distinction between a contractor and an agent is sound in principle might well be questioned—it was practically denied in *Bush* v. *Steinman*, and much might be said in favor of that decision. But whether sound or not, it is clearly and immovably established by authority, and the general rule as recognised in America follows inexorably from it.

LUCIUS S. LANDRETH.

RECENT AMERICAN DECISIONS.

United States Circuit Court, District of New Hampshire.

HORNE *v.* BOSTON, &c., RAILROAD CO.

A railway corporation, incorporated in several states through which it runs, is, by a fiction of the law, for all purposes of jurisdiction, a citizen of each of the states; and it cannot remove a cause to the federal courts on the ground of its citizenship in the other states.

THE plaintiff, a citizen of New Hampshire, brought her action in one of the courts of that state against the defendants, as a corporation duly established and having a place of business at Exeter, in the same state, for personal injuries sustained through the fault of the defendants, at Lawrence, in the state of Massachusetts, setting her damages at more than $500.

The defendants in due season filed their petition, and moved to remove the action to this court.

The judge refused to order the removal, and his ruling has been sustained by the full bench of the Supreme Court of New Hampshire.

The defendants were first incorporated in New Hampshire by their present name, and certain short lines of railroads were from time to time constructed in Massachusetts, which together made a continuous line of road from Boston to the state of New Hampshire, and was known as the Portland and Boston Railroad.

There was a railroad chartered in Maine under which certain parts of what is now the road of the defendants in this state, were built and operated. The corporations in the three states were afterwards consolidated under substantially identical laws by which the Boston and Maine Railroad was chartered in Maine and Massachusetts as it already had been in New Hampshire. The interests of the stockholders were united upon equitable conditions agreed upon by them, while each state required certain things to be done annually by the corporation which it had chartered.

The opinion of the court was delivered by

LOWELL, J.—The Supreme Court has decided that when the same corporation owning a road which runs through several states, is chartered by each of them, it is, by a useful fiction, to be considered for the purposes of jurisdiction a citizen of each of the states: *Railroad* v. *Wheeler*, 1 Black 286. The operation of this rule is now usually avoided by chartering the company in a single state, and merely authorizing that identical company to do business in other states. In such a case it remains always a citizen of the first state: *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Missouri, &c., Railroad Co.* v. *Texas, &c., Railroad Co.*, 10 Fed. Rep. 497; *Callahan* v. *L. & N. Railroad Co.*, 11 Id. 536.

If, however, there are charters in several states, the corporation when sued in one of them as a citizen of that state cannot set up that it is likewise a citizen of another; thus in *Railroad Co.* v. *Whitton*, 13 Wall. 290, a corporation chartered by Illinois and Wisconsin was sued as a citizen of Wisconsin by a citizen of Illinois. Afterwards the plaintiff himself removed the cause to the Circuit Court, and the defendant company moved to remand it on the ground that it was a citizen of Illinois; but the court held that when sued in Wisconsin as a citizen of that state, it could not deny its citizenship there. The only difference between that case and this is that here the plaintiff is a citizen of the state where the action is brought; but this does not affect the argument that the defendant company should not be permitted to deny its citizenship in this state. So it has been held in three circuits: *C. & W. I. Railroad Co.* v. *L. S. & M. S. Railroad Co.*, 5 Fed. Rep. 19; *Uphoff* v. *Chicago, &c., Railroad Co.*, 5 Id. 545 (and see the very able opinion of Judge HAMMOND in that case) *Johnson* v. *Phila., &c., Railroad Co.*, 9 Id. 6.

The case of *Chicago, &c., Railroad Co.* v. *Chicago, &c., Railroad Co.*, 6 Biss. C. C. 219, is distinguished by Judge DRUMMOND, who decided both cases in 5 Fed. Rep. 19, 545, *supra*, and his remarks will apply to *Nashua, &c., Railroad Co.* v. *Boston, &c., Railroad Co.*, 8 Fed. Rep. 458; see also *Johnson* v. *Phila., &c., Railroad Co.*, 9 Id. 6.

This being the state of the authorities I will only add that the fiction which makes two or three corporations out of what is in fact one, is established for the purpose of giving each state its

legitimate control over the charters which it grants, and that the acts and neglects of the corporation are done by it as a whole.

It is not material in considering the question of jurisdiction that the damage complained of was suffered within the limits of Massachusetts, and that the judgment will bind the corporation in that state: *Uphoff* v. *Chicago, &c., Railroad Co.*, 5 Fed. Rep. 545.

Motion to remand granted.

The general rule made in this case was that a corporation incorporated by each of several states is a citizen of each state for the purposes of jurisdiction in the federal courts, but if incorporated in one state and merely authorized to do business by another state within its territory, it is not a citizen of such state, and this for the reason that each state has control over the corporations it brings into existence.

Whilst it has been asserted (Dillon Rem. Ca. 68) that "after much uncertainty and fluctuation of opinion in the Supreme Court of the United States, the settled rule now is that a corporation for all purposes of federal jurisdiction is conclusively considered as if it were a citizen of the state which created it, and no averment or proof as to citizenship of its members is competent or material," yet the application of the rule and the reasons for its existence are not yet settled.

Beginning with the case of *Bingham* v. *Cabot*, 3 Dallas 382, and running through the cases of *Turner* v. *The Bank of North America*, 4 Dallas 8; *Turner's Adm'r.* v. *Enrille*, Id. 7; *Mossman* v. *Higginson*, Id. 12; *Abercrombie* v. *Dupuis*, 1 Cranch 343; *Waod* v. *Wagnon*, 2 Id. 1; *Capron* v. *Van Noorden*, Id. 126; *Strawbridge* v. *Curtiss*, 3 Id. 267; *Bank of United States* v. *Deveaux*, 5 Id. 61; *Hodgson* v. *Bowerbank*, Id. 303; *Corporation of New Orleans* v. *Winter*, 1 Wheat. 91; *Sullivan* v. *Fulton Steamboat Co.*, 6 Id. 450; it was ruled and reiterated that in order to maintain an action in the United States courts the parties must be citizens (men—material, social, moral and sentient beings—not corporations) of different states, and must be so averred and appear on the record—not inferred—and the cause must have existed *ab origine* between citizens of different states. See *Montalet* v. *Murray*, 4 Cranch 46; *Gibson* v. *Chew*, 16 Pet. 315; *Course* v. *Stead*, 4 Dallas 22; *Jackson* v. *Ashton*, 8 Pet. 148; *Methodist Church Case*, 4 Wash. C. C. 595.

In 1809 the question arose in three cases: *Bank of United States* v. *Deveux*, 5 Cranch 61; *Wood* v. *Insurance Co.*, Id. 57; *Insurance Co.* v. *Boardman*, Id. 78. Chief Justice MARSHALL said "that the invisible, intangible, and artificial being, the mere legal entity, a corporation aggregate, is certainly not a citizen, and cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in the corporate name," and as "the right of a corporation to litigate depends upon the character of the members who compose it, a body corporate is not a citizen," hence judgment in the last case was reversed because the record did not show the citizenship of the corporators. This ruling was followed in *Sullivan* v. *Fulton Steamboat Co.*, 6 Wheat. 450, and *Breithaupt* v. *The Bank of Georgia*, 1 Pet. 238. In *Vicksburg Bank* v. *Slocomb*, 14 Pet. 60, the corporation was sued in the state of its charter by a citizen of a different state; but it appearing by plea that two of its corporators were citizens of the same state as the plaintiff,

the court declined jurisdiction, affirming the Circuit Court decisions in 4 Wash. C. C. 597; *Bank* v. *Willis*, 3 Sumn. 472; *Ward* v. *Arrendondo*, 1 Paine 410. This was followed in *Irvine* v. *Lowrie*, 14 Pet. 293.

In the *Bank* v. *Deveaux*, 5 Cranch 61, the court held that "a corporation is not a citizen within the meaning of the Constitution of the United States, and cannot maintain a suit in the United States courts against citizens of a different state from that by which it was chartered unless the persons who compose the corporate body are all citizens of that state." In harmony with this the court in *Bank of Augusta* v. *Earle*, 13 Pet. 519, stated that "a corporation has no legal existence out of the state which created it because it exists only in contemplation of law and by force of the law, and where that law ceases to operate the corporation can have no existence. A corporation must dwell in the place of its creation." See *Runyan's Case*, 14 Pet. 122, Federalist, No. 80. Up to this period it was certainly the doctrine that a corporation was not a citizen within the constitution or judiciary act and had no recognition in the federal courts, and this existed until 1844, when arose the case of *The Louisville, Cincinnati and Charleston Railroad Co.* v. *Letson*, 2 How. 497.

In that case a citizen of New York sued a South Carolina corporation in South Carolina, describing its corporators as citizens of South Carolina, and it appearing by plea that two of the corporators were citizens of North Carolina, the court noticed this point as being new, and held that the parties were citizens of different states, saying that the case might be placed on this ground and thus harmonize with the doctrines in former cases, and proceeds: "But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person (although an artificial person), an inhabitant of the same state for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person." The court, however, limited the application of this language, stating that a corporation is deemed a citizen because the legal presumption is that the members of the corporation are citizens of the state which incorporated it, hence the suit is presumed to be against the members, "and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States."

Here we have two distinct views: the early cases holding that a corporation is not a citizen because it is not a being but a legal entity, and the court could only take jurisdiction on the citizenship of the members (see *Insurance Co.* v. *Boardman*, 5 Cr. 57), and the *Letson case*, that a corporation is a citizen—or, which is the same thing—that although the jurisdiction depends upon the citizenship of the members of the corporation, they will be conclusively presumed to be citizens of the state which created the corporation. Presuming upon the doctrine in *Letson's case*, a corporation sought recognition in Kentucky (12 B. Mon. 212), and the court, speaking of *Letson's case*, said: "There are some expressions in that opinion which indicate that corporations may be regarded as citizens to all intents and purposes. But in saying this the court went far beyond the question before it, and to which it may be assumed that their attention was particularly directed." (See 3 Zab. 429).

In *Rundle* v. *Canal Co.*, 14 How. 80, one of the judges who assisted in the *Letson case* expressed his disapprobation of its doctrine, while another limited the

conclusions of the court to the decision of the case before it. Subsequently, in *Indiana Railroad* v. *Michigan Railroad*, 15 How. 233, this question of jurisdiction was again presented, but the case went off on another ground, and in *Marshall's Case*, 16 How. 327, the court repudiated the "presumption" part of the *Letson case*, and said that "a corporation is a citizen, because although it is an artificial person, and a mere legal entity cannot be a citizen; yet it acts and contracts by and through natural persons, and it is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names without regard to the things or persons they are used to represent." In two subsequent cases the court followed the ruling in *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Covington Drawbridge Co.* v. *Shepherd*, 20 Id. 231. Then followed the case of *Ohio and Mississippi Railroad Co.* v. *Wheeler*, 1 Black 295, decided in 1861, where the declaration stated that the railroad company is a corporation under the laws of Indiana and Ohio, having its place of business in Cincinnati, Ohio, and that Wheeler was a citizen of Indiana. Wheeler pleaded to the jurisdiction of the court, averring that he was a citizen of Indiana, and that the railroad was a citizen of Indiana, and hence the court had no jurisdiction. The railroad demurred to the plea, and Chief Justice TANEY delivered the unanimous opinion of the court that on the facts presented by the pleadings the United States courts had no jurisdiction, saying that "a suit by or against a corporation in its corporate name is a suit by or against citizens of the state which created it, hence this suit in the corporate name is a suit of the individual persons who compose it, and must therefore be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of Indiana. Such a suit cannot be maintained on the ground of citizenship, and it makes no difference whether suit is brought in the individual names of the corporators or the corporate name. This corporation has been chartered by Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects. It has no legal existence in either state except by the law of that state. Neither state could confer on it a corporate existence in the other state nor add to or diminish the powers to be there exercised. It may be composed of the same natural persons, but the legal entity or person which exists by force of law can have no existence beyond the limits of the state which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Co. are therefore a distinct and separate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a United States court." As this case has been since followed it should be noticed. It decides: (1) A corporation has no existence outside of the state which created it. This is in harmony with the prior cases. (2) A corporation incorporated by two states with the same name, capacities and powers, and intended to accomplish the same objects, and spoken of in the laws of both states as one corporate body with same name and powers, is a separate and distinct corporation in each state. This is a logical sequence from the first proposition, and accords with the early cases heretofore cited; but what constitutes an act of incorporation, or a license, or a permit, is not settled. *Railroad* v. *Harris*, 12 Wall. 65; *Railroad* v. *Alabama*, 107 U. S. 581. (3) The members of a corporation are presumed to be citizens of the state which created it, and a

mitting it to a jury, that all the conductors and agents were habitually violating the orders of their masters, as well as an act of the legislature? It is for the jury to say what is the natural presumption which arises out of such facts, and there is no rule of policy which requires us to make any legal or fictitious presumption on the subject. I will not say what verdict ought to be given on such evidence, but I am very clear, that no man who is not a juror in the case has the right to decide that the president and directors were ignorant and therefore innocent of a custom which was open, public and notorious:" *Commonwealth* v. *Ohio, &c., Railroad Co.*, 1 Grant Cas. 350.

