RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

DAVID MAYNARD ET AL. v. FRACTIONAL SCHOOL DISTRICT, &c.

A bequest to the members composing the School District Board by name, and to their successors in office, of moneys to be expended in the purchase of books for a district library—they being the officers designated by law to perform similar duties for the district—is in effect a bequest to the district.

A school district may receive a gift of money to be expended in books for a district library, at the unrestricted discretion of its officers, notwithstanding that by statute the purchase of books for a district library, with district moneys, is subject to various limitations. Such a general gift is not foreign to the purposes for which districts exist, but in the direct line of furthering those purposes; and therefore the corporation may act as trustee in expending it under the general rules which confine the action of corporations within the purposes of their creation.

LUCY M. MAYNARD by her last will directed the residue of her estate, real and personal, not otherwise disposed of, to be sold and converted into money and applied under the following provisions:

"The effects thereof I give to David A. Woodard, Harmon Allen, and Thomas Richards, District Board for Fractional School District No. 1, in Milan, and No. 1 in York, and their successors for ever, in trust for the following named purposes: I direct that the funds so placed at the disposal of the said district board shall be placed at interest by them, and the interest be annually used for purchasing and adding to a school library, the said library to be selected and cared for by the said District Board or their legal representatives. And it is my wish that such books be selected as will be suitable for people of all ages and classes within the said district, and so used by them under proper rules and directions of said board as shall best promote the interests of education, general literature and morality."

The validity of this bequest was attacked by two of the heirs at law. The Circuit Court of Wastenaw county, affirming the order of the Probate Court, held the provisions to be valid; and the conclusions from the facts found were, "That the fair result of the bequest is to constitute the school district referred to, acting through its district board, trustees; and that the residue now remaining in the hands of the executors should be assigned to the persons constituting the district board of said school district and their successors for ever, for the uses and purposes expressed in said will."

From this order two of the heirs, David and John Maynard, appeal.

The opinion of the court was delivered by

CAMPBELL, J.—In order to determine the questions raised by the appeal it is necessary to consider the legal position of school districts and school boards.

Every school district is a corporation and the technical corporate name of this district is, Fractional School District No. 1 in Milan and No. 1 in York.

The district board have custody and care of all of the property and moneys of the district (except such as may be confided under certain circumstances to the director) and are required to apply and pay over all school moneys belonging to the district in accordance with law. Where there are district libraries, these are under the care and management of the district board, whose control is general, and who make selections and purchases, and provide for the safe-keeping and use of the books.

It is manifest, therefore, that both the intended beneficiary and the managers are persons known to the law as competent to take and use all property destined for the legitimate uses of school districts when sufficiently designated and granted.

The object of the will is entirely plain. It proposes to appropriate money to be used and managed permanently for the purposes of a district school library. The books are to be selected by the board for the time being, and the selection is with a view to promote the interests of "education, general literature and morality."

The ordinance of 1789 under which this region was first set apart for its future creation into states, which have been organized under its sanctions, declared that religion, morality and knowledge were necessary to good government and the happiness of mankind, and provided that for these expressed purposes, "schools and the means of education shall for ever be encouraged." It is somewhat strange, therefore, to have it suggested that libraries are not within the proper range of school apparatus, or that the purposes set forth in this will are in conflict with public school purposes. When schools cease to be used for such purposes they will cease to be worthy of support or toleration. Nothing but poverty can make it proper for any school district to deprive itself of the valuable aid of libraries, which enlarge and supplement the work of the teachers, and educate people of all ages as no other instrumentalities can educate them. The bequest in controversy, if invalid, must be so held because of some infirmity in the legal constitution of the district or in some defect in the declaration of the trust.

The bequest is for a purpose coming within the range of charities. But it is not one which requires any consideration of the doctrines which apply under the English system to imperfectly defined gifts and trusts. The property and the trusts are definite, the beneficiary is definite, and the trustees or managers are definite. If no managers were named, the administration of the trust would devolve on those officers who manage district business, and the board designated perform that function. The discretion involved, therefore, is the discretion of the lawful administrators of the district, and is a corporate discretion. There is no room for technical criticism upon the question whether the bequest is to the district or to the board. The intention of the will is not obscure, and the testatrix has directed the money to be paid just as she would have paid it in person had she desired during life to make a gift to the district.

There is really but one question of any importance on the record. That is, whether the corporation is legally capable of administering such a trust, which the appellants claim is not within the statutory powers; and they insist these bodies have none but statutory powers, and cannot go beyond them.

Upon this point the diligence of counsel has collected much learning, but it seems to have been overlooked that the subject has already been disposed of in this court, and we do not care to enlarge upon it.

In *Stuart* v. *School District No.* 1 *in Kalamazoo*, 30 Mich. 69, there was an examination into the powers of school districts to enlarge and extend their course of instruction and it was held the statutes cannot be narrowly construed without doing violence to their intent. In *Hathaway* v. *Sackett*, 32 Mich. 97, the contest was over a bequest to a village of fifteen thousand dollars to be used in the erection of a building for a high school. The objection was made there which is made here, that the purpose was foreign to the objects of the corporation. It was held, however, not to be repugnant, on the ground that education was a recognised factor in all civilization, and that schools were as important instruments of public advancement as municipal institutions, and neither foreign nor incongruous elements in municipal affairs.

Whether school districts could, without statutory authority, raise money for any library not meant for the purposes of the schools, is a very different question from whether a district library, if obtained without taxation, would be foreign to the educational interests of the

district. We are not disposed to regard the present library law as having any especial bearing on this matter. The argument which in the absence of such a law would exclude a library, would possibly stand in the way of keeping up any library not in all things patterned after the statute and supported in the same way. But we have no hesitation in holding, in accordance with the previous decisions, that there is nothing in our laws which cuts off public corporations from accepting benevolent offerings to enable them to extend their usefulness, and benefit their people, by enlarging their opportunities for culture and refinement, without multiplying or increasing their burdens. We do not hold that they may not reject such gifts if they have not intelligence enough to appreciate them. But we think the acceptance of such a bequest as this by a school district is in the direct line of corporate authority.

The judgment of the court below must be affirmed with costs of both courts, and the order be remitted for further proceedings.

All the judges concurred.

The objection to the bequest in the principal case was not based upon any inability on the part of the district authorities to establish and maintain a district library, for that authority was fully conferred by the statute, which authorized the township to vote moneys for district libraries for the use of residents of the district, and empowered the district board to expend them. But the statute also required that the books should be unsectarian in character and suitable for a district library. The power of the board was therefore carefully limited and confined within definite bounds. If now the board could be empowered by a private donor to purchase books in its discretion, it was said that books sectarian in character might be procured, and books not suitable for a district library, and thus the library be made up of books not sanctioned by law, but virtually prohibited, and the whole character of the library contemplated by law be changed. The trust would consequently, it was argued, be for a purpose not contemplated in the corporate organization, and any action in furtherance of it would be *ultra vires*.

It will appear from the opinion that the court did not deem it necessary to give much attention to this objection, considering it covered by the previous decisions, especially that of *Hathaway* v. *Sackett*, 32 Mich. 97, in which an incorporated village was held competent to take a bequest for the establishment of a high school. In explanation of that decision it should be stated that village corporations under the statute of Michigan do not establish schools; that power being conferred upon school districts, which are independent corporations, and the boundaries of which in a village may or may not be identical with those of the village itself. The court held in that case that the village had power to accept the bequest, and that if further powers were needed to enable the trust to be executed they might be conferred afterwards. A somewhat similar case is that of *First Parish in Sutton* v. *Cole*, 3 Pick. 232, in which there was a devise of lands to a parish "to be applied to the use of schools,

and to be kept by the inhabitants for ever." Towns, and not parishes, are the proper organizations in Massachusets for the creation of schools at the expense of their corporators, and they are compelled under penalty to establish and support them. And the objection was there made that "parishes are corporations with limited powers, relating only to parochial objects, such as providing for public worship, and having no authority to hold property for themselves or other persons to any other trust or purpose; at least not for schools, which is not a duty required of them by law." But it appeared that by statute parishes were *permitted* to raise money for the support of schools for their children, and the objection was therefore held unsound, though it is inferrible from what is said that it would have been overruled had no such statute existed. In *Phillips Academy* v. *King*, 12 Mass. 546, a question arose that may be compared to the question made by the appellants in the principal case, upon the discretionary authority conferred upon the school board by the bequest in the selection of books. In that case a bequest was made to an academy established with the design of propagating "Calvinism as containing the important principles and distinguishing tenets of our holy Christian religion, as summarily expressed in the Westminster Assembly's shorter catechism;" and the bequest which was contested proposed to add to this "the distinguishing principles of Hopkinsianism, a union or mixture inconsistent with the original design." But the court put aside the objection as unfounded, holding that the original design was the propagation of the Christian religion, and the bequest was in furtherance of that design and in nothing inconsistent with it.

The case of *First Congregational Society of Stonington* v. *Atwater*, 23 Conn. 34, was one in which a bequest to a corporation required action which in one particular went clearly beyond the contemplation of the law in its foundation. It was a gift to a school society of a town for the establishment and support of schools, but it required the trustees to be selected from two named religious organizations. In this regard it was quite as objectionable as was the conferring of general powers upon the school board to purchase books where the statute had only given restricted powers; but the gift was supported. In *Sargent* v. *Cornish*, 54 N. H. 19, it is decided that a municipal corporation may receive and hold money in trust for an object not foreign to its general purposes, even though the statute had withheld from it the powers to raise money by taxation for the same object. The gift there was to a town for the purpose of a yearly display of United States flags, and it was sustained. In *The Dublin Case*, 38 N. H. 459, a gift to a town for religious purposes was sustained, though towns had then lost their power to make contracts and raise taxes for those purposes. These cases cover the general subject. It is conceded that corporations cannot be trustees for purposes not germane to the purposes for which they are created: *Jackson* v. *Hartwell*, 8 Johns. 422; *Trustees, &c.*, v. *Peasly*, 15 N. H. 317; Perry on Trusts, sects. 42, 43, and cases cited; but where the purposes are germane they may be such trustees: *Philadelphia* v. *Fox*, 64 Penna. St. 169; *Webb* v. *Neal*, 5 Allen 575; *Heuser* v. *Harris*, 42 Ill. 425; *Vidal* v. *Girard's Executors*, 2 How. 61; *McDonough's Executors* v. *Murdock*, 15 How. 367. Even though other purposes are added which are not germane: *Matter of Howe*, 1 Paige 214. And we take it that when the law forbids public moneys to be expended in the purchase of sectarian books for district libraries, it does not thereby condemn them, or declare them foreign to the purposes of such libraries. The object in the re-

striction is merely to prevent an abuse; but if every religious denomination were inclined to make presents of its books to any public corporation connected with public instruction, it would be extraordinary if the corporation should be found lacking in authority to receive them. There is no policy of the law that would exclude from any public library any book which is not vicious and immoral in aim or tendency.

Another point not touched upon in the principal case is of interest, namely: Conceding that the authority of the corporation to execute the trust is doubtful, can the heirs raise the question? It has been decided that if the trust is valid in itself, as this clearly was, being a charity, only the state and not the heirs or other private parties could inquire into or contest the right of the corporation as trustee: *Wade* v. *Colonization Society*, 15 Miss. 663. And see *Vidal* v. *Girard's Executors*, 2 How. 61, 191; *Kinnaird* v. *Miller*, 25 Grat. 107; *First Congregational Society* v. *Atwater*, 23 Conn. 34; *Jackson* v. *Phillips*, 14 Allen 539; *Hathaway* v. *Sackett*, 32 Mich. 97. T. M. C.

