COURT OF APPEALS.

ALBANY, APRIL 5TH, 1856.

No. 3.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE MECHANICS' BANK IN THE CITY OF NEW YORK,

RESPONDENTS,

against

THE NEW YORK AND NEW HAVEN RAILROAD COMPANY,

APPELLANTS.

ARGUMENT

OF

WM. CURTIS NOYES, ESQ.

FOR THE APPELLANTS.

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ARGUMENT.

MR. NOYES, counsel on behalf of the appellants, said:

May it please the Court:

The parties in this suit are the New Haven Railroad Company, the defendants and appellants, and the Mechanics' Bank in the city of New York, who were the plaintiffs in the Court below, and are the respondents here; and, though nominally a suit against the Railroad Corporation, it is really a suit against more than one thousand of the original genuine stockholders of that Company, who have paid the money for their stock, and who are sought to be deprived of it without a farthing of consideration. It involves their interests to the extent of two millions of dollars, although in this suit the particular amount in controversy is not large; and it involves, in respect of reclamations between parties, other interests of a peculiar character, to a very large amount. Among these thousand stockholders and upwards, whom I represent, are more than one hundred and forty women, of whom many are widows, orphans, and persons comparatively helpless, who have invested small sums in the stock of this Company, and who, with the other stockholders, are sought to be deprived of those investments, and, in short, of a large part of their means of living, because the

transfer agent of the Company committed a gross fraud upon third persons; and the question is between the purchasers of certificates of stock made by the transfer agent, in fraud of their rights, and in violation of his duty, and these original, *bona-fide* holders of the stock, who had paid their money for it, and held it upon the confidence such an investment authorizes. They are sought to be deprived of this property without one dollar consideration ever having been paid to or received by the Company, by the transfer agent, or by anybody else, or in any other way ostensibly for them—simply because he issued false, and, as we say, forged certificates of stock.

This is a subject which I have felt myself bound to call to the attention of the Court in this manner, for the purpose of directing attention to the importance of the case, and as some justification (for certainly no apology is necessary) for minuteness and care in presenting it to the Court. This view will serve also to aid in counteracting an improper aspect in which the case has been presented to the courts and the public, as one in which innocent purchasers of the stock were alone interested; whereas it is the innocent original holders of the *bona-fide* stock who are most seriously affected by the decision of the court below.

I proceed now to narrate the facts as they are condensed in the statement prefixed to the points we present. The substance of the first paragraph I have already stated.

The Company was chartered in 1844, with a capital of two and with power to increase it to three millions of dollars.

It was increased immediately, and all paid in, and certificates for all the stock duly delivered to the several shareholders, who held them when the fraudulent certificates were issued.

By the charter of the Company its stock was made transferable, "in such manner and at such places as the by-laws of the Company should direct."

The Company, soon after its organization, adopted by-laws and rules to regulate the transfer of its stock. These provided for the appointment of transfer agencies in New York, New Haven, and Boston; for the forms of certificates and transfers; that all transfers should be made on the books of the Company at the transfer office where the stock was registered, and that no transfer should be made without the surrender of the prior certificate.

Of course, the business in that respect—the course which the law marked out for the transaction of business of that kind—was this: Whenever an owner of stock presented his certificate, and made the transfer by a written instrument under his hand upon the books of the Company, of that stock, and surrendered his old certificate, then the transfer agent was authorized to issue a new certificate to the transferee, certifying that he held that original stock, instead of its being held by the former owner. The transfer agent was not authorized to act at all until some person, by himself or by his attorney, came into his presence, in his office, and signed a transfer, surrendered the old certificate, and thereby directed a new certificate to be made to the new holder. This was not only the course of business required by the by-laws, but there was a special law of the State of Connecticut to the same effect, declaring that no transfer of stock should be valid against any other person than the grantor, unless registered on the books of the Company. I will not advert to that now, as I shall have occasion to call attention to it again.

Robert Schuyler was appointed the transfer agent in New York, in pursuance of these by-laws, immediately on their adoption; and he was also the president and a direc-

tor of the Company from the time it commenced business until he committed the frauds in question.

A short time prior to July, 1854, Schuyler, who was a member of the mercantile firm of R. & G. L. Schuyler, without any authority from or knowledge of the directors of the Company, commenced issuing fraudulent certificates of the Company's stock, and using them to borrow money upon, for his firm or for his own private use. Although he was transfer agent, he acted only for himself and in his private business when he borrowed money for his firm, and as Robert S. Schuyler alone, when he borrowed money for his private purposes upon the forged certificates. None of these transactions took place in the office or business of the Company, or really or ostensibly on its account, or upon any dealing or transaction in its business; nor did the Company ever receive any consideration or benefit whatever on account of them.