Aside from the implication from usage of authority in the officer or agent to make the contract in question, a strong reason for holding the company liable in these cases is that it had received the consideration and benefit of the contract, and hence should not be permitted to repudiate it, and thus take advantage of its own wrong. In *Burgate* v. *Shortridge, supra*, Lord ST. LEONARDS said: "It does not appear to me that if by a course of action the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I propose to put it to your lordships in point of law is this: The question is not whether that irregularity can be considered as unimportant or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

Acceptance and enjoyment of the benefits accruing from the act or contract of its officers or agents, even though such act or contract be clearly *ultra vires* and outside of the charter powers of the company, will estop the company from repudiating such act or contract, and disclaiming responsibility for it: *Zabriskie* v. *Cleveland, &c., Railroad Co.*, 23 How. 381; *Bissell* v. *M. S., &c., Railroad Co.*, 22 N. Y. 258; *Parish* v. *Wheeler*, Id. 494; *Cary* v. *Cleveland, &c., Railroad Co.*, 29 Barb. 35; *De Groff* v. *American, &c., Co.*, 21 N. Y. 124; *Argenti* v. *San Francisco*, 16 Cal. 255; *McClure* v. *Manchester, &c., Railroad Co.*, 13 Gray 124; *Chapman* v. *M. R., &c., Co.*, 6 Ohio St. 137; *Hale* v. *U. Mutual, &c., Co.*, 32 N. H. 297; *Railroad Co.* v. *Howard*, 7 Wall. 413; *White* v. *Franklin Bank*, 22 Pick. 181; *Tracy* v. *Talmage*, 14 N. Y. 162; *Fister* v. *La Rue*, 15 Barb. 323; *Southern L. Ins. Co.* v. *Lanier*, 5 Fla. 110; *Gould* v. *Town of Oneonta*, 3 Hun 401; *Hazlehurst* v. *Savannah, &c., Railroad Co.*, 43 Ga. 54; *Chicago Building Society* v. *Crowell*, 65 Ill. 458; *Bradley* v. *Ballard*, 55 Id. 413; *Bank* v. *Hammond*, 1 Rich. L. 281; *Silver Lake Bank* v. *North*, 4 Johns. Ch. 370; *Potter* v. *Bank of Ithaca*, 5 Hill. 490; *Suydam* v. *Morris Canal, &c., Co.*, Id. 491 note; *Sackett's Harbor Bank* v. *Lewis Co. Bank*, 11 Barb. 213; *Humphrey* v. *Patrons' Mercantile Association*, 50 Iowa 607.

A fortiori, then, will acceptance and enjoyment of the benefits accruing from the acts or contracts of its officers or agents estop the company from repudiating them where such acts are not *ultra vires* but within the powers of the com-

the B. & O. Railroad Co. a corporation of the District but upon the ground that the act operated as a license to the company to construct its road there, and having accepted the license, the company had placed itself in a position of a domestic corporation for all the purposes at least of being sued in that locality. The court say they could see no reason why one state may not make a corporation of another state as there organized and conducted a corporation of its own *quo ad hoc* any property within its territorial limits," citing *Maryland* v. *N. C. Railroad Co.*, 18 Md. 193; *Sprague* v. *Railroad Co.*, 5 R. I. 233; *Goshorn* v. *Supervisors*, 1 W. Va. 308; *Pa. Railroad* v. *Sly*, 65 Pa. St. 205; *Pomeroy* v. *Railroad Co.*, 4 Blatchf. 122. This position was also enunciated by the West Virginia court in several able opinions. *B. & O. Railroad Co.* v. *P., W. & Ky. Railroad*, 17 W. Va. 867; *Henen* v. *B. & O. R. R. Co.*, Id. 895; *Kephart* v. *Mahony*, 15 Id. 609; *Hall* v. *Bank of Va.*, 14 Id. 618; *B. & O. Railroad Co.* v. *Supervisors*, 3 Id. 319. But this position is adverse to *B. & O. Railroad Co.* v. *Koontz*, 104 U. S. 5; *B. & O. Railroad* v. *Carey*, 28 O. St. 208; *Railroad* v. *Stringer*, 32 Id. 468; *Brownell* v. *Railroad*, 3 Fed. Rep. 761; *Callahan* v. *Railroad*, 11 Id. 536; *Mo. Railroad* v. *Texas Railroad*, 10 Id. 497; *Chicago Railroad* v. *L., S. & M. Railroad*, 11 Reporter 323.

In *Railroad* v. *Koontz*, *supra*, the question involved was whether by taking a lease of the road of a Virginia corporation, the Maryland corporation made itself also a corporation of Virginia for all purposes connected with the use of the leased property? The Maryland corporation leased the railroad and franchise of a Virginia corporation. Neither state legislature acted in the matter. "The Maryland corporation simply occupies the position of a company carrying on an authorized business away from its home, with the consent of its own state and that of the state in which its business is done, and, therefore, it was entitled to removal, because the company, by leasing the Virginia road, *did not* become a citizen of Virginia. Its charter is the law of its existence and the *locus* of its legal residence, and it did not change its citizenship, it simply extended the field of its operations. It resides in Maryland, but does business in Virginia. A corporation is a citizen of the state which created it. It cannot migrate or change its residence without the consent of its state." It is, perhaps, questionable whether this case is in harmony with the reasoning in prior cases In *Railroad Co.* v. *Alabama*, 107 U. S. 581, the legislature of Alabama passed an act entitled "an act to incorporate The Memphis and Charleston Railroad," the preamble stating "whereas an act was passed by the state of Tennessee for the formation" of the company aforesaid, and, therefore, it was enacted that "said company shall have the right of way and enjoy the rights, powers and privileges granted by the Tennessee act of incorporation and subject to the same liabilities and restrictions imposed by said act." Then follows same special requirements, and the court held that this was an act incorporating this company in Alabama, and, although also incorporated in Tennessee, it must, as to all its doings in Alabama, be considered a citizen of Alabama. This act is substantially the same as the Virginia act concerning the B. & O. Railroad, and the court did not compare or refer to that enactment. In *The Railroad Co.* v. *Whitton*, 13 Wall. 283, the court stated that "although a corporation is an artificial person, created by legislative power, it is not a citizen within several provisions of the constitution, yet where rights of action are to be enforced it is a citizen of the state where it was created within the clause extending the judicial power of the United States to controversies between citizens of different states.

This company being, therefore, incorporated by Illinois, Wisconsin and Michigan must be regarded a citizen of each of these states." In *Muller* v. *Dows*, 94 U. S. 444, a corporation created by the laws of Iowa was consolidated with a corporation of the same name in Missouri, under the authority of each state; the court held that it was a citizen of each state, and stated that a corporation could sue and be sued, but that the suit was regarded as a suit by or against the stockholders, who were conclusively presumed to be citizens of the state which created it. And in *Steamship Co.* v. *Tugman*, 106 U. S. 118, the court said that a corporation is a citizen of the state which incorporated it, because the individual members of it are conclusively presumed to be citizens of the state which created the corporation, stating that in this it followed *Wheeler's case*, *Letson case*, *Marshall's case*, *Shepherd's case*; *Insurance Co.* v. *Ritchie*, 5 Wall. 541; *Paul* v. *Virginia*, 8 Id. 177; *Railroad Co.* v. *Harris*, 12 Id. 65. See *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Railroad Co.* v. *Mississippi*, 102 Id. 135; *Kern* v. *Huidekoper*, 103 Id. 485; *Insurance Company* v. *Dunn*, 19 Wallace 214.

Although it has been asserted in several cases, since the *Letson case* and the *Marshall case*, that it is now settled that a corporation is a citizen of the state which created it, and can sue in its corporate name, for the reason that the persons who compose it will be conclusively considered citizens of such state—equivalent to saying that a corporation is a citizen—yet the reasons do not harmonize nor when compared produce the same conclusions, and if the conclusions are correct, there seems to be no reason why a corporation is not a citizen within the meaning of some of the amendments to the constitution.

A corporation is or is not a citizen. If it is, it can sue. If it is not, it cannot sue. Before the *Letson case* the courts held that a corporation was not a citizen, but that the individuals who composed it could sue and be sued in the United States courts. Since that case it has been held that a corporation can sue in its corporate name, because the individuals who compose it will be held to be citizens. Before and since that case the suit is really and in fact by and against the individuals—the natural persons—but since that case it is presumed that the suit in the name of the artificial person is a suit by and on behalf of the natural persons, hence a corporation is held to be a citizen and can sue. If a citizen, it is a citizen of the state which created it, and as a state—a sovereignty—can create a legal entity—a corporation—in any manner it pleases; a corporation can be created by one or more states; and a state can incorporate the corporation of another state, even if composed of the same natural persons. If the corporation is chartered—incorporated—it is a legal being—a citizen—of such state. If not chartered, but operating under an enabling act—a license, a permission, or a lease, or anything which does not amount to an act of incorporation—it is not a citizen of such state, because it is not by that state created a legal person or being. But when is a legislative enactment a charter or an enabling act, or a license? What distinctive elements, features or language distinguish one from the other?

The same enactment substantially was held in the *Harris case* to be a license or enabling act, and not a charter, and in the *Alabama case*, 107 U. S. 581, to be a charter. In *Marshall's case*, *Wheeler's case*, *Whitton's case*, *Muller* v. *Maryland*; *State* v. *Railroad*, 18 Md. 193; *Allegheny Co.* v. *Railroad*, 51 Pa. St. 228, and the *Va. and West Va. Cases*, the courts held the respective enactments to be charters, whilst the other cases held such acts were not charters. This question has not been settled. See *Morse* v. *Insurance Co.*, 20 Wall. 445; *Doyle*

v. *Insurance Co.*, 4 Otto 535; *Ex parte Schollenberger*, 6 Id. 369.

