the Court in *Taylor* vs. *Nichols et al.*, 29 Vt. 104, to the effect that this requirement of the official oath is mere form, and should be regarded as directory merely. The action was on a receipt given by the defendants to the plaintiff as sheriff, and the defence was that the sheriff never gave any legal recognisance as such, and therefore never became legally sheriff. The Court inclined to consider the recognisance itself valid, but held, that whether so or not, as the plaintiff was a good officer *de facto*, and the attachment, therefore, legal between the parties, and as this suit was merely to enforce the attachment for the benefit of the creditor, the action could be maintained. It does not appear from the case that any question arose as to the plaintiff having taken the oath of office, and what was said on this point by the learned judge was merely by way of illustration, and probably without particular examination of the precise point involved in his observation.

The judgment of the County Court is reversed, and judgment rendered for the plaintiff for the damages assessed by the County Court.

In the District Court of the United States for the District of Wisconsin.

THE UNITED STATES *vs.* THE PROPELLER "SUN."

1. A vessel propelled in whole or in part by steam, is not liable to a penalty for transporting goods, wares and merchandise, without inspection of the hull and boilers, under the act of Congress of August 30, 1852. The penalty is alone for transporting passengers.
2. An answer to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts.

Quere.—Can a vessel belonging at the port of Buffalo, where inspectors are located by the act of August 30, 1852, be inspected at the port of Chicago?

The opinion of the Court was delivered by

MILLER, J.—By the information this propeller was seized by the Collector at the port of Milwaukee, on the 6th of October, 1861, for the following causes:

1st. That on the 20th of September, 1861, the propeller did transport goods and passengers from Milwaukee to Goderich, in Canada, without first having complied with an act of Congress, approved July 7, 1838, entitled "an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," and the act of August 30, 1852, entitled "an act to amend an act," &c., in this, that the hull of said propeller had not been inspected pursuant to the provisions of the ninth section of the last act within one year prior to the 20th of September, 1861. For each of said violations a penalty of five hundred dollars is claimed.

2d. That on the 28th of September, 1861, the vessel did transport goods and passengers from the port of Goderich to the port of Milwaukee, without inspection of her boilers, and for each violation of the act a penalty of five hundred dollars is claimed.

Respondent answers, that the vessel was licensed at Buffalo, and was employed in the business of commerce and navigation between the ports of Chicago and Milwaukee, on lake Michigan, and the port of Goderich, in Canada. That the hull and boilers of the vessel were inspected at the port of Chicago, and certificate issued on the 19th of September, 1860, and on the 8th of September, 1861, before the certificate had expired, respondent caused an application to be made to the inspectors at Chicago, for the inspection of the hull and boilers of the propeller; and on the 28th of the same month a second application was made.

At the time of the first application the inspectors were absent from Chicago, and at the time of making the second application the inspectors had not the pumps and necessary machinery for making the inspection, and that one of the inspectors was then absent. The propeller was inspected at Chicago on the 8th of October following, when a certificate was issued by the inspectors; and there are no local inspectors on lakes Huron and Michigan.

To the answer, the District Attorney filed exceptions: That respondent had not fully and distinctly answered the libel, and the matters set forth are immaterial and irrelevant.

Before considering the exceptions, it may be proper to inquire

what the respondent should answer to. The libel is intended to charge that the propeller is liable to a penalty of five hundred dollars, for carrying goods, &c., and a like penalty for carrying passengers from Milwaukee to Goderich, and similar penalties for carrying goods and passengers from Goderich to Milwaukee, without having been first inspected, as required by the acts of July 7, 1838, and August 30, 1852.

The act of July 7, 1838, 5 Statutes, 304, entitled "an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," directs in section 2: "that it shall not be lawful for the owner, master, or captain of any steamboat, or vessel propelled in whole or in part by steam, to transport any goods, wares or merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act; and for each violation of this section the owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, the one-half to the use of the informer, and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any District Court of the United States having jurisdiction of the offence." The act then directs the appointment and duties of inspectors of hulls and boilers of such boats and vessels.

The act approved August 30, 1852, 10 Statutes, 61, is an act to amend the act of July, 1838. The first section directs: "That no license, registry, or enrolment under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which

this is an amendment." The whole object and scope of the last act was to provide for the better security of the lives of passengers, and it provides a full and perfect system for the inspection of the hulls and boilers of vessels propelled in whole or in part by steam, and carrying passengers. By the section of the act above quoted, the penalty prescribed in the second section of the act of July, 1838, is continued as to vessels navigated with passengers on board, without complying with the terms of the act in regard to inspection. The penalty in the act of July, 1838, for transporting goods, wares, and merchandise on vessels not inspected, is not embraced in the act of August, 1852; and by this last act all parts of laws heretofore passed, which are suspended by, or inconsistent with the act, are repealed. That provision in the act of July, 1838, was outside of the object of the act, and in the subsequent act it is entirely omitted. In this respect the two acts are inconsistent, and the provision of the last act must prevail. This is a penal statute, and it must be construed literally. The respondent is not required to answer that part of the libel, of information claiming a penalty for transporting on this propeller, goods, wares, or merchandise, without previous inspection of her hull and boilers.

The exceptions to the answer will have to be allowed.

The answer neither denies nor confesses the charges. The respondent must fully and explicitly answer the several articles of the libel. He must deny the several articles, or confess and avoid them by a proper allegation of facts.

By the answer, the propeller was licensed at the port of Buffalo Creek, on the 5th of April, 1861. There is no allegation that since then she has been transferred to any other port. It is also alleged that her hull and boilers were inspected at the port of Chicago, on the 19th of September, 1860; and that before the certificate expired, and again on the 28th of September, 1861, application was made to the inspectors at Chicago for inspection, which was not done for the reasons stated. It is not alleged that the application was in writing, as the law requires; nor does it appear that the inspectors at Chicago had any official right to

perform the duty. By section 9 of the act of August, 1852, inspectors were directed to be appointed at Buffalo, which was the port where this propeller belonged. The inspectors are to perform the services required of them by the act, within the respective districts for which they shall be appointed; and by the twelfth specification of the section, the Board, when thereto requested, shall inspect steamers belonging to districts where no such Board is established. If this propeller belongs at the port of Buffalo Creek, it is questionable whether a certificate of inspection at the port of Chicago should be adjudged a compliance with the law. But this subject can be more maturely examined hereafter.

THE UNITED STATES *vs.* THE STEAMBOAT "SENECA."

A steamboat employed in transporting passengers between ports in the same State, is not liable to a penalty for not having the hull and boilers inspected under the act of Congress of August 30, 1852, and the District Court has no jurisdiction.

