RECENT AMERICAN DECISIONS.

Circuit Court of the United States, for the First Circuit.

EZEKIEL BYAM *et al.*, *vs.* JOHN BULLARD *et al.*

A sale of the thing patented, to an agent of the patentee, employed by him to make the purchase, on account of the patentee, is not per se an infringement. Accompanied by other circumstances, it may be evidence of an infringement.

This was an action on the case for an infringement of a patent right for the manufacture of loco foco matches, belonging to the plaintiffs. It came before the Court on a statement of facts, wherein it was stated that before the date of the writ, the defendants sold to an agent of the plaintiffs, who was employed by the plaintiffs to make the purchase, matches of the value of six cents. That such sale, if made to any other person than the plaintiffs or their agent, would have been an infringement of the patent; and the questions submitted were, whether such a sale was an infringement, and if so, what was the measure of damages.

Charles Sumner, for the plaintiffs.

William Brigham, for the defendants.

The opinion of the Court was delivered by

CURTIS, J.—The act of July 4, 1836, section 14, enables patentees and their assignees to bring actions on the case, to recover damages for making, using, or selling the thing whereof the exclusive right is secured by a patent. Two inquiries arise in this case: the first is, whether upon the facts stated, the law imports either the damage or the injury, both of which are necessary, by the common law, to support an action on the case. The second is, whether an action on the case for a violation of a patent-right, was intended to be given by the patent act, where there was neither damage nor injury received, according to the principles of the common law. As to the injury, the general rule of the common law is, *volenti non fit injuria;* and in accordance with this maxim, no one can maintain an action for a wrong, where he has consented or contributed to the act of which he complains. And this principle has been applied to numerous cases, in which, though the defendant was in

the wrong, the plaintiff's negligence had contributed to produce the consequential damages which were sought to be recovered in the action. Here, the plaintiffs not only consented, but co-operated, for through their agent they were themselves the purchasers. As to the damage, it is true that in general, the law imports damage from the violation of a right, but I am not aware that damage has ever been presumed by law, from an act in which the plaintiff co-operated, and which, therefore, must be supposed to have been done for his own benefit, or at the least, not to have been to his loss.

It was argued that *ex necessitate rei*, such a sale should be held to be an infringement, because it is only by such evidence, that an infringement of many patents can be shown. This may be sufficient to prove that such a sale may be evidence of an infringement, and that from such a sale, accompanied by other circumstances likely to exist, and capable of being proved, if the defendant does infringe, a jury would be warranted in finding an infringement by sales to others than the patentee.

If the plaintiffs' agent purchased the matches at a shop where matches and similar articles may be expected to be found for sale, if they were sold to him in the usual course of the trade there, and if he saw others exposed for sale, it would be a natural inference for a jury to make, that this was not the only parcel sold, that in the course of the defendants' business, he had sold what he showed himself willing and desirous of selling, and what customers are frequently in the habit of buying, and I know of no rule of law which would restrain them from drawing such an inference. But it is a very different question whether such a sale is itself an infringement. Thus, in *Hall* v. *Boot*, Webs., P. C. 100, the patent was for a process of singeing off the superfluous fibres from lace, by means of the flame of gas. The evidence of infringement was that the defendant had secretly prepared an apparatus similar to that used by the patentee, and had sold lace in a state to which it would have been brought by using the patented process. So, in a similar ruling, may be found in *Huddaet* v. *Grimshaw*, Davis, P. C., 290, *Bickford* v. *Skewes*, 1 G. & D., 736, and many other cases.

So in *Keplinger* v. *Younge*, 10 Wheat., R. 358, it was held that evidence from which a jury might infer that a patented machine was let to the defendant under color of a contract to buy the product of the machine, would authorize a finding of a use of the machine by the defendant.

But in neither of these cases, would the naked facts sworn to have amounted to an infringement. It remained for the jury to draw from them the inference that the defendants had in fact used the thing patented. Now, the argument *ex necessitate*, can extend no further than the supposed necessity extends, and that is at the utmost, only to make such a sale evidence of an infringement, which stops short of its being an infringement. It was also argued that this was not a sale to the plaintiffs, except by construction of law, but only to their agent, and that for the benefit of patentees, the law would not deem it the same as a sale to the plaintiffs. I can see no reason for making a distinction between patentees and other persons, in this particular, and if I were at liberty to disregard a plain rule of law for the benefit of patentees, I should very much doubt whether it would be for their advantage to hold that the acts of their agents were not their own.

Nor can I find any solid foundation on which to rest the right of a patentee to support an action on the case for the violation of his exclusive right, except that settled and reasonable common law basis of all such actions—injury and damage; injury by a violation of the incorporeal right, and damage, at least nominal, presumed by the law to arise from such violation. Such, I understand to have been the principle proceeded upon by Mr. Justice Story, in *Whitemore* v. *Cutler*, 1 Gall., R. 429, when he held that making a machine for a philosophical experiment, or to test the sufficiency of the specification, would not be an infringement; and in *Sawin* v. *Guild*, 1 Gall., R. 487, where he says, the act must be with intent to deprive the patentee of some lawful profit; and also by Mr. Justice Patteson, in *Jones* v. *Pearce*, Web., P. C. 125, where he excepts the making of a patented article for mere amusement, and not for profit. In these cases, inasmuch as there was supposed to be no damage, there was thought to be no action. And though I

am rather disposed, with Mr. Justice Washington, (in *Watson* v. *Bladen*, 4 Washington, R., 583,) to doubt whether the assumption is correct, that in such cases there is no damage, yet, if the assumption be correct, I think the inference is sound that no action lies.

It is true, some of the patent acts, which were repealed by the act of 1836, gave an action for a sale, if made without the consent, *in writing*, of the patentee or his assigns. But the law now in force contains no such provision, and if it did, I should still be of the opinion that a sale to the patentee himself was not such a sale as was intended by the statute; that no sale was within its meaning, except one which would be within the terms of the grant contained in the letters patent, which is a grant of an exclusive right to make, use, and *vend to others*, to be used. In this case I am of opinion that the sale to the plaintiffs' agent, was a sale to them, and that such a sale is not per se an infringement. On a statement of facts, as I am not at liberty to draw any inferences, and the judgment must be for the defendants. Judgment for defendants.

Circuit Court of the United States for the Third Circuit.

CECIL OLIVER, ET AL. VS. DANIEL KAUFFMAN, STEPHEN WAKEFIELD, AND PHILIP BRECKBILL.

1. Though the penalty given by the 4th section of the Act of 1793, with regard to Fugitives from Labor, is repealed by the act of 1850, the reservation of the right of action by the owners of such fugitives, for the injuries enumerated therein, is not affected.
2. "Notice" under the Act means *knowledge;* it is not necessary that a specific written, or verbal notice, from the owner of fugitive slaves, should be brought home to the defendant, in an action for "harboring and concealing," in order to make him liable.
3. "Harboring," within the act, is not synonymous with "concealment," but consists in any entertainment or shelter for an unlawful purpose. Mere acts of charity, however, will not constitute the offence.
4. In order to enable a plaintiff to recover in an action for "harboring and concealing" fugitive slaves, he must prove that the slaves were pursued by himself or his agent, for the purpose of reclamation; and that the defendant, knowing

them to be fugitives, harbored or concealed them in order to further their escape, and to enable them to elude pursuit.

5. Where, in such action, it is shown that in consequence of the harboring and concealment, the slaves escaped, and were lost to their owner, the measure of damages is the value of the slaves, with interest, if the jury think fit; otherwise, however, if the interference of the defendant was only after the plaintiff had abandoned all pursuit of his slaves.
6. In such action, the plaintiff is entitled to recover entire damages against all engaged in furthering the escape and in frustrating his pursuit.
7. Possession of slaves, otherwise shown to be such, is *prima facie* proof of title, and no formal bill of sale is necessary to establish ownership.
8. In an action for "harboring and concealing," under the Act of 1793, it appeared that the owner of the slaves, in carrying them from Arkansas to Maryland, from which State they afterwards escaped, had passed with them on the National Road over the State of Pennsylvania; but that, on their arrival in Maryland, they had been duly registered, according to law, as slaves, *held*, that such transit had not rendered them free, but that their *status* was to be determined by the law of Maryland.