Intimately connected with this is the question whether or not a state court can inquire into the facts and judicially determine whether or not the case is removable from the state to the federal court and either grant or deny the application. The following cases assert that the state court has not the power: *Stewart & Cutts* v. *Mordecai*, 40 Ga. 1; *St. Anthony Falls, W. P. C.* v. *King Bridge Co.*, 23 Minn. 186; *Herryford* v. *Ætna Ins. Co.*, 42 Mo. 148; *Hatch* v. *Railroad Co.*, 9 Blatchf. 105; *Fisk* v. *Railroad Co.*, Id. 362; *Fisk* v. *Union Pac. Railroad Co.*, 8 Id. 243; *Connor* v. *Scott*, 4 Dillon 242; *Cobb* v. *Insurance Co.*, 3 Hughes 452. The following cases assert that the state court has this power: *Mahone* v. *Railroad Co.*, 111 Mass. 72; *Bryant* v. *Rich*, 106 Id. 180; *DuVivier* v. *Hopkins*, 116 Id. 125; *Insurance Co.* v. *Garbach*, 70 Pa. St. 150; *Hadley* v. *Dunlap*, 10 O. St. 1; *Whitton* v. *Railroad Co.*, 25 Wis. 424; *Akerly* v. *Vilas*, 24 Id. 165; *The People ex rel. West'n Tran. Co.* v. *Sup. Ct.*, 34 Ill. 356; *Darst* v. *Bates*, 5 Id. 439; *Del. Railroad Const. Co.* v. *Railroad Co.*, 46 Iowa 406; *Burch* v. *Dav. & St. P. Railroad*, Id. 452; *Crane* v. *Reeder*, 28 Mich. 527; *Mabley* v. *Judge Sup. Ct.*, 41 Id. 33; *Atlas Ins. Co.* v. *Byrus*, 45 Ind. 133; *McWhinney* v. *Brinker*, 64 Id. 360; *Blair* v. *W. P. Mfg. Co.*, 7 Neb. 146; *Orosaco* v. *Gagliardo*, 22 Cal. 83; *Clarke* v. *Opdyke*, 10 Hun 383; *Carswell* v. *Schley*, 59 Ga. 19; *State ex rel. Coons* v. *Judge, &c.*, 23 La. Ann. 29; *Hanen* v. *B. & O. Railroad*, 17 W. Va. 881; *P., W. & Ky. Railroad* v. *B. & O. Railroad*, Id. 812; *Tunstall* v. *Parish of Madison*, 30 La. Ann. 471.

Under the act of 1875 a case cannot be removed unless the petition is filed "at or before the term of the state court at which the case could be first tried and before the trial"—not at the first term, but at the first term at which the cause as a cause could be tried. Under the act of 1789, sec. 12, stat. 79, the application for removal must have been made by the defendant when he entered his appearance. Under acts 1866, ch. 288, 14 stat. 306, and act 1867, ch. 196, 14 stat. 558, it might be made at any time before trial. This was the condition when the act of 1875 was passed, and the language of that act shows clearly a determination on the part of congress to change materially the time within which applications for removal were to be made. It was more liberal than the act of 1789, but not so much so as the later statutes. Under the acts of 1866–67 it was sufficient to move at any time before actual trial, while under the act of 1875 the election must be made at the first term in which the cause is in law triable. *Babbitt* v. *Clark*, 103 U. S. 606.

In *DuVivier* v. *Hopkins*, 116 Mass. 125, the court affirmed the order of the Superior Court refusing the petition for removal. In *Mahone* v. *Railroad Co.*, 111 Mass. 72, the court stated that to remove a cause the requirements of the act of congress must be complied with. If they are not, the jurisdiction of the federal court does not attach, and whether the requirements have or have not been complied with is for the state court to determine. The case of *The People ex rel. West'n Trans. Co.* v. *The Superior Court*, 34 Ill. 356, was an application for mandamus to compel the court to remove, which was refused, and the court, in affirming the order of refusal, said: "At the hearing of the petition, the petitioner should adduce satisfactory evidence of the facts which the act of congress requires to have existed to entitle him to a removal of the cause. If there is no satisfactory evidence offered of such facts, it is the duty of the court to refuse the prayer of the petition." In *Burch* v. *Davenport* v. *St. Paul Railroad Co.*, 46 Iowa 452, the court held that if the suit is not in fact removable, it is the

duty of the state court to disregard the application. The petition presents a question of law for the determination of the state court, and the mere filing of the petition and record in the federal court *does not ipso facto* remove the case. Nor will the filing of the petition and surety in the state court divest the state court of further jurisdiction, because "the court must be satisfied by proper evidence that the facts are sufficient to authorize the removal, and for this purpose the court has a right to inquire into the facts set forth in the petition, as well as investigate the sufficiency of the surety and determine the matter accordingly." *Orosaco* v. *Gagliardo*, 22 Cal. 83.

The act of 1875 does not prescribe what the petition shall contain, but provides that when certain facts specified in the act exist, a petition may be made and filed for the removal of the suit. The existence of these facts must be ascertained by the court to which the application is made, and to that end the averments of the petition may be controverted by the opposite party. Under the act of 1789, which was like that of 1875 in this particular, affidavits or other proofs were frequently received to controvert the petition. *Clark* v. *Opdyke*, 10 Hun 383; *Anderson* v. *Manufacturers' Bank*, 14 Abb. Pr. N. S. 436; *Fisk* v. *Chicago, Rock Island & Pac. Railroad*, 3 Abb. Pr. N. S. 453; *Smith* v. *Butler*, 38 How. Pr. 192; *N. Y. Piano Co.* v. *New Haven Steamboat Co.*, 2 Abb. Pr. N. S. 357. When the state court, wherein a suit is pending, is called on to yield its jurisdiction on statutory grounds, it must inspect the documents and evidence to ascertain whether or not these statutory grounds exist. How else could the court know whether to retain or part with the cause? The state court must decide whether a given case is or is not a part of its business. The proceeding for removal is open, by petition, and contemplates a taking with leave, and not furtively by a sort of statutory larceny. The state court must know of the proceedings and see that the facts come within the requirements of the act. When they conform thereto the state court has no right or power to retain the case, and when they fail in any essential particular, it has no right or power to send the case away or order it removed. *Carswell* v. *Schley*, 59 Ga. 19. And the Supreme Court of the United States, in *Gordon* v. *Longest*, 16 Pet. 97, held the same views substantially, and stated that "it must be made to appear to the satisfaction of the state court" that the case is removable. In *Kanouse* v. *Martin*, 15 How. 198, the court said that when it appeared to the state court that the sum, citizenship and sufficiency of the surety were within the act, a case for removal was made, and it was "then the duty of the state court to accept the surety and proceed no further in the cause." In *Insurance Co.* v. *Morse*, 20 Wall. 458, Chief Justice WAITE, with whom concurred Mr. Justice DAVIS, said "the state court had jurisdiction to try the question of citizenship upon the application for removal."

After conceding the power of the state court to determine whether or not a case is removable, the Supreme Court, in *Kimball* v. *Evans*, 93 U. S. 320, said that "after final judgment has in fact been rendered by the highest court of the state in which a decision in the suit can be had, the case may be again brought here for a determination of the question arising upon the petition for removal." But to the refusal of the state court to order the removal, the record must show an exception to the ruling in order to have a standing in the federal Supreme Court upon a writ of error. *Fashnacht* v. *Frank*, 23 Wall. 416, as held in *Railroad Co.* v. *Koontz*, 104 U. S. 5: "If, after a case has been made, the state court forces the petitioner to a trial and judgment, and the highest court of the state sustains the judgment, he is entitled to a writ of error to this court *if he saves the*

question on the record. And if the exception is saved on the record, it is not necessary to protest to the exercise of jurisdiction at subsequent stages of the trial. *National Steamship Co.* v. *Tugman*, 106 U. S. 118.

The state court having acquired jurisdiction it must proceed until it is *judicially informed* that its jurisdiction over the cause has ceased or is suspended. It takes the case as made by the party himself, and need not inquire further, but it may. If that is not sufficient to oust the jurisdiction, the state court can proceed with the cause: *Insurance Co.* v. *Pechner*, 95 U. S. 183; *Amory* v. *Amory*, Id. 186; because the right of removal is statutory. Before a party can remove he must show upon the record that his case comes within the statute. His petition becomes a part of the record. It should state facts, which, taken in connection with such as already appear, entitle him to the removal. If he fails in this he has not in law shown to the court that it cannot "proceed further with the cause:" *Insurance Co.* v. *Pechner*, *supra*. In *Railway Co.* v. *Ramsey*, 22 Wall. 328,' the court said: "To obtain the transfer of a suit the party desiring it must file in the state court a petition therefor, and tender the required security. Such petition must state facts sufficient to entitle him to have the transfer made. This cannot be done without showing that the Circuit Court would have jurisdiction of the suit when transferred. The one necessarily includes the other. *If upon the hearing of the petition it is sustained by the proof, the state court can proceed no further.*" The jurisdiction of the federal court must appear from the record: *The Bible Society* v. *Grove*, 101 U. S. 611. This record is made in the state court. If it does not so appear the federal court cannot take jurisdiction. If the state court has no power to investigate and pass upon the jurisdictional facts, then this question remains undetermined in any given case. The jurisdictional facts must be ascertained somewhere; the federal court cannot do it because that court takes the record as it comes from the state court, hence the facts can only be determined by the state court: *Insurance Co.* v. *Pechner*, *supra*. In the *Removal Cases*, 100 U. S. 474, the Chief Justice said: "We fully recognise the principle heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made, which, upon its face, shows that the petitioner can remove the cause as a matter of right." To the same effect is *Babbitt* v. *Clark*, 103 U. S. 610; *Railroad Co.* v. *Koontz*, 104 Id. 5.

The weight of the authorities is that the state court must be judicially informed of the facts and determine them, or at least inquire whether or not the facts exist. If the state court cannot be deprived of its jurisdiction until judicially informed that its jurisdiction is suspended, then it cannot be so deprived until it judicially ascertains the truth of the assumed facts by which that suspension has been effected. The state court cannot judicially know that the jurisdictional averments of the petition are true without a judicial inquiry, and it cannot make such inquiry unless it has the power to controvert the averments alleged. The state court had the rightful jurisdiction of the cause before the filing of the petition, and unless the averments of the petition are true, its jurisdiction continues, because a mere fiction or falsehood cannot transfer its jurisdiction. Then must the court which has the rightful jurisdiction, upon a mere suggestion of facts, which may be true or false, surrender its jurisdiction to a court which can have jurisdiction only in the event that the facts are true? If this is correct then this absurdity follows: the court which has

jurisdiction must decline to exercise it until a court which may have none may see proper to decline it. Such a construction of the statutes is not only unreasonable, but is in conflict with the most elementary principles of constitutional government.

In *White* v. *Holt, Judge, et al.*, 20 W. Va. 814, the C. & O. Railroad, being defendant in the court below, made an application in the state court for removal, which was denied; it then obtained a continuance and procured transcript of the record, and docketed the case in the federal court. At the next term of the state court the order of the federal court docketing the case was presented, and the court refused "to proceed further in the case." In the federal court, whilst proceedings for mandamus were pending in the state court, a nonsuit was procured, and then an injunction from the federal court to restrain the mandamus proceedings in the state courts. Chief Justice JOHNSON, in an able and exhaustive opinion, said: "The filing of the transcript and the docketing of the case in the federal court after the filing of the petition and bond, did not and could not remove the case. When the state Circuit Court refused the petition of the defendant, the proper course for it to have pursued was to submit to the refusal, proceed with the trial, and in case of an adverse judgment take an appeal to this court, and if the judgment of the court below had been affirmed, obtain a writ of error from the Supreme Court of the United States, which alone can finally decide the question." This method was pursued until *Railroad Co.* v. *Whitton*, 13 Wall. 270, decided in 1871. Since then there are several instances where federal courts have assumed jurisdiction upon the filing of the transcript and docketing of the cases, from whence they went to the Supreme Court of the United States. Amongst which are the *Removal Cases*, 100 U. S. 427; and *Bondurant* v. *Watson*, 103 Id. 281.