The opinion of the Court was delivered by

MILLER, J.—It is propounded in the information, that at the port of Superior, on Lake Superior, in this District, the Collector of Customs for the Collection District of Michilimackinac, did seize said steamboat and now holds her in his custody within this District, as forfeited to the United States for carrying and transporting goods and passengers between the ports of Superior and Bayfield, on Lake Superior, within this State, without license and the inspection of her hull and boilers required by the Acts of Congress of July 7th, 1838, and August 30th, 1852, and in violation of those acts.

By the information, this steamboat was engaged exclusively in transporting passengers and property between the ports mentioned in the information, which are located on Lake Superior, and within the State of Wisconsin.

It is well settled that the constitutional power of Congress "to

regulate commerce with foreign nations and among the several States," does not embrace the purely internal commerce of a State: *Gibbons* vs. *Ogden*, 9 Wheat. 1; *Brooks* vs. *The Steamboat Peytona*, 2 Law Monthly, 518; *Whitaker* vs. *The Steamboat Fred. Lawrence*, Id. 520; *The New Jersey Steam Navigation Company* vs. *The Merchants' Bank*, 6 Howard, 344; *Allen* vs. *Newbury*, 21 Howard, 244.

The act of Congress of July, 1838, provides that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport goods, &c., or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, without having first obtained from the proper officer a license under existing laws and without the inspection required, under a penalty of five hundred dollars for each violation of the act. And the act of August, 1852, continues this penalty, for transporting or carrying passengers without inspection. The terms of the act embrace the local employment of this steamboat; but the act must be construed according to the constitutional provision as expounded by judicial authority. The steamboat was employed between places within this State. The contract of affreightment with the steamboat Fashion, in *Allen* vs. *Newbury*, was for the transportation of leather on Lake Michigan between ports in this State. The contract with the steamboat Fred. Lawrence, was for a passage on the Mississippi river, between ports in this State. The license required by the act is for carrying on the coasting trade, and the inspection is for the security of the lives of passengers on board of steam vessels. It is evidently an act for the regulation of commerce under the constitution. From the decisions referred to, it is apparent that this Court in Admiralty would not have jurisdiction of this steamboat, while engaged as propounded in the information. And it appears very plainly that jurisdiction cannot be maintained of this information, for the reason that the steamboat is not alleged to be employed in the foreign or coasting trade, but was running between ports and places within the State of Wisconsin; and she was exclusively within and subject to State regulations and control. The District

Court for the State of Missouri, in *The United States* vs. *The Steamboat James Monroe*, and *The United States* vs. *The Steam Ferryboat Pope*, 1 Newbury's Reports, 241 and 256, holds the same opinion.

The information will be dismissed for want of jurisdiction.

In the Supreme Court of Pennsylvania, 1862.

ALEXANDER DEAN AND WIFE *vs.* DANIEL NEGLEY AND STERLEY CUTHBERT.

1. In an issue to try the validity of a will, which was contested on the ground of undue influence, want of mental capacity, coercion, and on other grounds, it appeared that, by the alleged will, the testator gave a trifling sum to his only legitimate child, and then bequeathed the residue of his property to the children of a woman with whom he was alleged to have been living in adulterous intercourse. There was no direct evidence given or offered of want of mental capacity at the time, or of any actual coercion or influence exerted in the testator as respects the testamentary act; but it was proposed to prove the fact of this adulterous intercourse, which was of long continuance, and which had obliged his wife and daughter to abandon his house, and that the alleged adulteress was a woman of vigorous character, and exerted a despotic influence over his actions generally, in connection with the fact that he was suffering from a painful disease, to relieve which he took opiates, as tending to show undue influence generally. *Held*, that the evidence was admissible for this purpose, on the ground that the relation being an unlawful one, the influence which sprang from it must also be unlawful.
2. *Semble*, by LOWRIE, C. J., that this would be a presumption of law.

Error to the Court of Common Pleas of Allegheny county.

This was an issue of *devisavit vel non*, directed by the Register's Court of Allegheny County, and tried in the Court below, to determine the validity of a paper purporting to be the last will and testament of one William Johnston, who died on the 4th of December, 1860. By this paper, which bore date the 23d day of December, 1857, the alleged testator, after providing for the payment of debts and legacies in the usual way, and for the erection of a monument to his memory, bequeathed to his only child and daughter, Elizabeth, then Elizabeth Dean, (plaintiff in error,) the sum of $20. He then gave and bequeathed the residue of his

estate to Sarah Bell Bolton, Eliza Bolton, Olivia Bolton, Josephine Bolton, and Annie Bolton, daughters of John and Rosana Bolton, in the manner therein set forth, in token of his friendship for them. And he appointed the defendants in error, Daniel Negley and Sterley Cuthbert, to be his executors.

The paper, on its face, was duly executed as a will. To its admission as such, a *caveat* was filed by the plaintiffs in error on the following grounds:

That the testator was of non-sane mind and memory at the time of the execution of the alleged will; that it was procured by fraud, coercion, or undue influence; that, at the time of executing it he labored under a monomania, weakness, and delusion in respect to his heir-at-law, which had an undue influence on his judgment; and that he was so importuned by parties having an interest in depriving his relatives of his estate, as to amount to coercion.

On the trial of the issue, the executors, in support of the will, produced the subscribing witnesses, who testified to its due execution, and very distinctly to the sanity of the testator at the time.

On behalf of the contestants, after the proof of the marriage of the testator to Mrs. Jerusha Butler, a widow, the mother of Mrs. Elizabeth Dean, the testator, only legitimate child and heir, Dr. A. H. Gross, the attending physician, was called as a witness, and testified that the testator had for ten years been affected by cancer of the eye and nose, of which disease he at last died. The disease had been, as usual, treated with opiates. He could not rest without them. The habitual use of opium is always detrimental to the mind. The use of opium was commenced in the latter part of 1857—at first in moderate doses, and afterwards constantly.

The testator boarded for some time with Mrs. Bolton. She nursed him, and undoubtedly had a great influence over him when nursing him. "She was," said the witness, "a vigorous, *managing* kind of woman, such as could manage a man pretty well. A person under the influence of opiates and a painful disease is more liable to be subject to the influence of his nurse.

"I knew Johnston well; I don't think man or woman could control him past his pleasure when he was not under the influence of opium or suffering. When not under pain or opiates, he had a decided will of his own; when under opiates or pain, he was more liable to influences. In 1857 and 1858, his use of opiates was very moderate. When not under the paroxysm of pain or use of opiates, in 1858 or 1859, he was of as sound mind as any man. I never knew of any defect of mind till lately, in 1860.

"Mrs. Bolton was a good nurse; Johnston was very well nursed."