It is not pretended that he was professing to do any act for the Company. It is not pretended that it was done in the office of the Company, although it might have been done there. It is not proved that the parties dealing with him, in taking the stock, supposed they were dealing with the Company, or on account of the Company, unless the certificate itself upon its face is in law deemed to authorize that presumption. A transfer agent, embezzling the blanks entrusted to him to be used upon a proper transfer, takes them into his private office, or into the office of Robert & Geo. L. Schuyler, manufactures them into new certificates, or apparently good ones, and then retails them in his own business, by himself or somebody else, to borrow money upon.

The certificates in some instances were delivered to a third person to procure the money for him; and it is unimportant for our purposes whether he was *particeps*

criminis, or whether an innocent agent. The great distinction in this case is, that neither Schuyler nor such agent was doing any act, making any declaration, or professing to do any act or making any declaration on account of or on behalf of the Company, when he made the certificate, or when he passed it off, as the parties knew, he did so for his own purposes, or for the purposes of his firm, and not for or on account of the Company.

Chief Judge.—He filled them up in his own name?

Mr. Noyes.—Not in this particular case, but in many others.

The amount he thus fraudulently issued was nearly two millions of dollars.

One of these fraudulent certificates, for eighty-five shares, forms the foundation of the present action, which is brought upon it as a valid certificate for good stock.

The complaint, however, does not allege it was good stock. It only avers that the plaintiffs supposed it was good stock when they took it, but it does not aver that it was good stock. At the bottom of page 4 of the case is this allegation: "These plaintiffs further say that they supposed said certificate to be, and received it as a genuine and valid certificate for what it purported to be, and that the signature thereto is in the proper handwriting of said Robert Schuyler, and that it conforms in every respect to the defendants' certificates for said stock which are admitted to be genuine, and such as they have always been in the habit of using."

Then it is also alleged that the plaintiffs have "presented said certificate and power of attorney at the transfer office of said defendants, and demanded leave to transfer said eighty-five shares of stock, but that such leave was refused, and that the said Company justify said refusal, and allege and maintain that said stock is spurious

and issued without any authority of said Company, whereby said certificate is rendered worthless and unavailable in the hands of these plaintiffs."

The certificate in question in this suit was dated April 20th, 1854, and was given by Schuyler to Kyle on the 13th of May of that year, to borrow money. It did not represent any genuine stock of the Company, but was a fraud on the part of Schuyler, to raise money for his own purposes, or for the purposes of his firm.

It was in the same form as the certificates usually made by Schuyler and delivered to an owner of genuine stock; and it declared that Kyle was entitled to eighty-five shares of the stock, transferable on the books of the Company, at its office in New York, by Kyle or his attorney on surrender of the certificate, and was signed "Robert Schuyler, Transfer Agent."

Its form was as follows:—

NEW YORK AND NEW HAVEN RAILROAD COMPANY.

No. 4,574.

Capital, $3,000,000. New York Office. Shares, $100 each.

Be it known, that Alexander Kyle, of New York, is entitled to eighty-five (85) shares of the capital stock of the New York and New Haven Railroad Company, transferable on the books of the Company, at its office in the city of New York, by the said Alexander Kyle or his attorney, on the surrender of this certificate.

ROBERT SCHUYLER,
Transfer Agent.

New York, April 20th, 1854.

It was printed upon ordinary foolscap paper, in red ink, and has a blank power to transfer, such as Kyle executed upon this occasion, which is the next paper, and which reads as follows:—

KNOW ALL MEN BY THESE PRESENTS, That I, Alexander Kyle, for value received, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer unto the President, Directors, and Company of the Mechanics' Bank, in the city of New York, eighty-five shares in the capital stock of the New Haven Railroad Company, standing in my name on the books of said Company, and transferable only at its office in the city of New York. And I do hereby constitute and appoint F. W. Edmonds, Cashier of said Bank, my true and lawful attorney irrevocable, for me and in my name and stead, but to their use, to sell, assign, transfer, and set over, all or any part of the said stock; and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute, with like full power; hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof, I hereunto set my hand and seal, the 26th day of April, one thousand eight hundred and fifty-four.