In 1864, Judge DRUMMOND, in *Hough* v. *Trans. Co.*, 1 Biss. 425, said: "The acts of Congress have given certain legal discretion to the judge of the state court, not that thereby the defendant is deprived of the right which the statute gives him, but that it is competent for the appellate state court to redress the wrong if wrong has been done to the defendant, by correcting the errors of the court below. If the highest state court will not do that, the defendant has his remedy by writ of error to the Supreme Court of the United States. All cases in which the question has arisen have gone to the Supreme Court of the United States in this way, and the error of the state court, where any existed, has been rectified in this way." See *Hadley* v. *Dunlap*, 10 O. St. 1.

This course would preserve the harmony of our dual system of government, and prevent the unhappy conflicts of jurisdiction which are so frequent today between state and federal courts.

This brings up the question whether or not the order granting or refusing the removal is appealable. The negative was announced in *Gordon* v. *Longest*, 16 Pet. 104. In *Akerly* v. *Vilas*, 24 Wis. 165, the court held that such an order was appealable, and the state courts had jurisdiction to hear and determine the appeal. Judge PAINE, who delivered the opinion, said, that "nothing is better settled than that an order by which a subordinate court dismisses a case for want of jurisdiction, or in any way divests itself of jurisdiction, is subject to review on appeal." In the *Mayor* v. *Cooper*, 6 Wall. 247, the court held that the power to hear and determine an appeal from an order by which a subordinate court attempts to assume or divest itself of jurisdiction, is not an assertion of jurisdiction. In

Nelson v. *Leland et al.*, 22 How. 48, the court said: "The question of jurisdiction in the lower court is a proper one for appeal," and the determination of this question is not the exercise of jurisdiction on the merits. In *Kanouse* v. *Martin*, 15 How. 198, the state Court of Common Pleas denied the application for removal, tried the case and rendered judgment. Appealed to Superior Court and judgment affirmed. Supreme Court United States reversed the judgment on the ground that the case was removable, but conceded the power of the Superior Court to determine the appeal: *Strander* v. *W. Va.*, 10 Otto 303. In *State ex. rel. Coons* v. *The Judges 13th Jud. Dist.*, 23 La. Ann. 29, the court said that the application for removal is analogous to a plea to the jurisdiction, and when granted, the order is appealable. This was followed in *Rosenfield* v. *The Adams Ex. Co.*, 21 La. Ann. 233; *Beebe* v. *Armstrong*, 11 Mart. 440; *Duncan* v. *Hampton*, 12 Id. 92; *State Bank* v. *Morgan*, 4 N. S. 344; *Fritz's Syndic* v. *Hayden*, Id. 653; *Fisk* v. *Fisk*, Id. 676. In *Burson* v. *The Park National Bank of New York*, 40 Ind. 173, 13 Am. Rep. 285, the court held that the order of removal was appealable. Judge DOWNEY, in delivering the opinion, held that when the order had been granted or refused, it was the duty of the court, on appeal, to decide the correctness of the ruling, and that if erroneous, it should be reversed, but that if correct, the case should be remanded with instructions. That when the order was refused the cause remained pending, and it was not then a final order or judgment: citing *Skeen* v. *Huntington*, 25 Ind. 510. The court further said "It is true that the act of congress provides that when the application has been made in the proper manner for the removal, the state court shall proceed no further in the cause. But this does not settle the question. The question is not, shall the subordinate state court proceed no further? but may the party who has thus been prevented from having the cause tried in the court in which the suit was pending, appeal to this court. If he cannot, when and to whom is he to look for a correction of the most flagrant errors and abuses resulting from the action of the subordinate court." The court overrules *The City of Aurora* v. *West*, 25 Ind. 148, and cites *Akerly* v. *Vilas*, 24 Wis. 165; s. c. 1 Am. Rep. 166; *Whitton* v. *Railroad Co.*, 25 Id. 424; 3 Id. 101; *Insurance Co.* v. *Dunn*, 20 O. St. 175; 5 Am. Rep. 642; *Kanouse* v. *Martin*, 15 How. (U. S.) 198; *Beery* v. *Irick*, 22 Gratt. 484.

JOHN F. KELLY.

Bellaire, Ohio.

Supreme Court of Minnesota.

OLSON *v.* CROSSMAN.

An innkeeper is by the common law responsible for the loss in his inn of the goods of a traveller who is his guest, except when the loss arises from the negligence of the guest, the act of God or of the public enemy. To absolve the innkeeper from liability when the loss has been proved, it must affirmatively appear that the loss arose from one of the above-mentioned exceptions.

A guest is not to be charged with negligence merely because the theft was com-

mitted by another guest of the inn whom he did not bring there, even though with his consent he is placed to sleep in the same room with such other guest.

Notice to the guest to deposit valuables with the landlord, where not such as the statute prescribes, does not relieve the landlord from liability, unless it be brought to the knowledge of the guest, so that his assent to limiting the liability of the landlord may be presumed.

APPEAL from an order of the Minneapolis Municipal Court, denying a new trial.

Robinson & Bartleson, for respondent.

Merrick & Merrick, for appellant.

GILFILLAN, C. J.—Action by a guest against an innkeeper to recover for money stolen from plaintiff in the inn while such guest. The common-law liability of an innkeeper is well stated in *Lusk* v. *Belote*, 22 Minn. 468, thus: "An innkeeper is by the common law responsible for the loss in his inn of the goods of a traveller who is his guest, except when the loss arises from the negligence of the guest, or the act of God, or of the public enemy." Unless it appear to have arisen from an excepted cause, when the loss is proved, the innkeeper is liable. There was no pretence in this case that the loss was from the act of God or of the public enemy. The only claim that it was from plaintiff's negligence was based on the fact that the money might have been taken by one or other of two companions with whom plaintiff came to the inn, and with whom he occupied a room. The court correctly charged the jury that if taken by one of these the defendant would not be liable; but that to absolve him on that ground the fact that it was so taken must affirmatively appear.

While a theft from the guest by a companion whom he brings to the inn is imputable to the guest as his own negligence, he is not to be charged with negligence merely because the theft was committed by another guest of the inn whom he does not bring there, even though with his consent he is placed to sleep in the same room with such other guest.

The statute (sections 21 and 22, c. 124, Gen. St. 1878) enables an innkeeper to limit his liability as to certain property of a guest by keeping an iron safe and posting certain notices. The evidence does not indicate that defendant had complied with this. A notice at the head of the register of guests, or a verbal notice to the guest, not being such notice as the statute prescribes, is of no

avail unless the guest consent to it, so as to constitute a contract limiting the innkeeper's liability. Of course it would not amount to such a contract unless the guest's attention was called to it, so that he might be presumed to have understood and assented to it.

The evidence was sufficient to sustain the verdict.

Order affirmed.

The rule is generally stated by courts and text writers, as stated in the principal case, that where the guest is not in fault the innkeeper is responsible as insurer of the personal effects of his guest, except only against losses by the act of God or of the public enemy: Cooley on Torts 635; 2 Kent Com. 594; 1 Chitty on Cont. (11th Am. ed.) 675; 1 Pars. on Cont. (6th ed.) 146; *Mason* v. *Thompson*, 9 Pick. 280; *Shaw* v. *Berry*, 31 Me. 478; *Norcross* v. *Norcross*, 53 Id. 163; *Piper* v. *Manny*, 21 Wend. 282; *Grinnell* v. *Cook*, 3 Hill. 485; *Hulett* v. *Swift*, 33 N. Y. 571; *Wilkins* v. *Earle*, 44 Id. 172; *Thickstun* v. *Howard*, 8 Blackf. 535; *Manning* v. *Wells*, 9 Humph. 746; *Mateer* v. *Brown*, 1 Cal. 221; *Burrows* v. *Trieber*, 21 Md. 320; *Sibley* v. *Aldrich*, 33 N. H. 553; *Woodworth* v. *Morse*, 18 La. Ann. 156; *Packard* v. *Northcraft*, 2 Met. (Ky.) 439; *Lusk* v. *Belote*, 22 Minn. 468; *Chamberlain* v. *Masterton*, 26 Ala. 371; *Richmond* v. *Smith*, 8 B. & C. 9: *Morgan* v. *Ravey*, 6 Hurlst. & N. 277; *Day* v. *Bather*, 2 H. & C. 14; *Cashill* v. *Wright*, 6 El. & Bl. 900; *Oppenheim* v. *White Lion Hotel Co.*, L. R., 6 C. P. 515.

There are, however, eminently respectable authorities which take a different view of the innkeeper's liability. Mr. Story, in his work on Bailments, sect. 472, says: "But innkeepers are not responsible to the same extent as common carriers. The loss of the goods of a guest, while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics: Jones on Bail. 96; *Bennet* v. *Mellor*, 5 Term R. 276. But he may, if he can, repel this presumption by showing that there has been no negligence whatever: *Dawson* v. *Chamney*, 5 Q. B. 164. [See, however, the subsequent case of *Morgan* v. *Ravey*, 6 H. & N. 277]; or that the loss is attributable to the personal negligence of the guest himself; or that it has been occasioned by inevitable casualty or by superior force." See, also, Story on Bail. sect. 482. Substantially the same rule is either laid down or finds support in the following American cases: *Metcalf* v. *Hess*, 14 Ill. 129; *Johnson* v. *Richardson*, 17 Id. 302; *Merritt* v. *Claghorn*, 23 Vt. 177; *McDaniels* v. *Robinson*, 26 Id. 316; *Kisten* v. *Hildebrand*, 9 B. Mon. 72; *Howth* v. *Franklin*, 20 Texas 798; *Laird* v. *Eichold*, 10 Id. 212; *Howe Machine Co.* v. *Pease*, 49 Vt. 477; *Sasseen* v. *Clark*, 37 Geo. 242; *Cutler* v. *Bonney*, 30 Mich. 259; *Vance* v. *Throckmorton*, 5 Bush 41.

In view of the conflict thus apparent among the authorities, the question involved in the principal case cannot be said to be settled, though, perhaps, it would not be incorrect to say that the preponderance of authority supports the doctrine of the principal case.

M. D. EWELL.

Chicago.

Supreme Court of Connecticut.

ELLA E. BEARDSLEY *v.* THE CITY OF HARTFORD.

A city is not bound to maintain a railing in front of the numerous basements and basement steps that line its business streets.

As cities are, by reason of special advantages, burdened with special duties as to highways from which country towns are exempt, so they have also the benefit of exemptions from liability arising out of the necessities of their business.

Open basement descents being necessary to the business of a city, the failure of the city to erect a barrier in front of such a basement is not of itself negligence, and the city is not liable to a passer by who, without negligence on his part, falls into such basement.

THIS was an action on the statute with regard to highways, to recover damages from the defendant city for an injury sustained by the plaintiff through, as it was claimed, the defective condition of a sidewalk of the city. The case was defaulted in the Superior Court and heard in damages. The court awarded full damages, and the case is brought up by a motion in error, the defendant claiming that the court erred in awarding more than nominal damages.