The contestant then offered to prove that the testator had been living in an adulterous connection with Mrs. Bolton, the mother of the residuary devisees, for many years; that the connection, which began about sixteen years after his marriage, was so notorious and conducted in such a manner as to compel Mrs. Johnson, with her daughter, (then about fourteen years old,) to leave his house; and that after the separation, his illicit intercourse with Mrs. Bolton continued uninterruptedly till his death.

That the opiates which the testator had been obliged to take on account of his disease, had weakened his mind, and made him more or less subject to the control of those about him, and particularly to that of Mrs. Bolton, in his business transactions and otherwise.

That "Mrs. Bolton was a woman of masculine vigor and understanding, and exercised a despotic influence over Johnston in relation to many of his business transactions, interfering with his contracts where they did not suit her views, and inducing him to annul or alter them according to her pleasure and dictation, and this both before and after the making of the will. That Mrs. Dean, both before and after the making of the will, visited her father, with the expectation of having confidential and private conversation with him, and upon every such occasion Mrs. Bolton, or some member of her family, remained in her room, so that no such intercourse could take place.

"That Mrs. Dean was always anxious and ready to go and nurse her father during his illness, and to reside with him or have him

reside with her, on condition that he would sever his connection with Mrs. Bolton, of which he was fully aware, and had expressed himself in terms of affection for her, but still refused to sever his connection with Mrs. Bolton."

And that the only source and basis of the testator's fortune was the income derived from his wife's estate, which he had saved and invested.

The offer of this evidence was made in connection with the disposition of the will, for the purpose of showing undue influence by Mrs. Bolton in procuring the execution of the will.

To this offer the proponents of the will objected (except so far as it was proposed merely to show the extent of the testator's property, and the condition of his mind from disease and the application of opiates) for the following reasons, viz.: because,

1. The evidence offered did not tend to throw any light on the testamentary capacity of the testator at the time of making his will.

2. That the fact of alleged adultery did not tend to show undue influence by Mrs. Bolton over the testator at the time of making his will.

3. The acts, declaration, or conduct of Mrs. Bolton, she not being interested in law in establishing the will, were not evidence.

4. The offer did not show, or tend to show, undue influence by any one in setting up the will.

The learned judge overruled the offer for the foregoing reasons, and also because the contestants' counsel did not propose to follow it up by testimony tending to show that fraud, deceit, coercion, or other undue influences were actually used by Mrs. Bolton, or that the will was made under such influences.

The contestants, then, in connection with their previous offer, proposed to prove that Mrs. Bolton did, within a few days prior to the date of the will, use undue influence on the mind of the testator, so as to induce him to annul a lease that he had made, and to assert as a reason for so doing, that he was out of his mind at the time of entering into the same.

This additional offer was also overruled by the learned judge,

because it was not proposed to show thereby that her influence was exerted in any way to procure him to make the alleged will, and that it could not be inferred that the will was made under undue influence, from the fact that Mrs. Bolton had great influence with the testator, and used it for other purposes.

The jury having found for the will, these rulings were assigned for error here.

Charles Shaler and *Bruce & Negley*, for plaintiff in error.
Marshall & Brown, for defendants in error.

The opinion of the Court was delivered by

LOWRIE, C. J.—The will of a man who has testamentary capacity cannot be avoided merely because it is unaccountably contrary to the common sense of the country. His will, if not contrary to law, stands for the law of descent of *his* property, whether his reasons for it be good or bad, if they be indeed his own, uninduced by unlawful influence from others. Lawful influence, such as that arising from legitimate or social relations, must be allowed to produce its natural resnlts, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it; and there can be no presumption of its actual unlawful exercise merely from the fact that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary dispositions. Such influences are naturally very unequal, and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and the law cannot criticise and measure them so as to attribute to them their proper effects, no will can be condemned because the existence of such an influence can be proved, and because the will contains in itself proof of its effect. It is only when such influence is unduly exerted over the very act of devising, so as to prevent the will from being truly the act of the testator's, that the law condemns it as a vicious element of the testamentary act; so the law always speaks of the natural influence arising out of legitimate relations. But we should do violence to the morality of the law, and therefore to law itself, if we should apply this rule to unlawful, as well as to lawful

relations; for we should thereby make them both equal in this regard at least, which is contrary to their very nature. If the law always suspects, and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian, and trustee, where such persons seem to go beyond their legitimate functions, and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence over the kind of act that is under investigation. In their legitimate operations those positions of influence are respected; but where apparently used to obtain selfish advantages, they are regarded with deep suspicion; and it would be strange if unlawful relations should be more favorably regarded.

And the voice of the law on this general subject is distinct and emphatic, transmitted through many generations, and embodied in many Latin maxims, of which the following are some: *Nemo commodum capit de injuria sua. Nemo ex proprio dolo consequitur actionem. Frustra legis auxilium petit, qui in legem committit. Pacta, quæ contra bonos mores sunt, nullam vim habent. Ex dolo malo, ex malificio, ex turpi causa, ex pacto illicito, non oritur actio. Ex injuria non oritur jus. Pacta, quæ turpem causam habent, non sunt observanda. In odium spoliatoris, omnia præsumuntur.* All of which may be summed up in one sentence—No one shall derive any profit through the law by the influence of an unlawful act or relation.

The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions, for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relation and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former case it is right because the relation is lawful, and in the latter it may be condemned, together with all its effect, because the relation is unlawful.

It is not inconsistent with this, that it has been decided that the

devise of a wife to her second husband was not affected by the fact that *she* knew she had a husband living at the time of her second marriage, even though the second husband heard of it before her death; for this shows no conscious transgression of law by him in marrying her, and her heirs could not set up her fraud on him as a reason for avoiding her will: 8 Harris, 329.

There can be no doubt that a long-continued relation of adulterous intercourse is a relation of great mutual influence of each over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life or very close observation of persons around us in order to reveal the fact. Our divorce law of 1815 shows its abhorrence of the crime and its influence, by forbidding any one, divorced for adultery, from marrying his or her *particeps criminis* while the injured consort is living, and by disabling a woman thus divorced from devising or conveying her property, if she cohabit with her paramour. And the Canon Law, though it allowed children born before marriage, to be legitimized by a subsequent marriage, refused this privilege to children born of adulterous intercourse, and did not allow even a devise in their favor from the faulty parent.

If, then, there was such a relation between the testator and Mrs. Bolton, at the time of the making of this will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a *presumption of law* of undue influence, but we do not so decide, but leave it as a question of fact merely. We are, therefore, of the opinion that the evidence offered ought to have been received.

Judgment reversed and a new trial awarded.

In the New York Court of Appeals.