ALEX. KYLE. [L. S.]

JUSTUS EARLE.

Kyle, who was thus employed by Schuyler, was Secretary of the Harlem Railroad Company, of which Schuyler had formerly been President, and he and Schuyler were engaged in forging certificates of the stock of their respective Companies; Kyle using the Harlem Railroad, and Schuyler the New Haven, as the bases of their operations.

Mr. Lord.—That is not the case.

Mr. Noyes.—The *fact* is found by JUDGE BOSWORTH, who tried the case, as follows:

It was admitted, and I therefore find, that the certificate of stock of the New York and Harlem Railroad Company, mentioned in the said note, was illegally issued by the said Kyle, as Secretary of the said Company, and was an excess over and above the limited amount of the preferred stock of that Company.

He had been engaged in it, because he had issued false certificates of the Harlem Railroad Company to the

amount of over $200,000. It was found in reference to this case, as to the loan from the plaintiffs only. The fact therefore is as I have stated it.

Kyle, on the 13th of May, 1854, applied to the cashier of the plaintiffs' bank in his own name, to borrow money on the certificate of stock of the New Haven Railroad Company, and another fraudulent certificate made by him as secretary of the Harlem Railroad Company, without disclosing that he was acting for Schuyler.

The cashier of the bank, without any inquiry or examination of the books of the Company, and without ascertaining *whether any stock stood in Kyle's name on its books or otherwise*, lent him $12,000 upon the security of this certificate and the other fraudulent certificate of Harlem stock, made by Kyle himself for one hundred and ten shares.

It was proved by the plaintiff's cashier, Mr. Edmonds, that they never went to the office of the Company, or took any trouble to inquire; but that they relied upon this certificate and the Harlem certificate alone, as to the truth of the representations they contained. For this loan the cashier took the ordinary stock note of Kyle, payable on demand, and a power of attorney from Kyle to transfer the stock mentioned in the certificates. Of course the stocks were pledged only as collateral security.

None of the officers or directors of the Company except Schuyler had any knowledge of this transaction, nor of any of the other frauds committed by Schuyler, and never sanctioned or approved them. Nor did the Company ever receive any consideration or benefit for the certificate or the spurious shares represented by it.

It had no power or authority to increase its stock;

and to do so was a criminal offense, and a violation of the charter of the Company.

The charter of the Company prescribed that the capital should be two millions, with power to increase it to three millions, as I have already stated.

After Schuyler's frauds were discovered on the 5th of July, 1854, the Bank demanded of the Company leave to transfer the eighty-five shares, or payment of the amount they had loaned on the stock, both of which were refused; the former as well because the certificate was fraudulent as because the transfer books had been closed by a resolution of the Board.

I will read that resolution, in order to show the circumstances under which the Company acted in closing the transfer books. Their minutes state that "a communication from Robert Schuyler was presented," as follows:

GENTLEMEN,

Your attention to the stock ledger of your Company is essential, as you will find there much that is wrong. The details can be furnished you with precision, though I cannot do so. In reference to the connection of these transactions with R. & G. L. Schuyler, I wish to make my solemn assurance that in no way has my brother been concerned in them, nor has he ever known or been informed of them; in fact there was no mode in which he could obtain information except from myself, and I have ever been quite as careful to keep him in ignorance as any other person. He could not even have ascertained the facts from our own books and accounts, and to those of the New Haven Company in my charge, he had no access.

Your obedient servant,

ROBERT SCHUYLER.

To the Directors of the
NEW YORK & N. H. R. R. Co.

On motion, resolved, That the transfer books of this Company be and the same are hereby closed, until further orders of the Board.

After the books had thus been closed, this demand to transfer this stock and treat it as genuine stock was re-

fused, upon that ground, and also upon the ground that it was not genuine. Of course, the effect of permitting the transfer of it, would have been a recognition of its validity, and giving a new certificate would have only complicated the difficulty under which the Company labored; and therefore, they refused to permit any transfer, and have hitherto always refused to permit any transfers of the spurious stock issued by Schuyler.

This case was tried at special term, and a *pro-forma* decision was given, without argument, in favor of the plaintiff; and it was fully argued at the general term of the Superior Court—five of the judges hearing the cause; and with a single dissentient (JUDGE CAMPBELL), they decided in favor of the liability of the Company upon the certificate.

Chief Judge.—Was it a judgment for so much money?