This was an action on the case for the harboring and concealment of certain fugitive slaves, the property of the plaintiffs, whereby they escaped and became lost to them, brought under the fourth section of the Act of Congress of Feb. 12th, 1793. The suit had been originally begun in one of the courts of Pennsylvania, and a verdict recovered, but the Superior Court, on error, held, reversing the judgment, that no action lay at common law for the injury complained of, and it was therefore recommenced here. (See *Kauffman* v. *Oliver*, 10 Barr, 514.)

On the trial of the case, the material facts developed were briefly as follows:

The plaintiffs were the minor children of Shadrach S. Oliver, a citizen of Arkansas, who died in 1846, leaving the slaves in question, and other property. His widow took out letters of administration; and, there being no debts, an amicable division of the estate was made, by which the slaves fell to the share of the plaintiffs. In the early part of 1847 Mrs. Oliver and her children removed to Maryland, carrying the slaves with them. In their journey, after taking the usual route up the Ohio, they passed in stages on the National Road across the State of Pennsylvania, stopping at

Uniontown to get food, but making, otherwise, no pause. On their arrival in Maryland, the slaves were duly registered at Hagerstown, in that State, under a statute making registry necessary under the circumstances.

In October, 1847, thirteen of the slaves escaped into Pennsylvania. Immediate pursuit was begun, and after a few days, some information was obtained, by which the slaves were traced to the barn of Kauffman, one of the defendants, near Shippensburg. The agent of the plaintiffs proceeded there at once, but was unsuccessful in his attempt to recover them; and, after other efforts, was obliged to give up his search as fruitless. Witnesses were introduced on the part of the plaintiff, to prove that the slaves had been actually received and concealed by Kauffman, with knowledge of their condition; and that he and the other defendants were engaged in procuring their escape. This was met, however, by contradictory testimony on the part of the defence; and on all the principal points in the case the evidence was entirely conflicting.

The Act of Assembly of Pennsylvania of 1847, § 7, which was in force at the time of the transit of the Oliver family, with the slaves, across the State, repeals so much of the Act of 1780 "as authorizes the masters or owners of slaves *to bring and retain* such slaves within the Commonwealth, for the period of six months, in involuntary servitude, or for any *period of time whatsoever.*" It was urged, amongst other grounds of defence, that, under this act the voluntary taking of the slaves through Pennsylvania rendered them free.

In the course of the argument, allusion was made, on both sides, to the late trials in this Court for treason, arising out of the riot and homicide at Christiana; and the Report of the Attorney Geneal of Maryland, made to the Executive of that State.

The case was argued by

H. M. Watts and *C. B. Penrose*, for Plaintiffs.

W. B. Reed and *D. P. Brown*, for Defendants.

The charge to the jury was delivered by GRIER J. (after stating the facts and pleadings.)

In the performance of your duty on this subject, it will be proper that you suffer no prejudice to affect your minds, either for or against either of the parties to this suit. The odium attached to the name of "abolitionist" (whether justly or unjustly, it matters not), should not be suffered to supply any want of proof of the guilty participation of the defendants in the offence charged, even if the testimony in the case should satisfy you that the defendants entertained the sentiments avowed by the class of persons designated by that name. The defendants are on trial for their *acts*, not for their *opinions*. Beware, also, that the occasional insolence and violent denunciation of the South be not permitted to prejudice your minds against the just rights guaranteed to them by the Constitution and laws of the Union. An unfortunate occurrence has taken place since the former trial of this case, which, as it is a matter of public history, and as such has been introduced into the argument of this case, it becomes the unpleasant duty of the Court to notice in connection with this portion of our remarks. A worthy citizen of Maryland, in attempting to recapture a fugitive, was basely murdered by a mob of negroes on the southern borders of our State. That such an occurrence should have excited a deep feeling of resentment in the people of that State, was no more than might have justly been expected. That this outrage was the legitimate result of the seditious and treasonable doctrines diligently taught by a few vagrant and insane fanatics, may be admitted. But by the great body of the people of Pennsylvania, the occurrence was sincerely regretted, and an anxious desire was entertained that the perpetrators of this murder should be brought to condign punishment. Measures were taken, even at the expense of sending a large constabulary and military force into the neighborhood, to arrest every person, black and white, on whom rested the least suspicion of participation in the offence. A large number of bills of indictment were found against the persons arrested for high treason, and one of them was tried in this Court. The trial was conducted by the Attorney General of the State of Maryland; and although it was abundantly evident that a riot and murder had been committed, by some persons, the prosecution wholly failed in

proving the defendant, on trial, guilty of the crime of treason with which he was charged. But, however much it was to be regretted that the perpetrators of this gross offence could not be brought to punishment, the Court and jury could not condemn, without proof, any individual, to appease the justly offended feelings of the people of Maryland. Unfortunately, a different opinion with regard to our duty in this matter, seems to have been entertained by persons holding high official stations in that State; and certain official statements have been published, reflecting injuriously upon the people of Pennsylvania and this Court, which have tended to excite feelings of resentment, and to keep up a border feud, which, if suffered to have effect in our Courts, or in the jury-box, may tend to prejudice the just rights of the people of Maryland, and of the plaintiffs in this case. These offensive documents, I have reason to believe, are neither a correct exhibition of the good sense and feelings of the people of that State, nor of the legal knowledge and capacity of its learned and eminent bar. It would do them great wrong to suppose them incapable of understanding the legal proceedings, which have been made the subject of so much reprehension, or capable of misrepresenting them.

It is your duty to treat with utter disregard ignorant and malicious vituperation of fanatics and demagogues, whether it come from North or South, and give to the respective parties such protection of their respective rights as the Constitution and the laws of our country secure to them.

I have urged these considerations on your attention more at length, because they have been the subject of much comment by counsel.

The foundation of the legal rights now asserted on behalf of the plaintiffs, is found in the Constitution of the United States.

The provision of the Constitution (Art. 4th, § 3) is as follows:

"No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation thereof, be discharged from such labor or service, but shall be delivered up 'on claim of the party to whom such service or labor may be due.' It declares, also (Art. 6, § 2), "That this

Constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

By virtue of this clause in the Constitution, the master might have pursued and arrested his fugitive slave in another State; he might use as much force as was necessary for his reclamation; he might bind and secure him so as to prevent a second escape. But as the exercise of such a power, without some evidence of legal authority, might lead to oppression and outrage, and the master, in the exercise of his legal rights, might be obstructed and hindered, it became necessary for Congress to establish some mode by which the master might have the form and support of legal process, and persons guilty of improper interference with his rights might be punished. For this purpose the Act of Congress of 12th Feb., 1793, was passed. By the 3d Sec. of this Act, the master or his agent is empowered to seize and arrest the fugitive, and take him before a Judge or Magistrate, and, having proofs of his ownership, obtain a certificate, which should serve as a legal warrant for removing the fugitive.

The 4th Sec. describes four different offences—1st, knowingly and wilfully obstructing the claimant in seizing or arresting the fugitive; 2d, rescuing the fugitive when so arrested; 3d, harboring; 4th, concealing such person after notice that he is a fugitive from labor.

Under this statute you will observe that a penalty of five hundred dollars is incurred for harboring or concealing a fugitive, which the party injured may recover; but the present action is not for this penalty. In this suit, the plaintiff is only entitled to recover the damages he has actually sustained by the acts of the defendants. You will first determine whether the proof, under the principles here laid down, entitles the plaintiff to recover. And if they be so entitled, you will then have to consider the amount of damages.