BENJAMIN GOULD, RESP., *vs.* THE TOWN OF STERLING, APPEL'T.[1]

By the provisions of a statute, the Supervisor and Commissioners of the town of S. were authorized to borrow a sum of money, not exceeding twenty-five thousand dollars, upon the credit of the town, and to execute therefor, under their official signatures, a bond or bonds. They were to have no power to do any of the acts authorized by the statute until the written assent of two-thirds of the resident tax-payers was obtained and filed in the office of the County Clerk. The money, when obtained, was directed to be paid over to the president and directors of a railroad company then about to be organized for the construction of a railroad through the town. Instead of borrowing the money, the Supervisor and Commissioners executed and delivered the bonds directly to the railroad company in payment for stock for which they were authorized to subscribe, and these were subsequently sold by the company at a discount. Each of the bonds, upon which the plaintiff brought his action, stated that the requisite consent of the tax-payers had been obtained and properly filed, with a certificate of the County Clerk that a paper, purporting to be the written assent, &c., had been filed in his office. The statute did not authorize the giving of this certificate, nor did it prescribe in what method the written assent should be proved. No evidence was offered that the consent had been given other than what is above stated. The bonds on which the suit was brought were payable to bearer, and the plaintiff was a holder for value.

1. *Held*, that the power to borrow was not properly complied with.
2. That the provision requiring the assent of the tax-payers, as evidenced, was a condition precedent to the issue of the bonds, and an indispensable prerequisite to their validity.
3. That, in the absence of all direct proof that the written assent had been obtained, the town was not estopped by the acts of its agents, who had issued bonds asserting upon their face that it had been, even though it had, for a considerable period, acquiesced in their acts. Such consent should have been proved affirmatively. The case does not come within the rule that when a power is conferred, if the agent does an act which is *apparently* within the terms of the power, the principal is bound by the representation of the agent as to the existence of any *extrinsic* facts essential to the proper exercise of the power where such facts, from their nature, rest *peculiarly* within the knowledge of the agent. The defect consists in the existence of the power itself, and if it did not, the facts requisite to the validity of the bonds being created by statute, were not peculiarly within the knowledge of the town.

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[1] We are indebted to the courtesy of Mr. Ch. Judge Selden, for the following opinion, for which he will accept our thanks.—*Eds. A. L. Reg.*

4. The fact that the bonds were negotiable, and purchased for value without notice of the defect, does not, under such circumstances, aid the plaintiff.

The opinion of the court was delivered by

SELDEN, Ch. J.—The bonds or obligations upon which this action was brought, purported to have been issued by the Supervisor and Railroad Commissioners of the town of Sterling, pursuant to sec. 1 of the act of June 22, 1851, authorizing these officers, under certain circumstances, to execute such bonds. Several objections were made, upon the trial, to their validity. The statute authorized the Supervisor and Commissioners "to borrow" a sum not exceeding twenty-five thousand dollars, upon the credit of the town, and "to execute therefor, under their official signatures, a bond or bonds," &c. The money, when obtained, was directed to be *paid over* to the president and directors of a railroad company then about to be organized for the construction of a railroad through the said town, "to be expended by them in grading and constructing" such road.

Instead of *borrowing* the money, the Supervisor and Commissioners executed and delivered the bonds in question directly to the railroad company in payment for stock for which they were authorized by the act to subscribe, and they were subsequently sold by the company at a discount. The question is, whether this was within the authority conferred by the act? It is clearly not within its language. No money was borrowed, and nothing else was authorized by the *terms* of this act. If, however, what was done was the same *in effect*, as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material. But it is plain that, neither in respect to the railroad company or the town, was its effect the same. If the statute had been pursued, the company would have had a sum equal to the par value of the bonds to expend upon their work. As it was, they were compelled to sell the bonds at a discount, in order to realize the money.

If the railroad company could sell at a discount at all, it could of course sell at any sacrifice, however great. The bonds of the town of Sterling for twenty-five thousand dollars might have been

sold for ten thousand. Can it be supposed that if such a power had been specifically asked of the legislature, the request would have been granted? Would the town have been permitted to incur a debt, to be paid by taxation upon its inhabitants, of twenty-five thousand dollars, for the sake of furnishing the railroad company with ten thousand to be expended upon its works? I think not; and yet this is, *in effect*, the power which it is claimed was conferred by the act authorizing the town to borrow. The rate of discount, whether more or less, can make no difference with the principle.

Had the town itself made the sale, and paid over the avails to the railroad company, it seems to me entirely clear that the transaction would have been illegal. It is usual for the legislature, when conferring upon a municipal or other corporate body the power to raise money upon the faith and credit of the corporation, to guard against such a sacrifice. An example of this may be seen by referring to the act amending the charter of the city of Rochester, passed July 3, 1851. By sec. 12 of that act, the Common Council were authorized to create a public stock not exceeding thirty thousand dollars, to be applied to the erection of a City Hall, and for that purpose to issue bonds or certificates in the usual form. They were also authorized to sell and dispose of such bonds or certificates "upon such terms" as they should deem most advantageous to the city, "but not for less than par." By sec. 285 of the amendatory act, power was also conferred upon the Common Council to borrow, upon the faith and credit of the city, a sum not exceeding three hundred thousand dollars, at a rate of interest not exceeding seven per cent., and to issue bonds therefor; and, by sec. 286, they were authorized to sell and dispose of such bonds upon such terms as they might deem most advantageous, and to invest the proceeds in the Genesee Valley Railroad Company; but they were expressly prohibited from selling them for less than par.

The reason why such a prohibition was not inserted in the act under consideration, can be readily seen. By each of the sections of the act amending the charter of the city of Rochester, to which I have referred, the Common Council were expressly authorized *to sell* the bonds, and hence the necessity for the restriction. In the

present case the only authority given by the act is *to borrow* upon the bonds of the town. No express power to sell the bonds is given, and no such power can be implied. To borrow money, and give a bond or obligation for it, and to sell a bond or obligation for money, are by no means identical transactions. In the one case, the money and the bond would, of course, be equal in amount. In the other, they might or might not be equal. Hence, a mere authority to a corporation *to borrow* money upon its bonds, is equivalent *ex vi termini* to an authority to dispose of its bonds *at par*, and no further restriction is necessary.

But it is true, the town did not itself sell the bonds, or make any sacrifice upon them. It transferred them to the railroad company *at par* in payment of stock for which it was authorized to subscribe. This, however, in my view, does not strengthen the plaintiff's case. It was as much a departure from *the terms* of the statute, as if the town had itself sold the bonds at a discount, and was equally inconsistent with its object and intent, which was, that the railroad company should receive a sum equal to the amount of the debt incurred by the town to expend upon the road, in the completion of which the town was supposed to have an interest. It is a well-settled and salutary rule in respect to every statutory authority of this kind, that the statute must be strictly pursued. In this case there is not only a literal but a substantial difference between the course pursued and that pointed out by the statute. It follows that the bonds were illegally issued, and were consequently void in the hands of the railroad company; and as the referee has expressly found that the plaintiff became the purchaser with full knowledge that the bonds had not been issued for money borrowed, but in payment for the stock of the company, he is in no better situation than the railroad company itself.

