In Attorney General *v.* Brown, 1 Wis. 513, this court adopted the uniform rule of governing such cases. If there be two affirmative statutes upon the same subject, one does not repeal the other, if both may consist together; and we ought to seek for such construction as will reconcile them." . . . Attorney General *v.* Railroad Companies, 35 Wis. 425.

The two statutes here in question may not only stand together, but the provisions of the later were obviously designed to be cumulative to the provisions of the earlier.

Neither do they fall within the rule, that a later statute revising the subject of an earlier statute, works a repeal of the latter. Lewis *v.* Stout, 22 Wis. 234; Burlander *v.* Railroad Co., 26 id. 76; Simmons *v.* Bradley, 27 id. 689; Moore *v.* Railway Co., 34 id. 173; Olson *v.* Railway Co., 36 id. 383. For the chapter of 1875 does not attempt to revise the provisions of 1872; does not purport to cover the whole ground; and would obviously be a very defective statute by itself.

The sections of the general railroad act of 1872 require railroads to be fenced, and declare the liability of the companies for injury to domestic animals occasioned by failure to fence. When such fences are made and maintained, these sections declare that the companies shall be liable only for willful or otherwise negligent injury. They proceed to declare the liability of individuals for placing domestic animals on railroads, and make other provisions tending to prevent accidents on railroads.

The chapter of 1875 requires railroads, two years or more in operation, to be fenced through inclosed lands; and, upon failure of the company, authorizes occupants of inclosed lands to give notice to the companies to fence; and, upon continued failure, gives an action to occupants against the companies for a penalty for every train passing through their inclosed lands.

Manifestly, these penalties given upon default to fence, without consequent injury, are not a substitute for the liability for actual injuries declared by the sections of 1872. The penalties are a distinct and independent remedy to force railroad companies to fence against danger

of accident. The action given by the statute of 1875 goes upon an essentially different ground from the action given by the statute of 1872. The one is penal, by way of coercion; the other is remedial for actual damages sustained. And, under the conditions given in the act of 1875, actions for penalties for not fencing, and actions for damages occasioned by failure to fence, would lie together, penalties recovered not going to compensation for damages sustained, and damages recovered for actual injuries not satisfying penalties incurred.

The first section of the chapter of 1875 requiring railroads in operation for two years to be fenced through inclosed lands, is plainly intended to state the conditions under which notice may be given under the second section. The two sections are clearly dependent. And the statement of the conditions under which the notice may be given and the penalty recovered, were plainly not designed, and cannot be held, to change the duty or liability of railroad companies declared by the statute of 1872. The latter is the general statute, governing all railroads, always, under all conditions. The former is a particular statute, applying to particular railroads, under particular conditions; and so applying as not to suspend or interfere with any provision of the general statute, but giving additional remedies of its own, under particular conditions, in aid of the provisions of the general statute.

It is needless to point out the essential details of the general statute which the particular statute does not attempt to cover, because it was not meant for a revising, but only for a cumulative, statute.

This case is therefore to be determined under the provisions of the general railroad act.

II. Assuming the appellant's duty to have fenced its

road at the *locus in quo,* the respondent's right to recover was put, upon the trial below, upon the question of his contributory negligence. And the first question to be determined here is, whether contributory negligence of a plaintiff enters into the defense, in an action against a railroad company for injury to domestic animals occasioned by total failure to fence the road.

It has been generally understood by the profession, for years past, that this court held the liability of railroad companies in that case to be absolute. McCall *v.* Chamberlain, 13 Wis. 637, has, it is believed, been generally credited with the establishment of the rule. But a critical examination of the late Mr. Justice Paine's opinion in that case does not appear to warrant that view. Doubtless there are things said in the case, *arguendo,* appearing to tend that way. But the question on which the opinion turns is, whether the mere fact that the animals were trespassers, would defeat the action. Of course all animals upon a railroad, except at legal crossings or by license, are trespassers. And the mere fact of trespass in such a case has rarely, if ever, been held to excuse injury occasioned by negligence of the railroad company, however the negligence may arise. Certainly not in this court. Stucke *v.* Railroad Co., 9 Wis. 202; C. & N. W. R'y Co. *v.* Goss, 17 id. 428. The trespass may come with or without negligence of the owner of the animal trespassing. The question of contributory negligence is therefore quite different from the question of trespass. And so contributory negligence of the plaintiff is not only not discussed, but not mentioned, in McCall *v.* Chamberlain.