In order to entitle the plaintiffs to your verdict, they must have proved to your satisfaction:

1. That the slaves or persons held to labor, mentioned in the

declaration, or some of them, were, by the laws of Maryland, the property of the plaintiffs—or, as the statute expresses it, that their labor and services were due to the plaintiffs for life, or a term of years.

2. That these persons so held to labor escaped to the State of Pennsylvania.

3. That the defendants, or some of them, aware of these facts, (having notice or knowledge that the persons harbored or concealed were fugitives from labor), did harbor or conceal them, contrary to the true intent and meaning of the statute.

4. And if you find these facts in favor of the plaintiffs, the amount of the damage, injury, or loss, sustained by the plaintiffs in consequence of such harboring and concealing.

On the first two points, there is no contradictory testimony. But while the escape of the twelve negroes has not been disputed, the defendants' counsel contend that the facts, as proved, do not show that the fugitives were slaves, or the property of the plaintiffs, but on the contrary that they were free.

It has not been disputed that the fugitives were the property of Shadrach S. Oliver at the time of his death in Arkansas. By the laws of that State, the widow has a right to a third of them, if treated either as real or personal estate. But, however the law might divide them, the widow and children, as entitled to the succession, after the payment of debts, could, by any family arrangement, settlement, or understanding, divide the property at their own discretion, and third persons would have no right to dispute its validity. Slaves, though for some purposes treated as real property, are chattels, and like other chattels may pass by delivery, without any formal bill of sale. Possession of them is therefore *prima facie* evidence of title.

It has been contended that these slaves became free by the act of the plaintiffs in voluntarily bringing them into the State of Pennsylvania.

This question depends on the law of Maryland, and not of Pennsylvania. This Court cannot go behind the *status* of these people where they escaped. We know of no law or decision of the Courts of Maryland, which treats a slave as liberated, who has been conducted by his master along the national road through

the State of Pennsylvania. On this subject, Lord Mansfield has said some very pretty things (in the case of Somerset), which are often quoted as principles of the common law. But they will perhaps be found, by examination of later cases, to be classed with rhetorical flourishes rather than legal dogmas. Since the former trial of this case, the point has been decided in the Supreme Court, as I think. But, however that may be, the point is ruled in favor of the plaintiffs, for the purposes of the present case, as we desire to have your verdict on the facts of the case, which are so much contested.

The great question, then, to which your attention will be directed, is whether the defendants, or any one of them, are guilty of harboring or concealing the fugitives as laid in the declaration.

Whether the plaintiffs could have sustained an action on the case on the mere guarantee of their rights as contained in the Constitution, we need not inquire. The action has been instituted with reference to the terms used in the Act of Congress of 1793. The fine inflicted by that act can be no longer recovered, because the Act of 1850, having changed the penalty, has thereby repealed the Act of 1793 to the extent to which it has been thus supplied. But the statute, so far as it gave an action on the case for harboring and concealing, has not been supplied or repealed.

As to the nature of the harboring and concealing (which is the substance of the complaint in this case), and which would subject the defendants to liability in this form of action, I shall repeat the observations made on a former occasion.

1st. What is meant by "*notice;*" and, 2d, what constitutes harboring.

On the first point, the Court has been relieved from much difficulty by a late case tried before Mr. Justice McLean, in Ohio; and which has been affirmed in the Supreme Court of the United States (see *Vansandt* v. *Jones*, 2d McLean, and same case, 5th Howard, 216). In that case it was decided that the word "notice," as used in this act, means knowledge; that it is not necessary that a specific written, printed, or verbal notice, from the owner be brought home to the defendant, but that it is sufficient if the evidence show that he knew the person he harbored or concealed was a fugitive from labor.

The word "harbor" is defined by lexicographers by the words, to entertain, to shelter, to secure, to secrete. It evidently has various shades of meaning not exactly expressed by any synonyme. It has been defined in Bouvier's Law Dictionary "to receive clandestinely, and without lawful authority, a person, for the purpose of concealing him, so that another, having the right to the lawful custody of such person, shall be deprived of the same." This definition is quoted in the opinion of the Court, as delivered by Mr. Justice Woodbury, in *Jones* v. *Vansandt*, 5 Howard, 227. But though the word may be used in the complex meaning there given to it, it does not follow that all these conditions are necessary elements in its definition. Receiving and entertaining a person clandestinely, and for the purpose of concealment, may well be called harboring, as the word is sometimes used. Yet one may harbor without concealing. He may afford entertainment, lodging, and shelter to vagabonds, gamblers, and thieves, without the purpose or attempt at concealment, and it may be correctly affirmed of him that he harbors them.

The Act of Congress, by using the terms "harbor and conceal," evidently assumed that the terms were not synonymous, and that there might be a harboring without concealment. The act seems to be drawn with great care and accuracy, and bears no marks of that slovenly diction which sometimes characterizes Acts of Assembly, where numerous synonymes are heaped together, and words are multiplied only to increase confusion and obscurity. But neither in legal use nor in common parlance, is the word harbor precisely defined by the words entertain or shelter. It implies impropriety in the conduct of the person giving the entertainment or shelter, in consequence of some imputation on the character of the person who receives it. An inn-keeper is said to *entertain* travellers and strangers, not to *harbor* them; but may be accused of *harboring* vagabonds, deserters, fugitives, or thieves, persons whom he ought not to *entertain*.

It is too plain for argument, that this act does not intend to make common charity a crime, or treat that man as guilty of an offence against his neighbor who merely furnishes food, lodging, or raiment

to the hungry, weary, or naked wanderer, though he be an apprentice or a slave. On the contrary, it contemplates not only an escape of the slave, but the intention of the master to reclaim him. It points out the mode in which this reclamation is to be made, and it is for an unlawful interference or hinderance of this right of reclamation, secured to the master by the Constitution and laws, that this action is given.

The harboring made criminal by this act, then, requires some other ingredient besides a mere kindness or charity rendered to the fugitive. The intention or purpose which accompanies the act must be to encourage the fugitive in his desertion of his master, to further his escape, and impede and frustrate his reclamation. "This act must evince an intention to elude the vigilance of the master, and be calculated to obtain the object." (2 McLean, 608.)

This *mala mens*, or fraudulent intent required by the act to constitute illegal harboring, is not to be measured by the religious or political notions of the accused, or the correctness or perversion of his moral perceptions. Some men may conceive it a religious duty to break the law, but the law will not receive this as an excuse.

If the defendant was connected with any society or association for the purpose of assisting fugitives from other States to escape from their masters, and, in pursuance of such a scheme, afforded this shelter and protection to the fugitive in question, he would be legally liable to the penalty of this act, however much his conscience, or that of his associates, might approve of his conduct.

The difference between the action for the penalty and the action on the case, is this: The defendants might be liable for the penalty if they illegally harbored and concealed the fugitives, even though the master may have afterwards reclaimed them.

But in an action on the case for damages, the plaintiff must show that the slaves were lost to him through the illegal interferance of the defendants, or that some other appreciable loss, injury, or damage, was suffered by him in consequence thereof. In the first case, he would recover the whole value of the slaves as damages; in the latter, only to the amount of loss or actual damage which he shows he has suffered.

If the owner of the fugitive does not think fit to pursue, in order to reclaim them, he cannot complain that those who have merely harbored them after their escape have injured him, unless he can connect such persons with the original escape of the slaves, and show that they seduced the slaves, and helped them to escape from the possession of their master. If the master had entirely abandoned the pursuit of his slaves and given up all attempts to reclaim them, before interference of the defendants, the whole value of the slaves could hardly be claimed as the measure of his damages, as their loss could not be then imputed to their harboring.