Mr. Noyes.—Yes. For the value of our stock at the time they demanded its transfer. They held two certificates precisely alike,—one valid against the Harlem Railroad Company, if this was good against us; and they obtained judgment for the whole value of our stock in money at the time they sought to transfer it, irrespective of the claim they had against the Harlem Railroad Company for their stock, although both sums would greatly exceed the amount of the loan.

I do not propose, at this stage of the argument, as I wish to be as succinct as possible, to consider the grounds upon which the court placed the right to recover. I will advance some stages in the argument before I do that, and I believe it is not usual now to read the opinion of the court below at length. I shall now proceed to a consideration of the character of the act committed by Schuyler, in making the false certificates. I do not do so

for the purpose of showing what the law is in reference to criminal liability, nor for the purpose of having the Court apply any criminal law to the decision of this case, which, in truth, involves only civil rights, but only for the purpose of showing how wide was the departure from the duties of transfer agent when Schuyler made the spurious certificates. Generally, the person whose name is forged, or whose paper is forged, is not responsible upon it in any form of action.

I repeat, then, that I call the attention of the Court to the *character* of this act, under the three first points which I have put forward, for the purpose of showing in what respect and to what extent Schuyler was departing from his duty in making these certificates,—to show how wicked and willful was the act upon which we are sought to be made liable, and how far, therefore, it was a deliberate and intentional departure from the duty he owed to us; first, all this has a bearing upon the great question to be determined, whether in performing that act, he was acting or professing to act as agent of the defendants, and within the limits of the authority which had been confided to him.

We say then, in the first place, that "Schuyler and Kyle well knew, when the first made and the latter passed to the plaintiffs the false certificate, that it was unauthorized and illegal,"—upon which there cannot be any manner of doubt as to Schuyler, and as to Kyle it is not important in this case. And that the act of Schuyler in making, and of Kyle in uttering it as a true instrument, constituted the crime of forgery. If it was forgery, it could not have been our act. It could not have been in any sense a legal act. He could not have been professing to do it, nor could any person taking it from him suppose

that he was acting, in doing it, as the agent of the Company.

Now, was it a forgery? I have referred first to the statutes. Our own statute applies, because it was done in this State, although the defendants are a Connecticut corporation. The statute is, that "Every person who, with intent to injure or defraud, shall *falsely* make, utter, forge, or counterfeit any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged, or diminished, or by which any rights or property whatever shall be, or purport to be, transferred, conveyed, discharged, diminished, or in any manner affected, shall be guilty of forgery." This is stated by the Revisors as a condensation of more than three hundred English statutes on the subject of forgery; and it embraces every possible case in which a false written instrument is made, by which rights or property may be affected in any manner, to the prejudice of another.

The certificate, we say, did not purport to be the act of Schuyler. True, his name was subscribed to it as transfer agent, but it was as an act of the Company. "Transfer agent," as added to his name, was a mere designation of his person, and to show who did this act, and that he did not certify for himself, but for the Railroad Company. It purported to be the act of, and it bound the Railroad Company, if it bound any one.

Now I call the attention of the Court to the common-law rule in relation to forgery, and to decisions made upon that subject—some very early ones, for the purpose of showing what was forgery at common law, and chiefly to establish that the making of an instrument, although made and signed by the party professing to have made and signed it, if it is false in fact, and is intended to have

a fraudulent and injurious operation upon third persons—is a forgery. The definition given in "Wharton's Criminal Law," and in the case of the *Commonwealth* vs. *Chandler* (Thatch. C. C. 187) is, "The false making or altering, *malo animo*, of any written instrument for the purpose of fraud or deceit."

So also, "the false making or alteration of a writing, to the prejudice of another's right." Can there be any doubt that this was the false making of a written instrument, intended to operate to the prejudice of our rights, and that it was intended to operate *as our* instrument, or that it was intended to be to the prejudice of the right of some other person as *our* instrument? Was not the instrument entirely false? As a certificate of the New Haven Railroad Company it was false. I call your Honors' attention to some of the early decisions upon this subject. In *Combe's case* (*Noy*, 101, *Moore*, 795, S. C.), it was held that to insert in a will against the knowledge of the testator, though he signed the instrument, a legacy which he did not authorize in his instructions for drawing the will, is a forgery; because he was deceived into putting his name to an instrument which was untrue. So it is held in the same case, that if a scrivener is directed to prepare a will to give a devise of land for life, and he fraudulently makes it a devise in fee, and the testator signs it, not knowing of the change, it is a forgery in the scrivener. In the Year Book 26 Hen. VI., Forger. 8; cited in Bacon's Abr., "Forgery A," and 3 Institutes, 169 (1), it was held, that where the defendant had given a deed of his farm (of course when there were no registry acts) to his neighbor, who was in possession of the deed, and then fraudulently, for the purpose of depriving him of his property, made out another deed, signing it himself,