It has perhaps been sometimes supposed that the same learned and lamented judge affirmed the rule of absolute liability for failure to fence, in his opinion in Antisdel

v. Railway Co., 26 Wis. 145. That would be a great mistake. The question of contributory negligence is not considered in the opinion. It is very significant, however, that in that case, which turned upon negligence of the railroad company in not maintaining its fence, the charge of the court below distinctly submitted to the jury the question of contributory negligence, as a defense to the action. This appears in the record, though not in the report. There is no doubt expressed in the opinion of the accuracy of the charge; and this silence may have some effect in the construction of the opinion. It is held in that case that the statute requiring railroad companies to maintain fences, though absolute in terms, does not impose impossibilities upon railroad companies; but only holds them to a high degree of diligence. There are phrases in the opinion which, like some in McCall *v.* Chamberlain, recognize an absolute liability for not building fences. But the opinion seems to disclose the sense in which that term is used. The duty of railroad companies to fence their roads is declared to be the same as the duty of towns to make their highways sufficient, and both are said to be absolute in terms by statute. The liability in both cases is said to be the same, and alike absolute in terms by statute. This is said of the duty *in principio,* and of the failure to perform it. So the opinion holds of the duty to maintain, and of the liability for not maintaining. The duty of a railroad company to maintain its fences once built, is declared to be the same as the duty of a town to keep its highways sufficient, once made so; and both are said to be absolute in terms by statute. The liability in both cases is said to be the same, and alike absolute in terms by statute.

This appears to be an accurate statement of the law.

For the statute governing railroad companies and towns, and declaring their liability for failure of duty, in these respects, are alike absolute. And they do not distinguish between the duty of railroad companies to build and their duty to maintain fences or between their liability for failure to build and for failure to maintain; do not distinguish between the duty of towns to make their highways sufficient, and their duty to keep them sufficient, or between their liability for failure to make them and for failure to keep them so. This appears to be held in all the cases. And when Mr. Justice Paine says of one of these duties, that it holds railway companies, not to an absolute duty under all conditions, but only to a high degree of diligence, his opinion appears not only to imply the application of that rule to all of those duties, but also to imply the application of the rule of contributory negligence to cases going upon failure to perform any of them. For the opinion appears to put the right of action, as it undoubtedly is, as for negligence. And the rule is universal that, in actions for injury by negligence, contributory negligence sufficient in degree will defeat them.

The comparison of the duties and liabilities of railroad companies and towns, in these respects, is a happy one. And yet no case is remembered, in which this court has distinguished between the liability of a town for injury caused by a highway never worked and defective *ab initio,* and by a highway once sufficient and afterward becoming defective, except upon the mere question of notice. And that is really a distinction without a difference; for a town is presumed to have notice of the highways which it has failed to work. And no case is remembered in which this court has held that contributory negligence would not defeat such an action against a town, going

either upon original or upon subsequent defect of a highway. Actions for negligence impute the injury to the negligence of the defendant alone. When the negligence of both parties co-operates alike in producing the injury, the action does not lie. Hoyt *v.* Hudson, 41 Wis. 105; Prideaux *v.* Mineral Point, 43 Wis. 513.