Supreme Court of Rhode Island.

CHARLES W. LYNCH v. JOHN FALLON.

A broker employed by A. to negotiate an exchange of properties between him and B., cannot recover commissions of B., although after the exchange was effected he expressly promised to pay.

ASSUMPSIT heard by the court, jury trial being waived.

Henry B. Whitman, for plaintiff.

B. N. & S. S. Lapham, for defendant.

The opinion of the court was delivered by

DURFEE, C. J.—This is an action of assumpsit to recover $2500 for commissions for the plaintiff's services as a broker in negotiating an exchange of real estate. The two estates exchanged were a hotel estate, belonging to the defendant, situated in Worcester, and valued by the defendant at $125,000, on one side, and a tract of land belonging to the West Elmwood Land Company, situated in Providence, on the other side. There was, subject to mortgages, an even exchange. The plaintiff claims that the defendant made him an express promise to pay him the regular commissions before the exchange, and after the exchange promised to pay him $2500. The defendant denies this. We think the agreement is proved. The defendant contends that, if proved, it is not binding upon him, the plaintiff having been previously employed by the West Elmwood Land Company to sell their land, and being in their employ throughout the transaction. We think this is proved. The plaintiff has

in fact presented a bill to the company or its representatives for services in effecting the exchange.

The general rule is, that though a person may be entitled to pay from both parties to a sale or exchange where he acts merely as a middleman to bring them together (*Rupp* v. *Sampson*, 16 Gray 398; *Siegel* v. *Gould*, 7 Lans. 177), he cannot be allowed to serve as an agent or broker for both, because in such case there is a necessary conflict between his interest and duty, and he is exposed to a temptation to sacrifice the interests of one or both of his principals to secure his double commissions. As agent for the vendor, his duty is to sell at the highest price; as agent for the vendee, his duty is to buy for the lowest; and even if the parties bargain for themselves, they are entitled to the benefit of the skill, knowledge, and advice of the agent, and, at the same time, to communicate with him without the slightest fear of betrayal, so that it is hardly possible for him to be true to the one without being false to the other. The claim to charge commissions to both parties is so unreasonable that it cannot be justified by any custom or usage: *Farnsworth* v. *Hemmer*, 1 Allen 494; *Walker* v. *Osgood*, 98 Mass. 348; *Pugsley* v. *Murray*, 4 E. D. Smith 245; *Everhart* v. *Searle*, 71 Penn. St. 256; *Raisin* v. *Clark*, 41 Md. 158; *Schwartze* v. *Yearly*, 31 Md. 270; *Morison* v. *Thompson*, Law Rep. 9 Q. B. 480.

It is intimated in *Pugsley* v. *Murray*, 4 E. D. Smith 245, that the rule only applies where the broker conceals the double employment; but other cases rest the invalidity of the contract upon broad grounds of public policy, and hold that it cannot be enforced even against a party who, knowing that the broker is already employed, promises expressly to pay him for his services. Thus in *Everhart* v. *Searle*, 71 Penna. St. 256, the defendant, knowing the plaintiff had the property for sale, agreed to pay him $500 for assisting him to negotiate a purchase of it, and it was held that the plaintiff could not recover on the contract. "The transaction," say the court, "is to be regarded as against the policy of the law, and not binding upon a party who has a right to object to it."

In *Raisin* v. *Clark*, 41 Md. 158, it was held that the broker could not recover of the party who last employed him, even though the double employment was known to both parties, and the party who first employed him had paid his commission. The court say: "The rule forbids the court to entertain an action founded upon such a contract." * * * "It is perhaps possible for the same agent

to serve both parties to such a transaction honestly and faithfully, but it is very difficult to do so, and the temptation to do otherwise is so strong that the law has wisely interposed a positive prohibition to any such attempt." And see Story on Agency, §§ 210, 211.

In the case at bar we do not find that the West Elmwood Land Company was informed by the plaintiff of his employment by the defendant. The representatives of the company continued to confer freely with him, and raised the price of their land, which they held at $50,000, and which they had previously offered through the plaintiff at fifteen cents a foot, to twenty-five cents a foot, so as to bring it up to or near the price which the defendant had put upon his estate. The plaintiff, for anything that appears, co-operated in this; he says he told the defendant it was a nice piece of land, good to build on; he does not say he ever told the defendant that the price was enormously inflated. The case shows how easy it is for an agent of both parties to become, either consciously or unconsciously, a mere instrument in the hands of the more adroit and sharp-witted party in hoodwinking the other and decoying him into a disadvantageous bargain. It indicates what temptations and facilities such a double agency presents for unconscionable concealments and misrepresentations, and how dangerous it would be even if it were exercised with the consent of both parties; and certainly without such consent, freely and fully given, the law ought not to tolerate it for a moment.

We give the defendant judgment for his costs.

That no man can serve two masters is as well established in the common law as in any higher code.

Accordingly, one who undertakes it is not allowed to recover compensation from *both* parties for whom he was acting. This is clear. By engaging to serve the second he forfeits his right to recover compensation from the one who *first* employed him; for he has placed himself in a position where he is unable to give his first employer all the skill, knowledge, discretion and experience which by his contract of agency he was bound to furnish: *Walker* v. *Osgood*, 98 Mass. 348. Not only so, but he acquires no right to compensation from his *second* employer, although the latter knew when he engaged him that he was already under a prior contract with the first principal. So far as he is concerned, it might be thought that if he knew the agent was already in the employ of, and interested for the opposite party, and chose to confide in him, notwithstanding his adverse interests, he ought not subsequently to refuse to pay him the compensation stipulated on his part, especially if there has been no actual fraud or deception on the part of such double agent. But it should be remembered that such arrangements are not illegal because of actual fraud in the particular case, but because all contracts which are opposed to open, up-

right and fair dealing are contrary to public policy and void. Any contract, therefore, by which one is placed under a direct inducement to violate the confidence reposed in him by another, is of this character. It is the duty of an agent of a seller to get the highest price that can be obtained in market, and if he subsequently engage with an expected purchaser to receive a commission from him on the purchase, he is under an inducement to effect a sale to him on lower terms than might have been obtained from others, because thereby he would secure a commission from both parties. He is thus placed under a direct temptation to deal unjustly with the first principal. If such an arrangement can ever be valid, therefore, it can be only when the double agency is known and approved by *both* principals. See *Price* v. *Wood*, 113 Mass. 133.

And so careful is the law to protect parties from imposition that if a person engages his friend and confidential adviser to examine property which he contemplates purchasing, and give his opinion upon it *gratuitously*, and he does so, and thus a sale is effected, such friend and adviser cannot afterwards recover of the vendor for accomplishing such sale, although he has expressly agreed to pay him. Contracts to pay "poundage for recommending customers to buy" are odious in the law: *Bollman* v. *Loomis*, 41 Conn. 581 (1874); *Wyburd* v. *Stanton*, 4 Esp. 179.

Not only is an agent debarred from *recovering commissions* from such second principal, but any arrangement he may make with him in consideration of such a double agency cannot be enforced. Therefore, if an agent empowered to sell agrees with an expected buyer to introduce him to the vendor and aid in promoting the sale, if the buyer will subsequently sell him part of the property at an agreed price, such agreement is invalid, and cannot be enforced by the agent against the buyer after he has purchased the whole estate: *Smith* v. *Townsend*, 109 Mass. 500.

So obnoxious to the law is this species of double dealing that not even a usage among brokers to charge double commissions in such cases will be of any avail. A custom or usage to be legal and valid must be reasonable and consistent with good morals and sound policy, so that parties may be supposed to have made their contracts with reference to it. If a valid usage is shown to exist it then becomes the law by which the rights of the parties are to be regulated and governed. But a usage to charge double commissions is wanting in these essential elements. It would be unreasonable, because, if established, it would operate to prevent the faithful fulfilment of the contract of agency. It would be contrary to good morals and sound policy, because it tends to sanction an unwarrantable concealment of facts essential to a contract, and operates as a fraud on parties who had a right to rely on the confidence reposed in their agents: *Farnsworth* v. *Hemmer*, 1 Allen 494; *Raisin* v. *Clark*, 41 Md. 158.

It is intimated in the case of *Lynch* v. *Fallon*, that a person could not act as agent for both parties, even though such double agency were known and assented to at the time by both parties, and both agree that each shall pay a portion of the fees. But this may be questionable when everything is fair and and understood by all parties. See *Joslin* v. *Cowee*, 56 N. Y. 626 (1874); *Rowe* v. *Stevens*, 53 N. Y. 621, affirming same case in 3 Jones & Sp. 189; *Adams Mining Co.* v. *Senter*, 26 Mich. 73; *Fitzsimmons* v. *Southern Express Co.*, 40 Geo. 330. An agent to purchase cannot, ordinarily, buy of himself (as is well known), and *vice versa;* but if such a transaction is fully assented to after-

wards by the principal, no doubt it may be done, and thus he will ratify the sale; and *a fortiori*, if it was expressly assented to before the same was undertaken to be done by the agent.

But without any assent or ratification by the principal, not only is the principal not liable to the agent for his commission, but he may avoid the contract *as against the other party*, although he may be as innocent as himself. The medium through which they have been brought together is tainted, and each party may repudiate the transaction if he does so in due time. See *Fish* v. *Lesor*, 69 Ill. 394; *Panama Telegraph Co.* v. *India Rubber, &c., Co.*, Law Rep., 10 Ch. App. 515 (1875), a very important case on this subject.

And even if the principal has ratified the contract made by a double agent, so far as *the adverse party is concerned*, it does not necessarily follow that he is liable to the fraudulent agent for his commissions. They stand on different grounds: *Solomon* v. *Pendor*, 3 Hurlst. & C. 639 (1865), where an agent to sell the defendant's land sold it to a company in which he was himself interested as a shareholder; and it was held that although the defendant had concluded to abide by the sale, he was notwithstanding not liable to the agent for his commissions. See the general subject treated in a masterly manner in the notes to *Fox* v. *Macreth*, 1 Lead. Cas. in Equity 115.

EDMUND H. BENNETT.

Supreme Court of the United States.

PETER DOYLE, SECRETARY OF STATE OF WISCONSIN, v. THE CONTINENTAL INS. CO. OF THE CITY OF NEW YORK.

The decision in *Home Insurance Co.* v. *Morse*, 20 Wallace 445, reaffirmed that an agreement to abstain in all cases from resorting to the courts of the United States is void as against public policy, and that a statute of the state of Wisconsin requiring such an agreement is in conflict with the Constitution of the United States, and void.

A state has the right to impose conditions to the transaction of business within its territory by an insurance company chartered by another state, which are not in conflict with the constitution or laws of the United States.

It has the right entirely to exclude such corporation from its territory, or having given a license, to revoke it, in its discretion, for good cause, or without cause.

The motive or intention of the state in so doing is not open to inquiry. The company has no constitutional right to transact its business in such state, and hence its exclusion therefrom for whatever cause violates no constitutional right.

The legislature of the state of Wisconsin enacted that if any foreign insurance company should transfer a suit brought against it from the state courts to the federal courts, it should thereupon become the duty of the secretary of the state of Wisconsin to revoke and cancel its license to do business within the state. An injunction to restrain the secretary of state from so doing because such transfer is made cannot be sustained. Having no constitutional right to do business in that state, the suggestion that the intent of the legislature is to accomplish an illegal result, to wit, the prevention of a resort to the federal courts, is immaterial.