and ante-dating it, for the purpose of showing that he had conveyed prior to the first *bona-fide* deed,—this was forgery at common law. This was decided nearly four hundred years ago; and it is to be remarked that there was in this case a genuine instrument, with the defendant's own signature,—but he had made a false date, for the purpose of defrauding his *bona-fide* grantee,—and it was held that he was guilty of forgery.

Your Honors are familiar with the doctrine that the indorsing a bill of lading, or any other instrument, by a man, with his own name, for the purpose of having it believed that it is the name of another, to whom the instrument was payable, by the same name, as in *Peacock's case* (6 *Cowen's R.*, 72), is a forgery. A bill of lading for coal came to New York, payable to George W. Peacock. Another George W. Peacock, got it, and indorsed his own name upon it, and he was convicted of forgery. In the case of *Regina* vs. *Wilson* (2 *Car. & Kir.*, 527), a clerk was authorized to fill up his master's check with a particular sum, and he filled it up with a sum which he was not authorized to insert; and he was indicted and convicted of forgery.

In the *Same* vs. *Blinkinsop* (2 *Car. & Kir.*, 531), the defendant drew a bill upon one Wm. Wilkinson, who was a workman in his employment, went and procured its acceptance by him, but passed it off as the acceptance of another Wm. Wilkinson; and it was adjudged a forgery.

In the *Same* vs. *White* (2 *Car. & Kir.*, 404), it was held, qualifying the rule in those two cases, that where a party himself made an acceptance, in the name of another, *as per procuration*, asserting that he did it by authority, it was not a forgery, but only a false representation that he was authorized to do what he was not in fact authorized

to do. In truth, he signed his name only as an agent, and did not attempt to sign for or to bind his principal in the principal's own name.

So, in *Regina* vs. *Hart* (7 *Car. & Payne*, 652), writing an acceptance over a blank given to the party to be used, for a sum not authorized, was held a forgery.

In *Bolland's Case* (1 *Leach C. L.*, 78), the use of the name of a fictitious person as a party to a written instrument, was deemed a forgery.

In the case of the *State* vs. *Shepley* (6 *Shepley*, 368) a person was authorized to draw a deed by a grantor for one acre. He drew it, inserting the description of the whole farm of the grantor, and it was signed by him without knowing of the departure from his instructions; and this was held to be a forgery.

These cases establish that if any written instrument be executed for and in the name of or as the act of another, without authority and with a view to defraud, and is used as a means of fraud, it is a forgery at common law.

In *Regina* vs. *Nash* (12 *Law & Equity R.*, 578), it was held that the forgery of a certificate of transfer of railway shares was within the English statutes as to forgery,—thus holding that such a certificate of transfer as the one in this case, though it was not designed to defraud a particular person, was within the protection of the laws against forgery.

The principle upon which these cases proceed, is this: The instrument in which the forgery is alleged to consist must purport to be the act of another, and to bind him. That is so here. It may be a false instrument with a true signature, or a true instrument with a false signature. This is the principle deducible from the cases. It makes no difference that it is the signature of the party if the

instrument is false, nor that the instrument is true if the signature is false, if there be an intent to defraud by means of it. Now, so far as I know, there is no case whatever opposed to this doctrine, except that of *Putnam* vs. *Sullivan* (4 *Mass. R.*, 45). That was an action against the indorsees of a note which appeared to have originated in leaving the signature of the defendants in blank, with the clerk of a mercantile house, who was authorized to use them in its business. This blank was obtained from him by some false pretense, then a note written upon it, and used, and passed into the hands of a *bona-fide* holder ; and it was held by the Supreme Court of Massachusetts that it was not a forgery, because it was a genuine signature, and being in the hands of a *bona-fide* purchaser without notice, he was not chargeable with the fraud, and could recover upon it. The case proceeded entirely upon the ground, (for it was not a criminal action) that by the negligent conduct of the parties, in leaving their name in blank with an incompetent or improper clerk, they were responsible for the injury which resulted from the negligence and want of care in the use of their name. I shall have occasion to advert to this principle by and by, but that was the ground upon which that decision proceeded. It is not to be denied, however, that the court did hold that it was not a forgery ; but in that respect the decision is opposed to all the cases which I have referred to, especially to the *Queen* vs. *Wilson* and the *Queen* vs. *Hart*; and the other authorities are equally adverse in principle ; for they decide that where one fills up a check or note or acceptance which he is authorized to use, with a name or a sum which he is not authorized to use or insert, and this is done with intent to defraud, he is guilty of forgery. The case of *Putnam* vs.