The views expressed in Antisdel *v.* Railway Co. appear to be quite inconsistent with the rule previously affirmed in Brown *v.* Railway Co. and Sika *v.* Railway Co., cited *infra.*

The absolute liability of railroad companies for injuries on unfenced roads, without reference to contributory negligence, is not held in Bennett *v.* Railway Co., 19 Wis. 145. The question was not in that case, where the animal appears to have gone upon the track from depot grounds not required to be fenced, by negligence of the owner. It is said, indeed, in the opinion of Mr. Justice Cole, that if the animal had strayed upon the road from a place which the statute required to be fenced, and which the company had not fenced, the company would be liable by reason of that neglect, without reference to negligence of the train which caused the injury; citing McCall *v.* Chamberlain. But that signifies only that failure to fence is negligence, and the question of contributory negligence, in such a case, is not considered or mentioned.

Blair *v.* Railway Co., 20 Wis. 254, does not pass upon the question, but strongly suggests that contributory negligence would defeat an action for injury caused by the company's failure to fence. That was an action by a passenger against the company as a common carrier of passengers, for injuries received in consequence of the failure to fence. Of course a more stringent rule would apply there, than in case of injury to trespassing animals. There

was no pretense of contributory negligence. But the chief justice emphasizes the fact that there was none, as if he thought that contributory negligence would defeat the action; adding that "the injury resulted solely and exclusively from the failure of the company to perform a positive and unqualified duty imposed by statute." This is the true view of an action for negligence, going upon the sole negligence of the defendant, without contributory negligence of the plaintiff.

So far it appears to be clear that the rule of absolute liability had not been adopted; and that intimations in favor of such a rule were apparently neutralized by intimations against it. But in Brown *v.* Railway Co., 21 Wis. 39, the rule of absolute liability was distinctly affirmed. The refusal of the circuit judge to instruct the jury that contributory negligence of the plaintiff would excuse the defendant, was expressly upheld. The opinion of the chief justice on the point is very brief; hardly discussing the question; not citing an authority in favor of the rule; appearing rather to take it for granted. The case appears to hold the statutory liability absolute, however gross contributory negligence might be. It seems to have been overlooked that the absolute liability of the statute is for damages *occasioned* by the failure to erect and maintain fences; that is, occasioned by that only. The word "occasioned" was apparently used in one sense of "caused;" and accurately used. Dr. Johnson's first definition of the verb, to occasion, is, to cause casually; his second, simply, to cause. Dr. Webster's is not substantially different: to give occasion to, to cause incidentally, to cause. Mr. Crabb appears to give the like construction to the word: "what is caused seems to follow naturally; what is occasioned follows incidentally." Of

course, the want of a fence cannot, of itself, cause injury, but it gives occasion to injury; causes it incidentally. The want of a sufficient fence gives occasion to an animal to go upon the track, gives occasion to injury there; but negligence of the owner may contribute to the occasion. So it is, perhaps, in actions for negligence against municipal corporations, in suffering their highways to be defective. Defective highways cannot, of themselves, cause injury, but they give occasion of injury to those passing over them. And it is difficult to perceive any distinction, in principle, in applying the rule of contributory negligence, to a case where the defendant's negligence is the direct cause of injury, and to a case where the defendant's negligence only gives occasion to injury. The profound deference which all owe to his great learning and ability as a jurist, suggests the belief that the chief justice's opinion in Brown *v.* Railway Co., and the judgment in the case, did not proceed upon sufficient consideration.

It may be remarked in passing, that the chief justice's comments on Hance *v.* Railroad Co., 26 N. Y. 428, appear to be not altogether consistent with the judgment in Dunnigan *v.* Railway Co., 18 Wis. 28. The latter case, by the way, clearly recognizes the application of the rule of contributory negligence to an action for failure to maintain cattle guards, fairly implying its application to actions for any failure under the statute.

The rule is reasserted at the next term in Sika *v.* Railway Co., 21 Wis. 370; but it is asserted only, not considered. This case is noticeable only for the chief justice's distinct recognition that the action for injuries occasioned by failure to fence, is an action for negligence; which, in principle, appears to give away the rule of absolute liability, independent of contributory negligence.