The right of exclusion belongs to the state, and the means by which it accomplishes that result are not the subject of judicial inquiry.

This was a bill of complaint, alleging that the complainant, The Continental Insurance Company of the city of New York, was a corporation organized and existing under the laws of the state of Connecticut and a citizen of that state; that prior to the passage of the act of the legislature of the state of Wisconsin, entitled "An act to provide for the incorporation and government of fire and inland navigation insurance companies," approved March 4th 1870, the complainant had established agencies, opened offices, and made considerable expenditures of money in advertising the business of insurance against loss by fire in the state of Wisconsin; that soon after the passage of said act complainant complied with the provision of section 22 thereof, and procured from the state treasurer and secretary of state the certificates and license to do business in said state as therein provided, and did subsequently fully comply with said act; but that upon filing appointment of an agent upon whom process of law could be served, complainant was compelled to add an agreement, on its part, not to remove into the federal courts suits brought against it in the state courts, which agreement to that effect was made; that after the decision of this court in *The Home Insurance Company* v. *Morse*, 20 Wall. 445, the complainant removed a suit brought on one of its policies against it in the state court, into the federal court; that because of such removal a demand was made upon the defendant, Peter Doyle, as secretary of state, that he revoke the certificate or license authorizing the complainant to do business in said state of Wisconsin; that complainant had a large number of agencies in the state engaged in the conduct of its business, and a revocation of its license would work great and irreparable injury to the complainant in its business in said state, and the complainant feared that said defendant would revoke said license unless restrained by injunction. A temporary injunction was issued restraining the defendant from revoking the license of the complainant because of the removal of said suit from the state to the federal court.

The defendant demurred to the bill. The demurrer was overruled, and a decree entered making the injunction perpetual. From this decree the defendant appealed.

Section 22, chapter 56, Laws of Wisconsin, 1870, provides as follows: "That any fire insurance company, association or partnership, incorporated by or organized under the laws of any other state of the United States, 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 in the United States Circuit 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."

Sects. 1 and 3, chap. 64, Laws of Wisconsin of 1872, provide as follows: "Sect. 1. If any insurance company or association shall make application to change the venue or remove any suit or action heretofore commenced, or which shall be hereafter commenced, in any court of the state of Wisconsin, to the United States Circuit or District Court, or to the federal court, contrary to the provisions of any law of the state of Wisconsin, or contrary to any agreement it has made and filed, or may make and file, as provided and required by section 22 of chapter 56 of the general laws of Wisconsin for the year A. D. 1870, or any provision of law now in force in said state, or which may hereafter be enacted therein, it shall be the imperative duty of the secretary of state, or other proper state officer, to revoke and recall any authority or license to such company to do and transact any business in the state of Wisconsin, and no renewal or new license or certificate shall be granted to such company for three years after such revocation, and such company shall therefore (thereafter) be prohibited from transacting any business in the state of Wisconsin until again duly licensed."

"Section 3. If any insurance company or association shall make application to remove any case from the state court into the United States Circuit or District Court, or federal court, contrary to the provisions of chapter 56 of the general laws of Wisconsin for the year A. D. 1870, or any other state law, or contrary to any agreement which such company may have filed in pursuance of said chapter 56 of the general laws of Wisconsin for the year A. D. 1870, or any other law of the state of Wisconsin, it shall be liable, in addition to a penalty of not less than $100 or more than $500, for each application so made, or for each offence so committed for making such application, the same to be recovered by suit in the name of the state of Wisconsin; and it shall be the imperative duty of the attorney-general of the state of Wisconsin to see and attend that all of the provisions of said chapter 56 of the general laws of 1870, and the provisions of this act, are duly enforced."

George B. Smith and *A. Scott Sloan*, for appellants.

Wm. Allen Butler, *R. T. Stevens* and *J. C. Sloan*, for appellees.

The opinion of the court was delivered by

HUNT, J.—The case of the *Home Insurance Company* v. *Morse*, reported in 20 Wall. 445, is the basis of the bill of complaint in the present suit. We have carefully reviewed our decision in that case and are satisfied with it. In that case, an agreement not to remove any suit brought against it in the state courts of Wisconsin, into the federal courts, had been made by the company in compliance with the Wisconsin statute of 1870. The company nevertheless did take all the steps required by the United States statute of 1789, to remove its suit with Morse from the state court into the federal courts. Disregarding that action, the Supreme Court of Wisconsin allowed the action in the state court to proceed to judgment against the company as if no transfer had been made. When the judgment thus obtained was brought into this court, we held it to be illegally obtained, and reversed it. It was held, first, upon the general principles of law, that although an individual may lawfully omit to exercise his right to transfer a particular case from the state courts to the federal courts, and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by any agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom or his constitutional rights.

As to the effect of the statutory requirement of the agreement, the opinion, at page 458 of the case as reported, is in these words: "On this branch of the case the conclusion is this: '1st. The Constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the federal court upon compliance with the terms of the Act of 1789. 2d. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void. 3d. The agreement of the insurance company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed.' "

The opinion of a court must always be read in connection with the

facts upon which it is based. Thus, the second conclusion above recited, that the statute of Wisconsin is repugnant to the Constitution of the United States, and is illegal and void, must be understood as spoken of the provision of the statute under review, to wit, that portion thereof requiring a stipulation not to transfer causes to the courts of the United States. The decision was upon that portion of the statute only, and other portions thereof, when they are presented, must be judged of upon their merits.

We have not decided that the state of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices and issue policies in that state. On the contrary, the case of *Paul* v. *Virginia*, 8 Wall. 168, where it is held that such conditions may be imposed, was cited with approval in *Home Insurance Co.* v. *Morse*. That case arose upon a statute of Virginia, providing that no foreign insurance company should transact business within that state until it had taken out a license and made a deposit with the state treasurer of bonds varying in amount from $30,000 to $50,000, according to the amount of its capital. This court sustained the power of the legislature to impose such conditions, and sustained the judgment of the state court convicting Paul upon an indictment for violating the state law in issuing policies without having first complied with the conditions required.

Ducat v. *Chicago*, 10 Wall. 410, decides that the statute of the state of Illinois requiring a license to be taken out by foreign insurance companies, for which six dollars each should be paid, and the filing of an appointment of an attorney with power to accept service of process, was a legal condition; and a requirement that when such company was located in the city of Chicago, it should also pay to the treasurer of that city $2 upon the $1000 upon the amount of all premiums received, was held to be legal. In the *La Fayette Insurance Co.* v. *French*, 18 How. 404, the court say "a corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state: 13 Peters 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroach-

ment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence."

Neither did the case of the *Home Insurance Company, supra,* undertake to decide what are the powers of the state of Wisconsin, in revoking a license previously granted to an insurance company, for what causes or upon what grounds its action in that respect may be based. No such question arose upon the facts or was argued by counsel or referred to in the opinion of the court.

The case now before us does present that point, and with distinctness. The complainant alleges that a license had been granted to the Continental Insurance Company upon it executing an agreement that it would not remove any suit against it from the tribunal of the state to the federal courts; that in the case of Drake it did, on the 10th day of March 1875, transfer his suit from the Winnebago Circuit of the state to the Circuit Court of the United States; that Drake thereupon demanded that the defendant, who is secretary of state of Wisconsin, should revoke and annul its license, in accordance with the provisions of the Act of 1872; that it is insisted that he has power to do so summarily, without notice or trial; that the complainant is fearful that he will do so, and that it will be done simply and only for the reason that the complainant transferred to the federal court the case of Drake, as above set forth.

The cases of *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Ducat* v. *Chicago*, 10 Wall. 410; *Paul* v. *Virginia*, 8 Id. 168, and *La Fayette Ins. Co.* v. *French*, 18 How. 404, established the principle that a state may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper that are not repugnant to the constitution or laws of the United States. The point is elaborated at great length by Chief Justice TANEY in the case first named, and by Mr. Justice CURTIS in the case last named.

The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable: *Rector* v. *Philadelphia*, 24 How. 300; *People* v. *Roper*, 55 N. Y. 629; *People* v. *Commissioners*, 47 Id. 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect: *Humphrey* v. *Pegues*, 16 Wall. 244; *Tomlinson* v. *Jessup*, 16 Id. 454.

A license to a foreign corporation to enter a state does not involve a permanent right to remain. Full power and control over its territories, its citizens and its business (subject to the laws and

constitution of the United States) belong to the state. If the state has the power to do an act its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus the pleading before us alleges that the permission of the Continental Insurance Company to transact its business in Wisconsin is about to be revoked for the reason that it removed the case of Drake from the state to the federal courts. If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it. The state of Wisconsin (except so far as its connection with the constitution and laws of the United States alters its position) is a sovereign state, possessing all the powers of the most absolute government in the world.

The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impractical suggestion which cannot be applied to the affairs of life. If the act done by the state is legal, is not in violation of the constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

In all the cases where the litigation of a state has been declared void, such legislation has been based upon an act or a fact which was itself illegal. Thus in *Crandall* v. *Nevada*, 6 Wall. 35, a tax was imposed and collected upon passengers in railroad and stage companies. In *Almy* v. *State of California*, 24 How. 169, a stamp duty was imposed by the legislature upon bills of lading for gold or silver transported from that state to any port or place out of the state. In *Brown* v. *The State of Maryland*, 12 Wheat. 419, a license, at an expense of $50, was required before an importer of goods could sell the same by the bale, package or barrel. In *Henderson* v. *The Mayor of New York*, 2 Otto 265, the statute required the master to give a bond of $300 for each passenger, conditioned that he should not become a public charge within four years, or to pay the sum of $1.50. In the *Passengers' Case*, 7 How. 572, the requirement was of a like character.

In all these cases it was the act or fact complained of that was the subject of judicial inquiry, and upon the act was the judgment

pronounced. The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its state court into the federal courts, contrary to the provisions of the Act of 1870, it shall be the duty of the secretary of state immediately to cancel its license to do business within the state. If the state has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.

It is said that we thus indirectly sanction what we condemn when presented directly, to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an "inexact statement." The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts, or cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or constitution of the United States, by its exclusion from the state, is infringed, and this is what the state now accomplishes. There is nothing, therefore, that will justify the interference of this court. The decree of the court below awarding a perpetual injunction is reversed, and the cause is remanded that a decree be entered dismissing the bill for want of equity.

BRADLEY, J., dissenting.—I feel obliged to dissent from the judgment of the court in this case. The following is a brief statement of the reasons for my opinion:—

Though a state may have the power (if it sees fit to subject its citizens to the inconvenience) of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness toward sister states, but prohibition except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous and productive of hostility and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other.

The citizens of the United States, whether as individuals or associations, corporate or incorporate, have a constitutional right, in proper cases, to resort to the courts of the United States. Any agreement, stipulation or state law precluding them from this right is absolutely void—just as void as would be an agreement not to resort to the state courts for redress of wrongs, or defence of unjust actions, or as would be a city ordinance prohibiting an appeal to the state courts from municipal prosecutions.

The questions arising upon these Wisconsin laws have already been considered by this court in the case of the *Home Insurance Co.* v. *Morse*, and we held and adjudged that the agreement which the company was compelled to make, not to remove a suit into the federal courts, was absolutely void. In principle, this case does not differ a particle from that. The state legislation of 1872, under which, and in obedience to which, the license of the appellees is threatened to be revoked, is just as unconstitutional and just as void as the agreement was in the former case.