S. O. Prentice, for appellants.

A. P. Hyde and *F. E. Hyde*, for appellee.

The opinion of the court was delivered by

LOOMIS, J.—The facts as presented by the record are briefly as follows: The place where the injury was received is a long-established street of the city known as Farmington Avenue, at a point where a hotel fronts upon the street, with the space between it and the street line open and flagged like the sidewalk, with nothing to indicate the line between the street proper and the open space in front of the hotel. The front of the building is found to be seventeen and a-half feet south from the curbstone of the sidewalk. The line of the street is eleven feet south of the curbstone, leaving six and a-half feet of space, which was private property, between the street line and the front of the building. The hotel is kept in the second and higher stories of the building, with an entrance in front; and all the lower story is occupied by stores fronting on the street, the whole frontage of the building being seventy-five feet. One of these stores, with a basement, and a stairway in front leading

to the basement, was occupied by one Harbenstein, as a bakery. The basement stairway extended four feet and seven inches from the front of the building, and had no protection except an iron railing on the west side of it. The plaintiff, on the 12th of February 1877, had occasion to pass along the sidewalk from the east about half-past nine in the evening, with two other ladies, and fell into this basement entry-way and was seriously hurt. It is found that the night was very dark and the wind blowing with great force, and that the three ladies went in close to the building to protect themselves somewhat from the violence of the wind, and that the plaintiff, when near the basement entrance, without being aware of its vicinity or existence, turned to speak to one of the ladies behind her and stepping backward fell into the opening. It is also found that the accident happened without negligence or want of care on her part.

It is well settled that a town or city is not liable for injuries from a defect in the highway, except as made so by statute. In some of the states a distinction is made, as to the rule of liability, between municipal corporations, or corporations proper, and quasi corporations, such as towns or counties, imposing a greater liability on the former. But this distinction is not made by the courts of the New England states, and it is holden by them that a municipal corporation is liable only by force of the statute. That is clearly the law of this state.

Our statute provides that, "towns shall, within their respective limits, build and repair all necessary highways and bridges, except where such duty belongs to some particular person." Gen. St., p. 231, sec. 1. Cities by their charters are charged with the same duty with regard to the highways and bridges within their limits. And the 10th section of the statute provides that, "any person, injured in person or property by means of a defective road or bridge, may recover damages from the party bound to keep it in repair." Another section of the statute provides that there shall be "a sufficient railing or fence on the side of such bridge, and of such parts of such road as are so made or raised above the adjoining ground as to be unsafe for travel." We think, however, that this provision does not apply to a case like this

It has been repeatedly held in this and other states that the absence of a railing, where the public travel is endangered by the want of it, constitutes a defect in the highway; making the

town or city liable, not by force of any statute specifically requiring a railing, but under the general provision that the highway shall be kept in repair—that term being held to mean that they shall be kept in such condition as to be *safe for public travel.*

A sidewalk is, of course, a part of a street, and entitled to the same protection as the rest.

The counsel for the defendant city has argued the case as if the mere fact that the place where the injury occurred was outside of the limits of the highway, is sufficient to save the city from all liability, even though the opening made travel unsafe. This proposition cannot be sustained. An object or a state of things outside of the line of the street may render travel unsafe, and make a town or city liable for an injury occasioned by it. Of course nearness to, or remoteness from, the line of the street is a very important and generally decisive consideration in determining whether the travel is rendered unsafe by it; but where it is so near as clearly to endanger public travel, the fact that it is outside of the line of the street has no other effect than this: If within the line of the street the authorities of the town or city have entire control over it, and can remove it if it be an obstruction, or fill up the cavity, if the defect be of that character, while they have no power to go upon private property for the purpose of doing it. The whole power, and so the whole duty of the corporation, is to protect the public against it by a railing. This they have power to place, not on the property of the adjoining owner, but only on or within the line of the street. If the adjoining owner has dug a deep hole near the street line he is personally liable for any injury that a passenger upon the sidewalk, who uses ordinary care, may sustain by falling into it. But the city will also be liable, not for the digging of the hole, nor for leaving it unfilled, but for not doing what it had perfect power to do, erecting a barricade of some sort to prevent passengers from getting into it.

About this general principle there can be no serious question. It is well stated by HOAR, J., in *Algeo* v. *City of Lowell*, 3 Allen 405: "The place where the plaintiff fell was indeed outside of the line of the street; but the defect in the street which occasioned the injury was the want of a railing, if one was necessary at that place to make the street safe and convenient for travellers in the

use of ordinary care. * * * The true test is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger; but whether there is such a risk of a traveller, using ordinary care in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient." Numerous authorities might be cited to the same effect.

The whole question in the present case is, therefore, whether it was the duty of the city to have placed a railing or barrier of some kind against these basement steps, so as to make sure that no passenger on the sidewalk could stray from the public way and fall down them.

And here it is to be observed that the city had no power to erect a railing that should simply fence in, in front and on the sides, this basement stairway. It would have had to go upon private ground to do this, and that it had no right to do. It could only erect a railing along the outer line of the sidewalk in front of the stairway. But such a railing would not have protected passengers from getting behind it unless it was carried along the whole front. It is found that a fence ran along the street line from the east, but only so far as the east corner of the hotel. As the plaintiff came along the walk from the east she must have been within the street line until she reached the corner of the building. Harbenstein's store was the second from the east corner, and the basement steps were immediately east of the door of his store. The plaintiff must have made, therefore, a very sudden deflection from the line of the sidewalk to bring herself in that short space, probably not over twenty or at most twenty-five feet, in close proximity to the building. It is found that the drug store at the east corner of the building had lights in the windows, so that she must have been aware of the deflection of her course. And her conduct in the matter is explained by the finding that she turned in towards the building "to avoid somewhat the violence of the wind." It is plain that, turning in at such an angle, as she left the part of the sidewalk that was fenced, would have brought her inside of any mere front railing that the city could have erected along the line of the walk on its own ground.

A passenger thus turning in could be protected from falling into the basement gangway only by side railings, which the city had no

right to place there, or by a continuous front railing that would have cut off all access to the hotel door and the doors of the stores, except through gates to be opened and shut as people passed in and out. Such an embarrassment as this to free ingress and egress would not be tolerated in a city, in front of a hotel and stores.

And this brings us to what we think is the real question in the case. Is a city bound to maintain a railing in front of the numerous basements and basement steps that line its business streets? Such basements are used in every populous city for business purposes of almost every kind. In a large city like New York the first story of almost every business block is reached by steps, that extend to the line of the street, while on each side of them are steps leading down to offices in the basement. These offices are of great value and rent for large sums, and it is essential to their convenient and profitable use that they be as open as possible to the entry of the public. Indeed, a railing in front of them, with the necessity of opening and shutting a gate as people passed in and out, would greatly impair their value for all the purposes that give them value. The same state of things exists, though in less degree, in a smaller city like Hartford. Along its principal streets, such basement shops may be counted by scores. In many of them there is not merely the necessary depression for steps, but the excavation extends along the whole front, giving room for larger windows and wider entrance. Every such depression by the side of the walk, though outside of the limits of the street, renders travel along the sidewalk dangerous; for even if the descent be one of but two or three steps, it would be enough to cause a dangerous fall to one who should inadvertently step off. Indeed, as a person by such a fall would be thrown against the brick or granite sides of the building, such a place would be much more dangerous than a pit-fall as deep in a place in the country, where one would fall only upon the soil. It is true that the more populous the city and hence the more thronged the street, the greater is the number of persons exposed to the danger; but as the city becomes more populous and the streets more thronged, the higher become rents, and the greater necessity for and value of such basement offices and places of business. It may indeed be set down as one of the necessities of city life, that basements along its business and therefore its most thronged streets, should be thus used, and that they should be not only open but inviting to the public. Now what is the duty of

the city with regard to them? There is no practicable way of perfectly protecting the public but by a railing in front of them. Can it be regarded as the duty of a city to maintain such a railing? Are we to apply to the case, without qualification, the same rule that would be applied to a pit-hole, like the cellar of a burned building, adjoining a sidewalk, where a railing would cause no inconvenience to the owner of the property?

It is a well-settled rule that the law varies with the varying reasons on which it is founded. This is expressed by the maxim, "*cessante ratione, cessat ipsa lex.*" This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself. If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances.

There are certain special duties with regard to highways resting on cities by reason of their character as such. One is that of having a more perfect road-bed for the greater amount of travel. Another, that of making sidewalks of ample width and generally flagged. Still another, that of removing snow and ice from the streets and walks. Thus, in *Landolt* v. *City of Norwich*, 37 Conn. 618, SEYMOUR, J., says: "The peril (from snow and ice) is not such as to warrant the great expense, in a sparsely inhabited village, of attempting a preventive or remedy; but in cities the aggregate of peril by reason of the number exposed to it becomes considerable, and the means of meeting the needful expense are ample; and hence, in cities the public as such properly undertake the duty of doing the best they can to provide against the dangers to travel which winter in this climate necessarily brings with it." Now if, by reason of the special advantages and special necessities of cities, they are by law burdened with special duties of this sort, from which country towns and villages, by reason solely of their character as such, are exempt, surely the rule should work favorably for cities in those particulars in which the necessities of business impose upon them limitations which do not exist in country towns. People collect in cities in large part for purposes of traffic, and to these purposes the central and most crowded streets of a city are almost wholly devoted. Must not the necessities of this business furnish the law that shall determine the action of the city in

the matter of barring out the public, for the sake of the safety of travellers, from those places below the level of the sidewalk that the business of the city absolutely requires should be kept easily accessible? There are special dangers all along a city street, for an unwary foot passenger, that do not exist in country towns. The projecting steps against which a pedestrian can so easily stumble in the night and be hurt, the hitching posts, posts for awnings, the very curbstone over which he could so easily trip, with the lower level of the gutter into which he could so easily be carried by a misstep, the occasional necessary descent of a steep place by steps, the projecting buttresses of buildings against which he might run —all needing but a slight deflection from the central part of the walk, which one would be very likely to make in a dark and stormy night—all these things, presenting dangers rarely found in a country village, and dangers to which the larger population makes the aggregate of exposure much greater, a city does not attempt, and is not expected, to provide against. They are necessary features of a city, and the peril a necessary incident of city life. The open basement descents are as necessary to the business of the city as the open and unprotected wharves of a seaport are to its commerce. Some streets in the city of New York lie close along the water, the wharves opening from them, and necessarily kept open for the passage of drays, while their outer edge is protected only by a low string-piece, which, while sufficient to prevent drays from backing into the water, would be no protection to a foot passenger, but would be likely to cause him to stumble and fall into the water. These unprotected wharves are often but a few feet from the line of the street, and the passenger could easily stray upon them in a dark night.

The principle we are laying down is only the old established one, that the city must have been guilty of negligence in leaving a basement entrance unprotected, before it can be liable for an injury happening by reason of it. If the erection of a barrier in front of such an entrance is what the city has no right to do, or if, having the right, it is what it cannot reasonably be expected to do, then there is no negligence in the omission to do it. This principle is abundantly sustained by the authorities.

In *Taylor* v. *Peckham*, 8 R. I. 349, the court held that a town was not liable for an injury from the fall of a sign which had not been securely fastened in its place upon a building outside of the

limit of the highway. BRADLEY, C. J., in giving the opinion of the court, says (p. 352), "The liability for such accidents would carry with it an equally extensive authority. The towns must necessarily have a corresponding right to control the uses of property adjoining the highway, so as to protect themselves from the liabilities for such use." In *Hubbard* v. *City of Concord*, 35 N. H. 52, SAWYER, J., giving the opinion of the court, says (p. 68), "We think it must be held to be the meaning of the enactment which subjects towns to liability for injuries resulting from obstructions, insufficiencies or want of repairs in their highways, that nothing is an obstruction which the town was not bound to have removed at the time of the injury under the circumstances of that particular case; nothing an insufficiency which it was not reasonably bound then to have improved; nothing a want of repairs which, in the same view it was not bound to have amended. * * * If there was no duty there was no negligence. In the very idea of negligence is embraced a duty which the party ought to have performed. If the town, under all the circumstances, was not bound to remedy the defect or remove the obstruction, it is chargeable with no negligence or failure of duty." In *Jones* v. *Inhabitants of Waltham*, 4 Cush. 299, the defendant town was sued for an injury by falling into a cattle guard at a place where a railroad crossed the highway. The town had placed a railing before it as far as it was able to do without interfering with the passage of the cars. METCALF, J., giving the opinion of the court, says (p. 301): "The only ground upon which the town can be held liable to this action is, that there was a dangerous place on the roadside which required a fence or barrier to make the road safe for travellers. But when a town has no power to erect such fence or barrier, it is not answerable for the consequences which follow from the want of it." Clearly there can be no difference in law between the case where a city has no power to place a barrier, and the case where it would, in view of all the circumstances, be unreasonable and improper for it to place one.