There is a sentence, purely *obiter,* in Mr. Justice Cole's opinion in Schmidt *v.* Railway Co., 23 Wis. 186, suggesting that, in case of injury to a domestic animal, "by the failure to erect the fence, the liability of the company would be clear and absolute, regardless of the question whether the owner had been guilty of negligence." This is a very broad reassertion of the rule of Brown *v.* Railway Co., but the rule was not involved in the case. The action was for injury to an infant, who strayed upon the road from adjoining premises unfenced. The case turned upon the contributory negligence of the child; and it was held that it was not guilty of such negligence as would defeat the action. And in commenting on the question, the humanity of the learned judge suggests the comparison between liability for injury to human beings and liability for injury to brute creatures. The rule in Brown *v.* Railway Co. was evidently more in the mind of the judge, than the statute on which the rule ought to rest. It was rather an allusion than a *dictum;* wholly irrelevant to the case, and therefore of no weight.

In Laude *v.* Railway Co., 33 Wis. 640, the liability of the railroad company turned upon its having permitted a gate in the fence to remain open for a long time. That was of course equivalent to a defective fence, to want of fence *pro tanto.* It is said in the opinion in that case, that the court below was right in assuming that there was no evidence of contributory negligence to go to the jury. This is a singular mistake. It is said indeed of particular circumstances which might imply the plaintiff's negligence. But no particular instruction was asked in reference to those circumstances. And the charge of the court below expressly submitted to the jury the questions of the defendant's negligence and of the plaintiff's contributory

negligence; expressly instructed the jury, in terms broad enough to include any negligence of the plaintiff, that his contributory negligence would defeat the action. The charge appears to have followed closely the language of the opinion in Antisdel *v.* Railway Co., evidently fresh in the mind of the learned counsel who drew the instructions, probably before the learned circuit judge when he gave them. The charge declares the liability for not fencing to be absolute, where there is no contributory negligence; holds railroad companies to a high degree of diligence in maintaining their fences; and adopts Mr. Justice Paine's precise words in stating that the diligence required of them is a qualification of the absolute liability in terms of the statute. There is indeed one sentence in the charge which appears to take the liability as absolute. But this is to be read in the light of the whole charge, which could leave the jury in no doubt that contributory negligence would defeat the action, and that the question was submitted to them. The charge was discussed at some length, and approved by this court. The chief justice discusses the negligence of the defendant and the contributory negligence imputed to the plaintiff, and upholds the judgment on both questions; apparently ignoring the rule of absolute liability, established some six or seven years before in Brown *v.* Railway Co., and Sika *v.* Railway Co. There is, indeed, one remark, not very precisely expressed, approving the isolated sentence of the charge already noticed, which has the look of favoring the rule of absolute liability. But the comment on this sentence in the charge, like the sentence itself, appears to be qualified by the quotation of the general charge submitting the question of contributory negligence to the jury. It is not to be overlooked that Antisdel *v.* Railway Co. was decided

several years after Brown *v.* Railway Co. and Sika *v.* Railway Co. And Laude *v.* Railway Co. may bear the construction of having regarded the cases in 21 Wis., affirming the doctrine of absolute liability with or without contributory negligence, as virtually overruled by the doctrine of the case in 26 Wis. If this view were not then in the mind of the court, all those cases seem to have been overlooked; and Laude *v.* Railway Co., as well as Antisdel *v.* Railway Co., appear to indicate an unconscious return to sounder views of the statutory liability for not erecting or maintaining railroad fences.

This doubtful state of the law was certainly unsatisfactory, as appears to have been first perceived in Pitzner *v.* Shinnick, 39 Wis. 129. That case involved negligence in leaving open a gate in a railroad fence, and the question of absolute or qualified liability for it. The court held the liability to be qualified, and that contributory negligence would be a defense. McCall *v.* Chamberlain, Antisdel *v.* Railway Co., and Laude *v.* Railway Co., are reviewed to some extent in the opinion. The rule of absolute liability is criticised with some emphasis. Its inconsistency with the rule of qualified liability only, under statutes equally peremptory, limiting railroad speed in cities and villages, and prescribing the liability of towns for highways, is pointed out. The rule of absolute liability for not maintaining fences is expressly overruled. The rule of absolute liability for not fencing is neither affirmed nor overruled, as not being in the case; but a strong intimation is given that it could not be upheld.