The argument used, that the greater always includes the less, and therefore, if the state may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property.

The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring states would not only cripple their energies, but would deprive the people of those states of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations—at least those of a commercial or financial character—should be able to transact business in different states. If these states can at will deprive them

of the right to resort to the courts of the United States, then in large portions of the country the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the state and general governments, and ought to meet the condemnation of the courts, whenever brought within their proper cognisance.

In my judgment, the decree for injunction ought to be affirmed; and in this opinion I am authorized to say that Justices SWAYNE and MILLER concur.

Court of Appeals of Kentucky.

OWENSBORO SAVINGS BANK v. WESTERN BANK.

Ratification by a principal of his agent's acts is only binding when made on full knowledge of the facts as they actually exist, not merely as the agent supposes them to exist.

The good faith of the agent does not exonerate him from liability to his principal if he has been in fact negligent or has disregarded orders.

Plaintiff, a bank, authorized its agent to make a loan on a note with any good collateral security. The agent made a loan on what would have been good security had it been free from prior liens, but the existence of prior liens was claimed. The plaintiff, with knowledge of this claim, accepted the note and the collaterals and brought suit to enforce its demand against the holder of the collaterals. In this suit it was defeated, the priority of the holder's lien being established. The plaintiff then brought suit against its agent for negligence in making the loan without good security: *Held*, that it had not ratified the agent's act, and on proof of the negligence it was entitled to recover.

Where an agent to loan money takes insufficient security the principal is not bound at his peril to accept it and discharge the agent or to reject it and look only to the responsibility of the agent; he may take the security and still hold the agent for any deficiency which, after due diligence, he suffers on it.

ERROR from Jefferson. The appellant (who was plaintiff below) and appellee were both incorporated state banks, doing a general banking business, the former in Owensboro and the latter in Louisville.

July 17th 1872, the appellant had money on deposit with the appellee, and on that day, by its cashier, W. K. Anderson, wrote to Henry Hurter, appellee's cashier, as follows:—

"We would like to have you invest some means for us, if you can, in good paper, at 30, 60, 90 or 120 days' time."

July 24th 1872, Hurter, in a letter signed "Henry Hurter, cashier," wrote to appellant's cashier that he had, on that day, loaned for appellant, to Robert Atwood, $5000 on his note at ninety days, secured by seventy shares of Bank of Louisville stock, certificates for which, endorsed by Atwood, he then held and would forward to appellant if desired. In the afternoon of the same day Hurter wrote a second letter, in which he said: "I omitted to inquire in my letter of this morning whether you wish the collaterals transferred on the books of the Bank of Louisville to your name, and certificates issued." In reply to the first of these letters, appellant wrote, acknowledging the receipt of Atwood's note, and returning it for collection, and also that the investment was entirely satisfactory; and in reply to the second, "We do not care to handle at all the collaterals on any paper you may discount for us. Do by them as you would if yours."

About August 15th, Atwood failed, and Hurter wrote to the appellant as follows: "At the time I loaned Mr. Atwood $5000 of your funds on Bank of Louisville stock as collateral security, I went to the Bank of Louisville, and ascertained from Mr. Morgan, the cashier, that the bank held no lien upon that stock, and informed Morgan, as there was no encumbrance on the stock, I would make a loan thereon. Yesterday it was rumored on the street that Mr. Atwood had failed, and I went to the Bank of Louisville to have the stock transferred to you, which the cashier refused to do. I thought it my duty to inform you of this, so that you can take such steps as your attorney may advise."

Some time afterward the appellant's vice president, in company with Hurter, called at the Bank of Louisville, and demanded a transfer of the stock into the name of appellant, which was refused on the ground that Atwood was indebted to the Bank of Louisville, and that it had a charter lien on its stock for the indebtedness of stockholders to it.

In that interview Hurter stated, in substance, that, before making the loan, he had called on the president and cashier of the Bank of Louisville, and they both told him the bank had no lien on the stock. This they both denied in the presence of appellant's vice president.

When the note matured the appellant brought suit upon it against Atwood, and it also brought suit against the Bank of Louisville to compel it to transfer the stock. Judgment was recovered against

Atwood, on which an execution issued, which was returned no property found. The Bank of Louisville answered, and set up its lien on the stock, which was adjudged superior to the lien of appellant, and the stock was sold, and failed to satisfy the prior lien, whereby the loan made for the appellant became a total loss.

This action was then brought against the appellee to recover damages for failing to take sufficient security for the loan.

The appellee, in its answer, denied all charges of negligence, and averred that it had acted with due caution and circumspection in making the loan, and also set up and relied upon a ratification of its acts in the matter after the appellant was in possession of all the facts and circumstances connected with the transaction.

A trial resulted in a verdict and judgment for the appellee.

James S. Pirtle, *G. W. Caruth* and *Thomas Speed*, for appellant.

Muir, *Bijur* and *Davie*, for appellee.

The opinion of the court was delivered by

COFER, J.—The only ground urged for a reversal is, that the court erred in instructing the jury in respect to the alleged ratification. The evidence showed, without contradiction, that before the appellant received the note and collaterals and brought suit against Atwood and the Bank of Louisville, it knew that the latter claimed a lien on the stock pledged to secure Atwood's note for an amount exceeding its value. But it also showed that the appellee's cashier informed the appellant that before the loan was made the Bank of Louisville agreed to release its lien, or, what was the same thing, to transfer the stock on its books into appellant's name. That the appellee's cashier knew, before he made the loan, that the Bank of Louisville had a lien on its stock for debts due the bank by the holders thereof, and that Atwood was then indebted to the bank in a sum greatly exceeding the value of the stock was not at any time disputed, the sole matter in dispute being whether it had agreed to waive its lien when called on by Hurter before he made the loan. That question was never finally settled until the judgment in favor of the Bank of Louisville was rendered.

Upon that evidence the court instructed the jury that, if the appellee fairly and fully communicated to the appellant all the facts and circumstances connected with the loan, which were known to

the appellee or its agent, Hurter, and that the appellant knew of the insolvency of Atwood, and the claim asserted by the Bank of Louisville and thereafter adopted the transaction, and received the note and collaterals, and treated them as its own, the law was for the appellee, although it might have been guilty of such negligence as would otherwise have rendered it liable.

The doctrine that, if an agent has, by a deviation from his orders, or by any other misconduct or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts or omissions, by the principal, if made with a full knowledge of all the facts, is elementary. But the instructions given in this case went further, and held that if the principal, at the time of accepting the note and collaterals, knew all the facts touching the loan and affecting the value of the security, which were then known to the agent, and, with such knowledge, received them and treated them as its own, the agent was discharged from liability. We have examined many authorities, both elementary and judicial, in which the doctrine of ratification, as between principal and agent, is discussed, but we have not found one which considered the good faith of the agent as an element in deciding whether or not there had been a ratification; but, on the contrary, whenever the good faith of the agent has elicited remark, it has been to the effect that it could have no weight in the decision of that question. "Indeed, in all such cases, the question is not whether the party (agent) has acted from good motives and without fraud, but whether he has done his duty and acted according to the confidence reposed in him:" Story on Agency, sect. 192.

Nor do we find any authority for exonerating a delinquent agent from liability if he communicates to the principal all the facts known to him at the time, and the principal ratifies the delinquency, and it afterwards turns out that the facts as communicated were not the real facts of the case. In such a case the assumed condition is not that claimed to have been ratified.

It was the duty of the appellee to loan appellant's money on good security, or such as a person of common prudence and skill in its business would have esteemed good. It did loan it upon a security confessedly sufficient if unencumbered, but which, as the event has proved, was encumbered to its full value, and, therefore, was no security at all. The appellee, through its cashier (for whose acts we assume for the present it was liable), represented that the stock

was not in lien to the Bank of Louisville; in other words, that the security was good. To know whether that representation was true was necessary to enable the appellant to make an election. It is true it knew the Bank of Louisville asserted a lien, but whether that lien was superior to the appellant's, or had been waived as appellee represented, it did not and could not know until the dispute was settled. We have, therefore, a case in which when the alleged ratification was made both the principal and agent were necessarily ignorant of the most essential fact in the whole case, and consequently there could not have been such a ratification as would release the agent from liability, if its conduct had been such that it was otherwise liable. The gravamen of the appellant's complaint is, that the appellee negligently failed to take sufficient security for the loan, and the defence is, that the alleged negligence has been ratified; and yet the uncontradicted evidence is, that at the time of the supposed ratification, it was not known that there had been the slightest negligence, or that the security was insufficient. It was not the act of making the loan that needed to be ratified. That was expressly authorized. Nor did the acceptance of the bank stock as security need ratification. The stock was confessedly worth more than the loan. That which needed ratification was the acceptance of the stock, *subject, as it was, to the lien of the Bank of Louisville,* as security for the loan. If, as the appellee affirmed, it was not subject to the asserted lien, there had been no negligence and there was nothing to ratify. Whether it was subject to that lien was never known until the suit to test the question was decided, and then, and not until then, did the appellant obtain a knowledge of the facts necessary to make an election whether to adopt or repudiate the acts of its agent.

We have found no case the facts of which are sufficiently like the facts of this to make the decision rendered a controlling precedent in this case; but assuming the two fundamental rules of the law agency, (1) that when the agent has deviated from his duty he becomes liable to his principal for such losses as are the direct and natural consequence of such deviation, whether his motives were good or bad; and (2) that he is only released from that liability when the principal, with a knowledge of all the facts, ratifies his departure from his duty, we think there can be no doubt of the correctness of the conclusion we have reached.

There was not only no evidence that the appellant knew at the

time of the alleged ratification that the appellee had taken insufficient security, but. on the contrary, the evidence was uncontradicted and conclusive that it did not, and there was, therefore, no evidence upon which to base an instruction on the subject of ratification.

None of the cases cited by appellee's counsel are like this. We cannot undertake to review them one by one, and point out the distinction between them and this case; but an examination of them will show that, in every one in which the agent was held to be discharged from liability for deviations from orders or duty, the principal knew, at the time of the ratification, that the agent had not done his duty; whereas, in this case, as we have already seen, the appellant did not, and could not, know but the appellee had taken ample security until it was decided that the Bank of Louisville had not waived its lien on the stock.

Nor are we prepared to sanction the doctrine that if an agent to loan money takes what he knows to be insufficient security, the principal must at his peril accept the security and discharge the agent from liability, or reject the security and leave it in the agent's hands, and look only to the agent for indemnity in the form of damages. The more rational and just rule would seem to be that the principal is entitled to the security taken by his agent, and to look to the agent for indemnity to the extent of the deficiency which, after proper diligence, he shall fail to realize on the security. This view seems to be sustained by the cases of the *Bank of St. Mary's* v. *Calder*, 3 Strob. 403; *Walker* v. *Walker*, 5 Heiskell 425; and by Wharton in his work on Agent and Agency, sect. 67.

Suppose an agent in doubtful circumstances, or a non-resident, takes security of a doubtful character or one of unknown value, shall the principal be required to make his election without an opportunity to test or make inquiry as to its value on pain of either giving up the security or releasing the agent? Such a rule does not commend itself to our judgment as either just or reasonable. And in the case of *Pickett* v. *Pearson*, 17 Verm. 470, the court distinctly intimates that he may take a reasonable time in which to test the value of the security. Such a rule works no hardship upon the agent. It can never operate, until he has deviated from his duty, in a manner to work an injury to the principal, and to produce a condition of affairs which must result in loss to the one or the other; and in such a case, both law and justice demand that he whose deviation from legal duty has necessitated a loss shall bear it. We

do not mean that an agent shall be held to guarantee the sufficiency of a security taken by him, but simply to apply our remarks to cases in which the agent has so acted that he would otherwise be liable to the principal and is compelled to rely upon a ratification of his acts to escape liability.