But if the owner or his agent, pursuing the fugitives for the purpose of reclamation, should trace them to the premises of a certain individual, and could trace them no farther, because they had been harbored and concealed, and carried away secretly by night, and delivered to another, who continued the same process, and the pursuit of the claimant was thus baffled, no one of those individuals thus interfering could be suffered to allege that *his* interference did not cause the loss of the fugitives, or that their value was not a proper measure of damages in an action for such harboring. If a number of persons combine together to commit a trespass or wrong, they are liable to damages to the extent of the whole injury. The injured party may recover judgment for the whole damage against each, and elect *de melioribus damnis*, as he can have but one compensation. And where a number of persons are sued for a joint trespass or tort, and the plaintiff can prove any one of them to be guilty, the jury may find the others not guilty, and assess the whole damages against that one, even though many others, known or unknown, may have combined with that one to do the act, and have not been sued. Although the plaintiff can recover but one satisfaction, the damages are indivisible, and each joint trespasser is liable for the whole.

It will be for you, gentlemen of the jury, to apply these principles to the facts of the case before you. The evidence is very contradictory. In some cases, testimony apparently conflicting may be reconciled without imputing corrupt perjury to either side.

It would be difficult, perhaps, for the most enlarged charity to do so in this case. The whole case has been argued before you with very great ability by the learned counsel, and as you are the sole judges of the facts, the Court do not think it necesary to make any remarks upon them.

If, in your judgment, the hypothesis of the defendants' counsel is supported by the evidence; if Mr. Breckbill was merely a spectator, without counsel, interference or assistance; if Mr. Weakley did not participate in the transaction at all, you should find them not guilty. If you believe, also, that Kauffman did not assist in harboring, secreting or deporting the slaves, but merely fed them out of charity, and suffered them to rest for a few hours in his barn; that they were brought there without his knowledge, consent, or approbation, and taken away without his assistance, or any act of his, to enable them to elude the pursuit of their owners, or to further their escape, your verdict should be in his favor also.

If, on the contrary, you find the hypothesis of the plaintiffs' counsel to be a true one; if, from the facts in evidence, you believe that certain persons in the region of country where the defendants reside, and including them, or any of them, were known as persons willing to assist fugitives to escape; that for this reason they were brought to the premises of Kauffman, by some person, known or unknown, who was assisting the slaves to escape; if they were received by him, harbored and secreted in his barn, then taken away by him, or by his agents or servants, after night, in order to assist them to escape, and to elude pursuit; if the slaves were thus transferred by him, with the countenance, counsel and assistance of Breckbill, to the barn of Stephen Weakley; if Weakley kept them secreted in his barn, and removed them on the following night to places unknown, and the pursuit of the owners of these slaves was thus baffled, you should find for the plaintiffs the full value of the slaves in damages, as against all the defendants, or such of them as you believe from the evidence to have had an active participation in the offence.

In fine, the burden of proof is on the plaintiffs, and, in order to support their action, you must find from the evidence—

1st. That the plaintiffs were owners of the slaves named and described in the declaration.

2d. That those slaves escaped from the State of Maryland.

3d. That they were pursued by the agent of the owners for the purpose of reclaiming them.

4th. That the defendants, or some of them, knowing them to be fugitives, harbored and concealed them, in order to further their escape and enable them to elude pursuit.

5th. And if, in consequence of such harboring, the slaves did escape, and were lost to their owners, you shall find the value of the slaves as damages, with interest, if you see fit.

You will suffer no prejudice to operate on your minds, in favor or against either of the parties, on account of any peculiar notions either you or they may entertain on the subject of slavery. You are sworn to render a true verdict. In order to do this, it must be according to the law of the land, rendering equal and exact justice to both parties.

Court of Chancery. Vermont, November, 1852.

BYRON STEVENS *v.* THE RUTLAND AND BURLINGTON RAIL-ROAD COMPANY, ET AL.

1. It is a settled principle in equity, that a majority of a joint stock association cannot use the joint property except within the scope of their business, without being liable to be restrained by injunction.
2. A corporator would be bound by a modification of a charter by legislative action, which is only an *auxiliary*, but not a *fundamental* change.
3. Where a corporation procures from the Legislature, by a supplemental act, authority to make a fundamental change in their charter, as to extend their railway to a different point, and thus really construct a new road, the rights of an individual corporator, as such, who does not assent thereto, are not thereby affected, although there be a majority vote of the corporation, accepting the act.

This is a bill preferred before the Chancellor of the third Judicial Circuit, against the Rutland and Burlington Railroad Company

and three of its directors, by a stockholder in the Company; the object of which is to obtain an injunction against the defendants, restraining them from applying the funds of the Corporation, or pledging its credit, for the purpose of constructing a railroad from Burlington, in the County of Chittenden, to Swanton, in the County of Franklin.

It appears that the Legislature of this State, at their session in 1843, granted a Charter of Incorporation to divers individuals, and to their successors, for the purpose of building a railroad from some point in Burlington, through the Counties of Addison, Rutland and Windsor or Windham, to some point on the west bank of the Connecticut river, under the name of the Champlain and Connecticut River Railroad Company. This name was subsequently changed by the Legislature, to the Rutland and Burlington Railroad Company. The charter, among other things, provides that the capital stock of the Company shall be one million of dollars, with the right in the Corporation to increase it to an amount sufficient to complete said road, and furnish all necessary apparatus for conveyance. The Company, after having procured some minor amendments to the charter, which it is not necessary to notice, caused the books to be opened, the stock to be taken, and organized in due time, under the law, and have caused the road to be constructed, and it has for some time been in successful operation. The plaintiff, upon opening the books, subscribed for five shares of the capital stock, has regularly paid his subscription, each share being one hundred dollars, and he has ever since been the owner of said shares. After this road was constructed, and while in operation, the Legislature of this State passed an additional act to authorise this Corporation to extend their railroad, at any time within three years, from Burlington to Swanton, in the County of Franklin, it being a distance of about thirty miles. This additional act also provides, that the Corporation, in the construction of this extension, shall have all the rights and privileges, and be subject to all the liabilities contained in the original charter, and the previous supplementary acts. The orator then proceeds to allege, that the Directors, who are made parties to this bill, and without authority from the Board of Direc-

tors or from the Corporation, and without any previous notice, and in bad faith, and for the purpose of prejudicing the interests of the shareholders, procured the Legislature to pass this additional act of 1850, and have caused it to be accepted by the Board of Directors; and that the Directors have caused a meeting of the stockholders to be called, to see if they will accept of this act, as an amendment to their charter; and that they threaten, if this act shall be accepted by a majority of the Corporation, that they will proceed immediately in the construction of this extension, and for that purpose will apply the funds and pecuniary resources of the Corporation, and pledge its credit, to whatever extent they shall find it necessary, to effect the object; and this, too, without the consent and against the will of the minority of the stockholders, and particularly the orator, who alleges that he has not, and will not consent to accept of said act of 1850, and construct said extension, and that he has, ever since the passage of the act, requested the defendants to desist from the same.

These are the material facts stated in the bill; which has been verified by affidavit. No affidavits have been filed on the other side, and no application for a delay of the hearing, for the purpose of answering the bill; and since it has been pending before the Chancellor, it appears the Corporation, at a meeting previously called for that purpose, have voted to accept of the act of 1850, as an amendment of their charter.

The question is, can the orator, upon such a state of facts, claim, at the hands of the Chancellor, his injunction?

This case was twice argued.

For the complainant, Messrs. *March* and *Aldis*.

For the defendants, Messrs. *Smalley*, *White* and *Ch. Linsley*.