That the negligence of the town must be actual and not merely constructive, follows from the rule, which is well settled, that the neglect to repair or render safe a highway must be such as would have made the town liable to an indictment. Thus, it is said in *Davis* v. *City of Bangor*, 42 Me. 522, that "the liability of a town for damages arising from a defective highway depends upon proof of the same facts that would render it liable to indictment, and in

all cases where it may be held for damages it may be indicted." In Wood on Nuisances, sect. 324, it is said that "as a rule, those defects only are actionable which are indictable at common law as nuisances;" and further on in the same section the law on the subject of exposures to injury from objects outside of the line of the highway is thus laid down (more strongly we think than the authorities will warrant): "For injuries resulting from any obstruction in the highway itself, and over which the proper authorities have lawful control, and which they can lawfully remove, the town or city is liable. But where the injury results from something outside the limits of the highway, upon land which they have no authority to enter upon, the individual making or continuing the erection or obstruction alone is liable. It would be highly inequitable to hold the town liable for injuries resulting from something over which they have no control and which they cannot remove, any more than any other citizen."

Now, in the court below, the judge, before whom the case was tried upon a hearing in damages, found the fact that travel along the sidewalk in question was endangered by the basement opening in question, and that the plaintiff sustained the injury while in the use of ordinary care, and upon these facts alone held the city liable to pay full damages. We think the court was in error in this, and that a further fact was necessary to the liability of the defendants, namely, that the basement opening was one which the city was bound to have protected the public against by a railing. The law will not infer the liability from the mere fact of the danger. The law will not hold the city to the duty of erecting a barrier before such a place unless in all the circumstances it was reasonable and proper to erect one. And this fact should appear in the finding. There was error in the judgment complained of.

In this opinion the other judges concurred.

Court of Chancery of Tennessee.

HALL ET AL. v. CHESAPEAKE, OHIO & S. W. RAILROAD CO.

A court of equity has no jurisdiction to compel the performance of a positive act tending to alter the existing state of things, such as the removal of a work already executed, although it may, by framing its order in an indirect form, compel a defendant to restore things to their former condition, and thus effectuate the same results as would be obtained by ordering a positive act to be done. The order when thus framed is called a mandatory injunction.

The true difference between a prohibitory injunction and a mandatory injunction is this: The former, when issued and executed, leaves the status of things just as it is at the time of execution. The latter, although prohibitory in form, when issued and executed works a change in the existing condition of things by prohibiting the defendant from doing the reverse of what he is desired to do, and in this way, he is compelled to do some act which restores the former condition of things.

A railroad company received rights of way over lands on condition that it should establish a permanent station at H. It established a station, and permanent improvements were made by the adjoining landowners. Afterwards it removed the station to a point three miles off, not as convenient to the general public, and refused to stop its trains at H. On a bill filed by the landowners, alleging that such refusal, if persisted in, would cause them irreparable damage and asking for an injunction to restrain the railroad from running trains past H. without stopping to give the usual facilities for receiving and delivering freight and passengers, *Held*, that the injunction asked for was a mandatory injunction and would not be granted on a preliminary application.

MOTION for preliminary injunction.

The bill was filed by certain citizens and landholders residing and owning lands in the vicinity of Hall's Station against the Chesapeake, Ohio & S. W. Railroad Company, alleging that when the railroad was in course of construction complainants gave to it rights of way over their lands upon the representation and express agreement that it had located and would establish and permanently keep at Hall's a regular depot; that it did establish and maintain from July 10th to October 15th 1882 such a depot; that in consideration of said agreement complainants built at their own expense a platform and house for receiving freight and passengers, and expended a large amount of money in permanent improvements in the vicinity; that in October 1882, the railroad established a depot at a point three miles from Hall's, at a low swampy place, inconvenient for the public, and thereupon discontinued the use of the depot at Hall's and refused to stop its trains there, and that complainants would suffer irreparable injury if the company was allowed to persist in this refusal. The bill prayed for an injunction to restrain

the railroad company from running its trains past Hall's without stopping to receive and deliver freight and passengers as at other regular stations and as the convenience of the public might require; that the railroad company should be required to stop its trains at Hall's as aforesaid, and that it be enjoined from further interfering with the facilities which had theretofore been accorded to complainants and the public at Hall's.

The opinion of the court was delivered by

LIVINGSTON, Chancellor (after stating the facts as above).

The application for injunction was elaborately and ably argued by the learned counsel for both parties and quite a lengthy list of authorities has been presented for my consideration. As the case is one of importance, I have taken time to carefully consider it, and to look into the authorities furnished and such others as I have at my command.

The defendant's solicitor, in his argument, resists the issuance of the injunction asked, on the following grounds.

1st. He insists that the injunction sought is of that class denominated *mandatory*, and avers that the chancery practice in Tennessee, will not allow the issuance of such an injunction on mere preliminary motion, as is sought here.

2d. That there is no merit in the application, because the court of chancery will not take jurisdiction of the matters sought to be litigated in the bill.

3d. Because complainant's remedy for the wrongs complained of is by action of damages at law.

4th. That complainants are not the proper parties to enforce the performance of a duty to the general public, in the establishing and keeping up of a depot by the defendant.

Upon these several propositions the complainant's solicitors join issue, and deny their soundness.

I will undertake, so far as it may seem necessary to the decision of the matter in hand, to dispose of these propositions in the order in which they have been presented by the defendant's solicitor.

First, as to the character of the injunction sought, and the practice of the court in reference thereto. This was the point most discussed by counsel for both parties.

Story and Kerr define an injunction thus: "A writ of injunction may be described to be a judicial process whereby a party is

required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ:" Story Eq. Jur., sect. 861; Kerr on Inj., p. 11. The latter author says further, "When commanding an act to be done, it issues after decree, and is in the nature of an execution to enforce the same:" Id. Again, after classing injunctions as *interlocutory* and *perpetual* he says: "The effect and object of the interlocutory injunction is merely to preserve the property in dispute in *statu quo*, until the hearing or further order:" Id. Mr. Bispham is quite concise but very full on the same point. He says: "An injunction in its legal sense is a writ remedial, issuing by order of a court of equity, and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act. An injunction may, therefore, be said to be either mandatory or prohibitory: A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act. The jurisdiction of the court to issue such a writ has been questioned; but it is now established beyond doubt. The order, however, is not *direct* in its form; but the end is reached by a writ apparently prohibitory:" Bispham's Principles of Eq., sects. 399, 400. He then gives an injunction to deliver books and papers, and remarks: "This order, it will be observed, is in terms a restraining order; but in effect it is a command to the defendant to deliver up the books and papers:" Id. Sect. 400. Again he says: "A prohibitory injunction, as its name imports, is one which is granted for the purpose of restraining the defendant from the continuance or commission of some act which is injurious to the plaintiff:" Sect. 401.

These general propositions are sustained by all the elementary authors who treat of injunctions. I make one other extract from Kerr on Injunctions. Under the title "Mandatory Injunctions," he says: "Though a court of equity has no jurisdiction to compel the performance of a positive act tending to alter the existing state of things, such as the removal of a work already executed, it may, by framing the order in an *indirect* form, compel a defendant to restore things to their former condition, and so effectuate the same results as would be obtained by ordering a positive act to be done. The order when framed in such a form is called a mandatory injunction:" Id. p. 231, sect. 12.

It is quite obvious, therefore, that the real difference between a

prohibitory and a mandatory injunction does not consist in the *form* in which they are drawn. They are both prohibitory in terms. The difference consists in the results produced when the writs are executed. The prohibitory injunction, when executed, leaves the rights of the parties and the condition of the property in the *status* in which they are found when the writ is sued out. The mandatory injunction, though simply prohibitory in form, effectuates, when executed and obeyed, a change in the *status* of affairs, and the defendant is compelled to do some act, by which the former condition of things is restored. This *positive* result is reached "by prohibiting the defendant from doing the reverse of what he is desired to do:" High on Inj., sect. 2.

Apply these plain rules of law to the case in hand, and what conclusion results? The bill alleges that the defendant, in constructing its road, established one of its depots at Hall's, and used, accepted and treated this point as one of its regular depots, from the time its road was opened, on July 10th 1882, to October 15th 1882, a period of three months. That during this period all the trains, both freight and passenger, stopped daily and regularly at this point, and that freights and passengers were received, discharged, shipped and transported by defendant at and from this point over and from said trains. This was the *former* condition of things, prior to October 15th 1882. Since then, and at the present time, the defendant has discontinued Hall's as a depot, or shipping point, on its road, the trains passing without stopping, and no freights or passengers coming to or going from Hall's over defendant's trains, the defendant refusing to receive, discharge, transport, deliver or forward, freights or passengers at, to or from Hall's, as one of its depots. This is the *existing* condition of affairs, and this has been the *status* for seven months prior to the presentation of the bill for fiat.

Suppose an injunction to issue restraining and prohibiting the defendant from running any of its trains, freight or passenger, over its road by Hall's without stopping them at this point as regularly as at the other depots on the road; and enjoining the defendant from refusing to receive, discharge, transport, deliver and forward freights and passengers over all its trains at, to and from Hall's as at any other of its regular depots, and such an injunction is served, and obeyed by the defendant; will any one argue that the result will be to maintain the present state of affairs at

Hall's. On the contrary, is it not clear that the effect would be to restore the former condition of things—that existing from July 10th 1882 to October 15th 1882. It is too clear for discussion, that the necessary result would be to compel defendant to re-establish and maintain a depot at Hall's. If this be so, it clearly follows that such an injunction would belong to the class known in the books as *mandatory*.

This point being settled, the next question for consideration is, whether such an injunction will issue in our practice on preliminary motion. The question is not entirely free from difficulty.

That courts of equity will issue mandatory injunctions on final hearing, and in execution of their decrees, is well established. Not so, however, when the application is made by preliminary motion, on a bill not yet in court. Let us first look into the authorities and rulings of the courts outside of Tennessee, to see if we may not gather some light which will aid in the investigation in hand.

In England we find different rulings and holdings on this question. Some of the judges have asserted and exercised this jurisdiction, in extreme cases: *Lane* v. *Newdigate*, 10 Vesey 192; *Robinson* v. *Lord Byron*, 1 Bro. C. C. 588; *Beadel* v. *Perry*, L. R., 3 Eq. 465.

Other eminent judges have as stoutly refused and denied the jurisdiction. *Anonymous case* by Lord THURLOW, 1 Vesey, Jr., 140; *Gale* v. *Abbott*, 8 Jur. N. S. 987; *Child* v. *Douglas*, Kay 578. Other cases, *both pro and con*, might be adduced, if anything was to be gained by it. The English law writers seem to think the jurisdiction *may* be exercised in extreme cases: Kerr on Inj. 232; 2 Dan. Chan. Prac. 1662–3.