Then come the cases of Jones *v.* Railroad Co., 42 Wis. 306, and Lawrence *v.* Railway Co., id. 322, considered and decided together. The former of these cases turns upon a similar question to that in Pitzner *v.* Shinnick,

and affirms that case. The latter also involved, to some extent, liability for not maintaining fences, and the question whether contributory negligence would defeat an action for failure to maintain them. The court held that it would; and used this language on the general question:

"It must be confessed that there is some discrepancy in the cases in this court, construing and enforcing the liability of railroad companies upon failure of duties imposed by statute. In the case of Jones *v.* S. & F. R. R. Co., considered and decided at the same time as this, notwithstanding some things said or ruled in McCall *v.* Chamberlain, 13 Wis. 637, Brown *v.* M. & P. Railway Co., 21 id. 39, Laude *v.* C. & N. W. Railway Co., 33 id. 640, and perhaps other cases, we hold that, while we are not now prepared to say whether or not contributory negligence would be a defense to an action for injury arising from the failure of a railroad company to construct a fence as required by the statute, contributory negligence of the plaintiff may defeat an action for injury arising from failure of a railroad company to maintain in repair such fence, once built. The principles on which numerous cases in this court rest, admitting contributory negligence as a defense in actions against railroad companies, for injuries arising from unlawful speed of trains within corporate limits, appear certainly to sanction the application of the same rule to the latter, if not to the former class of cases, under the statute requiring railroads to be fenced. The question will be fully considered in Jones *v.* S. & F. Railroad Co., and need not be further discussed here."

These are the cases on the subject. There may possibly be others bearing directly on the question, though it is believed not. If there are not, this review seems to suggest a conjecture that the court rather happened upon the

rule of absolute liability, than adopted it upon consideration. There does not appear to be anything in the previous cases in the court to support its summary adoption in Brown *v.* Railway Co. It appears to have been followed only in Sika *v.* Railway Co. And the doctrine appears to be afterwards discredited, perhaps forgotten, in Antisdel *v.* Railway Co., if not in Laude *v.* Railway Co. The last three cases, Pitzner *v.* Shinnick, Jones *v.* Railroad Co. and Lawrence *v.* Railway Co., expressly overturn one-half of the rule, the half of it which was directly in question in Brown *v.* Railway Co. and Sika *v.* Railway Co.

Doubtless the statute might have prescribed a rule of absolute liability in the way of penalty. But the wisdom of such a rule would be more than doubtful. Be that as it may, it is the duty of the court to interpret the statute as it is written. And here it may be proper to remark that the statute was not taken from New York, and is essentially different from the statute there, to which construction is given in Corwin *v.* Railroad Co., 13 N. Y. 42, and other cases. The statute there provides that until a railroad company shall have built its fences, it shall be liable for all damages to animals on the track; not for damages occasioned by the failure to fence. The essential difference between that statute and the statute here, is too obvious for discussion. It is not for this court to say whether the courts of that state, or of other states having essentially different statutes, have given proper construction to them. But it is the duty of this court to give to the statute of this state a just and reasonable construction upon its own letter and spirit. It has often been said in this court, and it is quite apparent, that the statute here was designed to protect trains on railroads at least as much as domestic animals straying upon them. Hu-

man life is somewhat more regarded than brute life. Cattle are part of the wealth of the state; but persons on railroad trains are part of the state itself. The *major* was quite as much within legislative attention as the *minor*. The statute was not intended or framed to relieve adjoining owners from diligence in the care of their domestic animals, at risk of danger to railroad trains; or to license negligence to establish cattle markets on railroads. The essential danger of railroads requires diligence on both sides; a high degree of diligence in the management of the road, and at least ordinary diligence on the part of adjoining owners. The rule of absolute liability appears to be as unwise in policy as unsound in legal construction.