BENNETT, CH.—It is an admitted principle, that in partnerships, and joint stock associations, they cannot, by a vote of the majority, change or alter their fundamental articles of copartnership or association, against the will of the minority, however small, unless there is an express or implied provision in the articles themselves that they may do it. It is equally well settled, that a court of Chancery will, upon the application of an individual member of a part-

nership or joint stock association, restrain, by injunction, the majority from using the funds or pledging the credit of the partnership or association in a business not warranted, and not within the scope of their fundamental articles of agreement. Courts of equity treat such proceedings by a majority, *as a fraud* upon the other members, which they will neither sanction nor permit. To prevent the commission of fraud, by injunction, has been one of the earliest and most appropriate heads of equity jurisdiction, as well as to relieve against it, when committed. It was upon this principle that Lord Eldon, when High Chancellor, upon the application of an individual member of a company, which had been organised for the purpose of carrying on a fire and life insurance business, restrained the company, by injunction, from embarking also in the marine insurance business; though the applicant had paid into the funds of the Company only £150, as a deposit upon fifteen shares: and the company gotten up by the *Rothschilds*, of England, and composed of six or seven hundred individuals, with a capital of five millions sterling. See *Natusch* v. *Irving and others*, Gow on Part., Appendix, p. 576. The same principle was applied to a corporation by the Vice Chancellor, and by Lord Chancellor Brougham, in the case of *Ware* v. *The Grand Junction Water Company*, 2 Rus. and Mylne, 461 S. C. 13 Cond. Ch. Rep. 126. The Vice Chancellor, upon the application of a single shareholder, restrained the Corporation, not only from embarking their funds and credit in a matter beyond the provisions of their charter, but also from applying to Parliament for a change in the charter, which would warrant it. The change desired to be made in that case was, that the Company might be enabled to get their supply of water by means of an aqueduct from the river Colne, instead of the river Thames, as authorised to do under their original charter. Lord Brougham, on appeal, dissolved that part of the injunction, it is true, which restrained the Company from applying to Parliament for an alteration of the charter in the particular desired, but retained the residue of it. So in *Cunliff* v. *The Manchester and Bolton Canal Company*, 13 Cond. Equity Rep. 131, n. the Vice Chancellor restrained the Corporation, upon the application

of a share holder, from applying to Parliament for a change in their charter, to enable them to convert a portion of their canal into a railway, and from applying any of the corporate funds to the proposed object.

It was well conceded, in the argument on the defence, that if the Corporation had been about to proceed to a construction of the contemplated extension without the act of 1850, it would have been a proper case for an injunction. The only question which can be open to debate is, as to what shall be the effect of the act of 1850, and a subsequent adoption of the act by the Corporation, upon the individual rights of a share holder who does not assent to its adoption? If bound by it, there is no equity in this Bill. It is, and must be admitted, that the Legislature have no constitutional power, unless it be reserved in the grant, to change or alter an act of incorporation without consent, and thereby cast upon the company new and additional obligations, or take from them rights guaranteed under the original charter. And indeed, this the Legislature have not attempted to do. It also is equally true, that it is a part of the law of corporations, that they act according to the voice of the majority. But it is to be remembered, that this is not a suit in which the plaintiff seeks to protect himself in any *corporate* right, but in his own *individual* right, growing out of the fact of his having become a corporator, by his subscription, and its payment, to the capital stock of the Company. One of an aggregate corporation may contract with the company, as well as a third person; and the rights of the individual so contracting are no more distinct and independent, in the one case, than in the other. The plaintiff, by his subscription, assumed to pay to the corporation, and only for the purpose specified in the charter, its amount, according to the assessments; and there was, at the same time, a TRUST created, and an implied assumption, on the part of the Corporation, to apply it to that object, and none other. The Corporation also assumed upon themselves to account to this corporator for his share of the dividends, when this road should be completed and put in operation; and for his share of capital stock, though not *in numero*. The charter, in this case, gives to the State the

right to purchase out the road of the Corporation, after a given number of years, upon certain terms therein specified. The relation between each original share holder and the Corporation is the same. The obligation of the contract between the Legislature and the Corporation, after an acceptance of the charter, is no more sacred than that which is created between the Corporation and the individual corporator. Does any one suppose the Legislature could, without the consent of parties, absolve a corporator from liability on his subscription to the Corporation, or modify it? and can they do the reverse of it? It is conceded that there is a class of alterations in a charter, which the Corporation may obtain and adopt, that would not so essentially change the contract as to absolve the coporator from his subscription, or give him a right to complain in a court of justice, in case he had previously paid it.

Where the object of the modification or alteration of the charter is *auxiliary* to the original object of it, and designed to enable the Corporation to carry into execution the very purpose of the original grant, with more facility and more beneficially than they otherwise could, the individual corporator can not complain; and I should apprehend it would make no difference with the rights of a Corporation, in such a case, though he could show that the charter, as amended, was less beneficial to the corporators than the original one would have been. The ground upon which such amendments bind the corporator, I deem to be his own consent. When he becomes a corporator by his signing for a portion of the capital stock, he in effect agrees to the by-laws, rules, and votes of the Company, and there is an *implied* assent, on his part, with the Corporation, that they may apply for and adopt such amendments as are within the scope, and designed to promote the execution of the original purpose; and he signs, and the Corporation receive his subscription, subject to such implied contingency: and if we regard it in the nature of a *license* only, it would not alter the principle. Both parties having acted upon it, it would not be countermandable.

But suppose the object of the alteration is a *fundamental* change in the original purpose, and designed to superadd to it something

which is beyond and aside of it; does the same principle apply? In the case of the *Union Lock and Canal Company* v. *Towne*, 1 N. H. Rep. 44, the Company, under an act of the Legislature of New Hampshire, passed Dec. 1808, were incorporated for *the purpose* of rendering the *Merrimack* river navigable from *Reed's Ferry* to *Amoskeag Falls;* and in this charter the Company were authorised to purchase and hold real estate not exceeding six acres, and to exact and collect toll for a period of forty years only, at a rate not averaging more than twelve per cent. per annum on the capital stock invested. In June, 1809, (the 23d) the Legislature passed an additional act, which took off all limitation as to the rate of toll, and time of its duration, and authorised the Company to purchase and hold real estate not exceeding one hundred acres. In 1812, the Legislature passed another act, conferring the right upon John L. Sullivan and others, to *lock Cromwell Falls*, on the same river, which was a point not embraced within the termini of the act of 1808; but in other respects the acts were similar; and in this act, Sullivan and his associates were authorised to transfer the charter to the Union Locks and Canal Company, so as to be considered a mere addition to that charter. It was transferred and accepted in August, 1813. The act of June, 1809, was passed upon the petition of the Corporation, and the defendant became a member of the Corporation in that summer; but whether before or after the 23d day of June, (the day of its passage,) does not distinctly appear; though the Court say, from the declaration it appears all the assessments were made after that date, and a part after the passage of the act of 1812, and the acceptance of it. It became material to pass upon the effect of both acts. The Court, in a well considered opinion given by Judge Woodbury, held that each of the subsequent statutes created such a fundamental change in the original charter as to absolve the defendant from all liability for assessments made after the passage of the additional acts; there being no evidence to show that he had ever personally assented to them.