There is another objection which is equally fatal to the validity of the bonds. Sec. 1, of the Act of 1851, after conferring upon the Supervisor and Railroad Commissioners power to issue the bonds, concludes with a proviso to the effect, that these officers should have no power to do any of the acts authorized by the statute until "the written assent of two-thirds of the resident per-

sons taxed" in the town, as appearing upon the last assessment roll, should have been obtained and filed in the Clerk's office of Cayuga County. Each of the bonds upon which the action was brought, stated upon its face that the requisite assent had been obtained and filed, and to each was attached a certificate in the following words: "Cayuga County, Clerk's Office, ss: I, Edwin B. Morgan, Clerk of the County of Cayuga, hereby certify, that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Sterling, with the affidavit required by sec. 1 of the Act referred to by its title in the foregoing bond, has been filed in this office."

The statute did not authorize the giving of any such certificate, nor did it provide for the filing of any affidavit, or prescribe in any manner the evidence by which the written assent should be established. The paper referred to in the certificate was also produced from the files of the Clerk's office, with a number of names attached. This paper, together with the certificate, was read in evidence under objection by the defendant's counsel. No evidence was given or offered of the genuineness of the signatures; nor that the subscribers were non-resident tax-payers of the town of Sterling; nor that the persons whose names were appended, if tax-payers, would constitute two-thirds of the whole number. The defendant's counsel moved for a non-suit for want of such evidence, and the motion was denied.

It was not contended upon the argument, if the obtaining of the written assent of two-thirds of the tax-payers pursuant to the statute is to be regarded as an indispensable pre-requisite to the exercise of the power to issue the bonds, that the evidence was sufficient under the ordinary rules of evidence to establish the fact. But it was claimed on the part of the plaintiff,

1. That the provision in regard to the consent of the tax-payers was not intended as a condition precedent, but merely as directory to the Supervisor and Commissioners; and that whenever those officers were satisfied that such consent had been given, they had power to act.

2. That the town was estopped by the acts of its agents, in

executing bonds, asserting upon their face that the requisite assent had been obtained and filed, and negotiating these bonds with the certificate of the County Clerk annexed; especially after having acquiesced for a considerable time in such acts.

3. That the bonds are negotiable instruments, and that the plaintiff is a *bona fide* holder without notice of the defect.

The first of these positions is obviously untenable. It is quite impossible to construe the proviso in the statute as embracing a mere direction to the officers upon whom the authority is conferred. It was plainly intended to make the obtaining of the assent of the tax-payers a condition precedent to the exercise of the power. Its words are: "Provided always that the said Supervisor and Commissioners *shall have no power* to do any of the acts authorized by the act until, &c." This admits of but one interpretation. It would be impossible to create a condition by language more explicit. The want of proof, therefore, that this condition had been complied with must be fatal to the recovery, unless the plaintiff is protected as a *bona fide* purchaser, or can maintain his position that the town is estopped.

The estoppel contended for is supposed to result from that rule of the law of principal and agent pursuant to which it is held, that when a power is conferred, if the agent does an act, which is *apparently* within the terms of the power, the principal is bound by the representation of the agent, as to the existence of any *extrinsic* facts, essential to the proper exercise of the power, where such facts from their nature rest *peculiarly* within the knowledge of the agent. This is the doctrine asserted in the case of *Farmers' and Mechanics' Bank* vs. *Butchers' and Drovers' Bank*, 16 N. L. R. 137. No representation of the agent as to *the fact of his agency*, or as to the *extent of his power*, is of any force to charge the principal. But it being shown by other evidence that the agency existed, and that the act done is within the general scope of the power, the principal is bound by the representation of the agent as to any essential facts known to the agent, but which the party dealing with him had no certain means of ascertaining.

The reason upon which that rule is founded is that given by

Lord Holt, in *Hern* vs. *Nichols*, 1 Salk. 289, viz.: that where one of two innocent parties must suffer through the misconduct of another, it is reasonable that he who has employed the delinquent party, and thus held him out to the world as worthy of confidence, should be the loser. This reason can, of course, only apply to a case where the principal has *himself* employed the agent, and voluntarily conferred upon him power to do the act. This clearly is not such a case. The agents here were designated not by the town, but by the legislature; and no power whatever was conferred by the town, unless the assent of the tax-payers was obtained. Any representation therefore by the Supervisor and Commissioners in respect to such assent, would be a representation as to the very existence of their power. Such representations as we have seen are never binding upon the principal. It is obvious, therefore, that the doctrine of the case of the *Farmers' and Mechanics' Bank* vs. *The Butchers' and Drovers' Bank*, has no application to the present case. It is also inapplicable for another reason. Knowledge of the facts in regard to the assent of the tax-payers was in no manner peculiar to the Supervisor and Commissioners, but was equally accessible to the parties receiving the bonds. The statute, of which they were bound to take notice, apprised them, that the bonds could not be legally issued until the requisite assent was obtained, and also that the assent when obtained would be placed upon the files of the County, to which all persons had access. The case is not therefore at all like that of the *Butchers' and Drovers' Bank*, where the extrinsic fact related to the state of the accounts of the bank with one of its customers, which could only be known to the teller and other officers of the bank. Here the parties who received the bonds, had the means of ascertaining, and were bound to inquire as to the existence of the facts, upon which, as they knew, the validity of the bonds depended. (*Note* 1.)

The negotiability of the bonds in no manner aids the plaintiff. It is true they are negotiable, and have in this respect most if not all the attributes of commercial paper, (*Note* 2.) But one who takes a negotiable promissory note or bill of exchange, purporting to be

made by an agent, is bound to inquire as to the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts, of which the agent may naturally be supposed to be in an especial manner cognisant, the *bona fide* holder is protected; because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. The mere act of executing the note or bill amounts of itself in such a case to a representation by the agent, to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence and nature of the power itself. In that respect, the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognisance of facts, which the other cannot be presumed to have known.

There is an obvious distinction between this case and that of the *State of Illinois* vs. *Delafield*, 8 Paige, 527. There the *State* was the party to be bound, and the State had by law appointed certain officers its agents, and conferred upon them power to execute and negotiate its bonds. The difficulty consisted in the irregular and unauthorized manner in which the power was executed, not in the creation of the power itself. The distinction is as plain as that between conditions precedent and subsequent in general.