The cases of Pitzner *v.* Shinnick, Jones *v.* Railway Co., and Lawrence *v.* Railway Co., overturning one-half of the rule of absolute liability, virtually disaffirmed the whole. They probably prepared the profession for the entire disaffirmance of the rule. They seem to have prepared so intelligent a jurist as the learned judge before whom this cause was tried. His charge disregarded the authority of Brown *v.* Railway Co.; instructing the jury that contributory negligence would defeat the action. It is unnecessary to repeat here what was said on the subject in those cases; showing the unsoundness of the rule in principle, and its inconsistency with the uniform rule in other actions for negligence, founded upon statutes quite as peremptory and absolute in terms.

The rule can no longer be upheld. The rule of this court must be taken as sustaining the defense of contributory negligence to actions against railroad companies, for injuries occasioned by failure either to erect or to maintain fences on the line of their roads, as in other actions for negligence.

III. Says Mr. Justice Paine, in McCall *v.* Chamber-

lain, *supra:* "The only question upon which it would seem there could be any room for doubt is, whether the statute requiring the company to fence was intended merely to regulate the division fences between the company and the adjoining landowners, for the convenience of the latter only, leaving the liability of the company, with respect to all others, as it would have been at the common law; or whether it was designed for the protection of the public generally, whose animals were liable to get upon the track. This question is suggested in the case in 3 Kernan, and the court came to the conclusion that the latter was the object of the statute. That conclusion seems to us more especially true in this state, many parts of which are thinly settled, and where it is almost the invariable custom for the settlers to allow their animals to run at large, fencing only their plowed lands. The rule of the common law requiring every one to fence in his own animals, under pain of their being considered trespassers if they entered even on the uninclosed lands of another, if strictly enforced, is often productive of hardships in a new country like ours. For this reason it has never been adopted in some of the states. Murray *v.* R. R. Co., 10 Rich. Law, 227; N. & C. R. R. Co. *v.* Peacock, 25 Ala. 229. It has been held to be the law in this state, though it is generally disregarded by common consent in the newly settled part of the state. And this fact, which was undoubtedly well known to the legislature, as well as the frequent hardships resulting from the strict enforcement of the common law rule, leads our minds to the conclusion that it was the intention of the statute, in requiring the railroad company to fence its road, to repeal the common law rule, and to protect not only the adjoining landowners, but the public generally."

Where there is a body of uninclosed land, and a custom

of turning cattle upon it to pasture, for a long time, without objection, license might perhaps be implied. But that question was excluded by the court below, and is not here.

But several cases in this court uphold the right to recover, in a case otherwise proper, under the statute, for injuries to domestic animals coming upon a railroad from land on which they were trespassers. McCall *v.* Chamberlain, Pitzner v. Shinnick, *supra.* As Whiton, C. J., remarks in Pritchard *v.* Railway Co., 7 Wis. 232, trespassing animals are not outlawed. And if, as all the cases in this court appear to hold, the mere fact that they are trespassers on the railroad itself, will not defeat a recovery, it is difficult to perceive why the fact that they had just before been trespassers elsewhere should have that effect.

The mere fact, therefore, if the fact sufficiently appear here, that the respondent's cow was permitted to pasture on land which he did not own, would not defeat his action. The true question was, whether the respondent was guilty of contributory negligence in suffering his cow to be at large upon unfenced land. The court below submitted that as a question for the jury. The verdict is, that it was not. And the question for this court is, whether the facts justified the court below in treating the contributory negligence imputed to the respondent as a question of fact; or whether the respondent's act was so manifestly and conclusively negligent, the court below should have withheld the question from the jury, and found the contributory negligence as matter of law. Langhoff *v.* Railway Co., 23 Wis. 43; Lawrence *v.* Railway Co., *supra.*

In Lawrence *v.* Railway Co. it was held to be contributory negligence, in law, to leave cattle, in the morning, at large for the day, without purpose and by mere inad-

vertence, in midwinter, presumably without food, within seventy rods of a railroad, without fence or obstacle to keep them from it. The facts are perhaps not sufficiently stated in the report. The cattle had been housed that season, were taken out that morning to be watered, and were not put back in their stable, as intended, by apparent forgetfulness. The inclination of the cattle to wander in such circumstances, and the danger of their coming on the railroad, were strong and obvious; and negligence in so leaving them was patent and gross. But perhaps that case went as far as the court would be warranted in going.

