may take advantage of its own defect of authority, for if that were not so it would become impossible, in practice, to restrain the acts of any corporation within the limits of its powers.

The proposition, too, here declared, that a contract, professedly made by a corporation, beyond the limits of its powers, derives no additional force from its being in negotiable form, is one of considerable practical importance, and one which might not readily strike the mind of all with favor. The fact that negotiable paper, made in violation of statutory enactments, and which on that account would be void between the original parties, has been held valid in favor of *bonâ fide* holders for value, has led many to suppose that negotiable paper made by corporations, *ultra vires*, would nevertheless bind the company in favor of such *bonâ fide* holders for value. But it was held in the case of *Balfour* v. *Ernest*, 5 Jur. N. S. 439, s. c., 5 C. B. N. S. 601, that a bill of exchange drawn on behalf of a joint stock company, in the form prescribed by statute, does not bind the company, even in the hands of a *bonâ fide* holder, if the bill be drawn for any purpose, not within the scope of the business of the company, or the powers of the directors. And the proposition is very obviously just, upon general principles, that a corporation cannot enlarge their powers to contract by assuming to do so in a particular form.

What is here decided, in regard to the want of power in a municipal corporation to erect a bridge and levy and collect tolls for passing the same, is clearly the result of the well-settled doctrine, that such corporations have no power to make a railway grant for the transportation of passengers and collecting of fares.

The discussion of these several topics by the learned judge, and the careful collection of the cases bearing upon the questions discussed, will render the opinion exceedingly valuable to the profession. And we have often regretted that our courts of last resort had not more leisure to prepare their opinions in a similarly satisfactory manner. But it is the curse of our day and generation, that our ablest and most useful men ruin themselves and fail to serve the public with any acceptance, just because they are pushed beyond their strength and ability; and by attempting to do ten times as much as they can do well, really fail of doing anything to any purpose. We feel that much of this complaint may well be laid at our own doors, notwithstanding the utmost effort to resist the tendency. I. F. R.

Court of Appeals of Kentucky.

COMMONWEALTH *v.* REED.

The commonwealth may maintain a civil action for its own use for damages against a sheriff for breach of his official bond by negligence in arresting a party charged with crime, or by wilfully taking insufficient surety from such party for his appearance.

THIS was an action against a sheriff and his sureties for an alleged breach of his official bond, in negligently failing to arrest Stephen Patterson, on four bench warrants issued on four several

indictments for unlawful gaming, and also in wilfully taking insufficient security for Pinkney Patterson, whom he had arrested under indictments for permitting unlawful gaming in his house—the petition alleging the escape of Stephen and the insolvency of Pinkney Patterson.

PER CURIAM.—The Circuit Court having sustained a demurrer to the petition—which is good if such an action be maintainable—the only question for revision by this court is, whether the commonwealth has a right, for its own use, to recover in a civil suit, against the sheriff and his sureties, damages for a breach of their covenant.

Although there may be no precedent of any judicial recognition of such a remedy, yet we can perceive no reason why it should not be available, and it seems to us that principle sanctions it, and that it is sustained by both the common and statutory law of Kentucky.

The sheriff's official bond is required for assuring his fidelity as well to the commonwealth as to every individual who may lose by his infidelity. His delinquencies, as charged in this case, might subject the commonwealth to some insecurity, and to loss of revenue which she might have derived from the execution of the process. Why, then, should not she, as well as a citizen, have a right of action for damages to himself from a breach of the bond given to her for securing her interests as well as those of citizens?

The fact that the sheriff may be liable to a fine is no sufficient answer. This is only punitive; the civil action is remunerative. He may be insolvent, and his sureties would not be responsible for the fine. And the actual damage to the commonwealth may greatly exceed the amount of the fine.

Nor is the indeterminateness of the damages and the difficulty of ascertaining their precise amount by any certain or fixed standard, a sufficient answer.

The same difficulty occurs in many other classes of actions undoubtedly maintainable. Nominal damages might always be recovered, and generally the amount of the prescribed fine would afford a definite criterion for assessing the civil damages. In this case no court can assume that had Stephen Patterson been arrested he would ever have been tried, or, if tried, convicted,

or, if convicted, that the fines would ever have been collected by the commonwealth. But still, for every wrong there is a remedy; therefore, the imputed breach of the bond must be actionable upon common-law principles, and the damages must be assessed by the best tests the facts of the case may afford.