The courts of the United States have been more chary than those of England in this direction, and this extraordinary power has been less frequently asserted and exercised. Still, a few cases of the kind may be found in the state and federal courts. *Cole Silver Mining Co.* v. *Virginia, &c., Water Co.*, 1 Sawyer 565; *Camblos* v. *Philadelphia Railroad Co.*, 4 Brewster 563. These two references are taken from Judge COOPER'S note 8 to 2 Dan. Chan. Prac. 1663, and I cannot vouch for the position claimed for them by Judge COOPER. I would infer, however, from a synopsis of the 4 Brewster case, found in note of Mr. Prichard to the case of *Southern Ex. Co.* v. *Nashville, &c., Railway Co.*, 20 Am. Law Reg. N. S. 604–5, that Judge COOPER is mistaken in supposing

that the case sustains the proposition for which he cites it in his note. It appears from the synopsis given that the preliminary mandatory injunction was refused, and the bill dismissed on demurrer. This was a federal court case from Pennsylvania. On the other hand we have a number of cases—some of them ably and well considered—which deny the jurisdiction of courts of equity thus summarily to dispose of the rights of parties. Judge COOPER in note 2 to Dan. Chan. Prac. 1662, says, "A mandatory injunction will not be ordered on a preliminary or interlocutory motion, and only on final hearing to execute the decree of the court." He cites for this proposition, *Audenreid* v. *Railroad Co.*, 68 Penn. St. 370; *McCauley* v. *Kellogg*, 2 Wood 13; *Rogers, &c.*, v. *Erie Railway Co.*, 5 C. E. Green 379. Again he says, same note, "An injunction is no remedy for past injuries," and cites *McMinville, &c.* v. *Huggins*, 7 Cold. 217; *Rutherford* v. *Metcalf*, 5 Hay. 58; *Owen* v. *Ford*, 49 Mo. 436; 2 Stew. Eq. 6. Again, in same note, "An injunction requiring a party to do a particular thing, as to surrender possession of premises, is never allowed before final hearing," citing *Kamm* v. *Stark*, 1 Sawyer 547.

I have examined the case of *Audenried* v. *Railroad Co.*, 68 Pa. St. 370, reported also in 1 Am. Railway cases, by Truman, p. 515, and find it an ably argued and well-reasoned case by the highest court of Pennsylvania, that very eminent jurist, the late Judge SHARSWOOD, delivering the unanimous opinion of the court. He examines fully the English cases bearing on the question and traces all those in favor of the summary exercise of this extraordinary jurisdiction to the case of *Lane* v. *Newdigate*, 10 Ves. 192, which latter case, he says, ought not to be followed in any court. He wisely remarks, that, "an injunction as a measure of mere temporary restraint is a mighty power to be wielded by one man. It would extend far beyond all safe and reasonable bounds to permit it to go farther." The chancellor had granted a mandatory injunction, following closely *Lane* v. *Newdigate*. An appeal from the order granting the process was taken, and the court above reversed the order of the chancellor, holding that such an injunction would never be granted before final hearing. Quite a number of cases from American courts are cited, and quoted from, by the court, sustaining the views of that court.

Chancellor GREEN, of New Jersey, a very high authority on the jurisdiction and practice of courts of equity, arrived at a simi-

lar conclusion, after an examination of all the authorities, in the case of *Rogers, &c.* v. *Railway Co.*, 5 C. E. Green 387, cited in his note 2 to Dan. Ch. Pr. 1662, by Judge COOPER. As to the conclusion reached by Chancellor GREEN, see Am. note to Kerr on Inj. 231.

Judge REDFIELD, in his note 1 to sec. 861 of his edition of Story's Eq. Jur., uses this language: "It seems a Court of Equity has no power to order a party to undo what he has done (*Bradbury* v. *Manchester, &c., Railroad Co.*, 8 Eng. Law and Eq. 143), unless after a decree; in which case the injunction becomes a judicial process. *Washington University* v. *Green*, 1 Md. Ch., Dec. 97."

Thus it will be seen that the courts in this country are not in entire accord on this question. The jurisdiction has been exercised and asserted in a few *extreme* cases; but in a larger number of cases, and by abler judges, perhaps, the jurisdiction has been denied and repudiated. I think Mr. Bispham not very far wrong when he says, as his conclusion of the matter, "A mandatory injunction is granted only with great caution; and the courts are particularly reluctant to grant such an injunction upon an interlocutory application, and before final decree. Indeed, the inclination of American courts is against granting such an interlocutory injunction. But in England, the better opinion is, that a mandatory injunction *may* be had on interlocutory application." Bisph. Eq. Principles, sec. 400. I think he might have expressed himself in still stronger language, when referring to the "inclination" of the American courts, as being against the practice.

Complainant's solicitors referred to and relied upon the case of *Southern Express Co.* v. *L. & N. Railroad Co.*, 20 Am. Law Reg. N. S. 590, and to the action of the other federal judges in kindred cases, as shown by Judge BAXTER'S opinion. I find nothing in this case, or these cases, which contravenes the view of the case which I have just announced. 1. The practice of granting injunctions is different in the Federal from the state court practice. 2. The orders granted in these cases, so far as I gather from Judge BAXTER'S opinion, were "restraining orders," which operated not as a mandatory injunction, to change the then existing state of things, but simply to keep matters in *statu quo* until the hearing. The order by Judge BAXTER granting the preliminary injunction, is given in 2 Flippin's U. S. Rep. (6th Circuit) 688, and is clearly not for

a mandatory injunction. 3. The question of the power of the court to issue a *mandatory* injunction is not hinted at in the opinion, nor in the reporter's note in connection with the case. The same considerations apply to the Nashville stockyard case from the same court.

I have been referred, also, to the last paragraph on 724th page of 3 Waite's Actions and Def., under title "Injunctions against Railroads." It is sufficient to say of this reference, that there is nothing in what the author says which indicates, in any manner, as to how or when the injunctions referred to were granted.

The cases of *Henry* v. *Koch*, from Kentucky Court of Appeals, 22 Am. Law Reg. N. S. 394, and *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y. (1 Hand.) 191, were pressed in argument by complainant's solicitors, as very favorable to their view of this question. I have examined those cases, and find that the injunctions were ordered on final decree, and not before. No reference is made, in either case, to the power of the court to grant such an injunction on interlocutory motion.

As before indicated, I am of opinion that the practice of the American courts is clearly against this extraordinary means of redress. This is true of the courts outside of Tennessee. Is the practice in our state in accord with this decided current outside of the state? I think so. Ii is true we have but little in our decisions upon the mooted question, but I think that little is all pointing in one direction.

The first case to which I refer is that of *Rutherford* v. *Metcalf*, 5 Hay. 58. I quote from the reporter's head-notes. "An injunction may issue to quiet a person in possession of land until the hearing, if the bill shows that he is in possession, and that he is likely to be turned out before his right can be investigated in court." Again, "But the injunction cannot command the defendant to repair a wrong already done, but only to abstain from doing wrong; and cannot be construed as forbidding the defendant to keep possession of that which he actually had at the time of the injunction."

The question before the court was whether the defendant had been guilty of a breach of the injunction granted on motion, and involved a discussion of the scope of the injunction. While the direct question was not before the court in that case, yet it can be clearly seen from the opinion in the case, as to what the judge's

views of an injunction granted on preliminary motion were. He very clearly intimates, as the syllabus indicates, that the possession could not be changed by preliminary injunction, and that the only office to be served by an injunction was to maintain the *status quo* until hearing.

I refer now to the case of *McMinnville, &c., Railroad* v. *Huggins*, 7 Cold. 218. The bill prayed for an injunction to restrain the defendants, Huggins and Price, from controlling, directing or running the railroad in litigation, and from interfering with complainant, Marbury, in the discharge of his duty as receiver of said road; and that Marbury be put in full and complete possession thereof. The defendants, Huggins and Price, were then in possession. The chancellor granted a preliminary injunction as prayed for. The master issued an injunction, not only restraining the defendants as prayed in the bill, but going beyond the fiat and commanding the sheriff to put the receiver in possession of the road, and the sheriff executed the writ and placed Marbury in possession as commanded.

Huggins and Price filed answers and moved the chancellor, at Chambers, to dissolve the injunction, and for an order restoring them to possession. This motion prevailed, the injunction was dissolved, and an order made placing Huggins and Price in possession, which was done.

The receiver and the railroad company filed a petition in the Supreme Court for a *supersedeas* to the court below to supersede this last order of the chancellor, to the end that same might be reversed by the Supreme Court. This petition was filed under sec. 3933 of the Code of Tenn., and the decision involved a construction of this section and the practice under it.

Judge ANDREWS, delivering the opinion of the court, says: "The question is, whether, under the authority given us to grant *supersedeas* to interlocutory orders and decrees, we may not set aside orders of the chancellor, granting and dissolving injunctions; or whether our authority is limited to the staying of proceedings under decrees which are of a nature to be actively and affirmatively enforced against a party." P. 223.

He declares that the power to supersede under this section, only extended to such interlocutory orders and decrees, as may be enforced actively against a party; and then proceeds to make an application of the holding to the case before him. To this end he

discusses the nature and office of injunctions, and says: "An injunction in our practice is a prohibitory writ, and its office is to restrain, and not to compel, performance. It does not authorize any act to be done, and there can be no proceeding under it capable of being stayed by a supersedeas." P. 225. "So of an order dissolving an injunction. Such an order removes the prohibition imposed by the injunction, but does not itself require or authorize the doing of an act." Again he says: "Neither under the injunction, or the order dissolving it, is there any proceeding which can be stayed." Id.

The language used clearly negatives the idea that we have any such writ in our practice as a *mandatory* injunction upon an *interlocutory* motion. But it is said of the language quoted that it was unnecessary to the decision of the case, and therefore but the *dictum* of the judge who used it. It is true, the order granting the injunction was not directly involved in the question then before the court. But the learned judge construes the section involved, and, in ascertaining the character and nature of an order to dissolve, he, in part, reaches his conclusion from the known character and office of the injunction and the order granting it. He arrives at the conclusion that the order dissolving must necessarily be negative and passive in its character, *because*, and for the reason, the injunction, in our practice, is *prohibitory* only. I am unable to say, therefore, with the learned counsel for complainants, that this is the mere *dictum* of Judge ANDREWS.

The language quoted has never been questioned by any subsequent decision, so far as I am aware, although the case has been cited and followed as authority repeatedly since it was decided. This construction of the statute, sec. 3933, has been frequently adopted by our court upon the authority of this case. See *Mabry* v. *Ross*, 1 Heisk. 776; *Redmond* v. *Redmond*, 1 Leg. Rep. (Tenn.) 361; 12 Heisk. 506; 1 Lea 78; Id. 396; 8 Id. 465. In the 1 Heiskell case, p. 776, the court uses this language: "The question came before this court again in the case of *McMinnville, &c., Railroad Co.* v. *Huggins*, 7 Cold. 217. In that case it is held that this court has not the jurisdiction, under the statute, to set aside a temporary injunction or an order dissolving such an injunction. The reasoning of Mr. Justice ANDREWS in that case is conclusive, and we may be permitted to commend it as the leading case upon the interpretation of these statutes."

In *Redmond* v. *Redmond*, 1 Leg. Rep. (Tenn.) 361, reported also in 9 Baxter 561, Judge McFARLAND, delivering the unanimous opinion of our Supreme Court, on a motion to discharge a supersedeas granted by one of the judges, superseding an order for an attachment to issue from the chancery court, after citing *approvingly* the case from 7 Coldwell 217, said, "but we have no power in this mode to reverse the action of the inferior court, or to set aside, or annul, or supersede orders or decrees, which are merely of a *negative* or *prohibitory character*, or such as have been executed. *We cannot, therefore*, supersede *an order granting an injunction*, as this *requires nothing to be done, but is simply prohibitory.*" Mark the language of the learned judge. It certainly is not devoid of meaning. The italicizing is my own.