In the *Middlesex Turnpike Corporation* v. *Lock*, 8 Mass. Rep. 268, the Court held that a variation and change in the course of

the turnpike road, from that which was prescribed in the original charter, was such a fundamental alteration as to absolve the subscribers from the payment of assessments made after the amendment to the charter, upon a subscription for stock, made before. The supplementary act, in that case, was passed upon the application of the Directors of the Company, with the assent of the Corporation, at a meeting duly called for that purpose; and the alteration proposed in the act, was in the course of the turnpike road from Biskit Bridge, in *Tyngsboro'*, to the Fork, in *Bedford.*

The case of the *same Company* v. *Swan*, 10 Mass. Rep. 384, arose under the same charter, as amended, and was brought to recover assessments on Swan's subscription, made after the amendment. The case differed from the one in the 8th vol. in this: Swan was a Director in the Company, and joined in the application to the Legislature for a change in the charter, and when it was claimed by the counsel, that that fact, in connection with the fact that he was officially concerned in making the road under the amended charter, was equivalent to an individual assent to the amendment, and bound him personally; the Court say they can not admit the soundness of the position. See, also, the *same plaintiff* v. *Walker*, 10 Mass. Rep. 390. I cannot see that the case of *Revere* v. *The Boston Copper Company*, 15 Pick. Rep. 351, 363, cited by the defendant's counsel, makes for them, but rather the reverse. The object of the suit was to recover an indemnity, which the plaintiff claimed he had sustained in consequence of the defendant's refusal to employ him, and pay him a salary agreeably to a special promise which he had made with them, which by its terms, was limited to the time for which the Corporation was established, provided the plaintiff should so long live, and continue to perform his part of the agreement. The plaintiff was a stockholder, and took charge of the business as the agent of the company. The business of the Company proved unprofitable, after a trial of more than four years, and a majority of the Corporation voted to dissolve the Company, and wind up its concerns; and for that purpose appointed trustees, and assigned their effects. They also *discharged* the plaintiff from their service, and gave notice to

the executive department of the Government, that they claimed no further interest in the charter. By the by-laws, the officers held their offices for one year, and until others were appointed. The Court said, the Corporation was not dissolved; and that the plaintiff, though one of the Corporation, was not bound by the vote of the majority. So far as an aggregate corporator, he might be bound, they say; but treating him as an *individual*, with *individual rights*, he was not bound by the majority vote. This is a strong case to show the distinction, and the plaintiff had his damages allowed him after he was discharged by the majority vote, by reason of the defendants' refusing to employ him.

The case of the *Hartford and New Haven Railroad Company* v. *Croswell*, 5 Hill, 385, has an important bearing upon the one before us. The amendment in that case to the original charter, authorized the defendant to purchase, hold, and run upon the Sound, steamboats in connection with their railway, and gave the Company, for that purpose, an increase of capital not exceeding $200,000. This seems to be nothing more or less, so far as principle is concerned, than an *extension* of the *terminus* of the road at New Haven, by steam power, on the railroad which the God of nature has made, instead of a railroad by land, constructed by the art of man. This amendment was accepted both by the Directors of the Company and by the Corporation, convened for that purpose; and yet it was held that the alteration was *fundamental*, and absolved the defendant from all liability for the assessments on his stock; there being no evidence that the defendant had personally assented to an acceptance of the amendment. In that case the assessments were made, and had become payable, and had been demanded of the defendant, before the amendment of the charter. Ch. J. Nelson, in his opinion, lays down this general proposition, "that corporations can exercise no power over the corporators, beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent." * * * *

In *Ellis* v. *Marshall*, 2 Mass. Rep. 269, it was held that no man could be made, by act of legislation, a member of an aggregate corporation without his *personal* consent; and the same principle

would seem to apply, when he is asked to remain and become a corporator under a supplementary act, to be attached to and become a part of the charter, where that which it is proposed to *superadd* is *vital*, and constitutes a *fundamental* change in the charter, which is but the constitution of the Company.

The case of *Gray* v. *Monongahela Navigation Company*, 2 Watts and Sergeant, 150, has been much relied upon in the defence. The purpose of the incorporation, as specified in the grant, was to construct a lock navigation on the Monongahela river. In the charter it was provided that the Company might raise their dams to a height not exceeding 4½ feet; and that no one stockholder should have, to exceed ten votes. Some three years after the passage of the act, a supplemental act was passed, taking off the limitation as to the height of the dams, and permitting them to be raised to a height not exceeding eight feet, and providing that a share holder of a given amount might have twenty votes. The plaintiff became a subscriber for stock, soon after the charter was given, and the action was for certain instalments. The alteration was at the request of the Directors. It was claimed that the alteration changed a most essential feature in the original charter, and would absolve the defendant below from all obligation to pay his assessments. But the Court held otherwise, and I do not know that I should differ from them. In regard to the provision in respect to a change in the ratio of votes, the answer given by the Judge at the Circuit, in his charge to the jury, would seem to be conclusive. He says, it was to correct a palpable blunder in the first act, which made the section obscure and contradictory; and if the alteration disturbed the obligation of the contract, the act was so far void, and the contract left in force. The provision enlarging the license as to the height of the dams erected in the river, was evidently in furtherance of the object of the original grant, which was to construct a lock navigation. It might well be said, that the Corporation had an implied authority to obtain such an amendment to the original grant.

In this very case, Ch. J. Gibson says, if the amendment extended to a change in the structure of the association, it would have been

fatal; and it was so held by that Court in the *Indiana and Ebensburgh Turnpike Company* v. *Phillips*, 2 Penn. Rep. 184. The change in the case of *Irvin* v. *The Turnpike Company*, 2 Penn. Rep. 466, was in the location of a part of the road. This was held, by three judges against two, not to be such an alteration of the grant as to be fatal; and that an acceptance of the amendment by the Corporation would bind the individual corporators.

This case is opposed to the Massachusetts cases, and I am not called upon to say which I should be disposed to adopt. It is sufficient to say, that in the one case the Court did not consider the alteration in the charter as a *fundamental* change in the structure of the association; while in the other, it was so considered. And as this preliminary question is determined, so the result must follow. I apprehend neither the case of *Lincoln and Kennebec Bank* v. *Richardson*, 1 Greenleaf, 79, or of *Foster et al.* v. *The Essex Bank*, 16 Mass. Rep. 245, has any material bearing upon the question, to show that the plaintiff was bound individually by the majority vote of this Corporation.

The case of *Ware* v. *The Grand Junction Water Company*, 13 Cond. Chan. Rep. 126, has been relied upon to defeat the equity of this bill. The Vice Chancellor allowed a special injunction, in the terms of the prayer of the bill; the first branch of which restrained the Company from making any application to Parliament, or taking any other proceedings for obtaining such an alteration in the original charter, as was desired; and the second branch merely restrained them from carrying those alterations into execution, independently of such legislative sanction; or from using, or permitting to be used, the seal, name, funds, credit and officers of the Company, with a view to effect any such purpose, under their existing constitution. The Lord Chancellor supported the injunction of the Vice Chancellor, so far as related to all such acts as were not authorized by the then present constitution of the Company; but dissolved it, so far as to permit the Company, as a *qua corporate body*, to apply to Parliament for an alteration in their charter, so as to authorise the change desired; but restrained them from applying their corporate funds to that purpose. The Chan-

cellor proceeded upon the ground, that it was an *incidental* right in the corporators, as a *qua corporation*, to apply for such a change; and that the plaintiff subscribed for stock, subject to such a contingency; and that all the arguments touching the proposed change, were proper for a committee of the House of Lords, or Commons. He evidently goes upon the ground, that Parliament is the proper place to meet the question; and that if Parliament decide to make the alteration proposed, it is binding upon all the corporators. I apprehend, that the views expressed by the Lord Chancellor in that case, if sound, must rest upon one of two grounds: either that the change asked for in the charter was not a *fundamental* one, or else upon the ground of the *transcendent* powers of a British Parliament. It is evident that Lord Brougham, in the case of *Ware* v. *The Grand Junction Water Works*. grounds himself upon the *sovereign and uncontrollable* powers of the Parliament. The change in the charter, asked for in that case. would, under most, if not all the decisions in this country, be regarded as a *fundamental* one. The argument of Lord Brougham. at least in one particular, does not seem very sound. He says: "The Company ought to have the power of obtaining an alteration in their constitution, or that the plaintiff ought to have come in as a member of it under certain *conditions* and *limitations*." But would the *conditions* and *limitations* be more sacred than the Constitution itself? and if Parliament might change the *constitution*. might they not dispense with the *conditions* and *limitations?* See Amer. Law Mag. vol. 6, p. 93. But with us, no legislature can transcend the bounds of the constitution.