It is next contended that Hurter, the cashier, and not the appellee, was appellant's agent and made the loan, and that, therefore, the appellee is not responsible.

It is a sufficient answer to this to say that no such issue was presented by the answer, and it is there distinctly averred that the appellee made the loan and took the security.

It is also claimed that the appellee had no authority to act as agent in loaning money, and is therefore not liable, even if guilty of negligence in the matter.

The appellee is an incorporated bank, and we are unable to discover in its charter anything which prohibits it from engaging in any business incident to general banking. The answer presented no issue upon the point, and we cannot say, as matter of judicial knowledge, that the loaning of money for a customer is not a part of the legitimate business of general banking. Whether it is or not is a question of fact depending upon the custom of banks, and if it was intended to rely that such business was *ultra vires* the bank, the issue should have been made in the answer in order that the appellant might offer evidence to show that it was incidental to the business of banking, and therefore within the implied powers of the appellee.

It seems to us, therefore, that on the pleadings and evidence embodied in the record, the only question involved was whether the appellee used that care and skill in taking security which, under the circumstances, it was his duty to use.

If, in view of the character and standing of Atwood at the time the loan was made, the knowledge the appellee (or what is the same thing, its cashier) had of the lien on the collaterals given to the Bank of Louisville by its charter, what took place between the appellee's cashier and the officers of the Bank of Louisville, and his information as to Atwood's indebtedness to it, the loan would not have been made on the security taken by a person of ordinary prudence and skill in banking, the appellee is liable; otherwise, it is not.

Judgment reversed, and cause remanded for a new trial upon principles not inconsistent with this opinion.

Supreme Court of Kansas.

IN RE S. D. PRIOR.

For sneering, insulting, and disrespectful language used by an attorney to a judge before whom a matter is pending, concerning such matter and the judge's ruling thereon, the attorney may be punished by a fine, as for a contempt.

Such language as the following, coming from an attorney to a judge in a matter still pending before him: "The ruling you have made is *directly contrary to every principle of law, and everybody knows it*, I believe;" and that it is "my desire that *no such* decision shall stand unreversed in any court I practice in," is insulting and disrespectful.

It is immaterial whether this language is used in oral address in the hearing of others, or in a written communication to the judge.

An attorney, as an officer of the court, is under special obligations to be considerate and respectful in his conduct and communications to the court or judge.

A judge will do wisely to overlook any mere hasty unguarded expression of passion or disappointment, even though disrespectful, or simply notice it by a reproof. But where an attorney insists upon a right to use such disrespectful language, or is in the habit of so using it, or fails, when his attention is called to it, to apologize therefor, it may become the clearest duty of the judge to punish him for a contempt.

On an appeal from an order punishing for contempt, the mere question of the advisability of the court's action is not the matter of consideration; it is the question of power, and whether the act or word punished is in fact a contempt.

APPEAL from an order of CAMPBELL, J., adjudging S. D. Prior guilty of contempt.

W. McDonald, for appellant.

The opinion of the court was delivered by

BREWER, J.—Motions to dissolve certain injunctions were argued before Hon. W. P. CAMPBELL, district judge of the 13th Judicial District. The motions were taken under advisement and a few days thereafter word was sent by the judge to the counsel for plaintiff, advising him of the overruling of the motions. This information was conveyed to the counsel for defendant, one of whom wrote and forwarded the following letter:—

"Winfield, Cowley County, Kansas, June 26th 1876.

Hon. W. P. CAMPBELL:—

Dear Sir: Mr. Hackney this evening informed me that he had received a letter from you stating that you had overruled the motions to dissolve those injunctions. I can hardly believe that such is the fact, *for it is directly contrary to every principle of law governing injunctions* and *everybody* knows it, I believe. Consequently we send herewith orders dissolving said injunctions. But if you have

concluded to overrule said motions, as Hackney says, you will please allow our exceptions to each and every of your rulings and allow us time to make and file our case in Supreme Court, which we will do as quick as it can be done. For it is our desire that *no such* decisions or orders shall stand unreversed in any court we practice in; also fix terms for staying orders.

Yours respectfully,

PRIOR, KAGER & PRIOR."

The judge on the receipt of this letter construed it as a contempt, issued his warrant for the arrest of the writer, and after a hearing adjudged him guilty of contempt, fined him fifty dollars therefor, and suspended him from practice in the courts of that district until the fine should be paid.

The question presented for our consideration is whether this ruling and order of the judge shall be set aside or permitted to stand. It appears from other testimony in the case, as well as from the intimations in the letter, that no orders had actually been signed. Notice of his conclusions had simply been given and the attorneys requested to prepare the formal order; the matter was therefore still pending before him.

Upon this we remark in the first place that the language of this letter is very insulting. To say to a judge that a certain ruling which he has made is contrary to every principle of law and that everybody knows it, is certainly a most severe imputation. The learned counsel for appellant says in his brief:—

"There is nothing in Mr. Prior's letter to Judge CAMPBELL that is insulting, contemptuous, or even the least disrespectful. Mr. Prior simply tells the judge, in a plain matter-of-fact way, that he has committed an error of law in his decision, if such decision is as has been represented to him, and in that event requests that his exceptions thereto may be allowed, to the end that he may have an opportunity of presenting the matter to the Supreme Court for review. There is no reflection upon the motives of the judge, in rendering such decision, or imputation upon his integrity; nothing in fact to which, in the light of reason and fairness, any possible intention of contempt can be attached. In the warrant issued for the arrest of Mr. Prior, the judge states that the letter was written for the purpose of 'insulting, abusing and intimidating' him. There is nothing insulting in the letter—unless it is an insult to

this judge for an attorney to disagree with him upon a question of law; nothing abusive about it, unless it is the unpardonable temerity of the expressions that evidence the dissent on the part of the attorney from the exposition of the law by the judge; nothing about it calculated to 'intimidate,' unless it is the statement that the disputed question will be referred to the Supreme Court for review."

We cannot concur in this construction of the letter. It is not merely an assertion of a difference of opinion, but a charge that he has decided in a way that he as well as everybody else knew to be wrong. To say to a judge that his ruling is contrary to every principle of law, may be simply a reflection upon his intelligence, but to couple with it an assertion that everybody knows it, is clearly an imputation upon his integrity. How can a judge be honest and yet decide contrary to that which he as well as all others know to be the law?

We remark, secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. He is an officer of the court and it is therefore his duty to uphold its honor and dignity. Certain privileges attach to him by reason of such official position. He may in the trial of cases use language concerning witnesses and parties, and all matters and things in issue, which elsewhere and under other circumstances would be libellous. By virtue of this privilege, we often hear from the lips of counsel in argument, or read in the briefs filed in proceedings in error in this court, the most severe animadversion and criticism upon the conduct and rulings of the courts from which the proceedings are brought. They have the same right of criticising the rulings and conduct of those courts in proceedings pending here that they have in those courts of criticising the actions and conduct under review there. In other words, the independence of the profession carries with it the right freely to challenge, criticise and condemn all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect towards the tribunal in which the proceedings are pending. And the fact that the tribunal is an inferior one and its rulings not final and without appeal, does not diminish in the slightest degree this obligation of courtesy and respect. A justice of the peace, before whom the most trifling matter is being litigated, is entitled to receive from every attorney in the case

courteous and respectful treatment. He is *pro hac vice* the representative of the law as fully as the chief justice of the United States in the most important case pending before him. A failure to extend this courteous and respectful treatment is a failure of duty, and it may be so gross a dereliction as to warrant the exercise of the power to punish for contempt. Now, as we have said, the language of the letter is insulting. It would be so regarded outside of judicial proceedings and in the intercourse of gentlemen. To charge another with knowingly doing an illegal act would always be regarded as an imputation to be resented. Change the circumstances a little; suppose in a public trial in the court house, after a ruling had been made, an attorney in the case should say to the court, "that ruling is not the law and your honor knows it;" who would doubt that the court might rightly treat such language as contempt and punish it accordingly? Yet practically that is this case. The fact that in the case supposed others are listening and hear the words and in this the language reaches the judge alone does not change the quality of the act. It will be borne in mind that the remarks we have made apply only while the matters which give rise to the words or acts of the attorney are pending and undetermined. Other considerations apply after the matters have finally been determined, the orders signed or the judgment entered. For no judge and no court, high or low, is beyond the reach of public and individual criticism. After a case is disposed of a court or judge has no power to compel the public or any individual thereof, attorney or otherwise, to consider his rulings correct, his conduct proper, or even his integrity free from stain, or to punish for contempt any mere criticism or animadversion thereon, no matter how severe or unjust. Nor do we wish to be understood as expressing any opinion as to the power to punish others than attorneys and officers of the court for language or conduct, even while the matter is pending and undetermined. Whether the same rules and considerations apply to them or not we do not care to inquire. Such is not the case before us, and to this case alone do our remarks apply. We remark again, that a judge will generally *and wisely* pass unnoticed any mere hasty and unguarded expression of passion or at least pass it with simply a reproof. It is so, that in every case where a judge decides for one party he decides against another, and ofttimes both parties are beforehand equally confident and sanguine. The disappointment therefore is great, and it is not in human nature that there should be other than

bitter feeling, which often reaches to the judge as the cause of the supposed wrong. A judge therefore ought to be patient and tolerant of everything which appears to be only the momentary outbreak of disappointment. A second thought will generally make a party ashamed of such outbreak, and the dignity of the court will suffer none by passing it in silence. On the other hand, a little thing, which is properly unnoticed once, may by its repetition require notice and punishment. It is but a little matter to whisper a single time in the presence of a court in session, but if repeated and the monitions of the court disregarded, it may become not merely the privilege, but the clearest duty of the court to punish for contempt. So, an attorney, sometimes, thinking it a mark of independence, may become wont to use contemptuous, angry or insulting expressions at every adverse ruling, until it becomes the court's clear duty to check the habit by the severe lesson of a punishment for contempt. The single insulting expression for which the court punishes may therefore seem to those knowing nothing of the prior conduct of the attorney, and looking only at the single remark, a matter which might well be unnoticed, and yet if all the conduct of the attorney was known the duty of interference and punishment might be clear. We make these suggestions not as intimating that such has been the prior conduct of the attorney in this case, for we neither know nor have heard anything outside of this single matter which reflects at all upon him. We do it simply to indicate that the wisdom or necessity of the court's action is not always disclosed by the single matter apparent in the record, and that therefore in a matter like this, involving personal conduct toward the court, a large regard must be paid to its discretion. If the language or conduct of the attorney is insulting or disrespectful, and in the presence, real or constructive, of the court, and during the pendency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt. See generally on the subject of contempt, 5th ed., 2 Bishop on Crim. Law, ch. 12, sect. 242, and following, and cases cited: 4 Blackstone 283; Commonwealth *v.* Dandridge, 2 Va. Cases 408. We remark, finally, that while from the very nature of things the power of a court to punish for contempt is a vast power and one which in the hands of a corrupt or unworthy judge may be used tyrannically and unjustly, yet protection to individuals lies in the publicity of all judicial proceedings and the appeal which may be

made to the legislature for proceedings against any judge who proves himself unworthy of the power intrusted to him.