Confirmatory and, as we think, only declaratory of the common law—the sixth section of article 8, chapter 83, of Stanton's Rev. Stat., p. 259, provides that "clerks of courts, sheriffs, and other public officers, and their sureties, and the heirs, distributees, devisees, and personal representatives of each, may be proceeded against by suit or motion, jointly or severally, for their liabilities or defalcations by the commonwealth in her own right."

The application of this enactment cannot be restricted by the context of the article in which it is found, and which is too contracted for its useful or consistent operation. But it is, in its range, coextensive with the chapter on revenue, and applies to every case affecting the revenue of the commonwealth, as this case certainly may affect it by possible diminution. One of the principal objects seems to have been to hold the sureties to liability. On these grounds we are of the opinion that the action, as brought, is maintainable, and that, consequently, the Circuit Court erred in sustaining the demurrer to the petition.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

The importance and novelty of the foregoing decision seem to bring it fully within the range of our publication. We cannot say, that we should have been inclined, *à priori*, to have adopted the same view of the law, and still we are far from feeling any decided repugnance to the decision. It seems to us, that the statute of the state referred to in the opinion may be regarded as favoring the view taken by the court. It is true the court also intimates that the view is sustained, by principle, as well as by the common and statutory law of Kentucky.

We feel very confident that the common law of England countenances no such remedy in favor of the government, in cases of a criminal or penal nature, where the default complained of is in not detaining the accused party, when arrested, and where the proceeding is, in form, criminal. The only remedy which could there be resorted to in cases of that character would be by attachment for a contempt of the court before whom the process is made returnable. The English authorities are digested in 14 Petersdorff's Ab. 615. It seems that at common law the remedy by attachment was the only one allowed. Remedies by action in favor of private parties seem to be exclusively of statutory origin in England. But some of the later English statutes have given an action against the party by a common informer suing *qui tam:* 4 Geo. 3, c. 13, s. 4; *Sturmy* v. *Smith*, 11 East 25. And there seems to be no question the sheriff is amenable

for the act of his officers, though the offence be indictable: *Woodgate* v. *Knatchbull*, 2 T. R. 148.

And we see no objection in point of principle or precedent, to allowing an action in favor of the state upon all actions which sound in damages merely, and where the object is to recover a pecuniary mulct or penalty. Thus, in actions to enforce recognisances in criminal cases, or in penal actions, there would be no such uncertainty as would be likely to embarrass the courts or juries. It has been often held that the liability of a sheriff is in the nature of a tort, and that assumpsit will not lie: *Walbridge* v. *Griswold*, 1 D. Chip. (Vt.) 162. So also of a collector of taxes: *Charlestown* v. *Stacy*, 10 Vt. R. 562. But beyond this it seems to us the sheriff is so much a part of the government, being the head of the police force of the county and of the *posse comitatus*, that there would be an incongruity in quickening his pulses in favor of duty by an action on the case for any tortious act or neglect. The remedy of public opinion and in extreme cases, where there is reason to presume bad faith and criminal connivance, by attachment and imprisonment, in the discretion of the court, or by fine, would seem more natural and effective, in the majority of cases.

But we are not insensible to the fact that all punishment, as well as reward, is fast coming to be measured by its direct effect upon mutual interests and pecuniary advantage or loss. It is humiliating to reflect that it is so, so much as the stubborn facts compel us to recognise. And when that high sense of honor, that made the sheriffs of England to be reckoned among the nobility, as *vice comes*, or the deputy of the earl, when that fails to render such important officers insensible to all considerations except the strict law of duty, it may become necessary to extend pecuniary penalties so as to embrace all the duties of the sheriff.

I. F. R.

Louisville Chancery Court, Kentucky.

HORD AND WIFE *v.* CRUTCHER AND ALEXANDER.

Real estate in Kentucky was sold under an execution during the rebellion. The owners were residents of Mississippi, a state at war with the United States. A. having deterred other purchasers by announcing that he was bidding for the owners, bought the land for half its real value, and afterwards sold and conveyed it to B. for double the price he had paid, and claimed to hold the proceeds for his own use: *Held* that

A. could not be considered a trustee for the owners by parol on account of the Statute of Frauds, nor by any form of contract, express or implied, because the owners were then public enemies.

The question whether or not B. had notice of A.'s announcement at the sale was therefore immaterial, and his title to the land valid.

But the owners might recover from A., as his acts did not constitute a contract but a tort, as to which the right of action was only suspended by the war.

The measure of damages is the advance A. received on his resale, allowing him interest on his payment, and reasonable commissions.

THE opinion of the court was delivered by