In the case of *Coleman* v. *Eastern Counties Railway Companies*, 10 Beavans' Rep. page 1, the Directors of the Railway Company, for the purpose of increasing their business, proposed to *guarantee* certain profits, and to secure the capital stock of an intended steam packet company, who were to act in connection with the Railroad Company; and it was held not to be within their power; and they were restrained by injunction, upon the application of a shareholder, even though it appeared that the share holder was suing at the instigation of a rival company. The Mas-

ter of the Rolls, Lord Langdale, says, "that such a circumstance, in itself, was not sufficient to prevent the orator from obtaining a special injunction, upon the merits of his case." In the recent case of *Munt* v. *The Shrewsbury and Chester Railway Company*, 3d vol. of English Rep. in Law and Equity, p. 144, the defendants, by various acts of Parliament, were empowered to construct several railways, and also to build wharves and warehouses, for the purpose of the traffic of the Company, upon the banks of the river *Dee*. The Railway Company brought a bill into Parliament, to empower them to improve the navigation of the river *Dee*, having no power to apply any of the capital of the Company to that purpose, under the original charter. Upon the application of a single shareholder, it was held that the Directors could not apply any of their funds in improving the navigation of the river *Dee*, or in payment of the expenses of getting a bill through Parliament for that purpose; and an injunction was granted to restrain them from so doing. In that case, it was a conceded fact, that the prosperity of the Railway Company depended materially upon the navigation of the river being kept in good condition, and that it was then in a state of deterioration; and the Company had actually expended two thousand pounds upon the river before the bill was brought. The Master of the Rolls says, "so far as the power of a Court of Chancery extends, it has *unalterably* decided, that companies possessed of funds for objects which are distinctly defined by act of Parliament, cannot be allowed to apply them to any other purpose whatever, however beneficial or advantageous it may appear to be to the Company, or to individual members of the Company." The injunction not only stayed them from expending any further sums of money upon the river, but from applying to Parliament for an alteration of the charter, at the expense of the Corporation.

If, in a case like the present, the majority cannot bind the minority, it is plain that there is an equity in this bill, and that the defendants can stand in no better situation than if they had, by a vote of the Company, proceeded to build the extension, and to apply the funds and credit of the Corporation to that purpose, without any additional act of the Legislature. The case of *Living-*

stone v. *Lynch, et al.*, 4 Johns. Ch. Rep. 573, was the case of a voluntary association, under the name of the North River Steam Boat Company; and a majority, without the consent of the minority, changed, by a vote, the articles of association, and proceeded in their business according to their new articles. The bill was brought by the plaintiff against the majority of the Company, to have the rights of the association reinstated on their former basis; and the Chancellor decreed the new articles *null and void*, and set up the old articles, and enjoined all further proceedings under the new articles. In the case of *Natusch* v. *Irving et al.*,[1] which was also the case of a voluntary association, an injunction was allowed to restrain them from going into a business not within the scope of the original articles, in pursuance of a vote of the majority. And in that case, before the hearing, the defendant had offered to pay back all that the orator had paid into the Company, with interest from the date of the payment, and also to fully indemnify him against all loss, by the transactions of the Company, already had or thereafter to be had, in the business, which was beyond their original articles. Lord Eldon, to this part of the case, replies, in substance, that it is not competent for any number of persons, in a partnership (unless so provided for,) formed for specified purposes, to effect that formation by calling upon some of their partners to receive back their capital stock and interest, and quit the concern—which, in effect, would be merely *compelling* them to retire upon such terms as should be dictated to them, so as to form a *new Company;* and that it is the *right* of a partner to hold his associates to the *specified purposes*, whilst the partnership continues, and not to rest upon indemnities with respect to what he had not contracted to engage in; and that a partner cannot be compelled to part with his shares, though for double what he originally gave for them; and that it may be his principal reason for keeping them, to have the partnership carried on according to the original contract. This doctrine of Lord Chancellor Eldon necessarily grows out of the doctrine, that it is the business of the courts of justice to

[1] Reported in the appendix to Gow. Part. 576.

enforce the contracts of parties, *not make them.* To give to courts not only the power to enforce, but also the power to make, or even modify in one iota a contract fairly made, would be the *rankest despotism.*

I am not ready to suppose the Directors, in procuring the act of 1850 to be passed, or the Corporation, in accepting that act, acted in bad faith to any of the old stockholders; but doubtless they were governed by the most honorable motives, and meant it for the best good of all concerned, notwithstanding the allegations in the bill. The case is not put at all upon the allegations in the bill, imputing bad faith to the Directors in obtaining the act of 1850. If it was, it would be very material to the merits of the question that the bill should be answered. The ground assumed is, that this Corporation had the funds of the original stockholders for an object distinctly defined in the original charter, and that they cannot be allowed to apply them to any other purpose whatever, without the consent of the stockholders; and that, to do it, would be a breach of trust.* *

Where it is clearly shown that a corporation is about to exceed its powers, and to apply their funds or credit to some object beyond their authority, it would, if the purpose of the Corporation was carried out, constitute a breach of trust; and a court of equity cannot refuse to give relief by injunction. See *Aagar* v. *The Regent's Canal Company*, Cooper's Equity Rep. 77. *The River Dan Navigation Company* v. *North Midland Railway Company*, 1 Railway Cases, 153–4. The case from the 1st vol. of Railway Cases was before the Lord Chancellor, and he uses this language: "If these companies go beyond the powers which the Legislature has given them, and in a mistaken exercise of those powers, interfere with the property of individuals, this Court *is bound* to interfere; and that was Lord Eldon's ground in *Aagar* v. *the Regent's Canal Company.* The Lord Chancellor further adds: "I am not at liberty (even if I were in the least disposed, which I am not,) to withhold the jurisdiction of this Court, as exercised in the case of *Aagar* v. *The Regent's Canal Company.*" In that case Lord Eldon proceeded simply on the ground that it was necessary to exercise this jurisdiction of chancery for the purpose of keeping these companies

within the powers which the acts give them. And it is added: "And a most wholesome exercise of the jurisdiction it is; because, great as the powers necessarily are, to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere, if there was not a jurisdiction continually open, and ready to exercise its power to keep them within their legitimate limits." It cannot justify the Chancellor in refusing to exercise the jurisdiction of chancery, because the defendants may claim the right to proceed under color of the act of 1850. It is a settled principle, that the circumstance of the defendant's acting under color of law, simply, can form no justification. The question, after all, will be; does the law justify the act which is being done, or threatened to be done? *Osborn* v. *The Bank of the United States*, 9 Wheaton, 738. If a law is unconstitutional, it can give no authority. If the power it confers is abused or exceeded, the person acting under the color of law is a wrong doer. In the case at bar the Corporation had no power to build the *extension* under their original charter; and the act of 1850 is not binding upon the orator without his consent.

The injunction must, therefore, be allowed; but only so far as to restrain the defendants, until the further order of the Chancellor, from applying the present funds of the Corporation, or their income from their present road, either directly or indirectly, to the purpose of building said extension in said road, or to pay land damages and other expenses which may be contingent upon the building of it; and also from using or pledging, directly or indirectly, the credit of the Corporation in effecting the object of the extension; and at the same time, the Company will be left at liberty to build the extension with any new funds which they may see fit to obtain for that specific object.[1]

[1] It is due to the learned Judge who delivered this able and elaborate opinion, to say that it is not printed in this Journal *entire*. Its length was such as to forbid it. It is believed, however, that every *material* part is here presented. *Eds. Am. L. Reg.*

Supreme Court of Pennsylvania, December, 1852.

HUTCHINSON *v.* M'CLURE, ET. AL.