It follows from these principles, that until it was shown that the written assent of the required number of tax-payers had been obtained pursuant to the act, there could be no recovery upon the bonds. The judgment of the Supreme Court must be reversed, and there must be a new trial with costs to abide the event.

Note 1. The very important question raised in this case as to the power of an agent to bind his principal by his representations, is not yet so definitely adjudicated that any conclusions can be considered as commanding general assent. A review of the positions established by the principal decisions upon the subject may not be unprofitable.

I. It seems entirely clear that no representations by an agent can ever establish the fact of agency. This proposition is true without qualification, both at law and in equity. If a person, who is not in fact authorized, represents that he has power to execute a promissory note for another, the instrument, so far as the supposed principal is con-

cerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term "negotiability," pre-supposes the existence of an instrument made by a person having *capacity* or *power* to contract in that particular manner. Instruments made by infants, married women, insane persons, or others without capacity to make binding contracts, gain no additional validity because they may assume the form of negotiable paper. It is entirely immaterial whether the incapacity or want of power is general, or extends only to the particular act in controversy. For similar reasons, an agent can no more enlarge his powers by means of unauthorized representations than he can create them. New York Life Insurance and Trust Co. *vs.* Beebe, 3 Selden, 364.

II. The inquiry then must be confined to the question, what has the *principal said or done* which bears upon the supposed agency? If the power cannot be derived from his representations or acts, it cannot exist at all. In analyzing the acts of the principal, there appear to be only two grounds on which he can be held liable for the representations of his agent: 1. That of identity; 2. That of estoppel.

1. When it is sought to charge the principal on the ground of his identity with the agent, it must appear that he has distinctly authorized the very act in question. If the authority is written, it is purely a question of construction; if oral, and every element of estoppel is absent, it is still necessary to investigate the precise authority conferred. Every act transcending the exact limits of the power granted, is inoperative and void.

2. The difficulty of the case arises when it is sought to apply the doctrine of estoppel to the law of agency. The inquiry then is, when shall the principal be held liable, though he has not authorized, or perhaps when he has expressly forbidden the act in question? It is apparent that the ground of identity here wholly fails. The agent is not the instrument of the principal. Notwithstanding this, the principal may be liable.

The true ground on this subject must be, that the principal may be liable for the acts of the agent when he exercises an employment which, by well-established usage, confers upon him certain powers, or when the authority, in form or in terms, includes the act in question. In these cases, the principal may be bound to third persons, though the agent did an unauthorized act, provided they had a right to act, and did in fact act, upon the understanding that the agent was authorized to proceed in the particular case. In the first class of cases, the authority given by usage *must be measured by the usage.* It cannot exceed this by a hair's breadth. The only inquiry is as to its exact limits and extent. This point is well illustrated by the familiar rule, that, by the usage of trade, a factor has a power to sell on credit. This he may do (contrary to express instructions from the principal) to an honest purchaser. But, as usage gives him no power to pledge goods, he cannot, in the absence of a statute, confer upon an honest pledgee a right to retain them for advances actually made. It is conceived that, upon this ground, the noted case of Grant *vs.* Norway, 10 C. B. 664, is best sustained. In this case, the master of a ship having the power conferred *by usage* to sign bills of lading for goods placed on board of his ship for transportation, executed fictitious bills of lading. It was held, that though these passed into the hands of *bonâ fide* assignees, they could not sue the owner for the deceit. The

action was on the case for deceit. The power to sign bills of lading was *not given "directly by the owner*, but by *commercial usage.*" The authority of the master could not be extended beyond such usage. The opinion of the Court evidently rests solely upon this ground. Says the Court: "The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship. So with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature, quality, and condition of the goods. Constant usage *shows* that masters have that general authority; and if a more limited one is given, a party not informed of it is not affected by such limitation."

"*Is it then usual*, in the management of a ship carrying goods for freight, for the master to give a bill of lading for goods not put on board? For all parties concerned have a right to assume that an agent has authority to do all which is usual." After showing that it was not usual to sign such bills, the Court proceeds: "If then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position of master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of his authority." Pp. 686-7-8. This case is then authority simply for the proposition that, when an effort is made to bind the principal by the usages of trade, the authority is *to be limited* by the usage as well as created by it. In this point of view, it is impossible to doubt the soundness of the decision. It has often been cited, however, as establishing another and quite a different doctrine. But the statement of the case shows that the turning point must have been the proper construction to be given to a well settled usage. Precisely the same view must be taken of the case of Freeman *vs.* Buckingham, 18 How. U. S. 182. The charterer of a ship, by a fraud, induced the master to sign fictitious bills of lading, and the question here was as to the usage. The Court make the decision rest upon a similar ground, citing with approbation the case of Grant *vs.* Norway, although the reasons upon which that decision rests were not presented with entire fulness. See also Walter *vs.* Brewer, 11 Mass. 99.

If we now examine the second class of cases we shall find no such accurate limitation of authority, as where the extent of a usage is in question. It is evident that the principal may, if he sees fit, bestow an unlimited authority. The inquiry then must be, what is the legitimate inference to be drawn from the statements or acts of the principal, as viewed by one who gives credit to them in good faith? The inference may be derived from a series of recognitions of the agent's act or from direct employment. It is believed that the following principles are applicable. 1. The authority or employment must, *in form* or apparently, include the act in question. If this were not so, we should be led to the conclusion that an agent might establish an agency by his own representations. 2. The acts or representations of the agent must naturally lead to the conclusion, that the supposed authority does exist. In other words, he must, in substance, affirm that the act in question forms *no exception* to the general delegation of authority. Such an affirmation is not to be regarded as creating an agency, but simply as an assertion that what has previously *appeared to be true* by the representations of the principal, is actually true. 3. The representations must have been made directly to third persons, so as to have induced their action and to have created a *privity of contract* between