I know of no case in our state reports which can be tortured into a holding different from what is said in the 5 Haywood case, the 7 Coldwell case, and the 9 Baxter case.

As further support for the position I have just indicated as to the practice in this state, I refer to "Hick's Tennessee Manual of Chancery Practice," p. 267–9, sub-sec. 6. This author is clearly of opinion that the language of Justice ANDREWS, in the 7th Coldwell case, which he quotes, states the true rule in Tennessee. His criticism of Lord ELDON'S ruling in *Lane* v. *Newdigate* is quite severe, but just.

I must conclude, therefore, that the practice in our state is in harmony with the holdings of the majority of the American courts on this question, and that the application for the preliminary injunction should be refused.

This renders any consideration of the other points, discussed by the learned counsel, unnecessary, and I decline to go into such discussion for the present. The fiat for injunction, on preliminary motion, is refused.

Supreme Court of North Carolina.

STEWART ELLISON *v.* THE CITY OF RALEIGH AND MAYOR AND ALDERMEN.

A municipal body cannot deprive one of its members of his place for causes, affecting his eligibility, that existed at the time of his election.

Where, in such case, one is removed, and his successor elected and inducted into office under a power given to fill vacancies, such successor holds under color of competent authority, and is a *de facto* officer; and the removed member being the adverse claimant, cannot be reinstated by mandamus against the defendants, but must resort to *quo warranto*.

APPEAL from a decree refusing a mandamus. The facts are fully stated in the opinion.

Messrs. *Fowle, Argo, Batchelor* and *Clarke*, attorneys for the plaintiffs.

Messrs. *Reed, Buzbee & Buzbee, Fuller & Snow* and *Lewis*, for the defendants.

The opinion of the court was delivered by

SMITH, C. J.—The plaintiff was duly elected an alderman from one of the wards into which the city of Raleigh is divided; took the oath of office before the mayor, and was present with his associate members of the board at three successive meetings of the body. At the third session, held on May 15th 1883, the plaintiff being present and occupying his seat, as he had hitherto done without objection from any source, a resolution was offered by one of the aldermen (the transcript of which was not introduced on the trial), vacating or declaring vacant the plaintiff's seat by reason of his incompetency in holding an office or place of trust under the government of the United States at the time of his election and since. The resolution was put to a vote upon a call for the previous question, and, upon a refusal to hear the plaintiff, was declared by the casting vote of the presiding officer, the mayor, to have passed. Nor was the plaintiff's name called in calling the roll, nor he allowed, though demanding the right, to vote upon the passage of the resolution. After the plaintiff's ejection the board proceeded to supply his place by the election of T. J. Bashford, under the provision of the city charter (sec. 20) for filling a

vacancy, and the plaintiff has since been excluded from acting with the body to which he had been elected.

This succinct statement of facts connected with the expulsion of the plaintiff, and the admission of said Bashford as his successor, suffices to present the question whose solution in our view is decisive of the case on appeal.

The proceeding is by mandamus to compel the restoration of the plaintiff to his office, and against the city of Raleigh and aldermen by name, except the said Bashford, who is not made a party either in person or as a member of the board.

Without pausing to animadvert upon the very irregular and summary method adopted to expel a member from his seat without a hearing, and the suppression of all discussion of the propriety of the contemplated action of the board, while there can be no serious doubt of the right of a corporate body to vacate the seat of a corporate officer for adequate causes arising subsequent to his taking his seat, since the case of *Rex* v. *Richardson*, decided by Lord MANSFIELD and followed by numerous others, we have been unable to find any precedent for depriving a member of his place by the action of a municipal body of which he is a member, for any pre-existing impediment affecting the capacity to hold the office. On the other hand, the same eminent judge, in passing upon the sufficiency of a return to a mandamus, says: "It is admitted that they (the mayor and burgesses of Lynn, the defendants), could not remove for want of an original title;" and again, "the dueness of the election is immaterial, for the corporation could not judge of the title" of the party prosecuting his right to the place: *King* v. *Lynn*, Douglas 85.

So in *Lord Bruce's Case*, 2 Strang. 819, the court say that a power of amotion is incident to a corporation according to modern opinion, and this exercise of inherent corporate authority in the cases pointed out by Lord MANSFIELD in *Rex* v. *Lynn*, may be essential to attaining the ends for which the corporation was formed.

"The power to remove a corporate officer from his office for reasonable and just cause," says Judge DILLON, "is one of the common-law incidents of all corporations: 1 Mun. Corp., sect. 179.

The board of aldermen, thus possessing the power under certain circumstances to vacate the seat of one of their number (the occasions for doing which, and among them—conduct on his part in

opposition to his oath and duty as a corporator, are mentioned by Lord MANSFIELD), have chosen to remove the defendant for the assigned reason of his incompetency under the constitution to occupy the place, he at the time of his election holding the appointment of janitor or custodian of the court house of the United States in said city, and to elect and put another in his place, who has assumed to act with his associate members and been recognised by them as the lawful incumbent in all their subsequent official transactions. His successor, having been thus inducted into the office under color of competent authority, even though the amotion of the plaintiff was in excess of the power conferred in the charter, becomes an officer *de facto* and his co-operating acts in the body are as effectual in their relations to others as if he filled the place *de jure* as well as *de facto*. The charter confers authority upon the board to fill a vacancy when any occurs in their body and they must determine the existence of the vacancy in order to the exercise of the power of supplying it.

Can the plaintiff then avail himself of the remedy by writ of mandamus against the wrongdoers and obtain the ouster of the present occupant and the restoration of the office to himself without the presence, in the action, of the alleged usurper?

In our opinion the plaintiff misconceives the redress and the mode of obtaining it provided by law. A mandamus is appropriate when there is no usurpation by another, and the end sought is to compel those who ought to admit, and refuse to admit, the person entitled by law to fill the place, to perform their duty in this behalf; and the writ may be granted, says Mr. Willcock, "when *quo warranto* does not lie, although the office be already full, as otherwise, in many cases, the applicant would be without remedy." Dill. Mun. Corp., sec. 678.

Mandamus may be sought to compel the city counsel to admit a councilman duly elected to that office: *State* v. *Rahway*, 33 N. J. L. 111, cited by Dillon in sec. 679. But as this writer remarks in the next section, 680, "the adjudged cases in this country agree that *quo warranto*, or an information or *proceeding in the nature of a quo warranto*, is the appropriate remedy when not changed by charter or statute for an usurpation of a municipal franchise, as well as for unauthorized usurpations and intrusions into municipal offices;" and the author proceeds: "If another is commissioned and in actual discharge of the duties of the office, an

adverse claimant to the office is not entitled to a mandamus, but must resort to *quo warranto.*" The wrongful occupant must, however, have entered under color of authority and not be a mere usurper in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy.

In this state the writ of *quo warranto* and proceedings by information in the nature of *quo warranto* are abolished, and the remedies which these forms formerly furnished can be obtained under special provisions made by statute: C. C. P. sec. 362, a substantial re-enactment of 9 Anne.

It is expressly declared in section 366 that an action may be brought by the attorney-general upon his own information or on the complaint of any private party against offenders, "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state."

The statute provides thus, and in subsequent sections, for the fullest relief to the rightful claimants against an unlawful intrusion, and thereby dispenses with the need of recourse to other process, unless those required to induct still refuse to do so after the amotion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting parties.

In *Howerton* v. *Tate*, 66 N. C. 231, this court remarked that, "supposing the writ of mandamus to be the proper remedy, *which we do not concede* (C. C. P. secs. 366 and 367), the proceeding was not properly instituted."

The doubt intimated is resolved in the subsequent case of *Brown* v. *Turner*, 70 N. C. 93, wherein after an elaborate discussion the court, BYNUM, J., delivering the opinion, thus speaks: "Is the plaintiff prosecuting his claim by the right form of action? Mandamus is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a present clear legal right to the thing claimed, and that it is the duty of the defendant to render it to him. If it appears from the complaint that two persons are claiming the same duty adversely to each other against a third party

the writ does not lie; Tom. Law Dict. *Mandamus*; 3 Burr. 1452; and that for the plain reason that the title must be decided between them before the defendant can know to whom the duty or thing is due." * * * "The question of title is put directly in issue, and when that is the case mandamus is not the form of action; but the appropriate remedy is an action in the nature of *quo warranto*, not against Howerton but against Turner."

The title here is in dispute so as to induce us to refrain from ordering any specific action to be performed by the board until the controversy is settled and the right determined by a direct adjudication. But if there were no other objection to the present form of proceeding, an insuperable obstacle is presented in the fact that the court is called on to pass upon the rights of one who is not a party to it. This is indispensable to his being affected by the result.

In support of a qualified recognition of the right officer to be reinstated through the command of the court, in section 67, High on Legal Rem., reference is made, in an appended, note to several decisions which we have looked into and find but one (*Drew v. Judges, &c.*, 3 Hen. & M. (Va.) 1), fully sustaining the text. In a return to the rule to show cause why a mandamus should not issue to the defendants to admit the plaintiff to the office of clerk of the said district court, whereof the defendants were judges, it appeared that the plaintiff produced on the first day of the session the evidence of his appointment, and his taking the prescribed oath, but did not tender a sufficient bond as required by law. The court thereupon appointed another in his stead, who at once proceeded in the discharge of his official duties. Four days thereafter the plaintiff offered a sufficient bond and was refused admittance to the office. The mandamus was then asked, and the rule to show cause ordered to issue. It was held that the plaintiff was not required to qualify on the opening of the court, and was in time in making his application afterwards according to the statute. In answer to the objection that the incumbent ought to have been served with notice of the pending motion, TUCKER, J., says: "It was properly answered that the return shows he had notice, being attested by him, and the record shows he did appear in the general court as a party, and consented to the award of a commission to take depositions." This decision may find support in the exceptional features of the case, the office being under the

direct control of the court, so that full relief could be administered with a due regard to the rights of both contestants. The mandamus is held a proper remedy in the case, among other reasons, because the right to proceed by a *quo warranto* information is not guaranteed to every citizen, and can only be prosecuted by leave of the attorney-general. But our statute (sec. 366 of C. C. P.), bearing the title, "Action upon information or complaint of course," seems to contemplate the action as one open upon the complaint of any private party, and if its institution as a remedy for a violated civil right is left to the discretion of the attorney-general (and we are not ready to concede an arbitrary discretion in the matter), we must assume that in every proper case his consent on proper terms will be given.

This was the method of procedure adopted in *Cloud* v. *Wilson*, 72 N. C. 155, where the defendant entered into the office of judge by virtue of an election authorized by an act of the legislature to fill an unexpired term, and it was sustained, although the statute was in violation of the constitution, and all done under its sanction was absolutely null. The controversy was between an officer *de jure* and one *de facto*, and this was recognised as the legal method of determining it.

We do not propose to inquire whether the office or place held by the plaintiff at the time of the election and since, is an "office or place of trust or profit," within the meaning of the constitutional amendment of 1875, which is but the restoration of a clause contained in the amendments made in the Constitution of 1835 and omitted in that of 1868, for it is no easy task to run the discriminating line which separates such offices and places from employments in the public service which are not embraced in those terms. Nor will we consider how far the court should go in reinstating in office, one improperly removed but who may appear disabled and forbidden by law to possess it and exercise its attached privileges and rights in the opinion of the court. It is enough for us to see that the right to the office is drawn in question, and that one who entered in the form of law and is in the possession of the place discharging its duties, is to be affected by the decision without having an opportunity to be heard.

It is certainly inadmissible to command the defendants to receive the plaintiffs into their body without at the same time removing their appointee, for the ward cannot have a representation in excess