Sullivan is therefore anomalous, is contrary to well-settled principles, and to the cases to which I have already referred the court.

In conclusion upon this case, I observe that it proceeds upon the peculiar doctrine, that a party who has permitted another to use his name upon blank paper, by means whereof a third party has been defrauded, has been guilty of negligence, and must be responsible for the consequences, the same as if he had circulated it. It has no other support, and must fall without it. This case and the grounds of its decision are adverted to in the case of *Goodman* vs. *Eastman* (4 New Hamp. R. 455), in which it was held that if an note for a particular sum was entrusted to another to use, and he altered it by increasing the sum without authority, the maker was not liable upon it, as it was a forgery; and that the doctrine relied upon in *Putnam* vs. *Sullivan* was not applicable to the case.

I also refer your Honors here to the case of the *Bank of Ireland* vs. *Evans's Trustees* (32 English Law and Equity R. 23), upon this doctrine of negligence, and to which I shall again advert, which decides that there must be either something that amounts to an estoppel, or something that amounts to a ratification of the act by which the Company is sought to be charged, to make negligence a good answer to the defence of want of authority in the agent to bind it by such act.

In the next place, then, and as to the character of the act of Schuyler, I say that the presentation of this forged certificate as a valid one, representing genuine stock of the Company, and obtaining money upon it, was a false token at common law, and a false pretense within the statutes.

It will not be necessary that I should enlarge upon this, for there cannot be any doubt about it. In *Adams*

vs. *The People*, in this court (1 Coms. R. 173), it was decided that presenting a false warehouse-receipt for goods which were not in the warehouse, and known to be so, and obtaining money upon it, was a false pretense within the statute. Giving checks upon a bank where no account is kept, in payment for goods purchased, is a false pretense. (*Rex* vs. *Jackson*, 3 Camp. 370; *Same* vs. *Parker*, 7 C. & P. 825.) Using fictitious or spurious bank notes knowingly, and obtaining money or credit upon them, within our statutes and within the doctrine of the common law are false pretenses. (2 R. S. 677 § 53). In both aspects, therefore, as a forgery and as a false pretense, the act of Schuyler was entirely beyond the scope of his duties, and in no sense the act of the Company.

So far, then, in reference to that act, considered by itself, and with reference to its legal character as affecting him, and as affecting us,—it was a simple crime, or rather a combination of crimes, involving a willful departure from his duty and a clear violation of law.

Then, under the third point, as to this act as connected with the Company, and as to its ability or right to perform it, I submit that neither the directors nor stockholders of the Company could increase the stock beyond thirty thousand shares; nor could they diminish the par value of the shares below one hundred dollars each, the amount fixed by the charter. In all cases, a corporation must show a grant in express terms, or by necessary implication, for all the powers it attempts to exercise.

It is hardly necessary that I should discuss this point very much at length, because it was substantially repudiated by all the members of the court below, except Mr. *Justice* HOFFMAN, who, while he does not decide that they had power to increase the stock, does decide that he had previously held in the case of *The Bank of Commerce* vs.

Ketchin, Rogers, and Bement, that they could admit new members, so as to introduce among the original holders of the stock a new set of proprietors, with distinct interests, and thereby reduce the nominal value of the shares. In other words, that the Company, without the consent of the stockholders, and without an act of the legislature, could dilute this stock, so as to make shares representing and being in fact $100 each by the charter, by the fraudulent issue of false certificates, amount to only $33 33⅓ per share; because two millions of new stock, represented by the false certificates, infused into three millions of the genuine stock, making the whole five millions, would reduce each share to that sum; and this in opposition to the universal practice, and the generally conceded law, that where you wish to increase or diminish the capital stock of a Company, you must apply to the sovereign power for a law (in the absence of any implied or express provision) authorizing it. This is in effect holding, that the stock which these original proprietors paid for, and which was in their possession as a permanent investment, could, by the deliberate and fraudulent act of the board of directors, or of its transfer agent, be thus reduced; and if it could be reduced in this manner, it could be destroyed or annihilated by the same means, and without legal authority.