The conclusion then to which we have come is that the order of the district judge must be affirmed. It perhaps should be added, that in the long answer made by the appellant to the order to show cause why he should not be punished, he tenders no apology and expresses no regret for the language used, but insists upon his right to use it.

Supreme Court of Nebraska.

THE CITY OF OMAHA v. ELLEN OLMSTEAD.

Municipal corporations charged by statute or by charters accepted by them with the care of streets are liable for injuries caused by defective pavements.

The mere interest of a resident or taxpayer of a city is not, under ordinary circumstances, sufficient to disqualify him as a juror in a case where the city is a party.

ELLEN OLMSTEAD, as plaintiff in the court below, brought suit to recover damages for injuries alleged to have been sustained by her in stepping into a hole in a sidewalk, on the north side of Douglas street, between Ninth and Tenth streets, in the city of Omaha.

All material allegations of the petition were denied by the answers. And it was further alleged that any injury received by plaintiff was occasioned by reason of her own carelessness. The time of the accident, as alleged, was about 8 o'clock in the evening of December 1st 1873.

A trial was had at the February term 1876, at which a verdict was returned for the plaintiff, fixing her damages at five thousand dollars, which verdict was set aside and a new trial granted on the ground that the evidence was insufficient to sustain it.

The case again came on for trial at the October term of the court, before Hon. S. B. POUND, judge, and on the trial in the court below Ferdinand Streitz was regularly called as a juror, and in response to questions put by plaintiff's attorney, made answers showing that he was a duly qualified juror in all other respects, but that he was a resident and taxpayer of the city of Omaha—whereupon plaintiff's attorney challenged said juror for cause, in that he was a taxpayer in the city of Omaha, and hence an interested party; which challenge the court sustained, and the juror was excused, to which defendant duly excepted.

Several other jurors were duly called, examined, challenged by the defendant and excused in like manner and for the same cause. A verdict was returned by the jury for the plaintiff, fixing her damages at $5500. A motion for a new trial was duly made, which was overruled and a judgment entered upon the verdict; to reverse which judgment the defendant in the court below now prosecutes its petition in error.

The question raised was: Is a resident taxpayer of a municipal corporation disqualified thereby from sitting upon a jury in which the city is a party?

The opinion of the court was delivered by

MAXWELL, J.—The plaintiff in error is organized as a city under the provisions of "An Act to incorporate cities of the first class." Sect. 15 of the act gives to the mayor and council the care, management and control of the city, its property and finances. The twenty-fourth subdivision of sect. 15 grants the power to care for and control, to name and rename streets, avenues, parks, and squares within the city, to provide for the opening and vacating of streets, avenues and alleys within the city, under such restrictions and regulations as may be provided by law.

Sect. 41 provides that the council shall have power to open, extend, widen, grade, pave, or otherwise improve and keep in good repair or cause the same to be done in any manner they may deem proper, any street, avenue or alley within the limits of the city, and may also construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material and in such manner as they may deem proper and necessary, and to defray the cost and expense of such improvement on any of them, the mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to and abutting upon the street, avenue, alley or sidewalk thus graded, paved, extended, constructed or otherwise improved or repaired.

Sect. 49 provides that the council shall have power to provide for keeping sidewalks clean and free from all obstructions and accumulations, and may provide for the assessment and collection of taxes on unoccupied real estate, and for the sale and conveyance thereof to pay the expenses of keeping the sidewalks adjacent to such real estate clear and free from obstructions and accumulations as herein provided.

By an act of the legislature approved November 4th 1858, the city of Omaha was incorporated under a special charter which conferred certain benefits and privileges upon the city. On the 8th day of February 1869, an act to incorporate cities of the first class became a law. The first section provides that all cities within this state having three thousand legal voters shall be deemed cities of the first class.

Sect. 64 provides that all rights and property of every description which were vested in any municipal corporation, under its former organization, shall be deemed and held to be vested in the same municipal corporation under the organization made by this act. It will not be denied that an act providing for the incorporation of a city must be accepted as a whole, and that the city in accepting the benefits derived therefrom must perform the duties required by law.

The corporate franchise is a valuable privilege, and is a sufficient consideration for the duties which the law imposes. The state grants to the municipality a portion of its sovereign authority, in greater powers of self-government than are given to *quasi* corporations, in increased facilities for the acquisition and control of corporate property, and in special authority over and control of the streets, and their adaptation to the wants and convenience of the citizens of the municipality. The acceptance of these privileges is considered as raising an implied promise on the part of the city to perform its corporate duties, and this implied agreement made with the sovereign power enures to the benefit of every individual interested in the proper performance of such duties: Cooley's Con. Lim. 248; *West* v. *Brockport*, 16 N. Y. 161; *Pittsburgh* v. *Grier*, 22 Penna. St. 54; *Browning* v. *Springfield*, 17 Ill. 143; *Weightman* v. *Wash*, 1 Black 41; 2 Black 418 and 590. The city has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition. Under these circumstances the city is liable for its failure to perform its duty.

In *Detroit* v. *Blakely*, 21 Mich., it was held (COOLEY, J., dissenting) that the city was not liable. The court say: "In the case of *Eastman* v. *Meredith*, 36 N. H. 248, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature which they have received upon conditions and which they hold by the same indefeasible right as individuals. But American municipalities hold their functions merely as governing agencies."

While it is true that in particular instances property and valuable franchises of a profitable nature were conferred upon municipal corporations as a condition for the performance of certain acts, yet it will not be contended that all or any considerable proportion of such corporations were thus endowed. Nor will it be claimed that liability for neglect of duty was restricted to corporations thus benefited. I think it will be found on examination that, as a rule, as valuable privileges and benefits are conferred by our laws providing for the incorporation of cities as were conferred by ancient charters.

In selecting jurors the object of the law is to secure fair, unbiassed persons, and it is the duty of the court, when objection is made, to see that such persons only are permitted to sit on a jury. But the mere interest of a taxpayer and resident of the city is not of itself, under ordinary circumstances, sufficient to disqualify him from acting as a juror in a case in which the city is interested. In this case both parties objected to residents of Omaha as jurors, and the objections were sustained by the court. The plaintiff therefore is not in a position to insist on the objection. A fair jury appears to have been selected, and the questions of fact fairly submitted to them, and we see no sufficient ground to disturb their finding. The judgment of the District Court is therefore affirmed.

RECENT ENGLISH DECISIONS.

High Court of Justice, Queen's Bench Division.

THE BUENOS AYRES AND ENSENADA PORT RAILWAY CO. v. THE NORTHERN RAILWAY CO. OF BUENOS AYRES.

The claim stated that plaintiffs and defendants were limited companies with registered offices in London: and that the action was brought for the rent of a railway station in Buenos Ayres, and for part of the cost of constructing lines of railway and approaches to the station. The statement of defence was that both plaintiff and defendant were domiciled in Buenos Ayres and carried on business there; that the premises in question were constructed on land which was the property of the republic of Buenos Ayres, and that plaintiffs and defendants were joint concessionaires under the republic of certain easements appurtenant thereto; that the construction of the premises was directed by the government of Buenos Ayres, which by its laws had powers of adjusting all rights arising out of such matter; that the contract, if any, as to the cost of construction was made at Buenos Ayres and was subject to the law of the place of contract, and that the republic had assumed jurisdiction over the plaintiffs' claim. *Held*, on demurrer that the defence was not good either on the ground of venue or of the comity of nations, as both parties were within the jurisdiction of the court and the facts alleged did not show that the jurisdiction of the Argentine republic over the claim was exclusive.

DEMURRER to the first six paragraphs of the statement of defence, which are fully set out in the judgment of the court.

Thrupp, for the plaintiff, cited *Mostyn* v. *Fabrigas*, 1 Sm. Lead. Cas., 5th ed., p. 607, and distinguished *Whitaker* v. *Forbes*, 1 Com. Pleas Div. 51.

Benjamin, contrà.

February 2d, the opinion of the court was delivered by

MELLOR, J.—By the statement of claim the plaintiffs, who are a limited company, having their registered office at 8 Union court, Broad street, in the city of London, sue the defendants, whose registered office is at No. 40, Finsbury Circus, in the city of London, for certain rents, maintenance, and a certain sum for the defendants' share in the construction of certain lines of railway, buildings, premises, and approaches to the central station in the city of Buenos Ayres, which the defendants were, in January 1873, let into the beneficial use and occupation of, on the terms that they should pay to the plaintiffs' company annually the rent and maintenance for, and of the said station, lines of railway, buildings and premises, and the rent for the said approach usual in similar cases, and that the defendants have occupied and use the same and the said approach since January 1873. To this the defendants, in the first six paragraphs of their statement of defence, plead that the plaintiffs' and defendants' companies are respectively domiciled in the Argentine republic, and carrying on their business there; that the central station mentioned in the plaintiffs' statement is constructed on land which is the property of the said republic; and that the plaintiffs and defendants are joint concessionaires under the said republic of certain easements appurtenant thereto, the rights of the plaintiffs not being in any way superior to those of the defendants, who further allege that the construction of the said central station was directed by the government of the said republic, and was for the benefit and convenience of the citizens of the said city of Buenos Ayres, and by the express provision of the laws of the republic; that powers of adjusting all rights arising out of the said construction properly applicable to the claim of the plaintiffs are vested in the government, and that any express or implied contract which can be proved to exist between the plaintiffs and the defendants with respect to the distribution of the cost of the construction

was made at Buenos Ayres, and is subject to the law of the place of contract. It then alleges that the republic has assumed jurisdiction over the claim of the plaintiffs. The defendants then submit that as the claim relates to immovable property, situate in a foreign country, the High Court of Justice has not jurisdiction over the same, and that to assume it would be a violation of the comity of nations, and that the contract having been made at Buenos Ayres, it cannot be conveniently investigated before the High Court. These are the substantial allegations upon which this portion of the statement of defence is founded, and by which the defendants seek to oust the jurisdiction of this court to entertain the claim.

Mr. *Benjamin* disclaimed any intention of arguing the case on any technical ground of venue. He rested his contention on higher grounds of policy and convenience and comity of nations. In looking carefully into the allegations made in the first six paragraphs of the statement of defence, I cannot find any allegation which claims or asserts exclusive jurisdiction in the courts of the Argentine republic to entertain this matter; and, although suggestions are made and hints given, there is no specific allegation which can be fairly so interpreted.