the principal and such person. 4. The fact that the particular act was not within the general delegation of power, must have been peculiarly within the knowledge of the principal. Very little discussion of this subject can be found in the earlier cases. It has been pressed upon the attention of modern jurists on account of the fact, that a large class of commercial business is performed through the medium of agents, especially that which is transacted by corporations. We are inclined to think that the doctrine itself is a modern one. The case which is usually cited, is Herne *vs.* Nichols, 1 Salkeld, 289. It was decided by Lord Ch. J. Holt at Nisi Prius: "In an action on the case for a deceit, the plaintiff set forth that he bought several parcels of silk for —— silk; whereas it was another kind of silk, and that the defendant well knowing this deceit, sold it to him for —— silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea; and the doubt was, if this deceit could charge the merchant; and Holt, Ch. J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter;* for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger, and upon this opinion the plaintiff had a verdict." From this meagre report of the case, its doctrine would seem quite doubtful as applicable to *agents in general*, because it has been distinctly held, after thorough discussion, that a mere power to sell does not of itself include a power to warrant: Brady *vs.* Todd, 9 C. B., N. S. 596–7, (1861;) and *a fortiori* does not include a power to misrepresent the qualities of the article. If the decision were made to depend upon peculiar rules applicable to factors, it would become, as before stated, a question of usage. The true ground of the decision is, doubtless, indicated by Cresswell, J., in Coleman *vs.* Riches, 16 C. B. 117. He says: "Herne *vs.* Nichols was a case of misrepresentation, not fraud; *the defendant there adopted the act of the factor.*" When placed upon this ground, the decision can be readily understood. The subsequent recognition of the act was upon general principles, equivalent to a prior command. Otherwise, it would be plainly repugnant to the case of Southern *vs.* How, 2 Croke, 469–70–71. In that case, three counterfeit jewels were fraudulently sold by the factor of the defendant to the plaintiff in Barbary, for good jewels. Their value was £100, and were sold for £800. The plaintiff, regarding them as valuable, sold them to the King of Barbary, who, discovering their true character, imprisoned the plaintiff until he repaid the £800. It appeared that the defendant was not cognisant of the fraud of the factor. The Court inclined against the plaintiff, upon the ground that, as the master did not command the servant to conceal the character of the jewels, he shall not be charged if the servant exceeds his power. The doctrine of Herne *vs.* Nichols, if so qualified, is supported by the recent case of Udell *vs.* Atherton, 4 Law Times, N. S. 797. In that case, the principal authorized the agent to sell a log of mahogany. He fraudulently concealed a defect in the article, making at the same time a wilful misrepresentation in respect to it. The principal was innocent; but, as he *retained the benefit of the contract*, he was held liable in an action for deceit. The form of action was the same as in Herne *vs.* Nichols. The opinion of Wilde, B., is especially noticeable. Mr. Addison, in his recent work on torts, makes the same distinc-

tion. He says: "If a fraudulent act has been committed by the agent, and his act is adopted, and the principal takes the benefit of the contract, he is liable in an action for deceit;" (citing 1 Scott, N. R. 685;) "but if the principal repudiates the transaction, and the representation is not within the scope of an agent's ordinary authority, he is not liable." 10 C. B. 688. It is not intended to deny that the reason given by Lord Holt is a good one in a proper case, but only to question its applicability to the facts as they appear in Salkeld.

This class of authorities is evidently but of little weight in respect to the question of the responsibility of the principal where the act of the agent *imposes a burden upon him*, and he seeks, as soon as it is ascertained, to repudiate it, and where there is no settled usage to determine the agent's authority. As far as can be ascertained, this question has not been distinctly presented in any of the English cases. It came up recently (1857) in the State of New York in the case of The Farmers' and Mechanics' Bank *vs.* The Butchers' and Drovers' Bank, 16 N. Y. (2 Smith.) 125; S. C. 14 N. Y. (4 Kern,) 623. The teller of the latter bank was in the habit of certifying the checks of customers with the knowledge of the officers of the bank, and was provided with a book for the express purpose of keeping a memorandum of such checks. He was under express instructions not to certify when the drawer of the check had no funds. In direct violation of his instructions, he certified checks for a person who had no funds to his credit, and they came into the hands of an honest holder for value. Upon this state of facts the bank was held liable. The question was admitted for the purposes of the case to be, whether a *bona fide* holder for value of a negotiable check, certified by a special agent, whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds.

It will be observed, that the statement of the question excludes cases of the first class where *usage* is an element. No usage was pretended, and no argument drawn from cases of that sort can be relied upon. The Court laid very considerable stress upon that well-known rule of the law of partnership, that one of the parties may, notwithstanding express restrictions, bind the firm upon a contract made within the scope of his employment. It would, however, seem that the power of the individual partner belonged to the first class of cases. It is conferred, not by *special authority*, but by *law*. This view is taken by the Court of Common Pleas in England in a very recent case, (1861)—Brady *vs.* Todd, 9 C. B., N. S., 596–7—Erle, C. J., delivering the opinion. "Partners have an authority conferred upon them by law in the same manner as masters of ships." p. 604. The Court expressly distinguish this class of cases from those where the principal holds out that the agent has an authority, and induces another to deal with the agent on the faith of the representation.

Dismissing, then, the case of partners, masters of ships, &c., from view, from what source can the authority of the teller be derived? We think that the question of *negotiability* is not involved. It must ever be borne in mind, that the want of a *power* to *make an instrument*, being a question of capacity, is a defect which defeats it *at law*, and makes it utterly void. An instrument must at least *exist* before it can be negotiable. For this reason the important case of the State of Illinois *vs.* Delafield, 8 Paige, 527, S. C. in Error, 2 Hill, 159, is not

parallel In that case an agent was restricted from selling certain negotiable bonds of the State of Illinois below par, or on credit. In violation of his instructions, he passed them to Delafield, who was cognisant of his breach of duty. Delafield was prevented by injunction from negotiating them, on the ground, that if they passed into the hands of an honest holder, the State must pay them. But in this case the bonds were *valid instruments*, having *been duly executed according to statute*. Even a wrong-doer might have transferred them to an honest purchaser without reference to the question of agency. But the question in the case of the Butchers' & Drovers' Bank was, whether the instruments were properly executed, or even existed at all.

Assuming, then, that the power of an agent to *create* an instrument must be measured in all cases by the same general principle, it would appear that the ordinary rules of the law of estoppel *in pais* must be invoked whenever it is sought to make a principal liable for the unauthorized acts of an agent, which he seeks to repudiate. The rule appears to be accurately stated in North River Bank *vs.* Aymar, 3 Hill, 270: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent, with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority." Though the rule is enunciated as to *written* powers, its principle extends to other cases. Upon this theory the case of the Butchers' & Drovers' Bank was correctly decided. The Bank had authorized the teller to sign instruments *in form*, including the one in question, and the purchaser acquired the check upon the faith and representation of the agent that it was included within the class of cases to which his authority extended. This principle would include all cases where the measure of authority was derived from the act of the principal, and another acted upon the representation. Thus, if there were *no rule of law or usage* limiting the authority of masters of ships to sign bills of lading, any person expressly authorized to execute them might bind his principal even if goods were not put on board, if a consignee acted upon the faith of the certificate that the goods had been shipped for his use by the consignor. See Walter *vs.* Brewer, 11 Mass. 104. In other words, the difference between Grant *vs.* Norway and the case of the Butchers' & Drovers' Bank, is simply this: in the one the authority is established by law, and as such cannot exceed the legal limit; in the other, the authority is directly conferred by act of the principal, and may extend so far as he pleases, or he may so clothe his agent with an apparent authority as to make him liable upon the rules applicable to estoppels *in pais*. Consequently, as new cases arise not affected by a well defined usage, the liability of the principal must be ascertained solely from the proper inferences to be drawn from his acts. If tellers of banks, for a long period, by a well settled usage, had authority merely as tellers to certify checks for customers only who had funds, we apprehend that the negotiability of the check would not protect even a bona fide purchaser when there were no funds. In fact, the very limitation by the usage gives the purchaser *notice of a want of authority*, and puts him upon inquiry, and upon that fact of implied notice the case of Grant *vs.* Norway turned. It remains to explain one or two cases which may appear to conflict with these views. The first