Now, in opposition to that, we cite the case of the *Salem Mill Dam Corp.* vs. *Ropes* (6 Pick. 32), in which Chief Justice PARKER says:—"No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators. If chartered with a fund limited by the act, it cannot enlarge or diminish that fund but by license from the legislature; and if the capital stock is parceled out into a fixed number of shares, the

number cannot be changed by the corporation itself." (Vide also *Angell & Ames on Cor.*, 5th ed. p. 146).

We say this cannot be done, because of the fact that the party is owner, and vested with the absolute dominion of his own shares, irrespective of the control of the corporation; and no man, no set of men, no board of directors, can alter or affect his right to that property without his consent,—nor even then without an act of the legislature authorizing it, if it enlarges or diminishes the capital stock of the corporation.

There are all the elements of a contract in reference to the ownership of this stock—a contract between the corporation and its various stockholders, and between the corporation and the public—a contract which cannot be disturbed under the constitution, without the consent of all the parties to it. The corporation is to hold the stock intact and inviolate for its owner and as his trustee, and it cannot be disturbed or altered without his consent. The owner, then, must transfer, or he must authorize some person for him to transfer, an entire or partial interest in his stock, before the directors or officers of the Company can in any way affect his rights, or confer any rights in respect of it upon another. If Judge Hoffman be right, I do not see why the capital stock may not be increased as well as diminished in the mode here attempted. Then it is no longer a question in the discretion of the legislature how powerful a corporation shall be by means of its aggregate capital, or to what extent it shall be controlled; but it rests with the board of directors, or a fraudulent transfer agent, to increase it, and they may do it in despite of the legislature, and of the stockholders themselves. So in reference to the ability of a corporation to carry on its business, the capital is fixed at a given sum in order that it may carry it on successfully. The legislature have

said what shall be the amount; but the judge decides that the directors may say it shall be reduced,—that three millions of chartered stock may be reduced to one, so far as the original stockholders are concerned,—practically saying it may be increased or diminished at pleasure, and new proprietors brought in against the wishes of the old ones, because the holders of the two millions of spurious stock are allowed to participate equally with the holders of the good stock in the property of and the control over the corporation.

To sustain the recovery in this cause is saying something more. By authorizing a recovery in money, it takes away, from three millions, two millions to pay for the fraudulent stock. It will not be pretended that the corporation itself, much less the transfer agent, had any right to increase or diminish the value of the original shares by any direct action upon the shares themselves, or that they had any right to admit new shareholders to a participation in those original shares, or any thing which was an equivalent for those original shares. Doing so would have been a violation of the charter, a criminal offense—the usurpation of a franchise,—punishable,—

1. As a misdemeanor, by fine and imprisonment as to those concerned in it; and

2. By a forfeiture of the charter of the Company, and by a fine also upon the Company.

For the purpose of showing the attempt to do this would be a criminal offense, and (if it is to be regarded as an attempt upon the part of Schuyler to increase the stock and admit new stockholders, or an attempt upon the part of the Company to do the same thing) punishable by fine and imprisonment, I quote what Blackstone says (3 Com. p. 263): "*Quo warranto* lies against one

who has abused or disused a franchise. * * * This is properly a criminal prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the crown." If the board of directors had admitted two millions of new stock it would have been a palpable abuse of the franchise. It could be restrained by injunction also, and could be punished afterwards if it had not been restrained, and even if it had been. Ch. KENT, in the case of the *Attorney General* vs. *Utica Ins. Co.* (2 John. Ch. 377), says: "The *quo warranto* at common-law was a criminal proceeding, and in addition to the judgment of seizure or of ouster, there was judgment that the defendants be taken to make fine to the king for the usurpation." Our statute provides for a fine of $2,000. (2 R. S. 485, §§ 48–9; A. & A. on Cor., 5 ed. § 175).

I also refer to the rule in Connecticut, where they have an express statute upon this subject, which reads thus: "When any person or corporation shall usurp the exercise of any office, franchise, or jurisdiction, the Superior Court shall have power to proceed by information, in the nature of *quo warranto*, to punish such person or corporation for such usurpation, according to the usage and principles of the common law; and also may permit an information in the nature of a *quo warranto* to be filed in the name of the attorney for the State, in the county where the cause of action arises, at the relation of any person desiring to prosecute the same, against any person usurping any corporate franchise or office; and may proceed therein and render judgment according to the course of the common law. (Conn. R. Laws of 1849, p. 131, § 289; *Kellog* vs. *Union Co.* 12 Conn. R. 20).