A judgment confessed or conveyance made for an antecedent debt, by a debtor in insolvent circumstances, and in contemplation of an assignment, with intent to evade the act of 1843, in regard to preferences in assignments, is not avoided by the proviso in the act of 1849, where the creditor had no knowledge of, nor participated in the unlawful intent. Summers' Appeal, 4 Harris, 169, overruled.

Error to Erie County.

The facts of the case are fully stated in the opinion of the Court.

LEWIS, J.—This is an issue directed to the Common Pleas of Erie County, to try whether Monroe Hutchinson, assignee of Squire Hall, is entitled to priority over John McClure, Steward C. Marsh and Alexander Freer, in the distribution of the fund raised by the sale of personal property of Hall, under execution in favor of the creditors last named.

On the 1st of August, 1846, Hall was indebted to McClure on a promissory note given for the purchase of a stock of goods at Cranesville, and on the 10th August, 1849, gave a single bill for the amount, with power to confess judgment. On the 8th December, 1848, he was indebted to McClure on another promissory note for goods at Girard, and on the 5th May, 1851, gave a single bill for the amount, payable within twenty days from date, with power to confess judgment. On the 4th August, 1851, both these debts were included in a judgment bond, and on the 18th August, 1851 judgment was entered on the bond, and execution issued.

On the 7th of July, 1851, Hall gave Marsh and Freer a bond, with power to confess judgment, for an indebtedness which arose two years before, for goods purchased in New York. On this bond judgment was entered on the 16th of August, 1851, and execution issued.

By virtue of these two executions, the goods of Hall were seized and sold by the sheriff. The sale commenced on the 1st September, 1851. On that day, while the sheriff was actually selling the goods, Hall executed an assignment, for the benefit of creditors, to

Hutchinson, the plaintiff. This assignment was not recorded until the 29th September, 1851, and the bond of the assignee was not approved until the 29th April, 1852. There was no evidence tending to show that the debts claimed by McClure, and Marsh, and Freer were not justly due, or that in attaining their judgment bonds, or in afterwards entering judgment on them, they had any intention to evade the provisions of the Act of 1843, relative to assignments. It did not clearly appear that Hall, when he gave these judgment bonds, respectively, on the 7th July and 4th August, contemplated an assignment, or even knew that he was insolvent. But, conceding that he had such knowledge, and entertained, at the time, an intention to make an assignment, how is that to affect an honest creditor who had no knowledge of any such purpose, and had no participation in the intention to evade the Act of 1843?

In *Worman et al.* v. *Wolfersberger, Esq.*, (a case in the middle district not yet reported,) it was shown that, according to all the decisions upon statutes enacted to prevent frauds upon creditors, the party who obtained a security or a conveyance, in good faith, was not affected by, unless they participated in, the wrongful intent of the debtor in giving it, and was declared that the doctrine in *Summers' Appeal*, 4 Harris, 169, "Was a departure from the principles which had usually governed the courts in the construction of statutes similar to the proviso in the act of 1849, and that there was something so revolting to the most ordinary sense of justice in depriving any one of a vested right—a lien for a just debt—without any fault of his own, that it ought not to be done, except in obedience to the plain and imperative mandate of a power not to be resisted." Is there any such "plain and imperative mandate" in the Act of 1849? Far from it. Even the learned Judge, who engrafted upon it the construction in question, admits, in his opinion, that the act is "exceedingly obscure," and that there is but "a glimmering" of such "intent" in it. 4 Harris, 174. And the legislative and executive departments, so far from admitting the existence of any such intent, within less than a year after the decision was pronounced, repealed the proviso upon which it was founded, and thus extinguished the *ignis fatuus* which had led the judicial mind

astray. Although this repeal cannot operate retrospectively upon rights which had previously vested, the judgment of the other branches of government, in cases admitting of doubt, is certainly to be treated with respectful consideration.

The decision in *Summers' Appeal* was a departure from the great principle which requires that statutes in derogation of the common law shall receive a strict construction. It was pronounced in manifest forgetfulness of an uninterrupted current of authority upon the construction of similar clauses in statutes to prevent frauds upon creditors. It was an invasion, without legislative warrant, of the long established right of the citizen, where he has not surrendered the dominion over his property to others, to conduct his affairs in his own way. It was a violation of a maxim of universal justice, which declares that no one shall suffer for another's fault—*Nemo puniri debet pro alieno delicto.* Its tendency is to produce uncertainty and litigation; and its result, if adhered to, would be to throw into confusion the plain business transactions of a community whose commercial enterprises prosper most when left to their own activity, intelligence and vigilance. In overruling it we correct a plain mistake—we affirm as a principle not to be denied, that the judicial power is not authorised to make new and inconvenient innovations upon the rights of the people, or to alter the law of the land upon a mere "glimmering" of legislative intent; and we replace ourselves upon ancient foundations, in accordance with the true doctrine of *stare decisis*, and in obedience to the authoritative voice of the law.

As the plaintiffs below failed to make out even a *prima facie* case, the defendants were entitled to a positive direction in their favor. It follows that the error in admitting the deposition of Hall, even if a bill of exception had been sealed, would furnish no ground for reversing the judgment.

The judgment on the verdict, and decree of distribution are affirmed.

NOTE.—We subjoin that portion of the opinion of the Court in Worman *v.* Wolfersberger, referred to above by the learned Judge:

"At common law, a debtor, in failing circumstances, so long as he holds dominion over his property, has an undoubted right to prefer one creditor over another. Many debts are contracted with a knowledge of the existence of this right, and upon the full confidence that it will be exercised to secure those who have the strongest claims upon the conscience, and even upon the gratitude of the debtor. Loans made from motives of friendship, and endorsements and other liabilities incurred as surety, without expectation of profit, are of this character. At least, they are so esteemed by the community in general, and any enactment which takes away the right of a debtor to prefer them, would produce a sudden change, so extensive in all business transactions, that its policy is somewhat questionable. The project is supported by a refinement in morals which is certainly in advance of the commercial spirit of the age in which we live. At all events, a change so important in the commercial dealings of the people, ought not to be put into operation by the Courts, until the legislative will, to that effect, be plainly expressed." * * *

After remarking on the Acts of 1843 and 1849, the Judge proceeds: "According to all the decisions upon statutes enacted to prevent frauds upon creditors, the party who obtained a security or conveyance in good faith was not affected by the wrongful intent of the debtor in giving it, unless the former participated in it. This was the construction of the English statutes of 13th and 27th Elizabeth, upon the clauses which made void grants, &c., 'made with the intention to deceive, &c., purchasers and creditors.' The same principle was decided in Massachusetts, Green *v.* Tanner, 8 Met. 411; in New York, Sands *v.* Hildreth, 14 John. 493; in South Carolina, Union Bank *v.* Toomer, 2 Hill's Ch. 27; in Alabama, Stover *v.* Herrington, 7 Ala. 142; in Mississippi, Pope *v.* Andrews, 1 S. & M. 135; in Indiana, Frakes *v.* Brown, 2 Blackf. 295, and in the Supreme Court of the United States, upon the statute of Illinois, Astor *v.* Wells, 4 Wheat. 466. But in Summer's Appeal, 4 Harris, 169, it was held, in a case where a debtor had made an assignment for the benefit of creditors, that the validity of a judgment previously given, 'hinged entirely upon the *scienter* of the *debtor*, as to his solvency or insolvency at the time he gave the judgment,' and the 'knowledge of the creditor' did not seem 'to enter into the account.' This was certainly a departure from the principles which had usually governed the courts in the construction of similar statutes. There is something so revolting to the most ordinary sense of justice, in depriving any one of a vested right—a lien for a just debt—without any fault of his own, that it ought not to be done except in obedience to the plain and imperative mandate of a power which cannot be resisted. The injustice of the principle engrafted upon the Act of 1849, by the decision last mentioned, produced, without doubt, the repeal of the proviso from which it sprang, within less than a year after the decision. Under such circumstances, its weight as a precedent will be open for consideration when the question arises."