is Coleman *vs.* Riches, 16 C. B. 103. It appeared in that case that the plaintiff was a corn dealer, who bought corn which was delivered at the defendant's wharf by the vendors. The defendant, or his agent, was in the habit of giving receipts to the vendors, and it was the practice for the plaintiffs to pay such vendors for the corn stated in the receipts to have been delivered. The plaintiff's agent wilfully gave a receipt in a particular case to a person who had not delivered any corn to the plaintiff's use, and the plaintiff, in accordance with his usual practice, paid such supposed vendor. He then sued the defendant for the loss occasioned by the fraud of the agent. There was no evidence that there was any agreement between defendant and plaintiff, to give these receipts, but they appeared to have been mere memoranda between the defendant and the sellers. They were voluntary, and not designed to influence the plaintiff's conduct. On this ground the defendant was held not to be liable. Says Jervis, C. J.: "I do not see how Riches' (def't) *knowledge* that Coleman (pl'ff) was in the habit of paying the vendors on the production of his receipt acknowledging the delivery of the wheat, makes his giving such a receipt a representation to Coleman." p. 106. So Cresswell, J.: "I have looked carefully through the evidence, and have failed to discover anything from which we can infer any such course of dealing as would render the defendant liable to the plaintiff for the fraudulent representation of his agent. To do so we must assume that there was some contract between the parties, that a receipt should be given only upon the delivery of the wheat, in order that the plaintiff might be protected from paying for it before it was sent. There clearly was no evidence to warrant that. It may be true that Coleman was in the habit of paying for the corn he purchased, upon the production of a receipt, and that Riches knew it. *But the defendant had nothing to do with the plaintiff's manner of conducting his business.* It leaves the case just as it was before." p. 119. The other Judges express similar views.

This case simply holds that an estoppel cannot arise unless the representation of the principal was made to the third party, so that he had a right to act upon it. It is quite apparent from the case, that if there had been an understanding between the parties that the receipts were to be given, the defendant would be liable for the fraud of his agent. Thus that able Judge, Williams, J., says in the same case: "If there had been evidence of an agreement between the plaintiff and defendant, that the latter should furnish the vendor with receipts on the delivery of the corn, upon the faith of which receipts the former should pay the price, I must confess I should have felt great difficulty in saying that the defendant would not be liable for the fraud of an agent, by means of which the plaintiff had been induced to part with his money on the faith of such delivery having taken place." The same idea pervades the opinion of the other Judges. Another case, which it may be well to distinguish, is that of the Mechanics' Bank *vs.* New Haven Railroad Co., 3 Kernan, 599. A corporation had appointed a transfer agent, who was authorized, in the ordinary manner, to transfer existing shares of stock upon the books of the company, and to give the usual certificates to the transferree. In company with a confederate, he issued spurious certificates, purporting that his confederate was entitled to certain shares of stock. These were indorsed in blank, and pledged to the plaintiff, who made advances upon them in good faith. They were not transferred to him upon the

books of the corporation. The Court held that he acquired no right to any stock, and that the railroad corporation was not liable in damages for the fraudulent act of the agent.

The ground of this decision is, that the principal is not directly liable for the unauthorized act of the agent, and that the law of estoppel was not applicable, because no *representation was made to the plaintiff*. The transfer of the stock certificate furnished no evidence of a contract between the plaintiff and the defendant. In fact, the stock was not assignable *at law*, being a mere chose in action, but, by the peculiar rules of equity jurisprudence, the assignor was converted into a trustee for the assignee. It is one of the most elementary principles of equity law, that the assignee in such a case obtains no more right than the assignor, unless he can show a direct and distinct representation made to himself, by the person liable, upon the faith of which he made the purchase. As no such representation was shown, and as his assignor had no rights against the railroad company, he had none. The case is not inconsistent with the principles hitherto established. In this connection negotiability becomes important. It cannot aid an instrument which does not come either within the actual or apparent power of the agent. But when a negotiable instrument is *in form*, though not in fact, authorized, and the person who takes it, is privy to the agent's fraud, though he has himself no rights against the principal. he can make him liable by transferring it to an honest holder. The negotiation connects the representation of the principal with the holder, and makes him privy to a contract.

To sum up the conclusions attained; it has been shown that an agent cannot create an authority by his own representations, but that in all cases the conduct of the principal is the subject of inquiry. The principal can become liable on two grounds: that of identity and of estoppel. Upon the ground of estoppel he may be liable either where there is a fixed usage respecting the agent's authority, or where an apparent power is conferred by direct authority. In the case of usage, the authority is limited by the usage itself. In an authority expressly or actually conferred, the inquiry must be whether the principal in form held out the agent, as having power to do the act in question, to the party who acted upon it, and whether the third person did accordingly act in good faith. If so, the principal is liable. But where the agent did the act without being held out as authorized, the principal is not liable, even though he knew the conduct of the agent. He is also not liable where the agent fraudulently creates an unauthorized chose in action in confederacy with another, and such other transfers the chose in action to an innocent assignee. This last proposition rests upon the peculiar rules of equity jurisprudence as applied to the assignment of choses in action.

Note 2. It may now be regarded as settled law, that bonds of a certain class are to be deemed negotiable. This is not true, of course, of ordinary bonds which are only assignable in equity. The doctrine of negotiability has been extended to exchequer bills, (4 Barn. & Ald. 1,) government bonds, (Gorgier *vs.* Mieville, 3 Barn. & C. 45; Long *vs.* Smith, 7 Bing. 284; Delafield *vs.* State of Illinois, 8 Paige, 527, s. 62, Hill, 159,) and other municipal bonds, such as those of towns and counties. Bank of Rome *vs.* Village of Rome, 19 N. Y., 5 Smith, 20; Gould *vs.* The Town of Sterling, *supra; contra*, Deaman *vs.* Lawrence County, 37 Penn., (1 Wright,) 353, (1860.) The Court in this case admits that its view is contrary to the current of American decisions.