It seems to me that, consistently with all these allegations, the plaintiffs are entitled to sue the defendants in this country in respect of the matters alleged in the claim. Both plaintiffs and defendants are in England, although they may be, as alleged, domiciled in the Argentine republic; they are not aliens, and there is nothing stated as to the law of the republic or the contract of the parties which is inconsistent with the power to sue in England. Both parties to the action are within the jurisdiction of the courts of this country, and the action, as far as procedure is concerned, has been properly initiated; and, although it is alleged that, by the express provision of the laws of the republic, powers of adjusting all rights arising out of the said construction properly applicable to the claim of the plaintiffs are vested in the government, that does not show that a contract by which a money compensation is agreed to be paid by the defendants to the plaintiffs for the beneficial use by the defendants of the plaintiffs' construction, may not be enforced before another forum. In short, I can find no allegation which asserts that jurisdiction over the subject-matter of the claim is, either by law or contract of the parties, vested exclusively in the courts of the

Argentine republic. When the allegations contained in the statement of defence are carefully analyzed, they amount to this only: that the contract was made in a foreign country, and that it relates to the use of property in such foreign country in which both parties have a domicile, and cannot be sued upon in this country, although both parties are within the jurisdiction of this court. The alleged convenience of one tribunal over another for the investigation of the claim is beside the question of jurisdiction; and as to the allegation that to entertain the claim in this country would be a violation of the comity of nations, or, as was argued by Mr. *Benjamin*, be disrespectful to the Argentine republic, that is in my opinion an assertion without any authority, and I cannot regard it. Lastly, he contended that, in deciding upon this question, we are dealing with an act of state. I confess myself unable to follow or see the effect of that argument, or how it arises upon the facts as alleged. It is true that the statement of defence asserts that the government of the Argentine republie has assumed jurisdiction over the plaintiffs' claim. I can see in that fact no act of state in the sense contended for by Mr. *Benjamin*, and it appears to me difficult to apprehend the effect of that allegation. A statement of defence which is intended by way of plea to the jurisdiction of the courts of this country, must be precise and clear, which is certainly not the case with the allegation in question. I cannot, carefully reading the allegation in the statement of defence, find any obstacle to my giving judgment in favor of the demurrer.

Judgment for the plaintiffs.

Rigidly as the rule in regard to local actions has been enforced in England at all times, it would have been useless in the present case to have relied upon it, since the claim grew out of contract and was therefore of a transitory character. While referring the reader to the note on *Mostyn* v. *Fabrigas*, Hare & Wallace's edition of Smith's Leading Cases, for a more elaborate discussion of the subject of local and transitory actions than the limits of a note here will permit, it may be not altogether useless to call his attention briefly to the rule, the reason for it and to some of the recent cases.

The old rule of the common law was that "injuries to real estate are local and must be redressed by an action in the county where the land is situated." So where the obligation arises in respect to the *estate* and not to the person, the action to enforce the obligation is local. Thus an action of covenant by the assignee of the reversion against the lessor, or *vice versa*, upon an express covenant contained in the lease, is transitory by the operation of 32 Henry VIII., ch. 34, 577; while debt, by the assignee or devisee of the lessor against the lessee, which is founded upon privity of estate, is a local action: 1 Chitty on Pleadings 301. See *Clark* v. *Scudder*, 6 Gray (Mass.) 123, where an action

by the assignee of the covenantee against the covenantor on a covenant respecting land was held to be local, the action depending on the privity of estate and not of contract.

The reason of the adoption of this rule arose out of the constitution of the old jury, who were but witnesses to prove and disprove the allegations of the pleadings. It was necessary that actions should be brought in such places that those familiar with the necessary evidence should be able to testify; and as the sheriff must summon the jury from the county where the action was laid in the declaration, it was essential while the jury were the witnesses for, and not the judges of, the evidence, to lay the venue truly. The inconvenience and evasion of justice which followed this rule caused it to be gradually relaxed, under the subtle device of a *videlicet*, until in most cases the form only of the old rule was observed while the spirit had wholly departed. Those cases in which the rigor of former times had not been relaxed in this respect became known as local actions and may be classified as those cases in which an injury is done to land (and through the possession or ownership of it, to the plaintiff), and the cases already referred to in which a duty is owed in respect to land held or owned by the defendant. The latter division of this class has already been noticed. The law is to this day the same in England and in most of the United States. In *Whitaker* v. *Forbes*, Law Rep. 10 C. P. 583; s. c. affirmed on appeal, 1 C. P. D. 51, the action was debt brought in the Common Pleas of England, for arrears of a rent-charge upon lands in Australia, prior to the operation of the new Judicature Act (which provided that in the future there should be no distinction between local and personal actions as regards venue.) It was held both in the Common Pleas and Court of Appeal that the venue was local and that the action therefore could not be maintained in England. CAIRNS, L. C., while regretting the anomalous rule by which, though both parties were in England, and perhaps never out of it, the action could not be maintained, felt himself bound, as did MARSHALL, C. J., in *Livingstone* v. *Jefferson*, *post*, by the authority of the decisions of *Pine* v. *Countess of Leicester*, Hob. 37; *Thursby* v. *Plant*, 1 Notes to Wm. Saund. 306–308. There was no authority for the proposition that the rule was inapplicable where the land lay out of England. BRAMWELL, B., in the same case, referred to *Livingstone* v. *Jefferson*, *post*, "where the law on this subject seems to have been ably summarized by MARSHALL, C. J."

As regards the cases which fall under the former division, *i. e.*, injuries to real estate, there has been some diversity of opinion both in England and in this country. In the case of *Mostyn* v. *Fabrigas*, *supra*, s. c. Cowper 180, though the question there raised a different point, since the injury was admittedly personal, MANSFIELD, C. J., referred to two cases in which, as he said, "the very gist of the action was local," and in which the objection was overruled. "I think it was an action brought against Captain Gambier, who, by order of Admiral Boscawen, had pulled down the houses of some sutlers who supplied the navy and sailors with spirituous liquors. * * * The objection was taken to the count for pulling down the houses. On the other side they produced, from a manuscript note, a case before Lord Chief Justice EYRE, where he overruled the objection, and I overruled the objection upon this principle, viz., that the reparation here was personal and for damages, and that otherwise there would be a failure of justice. I quoted a case of injury of that sort in the East Indies, where, even in the court of equity, Lord HARDWICKE had directed satisfaction to be made in damages. * * * I re-

collect another cause that came on before me, which was the case of Admiral Palliser. There the very gist of the action was local. It was for destroying fishing-huts upon the Labrador coast. The cause went on a great way. They would have stopped it short at once if they could have made such objection, but it was not made. Whatever injury had been done there by any of the king's officers, would have been altogether without redress if the objection of locality would have held."

According to the principle that English law in force prior to the revolution is the law of this country in the absence of legislation on the subject, these cases would seem to be of greater authority here against the rule than the later decisions made in England, in which the above cases were disapproved of. It is somewhat singular that in the cases which have arisen in this country this argument seems not to have been employed. *Doulson* v. *Mathews* (1792), 4 Term Rep. 503, is the leading case on this subject in favor of the rule. The action was trespass for entering the plaintiff's dwelling-house in Canada, and expelling him. Lord KENYON, at the trial, was of opinion that the action was local and accordingly nonsuited the plaintiff. *Erskine* subsequently moved to set aside the nonsuit, observing that the action was not to recover land, but merely a personal action to recover satisfaction in damages. He then referred to the cases mentioned by Lord MANSFIELD. Lord KENYON, C. J., said that the contrary had been held in a case in the Common Pleas, that where the action is on the realty, it is local. BULLER, J.: "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions. It is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here, which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local. Rule refused."

Warren v. *Webb*, 1 Taunt. 379, was case by the owner of a house against the adjoining owner for neglecting to repair the latter's spout, whereby rain soaked through into, and injured the plaintiff's house in Surrey, *to wit, at Westminster, in the county of Middlesex.* The action was held not maintainable on the ground of variance between the declaration and evidence. See *Simmons* v. *Lillystone, post,* in which it is said that this case is difficult to understand.

In *Richardson* v. *Locklin*, 6 B. & S. 775, the action was case for the wrongful diversion of a public footway whereby the plaintiff lawfully passing along the footway was injured. The venue was in Surrey; the footway was in Essex. The action was held local. "In substance," said BLACKBURN, J., it is an action for injury arising from a nuisance on real property, which is clearly a local action."

Jefferies v. *Duncombe*, 11 East 227, is an instance of the attempt of the court to distinguish by metaphysical evasions, where justice would otherwise be denied. As remarked by EMERY, J., in *Titus* v. *Frankfort*, 15 Maine 98, it "serves to show that there continued down to the time when it was decided in 1809, a disposition to carp at the mode of presenting to the court a case of consequential injury to the person, when the cause of action arose in a particular place, though immaterial, and the readiness with which the court, in pursuit of justice, discountenanced such objections." In *Jefferies* v. *Duncombe* (where the action was case for keeping a lighted lamp in front of the plaintiff's house, in order to throw upon him the imputation of being the keeper of a bawdy-house), the cause of action could not have arisen out of the county in which the premises lay, for the point of the

offence lay in the designation of the place where the plaintiff resided, and opposite to which the lamp was hung. It is true that the action was not for injury to the realty, but the possession of the realty by the plaintiff was certainly a *causa sine qua non* without which the particular injury could not have been inflicted. The action was held transitory. See *The Mersey and Irwell Navigation Company* v. *Douglas*, 2 East 499.

Simmons v. *Lillystone*, 8 Exch. Rep. (Wels., Hurl. & Gor.) 431, was case. The declaration laid the venue in London, and stated that the plaintiff owned real estate in Kent, abutting on the Thames, to which river he ought to have from his adjoining premises free access, and to the navigation of which he was entitled; yet the defendant had obstructed an adjoining portion of the said river, whereby the plaintiff received special damage. A verdict was entered for the plaintiff, with leave reserved to the defendant to move to enter it for him. The rule was discharged, the court holding that there was no allegation in the declaration which made it necessary for the plaintiff to prove that the obstruction took place in the city of London.

The rule is in force in the federal courts. *Livingstone* v. *Jefferson*, 1 Brockenbrough 203, was trespass, *q. c. f.*, brought in the Circuit Court of the United States for Virginia, for a trespass alleged to have been committed by the defendant, ex-President Jefferson, upon real estate in Louisiana. The venue was laid in New Orleans, "to wit, at Richmond, in the county of Henrico, and district of Virginia." MARSHALL, C. J., doubted the wisdom of the rule, but felt bound by the precedents.

"This is known to be a fiction. Like an ejectment, it is the creature of the courts, and is moulded to the purposes of justice, according to the views which its inventors have taken of its capacity to effect those purposes. It is not, however, of undefinable extent. It has not absolutely prostrated all distinctions of place, but has certain limits prescribed to it, founded in reasoning satisfactory to those who have gradually fixed those limits. It may well be doubted whether at this day they might be changed by a judge not perfectly satisfied with their extent.

"This fiction is so far protected by its inventors that the averment is not traversable for the purpose of defeating an action it was invented to sustain, but it is traversable whenever such traverse may be essential to the merits of the cause. It is always traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction.

"In the case at bar, it is traversed for that purpose; and the question is whether this is a case in which such traverse is sustainable, or in other words, whether the courts have so far extended their fiction as, by its aid, to take cognisance of actions of trespass on lands not lying within those limits which bound their process.

"They have, without legislative aid, applied this fiction to all personal torts, wherever the wrong may have been committed, and to all contracts wherever executed. To this general rule contracts respecting lands form no exception. It is admitted that on a contract respecting lands an action is sustainable wherever the defendant may be found. Yet in such a case every difficulty may occur that presents itself in an action of trespass. An investigation of title may become necessary; a question of boundary may arise, and a survey may be essential to the full merits of the cause. Yet these difficulties have not prevailed against the jurisdiction of the court. They are countervailed and more than countervailed, by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy, in a case where a

person who has done the wrong, and who ought to make the compensation, is within the power of the court.

"That this consideration should lose its influence where the action pursues a thing not in the reach of the court is of inevitable necessity; but for the loss of its influence where the remedy is against the person, and is within the power of the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment.

"If, however, this technical reason is firmly established, if all other judges respect it, I cannot venture to disregard it.

"The distinction taken is that actions are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local where their cause is, in its nature, necessarily local.