The circumstances here are very different. The cow appears to have been left, presumably with other cattle, in summer, on grass-land, some three-quarters of a mile from the railroad; certainly at a comparatively safe distance, and with no apparent temptation to stray so far, or to leave its pasture for the uninviting barrenness of a railroad, without even garbage to prey upon.

The danger to the animal in the former case was close and imminent; in the latter, remote and not apparently probable. An owner of ordinary prudence would not incur the risk of injury in the one case; might well incur it in the other. Negligence in the one case is not open to debate or doubt; in the other, it is manifestly open to both. Where negligence does not admit of doubt or debate, it is matter of law for the court. Where negligence is a question for doubt or debate, it is matter of fact for the jury. Negligence "may, in general, be said to be a conclusion of fact to be drawn by the jury, under proper instructions from the court. It is always so where the facts, or rather the conclusion, is fairly debatable or rests in doubt." Langhoff *v.* Railway Co., 19 Wis. 489.

The question is generally a mixed one of law and fact.

There may or there may not be a question of fact for the jury. Each case must be determined by its own circumstances. Courts cannot establish a general rule, determining what is or is not negligence under all circumstances. And when circumstances leave it in reasonable doubt, courts cannot take the question from the jury. In such a case as this, a jury is a far better judge of the question than a court. The question was plainly for the jury, and was properly and fairly submitted to it. And the verdict is conclusive of the fact.

By the Court.—The judgment of the court below is affirmed.

NOTE.

[Each case in the note after which is placed the figure (1) relates to the subject discussed in the foregoing opinion numbered I; those numbered (2) relate to the subject in the opinion numbered II; etc.]

Curry *v.* The Railway, *supra,* has been cited with approval in the Wisconsin Supreme Court, as follows: Murphy *v.* C. & N. W. Ry. Co.,[2] 45 Wis. 234, 242, 243; McCandless *v.* C. & N. W. Ry. Co.,[2] 45 Wis. 370, 371; Lockwood *v.* C. & N. W. Ry. Co.,[2] 55 Wis. 66; Bremmer *v.* Green Bay, etc., Ry. Co.,[2] 61 Wis. 118; Quackenbush *v.* W. & M. Ry. Co.,[2] 62 Wis. 416, 417; Hemmingway *v.* C., M. & St. P. Ry. Co.,[3] 72 Wis. 49; Heller *v.* Abbott,[3] 79 Wis. 413; Holum *v.* C., M. & St. P. Ry. Co.,[2] 80 Wis. 303; Thompson *v.* Edward P. Allis Co.,[2] 89 Wis. 530; Oeflein *v.* Zautcke,[2] 92 Wis. 178; McCann *v.* C., St. P., M. & O. Ry. Co.,[2] 96 Wis. 666; Schneider *v.* C., M. & St. P. Ry. Co.,[2] 99 Wis. 387; Helmke *v.* Thilmany,[2] 107 Wis. 322; Ray *v.* Stucky,[2] 113 Wis. 79; Herrell *v.* C., M. & St. P. Ry. Co.,[2] 114 Wis. 609; Perrault *v.* M. etc., Ry. Co.,[2] 117 Wis. 530; Fisher *v.* W. U. Tel. Co.,[2] 119 Wis. 150; Atkinson *v.* C. & N. W. Ry. Co.,[2] 119 Wis. 180; Morgan *v.* Pleshek,[3] 120 Wis. 310.

It has been cited with approval outside of the Supreme Court of Wisconsin, as follows: Cent. Branch Rld. Co.

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