"If this distinction is established; if judges have determined to carry their innovation on the old rule no further; if, under circumstances which have not changed, they have determined this to be the limit of their fiction for a long course of time, it would require a hardihood which, sitting in this place, I cannot venture on to pass this limit."

But each district of the federal courts is considered as a county, and it is no objection to the jurisdiction of a federal court that the action is local, provided the premises are situated in the district in which the action is brought: *Rundle* v. *The Delaware and Raritan Canal*, 1 Wallace, Jr. 275. The action here was case brought in the New Jersey district for the wrongful diversion of water in New Jersey, whereby the plaintiff's mills in Pennsylvania were injured. GRIER, J.: "Formerly where a nuisance was done in one county to lands lying in another, an *assisa in confinio comitatus* lay at common law (Fitz. Nat. Brev.) 'And albeit,' says Lord COKE, 'the counties do not adjoin, but there be twenty counties mean between them, yet the assize in *confinio comitatus* doth lie, and the justices shall sit between the said counties:' Co. Litt. 154 a. And if a declaration contained matter lying in two counties, it was tried by both counties on a *venire* directed to the sheriff of both counties, who summoned six of each county. But such proceedings have long been obsolete, and the doctrine established in *Bulwer's Case*, 7 Rep. 2 a, has ever since been held as law both in England and this country; 'that where the action is founded on two things done in several counties, and both are material and traversable, and the one without the other doth not maintain the action, then the plaintiff may bring his action in which of the counties he will.' Thus if a man does not repair a well in Essex which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 Hen. IV., 8, or I may bring it in Middlesex, for there I have the damage, as is proved by 11 R. I. *Action sur the case* 36; *Gowen* v. *Husse*, 1 Dyer 38 a; *Scott* v. *Brest*, 2 Term R. 241; *Mayor* v. *Cole*, 7 Id. 583; *Rex* v. *Burdett*, 4 B. & Ald. 95; *Oliphant* v. *Smith*, 3 Penna. R. 180. His honor held that the venue was well laid in New Jersey, "which as regards this (the Circuit Court of the United States) forms one county."

Worster v. *Winnipiseogee Lake Co.*, 5 Foster (N. H.) 525, was case for the overflow of the plaintiff's land. GILCHRIST, C. J., there said:—"Actions, though merely for damages occasioned by injuries to real property, are local; as trespass or case for negligence to houses, lands, watercourses, ways, or other real property: 1 Chitty's Pl. 298; Gould's Pl. 115, 116. * * * It is a general rule that *case* for an injury to land is a local action, and that the suit should be brought in the county where the cause of action arose."

Watts v. *Kinney*, 23 Wend. (N. Y.)

484, was an action on the case for diverting the waters of a stream and obstructing a right of way at Newark, in New Jersey. The declaration described the subject-matter as "situate, lying, and being in the township of Newark, in the state of New Jersey, to wit, at the city and county of New York." On error to the Superior Court of New York, NELSON, C. J., said:—"It appears to be conclusively settled, that *an action on the case* for diverting a watercourse, so far savors of the realty as to be classed with local actions, and must be tried in the county where the injury happens. It stands on a footing in this respect with real and mixed actions, such as trespass *quare clausum fregit*, ejectment, waste, &c., where if the lands lie in a foreign country they cannot be tried here."

On error brought to the Court of Errors, reported in 6 Hill 82, WALWORTH, C., said:—"The cause of action stated in the declaration is unquestionably local, not only by the provisions of the Revised Statutes, but also by the settled rule of the common law."

In *Roach* v. *Damron*, 2 Humph. (Tenn.) 425, GREEN, J., says: "This is an action of trespass for breaking and entering the plaintiff's close. In its nature it is a local action, the court of the county in which the land is situated alone having jurisdiction." In *Champion* v. *Doughty*, 3 Harrison (N. J.) 3, the court says: "This is an action of trespass *q. c. f.* * * * The action of trespass for breaking a close is a local action, and must not only be brought in the county where the land lies, but it must appear on the record that the trespass was committed in the county." This was trespass *q. c. f.*, brought in Atlantic county, the declaration stating a continuing trespass in that county from 1832, at which time the county was not in existence.

In Pennsylvania the question was settled in favor of the maintenance of the rule in *Prevost* v. *Gorrell*, 3 Weekly Notes 366 (Supreme Court of Penna.), affirming a decision of the Court of Common Pleas of Philadelphia county (2 Id. 440). HARE, P. J., in delivering the opinion of the court below, said:—"The declaration in this case avers that 'the plaintiff before and at the time of committing the grievances thereinafter mentioned was and still is possessed of certain mines of coal, situate in the county of Columbia, to wit: at the county of Philadelphia aforesaid; and that the defendant is possessed of certain lands and mines of coal adjoining the plaintiff's colliery;' and then goes on to aver that the defendant 'hath, by his wrongful acts and omissions in and upon the premises so possessed by him, caused water, filth and rubbish to flow and enter therefrom in and upon the plaintiff's premises, whereby the plaintiff has been greatly damaged and hindered.' Such a cause of action is clearly local. It is for an injury to the plaintiff in his capacity as tenant of real estate, through acts done by the defendant on other real estate possessed by him. This position was conceded during the argument, but it was contended that the distinction between local and transitory actions is merely arbitrary and technical, and should be disregarded as obsolete.

"It is no doubt true that the motive for requiring that issues should be tried in the neighborhood where the controverted facts are alleged to have happened, was that the jurors might be acquainted with the subject-matter, and able to correct or supplement the testimony of the witnesses by their own knowledge; and that a juror is now regarded as a judge who must draw his conclusions from the evidence. Hence an argument that the rule is a relic of a state of things which has passed away, and should have no place in our present system of jurisprudence.

"A careful consideration may lead to a different inference. A rule should not be abrogated because some of the reasons for it have ceased, if there are other and sufficient reasons for its continuance. Where the question at issue is as to the title, boundaries, situation or condition of real estate, persons who reside in the neighborhood must necessarily be called as witnesses, and the cause should obviously be tried at the place where they can be brought into court with the least inconvenience to themselves and cost to the parties. Nor is this all. Although the jurors must render their verdict according to the evidence, and not from their own knowledge, it is still desirable that they should have a general acquaintance with such matters as are to be laid before them, and be able to understand the technical words and terms of art used by the witnesses. Moreover, the case may be one that requires a view, and it would obviously be harsh and impracticable to take the jury away from their homes to inspect premises lying in another county, and perchance at the other end of the state. It was accordingly declared, by ROGERS, J., in *Oliphant* v. *Smith*, that 'in general, whenever a view may be necessary, the action must be brought in a county where the injury arises. In the language of Comyn, it is an action founded on a local thing and can be the better tried because the witnesses reside there, and the alleged nuisance may be inspected by the jury. It is a local question because of the defendant's possession within the body of the county. The only exception is the erection of a nuisance in one county to the injury of lands in another. Then the action may be brought in either.'"

In some of the states, however, a different rule prevails. *Titus* v. *Frankfort*, 15 Maine 98, was case in Penobscot county against the inhabitants of Frankfort, in Waldo county, for damages sustained from defects in a bridge, part of the highway in Frankfort. "It is true," said EMERY, J., "that highways within a town must be local. * * * The neglect of the defendants to do their duty is of a transitory character, a nonfeasance. It constitutes a personal action *in delicto*, and is transitory. See Arch. Pleadings 62, 87; Co. Litt. 282; 1 Wilson 336; *Grimstone* v. *Molineaux*, Hobart 251; Espinasse on Penal Statutes 88."

The distinction between this case and those of *Richardson* v. *Locklin*, 6 B. & S. 775, *ante*, and *Oliphant* v. *Smith*, 1 Pen. & Watts 180, must be sought for, if it exist at all, in the difference between faults of omission and of commission, a distinction fitter for a schoolman than a judge.

In *Black* v. *Black and Hunter*, 27 Ga. 47, it was decided that land held by a partnership was personal property and the objection on the ground of locality of action did not therefore prevail. See *Rogers* v. *Woodbury*, 15 Pick. (Mass.) 157, and *Hunt and Wife* v. *Town of Pownal*, 9 Verm. 417.

In Ohio the rule has been repudiated as inapplicable to the conditions of that state: *Genin* v. *Grier*, 10 Ohio 209. Action by reversioner against the assignee of a lease of real estate brought in Monroe county. Plea to the jurisdiction that the premises were situated in Guernsey county and out of the jurisdiction of the court. The action was held to be transitory. As this court is the only one which clearly points out the inapplicability of the English rule in the county courts of our states, the jurisdiction of which to compel an appearance is usually limited to the county itself, the opinion is given at some length. HITCHCOCK, J., said: "According to the rules of the English law the action is local, and cannot be prosecuted except in the county where the land lies. * * * From this it appears that the courts of England did not hesitate to change the rule of law when

it became necessary to subserve the ends of justice. In England, no inconvenience results from keeping up the distinction between local and transitory actions, because, as it is well known, the appearance of a defendant can as effectually be compelled in one county as another. * * * But, if in this state we were to adhere to the distinction, there must in many cases be an entire failure of justice. * * * Whether this distinction, between local and transitory actions shall be adhered to, must depend upon our own peculiar system of jurisprudence. * * * So far as it respects an action for the recovery of the possession of real property there can be no doubt; such action must be considered as local, and must be tried and determined in the county where land is situated. The only action of this description known to our practice is the action of ejectment. * * * Where then is the appropriate county? Is it the county in which the cause of action accrued? If so, then there must be a failure of justice, unless the defendant happen to be within that county, for without the service of process the court cannot take jurisdiction; and process, except in some specified cases, cannot reach beyond the county in which it is issued. If the action be to recover damages for a trespass upon real property, is the appropriate county the one in which the land trespassed upon lies? If so, the trespasser has nothing to do but to pass over a county line, and he escapes with impunity. And so with respect to an action like the one now before the court. If it be held to be local, the assignee of a term entirely exonerates himself from the payment of rent by fleeing or removing into another county. In all cases under our system it would seem, where the action is personal and for the recovery of a debt or damages merely, unless otherwise expressly provided by statute, the appropriate county in which to exercise jurisdiction is the county in which a defendant may be found, so that process can be served on him. It is not material that he should be a resident of the particular county; it is sufficient if he be found in it, so that the process can be legally served. By such service the court from which the process was issued obtains jurisdiction of the person of the defendant, and having jurisdiction of the subject-matter of the controversy can proceed with the case. * * * Considering all the legislation of the state upon this subject of jurisdiction, we entertain the opinion that it is the person of the defendant which gives a court jurisdiction in a particular case, so far as locality is concerned, and as a defendant cannot be compelled to answer in any other county, except the one in which he is served with process, except in some few specified cases, he must be held to answer there, provided the action be personal and sounds merely in debt or damages; and that such actions must in this state be considered transitory. We are aware that such decision is an innovation upon the subject. * * * It is necessary for the ends of justice, and no serious inconvenience can result from it."

An interesting case was recently decided by the Court of Appeals in England: *The M. Moxham*, 1 P. D. 43; reversed on appeal: Id. 107. The suit was begun by the plaintiff, an English company, against an English ship for negligently injuring a pier in a port of Spain, which pier was the plaintiff's property. It was held that the law of Spain (which held the master and mariners, and not the owners, liable in such a case) governed the case. "Very grave difficulties," says JAMES, L. J., "might have arisen as to the jurisdiction of this court to entertain any action or proceedings whatever with respect to injury done to foreign soil. But the question of jurisdiction has probably been successfully got over by