I have thus far considered the act of Schuyler, by which the defendants are sought to be charged, and of

his other acts in connection with this, in reference to himself, and also with regard to the Company, and its ability to do any thing of a like or similar character,—for the purpose of showing that they were not official or authorized, but were without power or right. This brings me to the question whether Schuyler, in doing these acts, or this act in particular, was acting as the agent of the Company, so that the Company is liable for the act which he performed.

This requires me to notice the grounds upon which the recovery is placed by the court below. The question presents itself in three aspects: Was Schuyler, in making the certificate, acting as the agent of the Company, or was he doing it for the Company? If he were and within the limits of his ascertained duty and power, then we may be liable. In reference to that, the Court below has not charged the Company upon the ground that it was an act which he was authorized to perform, or within the limits of his authority. We have not been charged upon any such ground; on the contrary, it has been repudiated.

The second aspect in which it presents itself is, that the act of Schuyler, in making and vending these certificates through Kyle, was a false representation while acting within the scope of his duty; or, to use the language of one of the judges, "within the limits of his apparent power," or "apparently within the limits of his power;" not within his apparent power, but apparently within the limits of his power; and that therefore we are responsible for that false representation. Let me call the attention of the court to some of these opinions. We were not made chargeable, because it was an act done within the real power at all; but we were charged upon the second ground of which I have spoken—that it was a representa-

tion within the apparent limits of his power. I refer to Judge Slosson's opinion: "The theory of the action is, that the defendants are bound by the act of Schuyler in issuing this certificate, though it was an abuse of his power, and a pure fraud on his part." He says again: "It is not in form an action to recover damages against the Company on the alleged ground that their agent in the course of his business as such had committed a fraud by which the plaintiffs have been injured, and for the commission of which fraud the defendants ought to respond; but it rests on the assumption that the Company is, under the circumstances, bound in law by the act, as though it had been their own, notwithstanding it was an act in abuse of the powers of the agent, and which the Company itself could not rightfully have done; and the question presented by the action is, whether the defendants can be bound in favor of a party dealing *bona-fide* with their transfer agent (which the plaintiffs confessedly were), by an act of his, which they themselves could not rightfully have performed, nor rightfully have deputed to him the power to perform, but which he has in fact performed while acting in the discharge of his office as transfer agent." That is, however, begging one important question, "for the performance of which he had general powers, and within the apparent limits of his duties." Not within the apparent power, the Court will observe, but within the "*apparent limits of his duties.*" Again, he says: "That the corporation itself, could not, without the sanction of the legislature, have under the circumstances rightfully issued this certificate, treating it as the representative of stock,—that is, could not have issued it without an abuse of their lawful powers under their charter, may be conceded; but it is nevertheless true, that they had the power in fact to do the act, as one coming

within the range of their corporate powers, though in the particular instance, it may be unlawful in itself as contravening the intent of the charter." Then again: "It is true, that in certain cases a corporation is not estopped from denying that an act upon which a claim against it is founded was unauthorized and illegal; but the rule has no application." "It applies where the corporation has done an act in clear excess, or in violation of its charter, or legal powers, and that in a transaction in which the party with whom it has dealt has notice or knowledge of the illegality of the act." His Honor's rule, therefore, is that an excess of power is of no consequence, as to the act being binding on the Company, unless the party has notice. Again he says "If this be true, I do not perceive in what respect the act differs by being done by the agent of the corporation, it being conceded that such agent had full powers in that particular business."

We do not concede that he had full power. His power was limited to the original three millions of capital, and to giving a certificate whenever an old one was returned, and a transfer of the stock which it represented was made. In other words, he was limited to the business of the principal concerning these three millions of stock. Judge Slosson then says: "And that the act was done while ostensibly within the limits and in the performance of his legitimate duties." That is also an error, as we suppose. Again he says: "As transfer clerk, Schuyler stood in the position of a general agent"—that we deny; "that is of an agent entrusted with the entire business of that department under the rules prescribed by the by-laws and regulations of the board of directors." That is undoubtedly so. "He was held out in this capacity to the world, and in the business of the transfer of the stock of the Company, the public dealt with him, and him only.

"Within the limits of that employment, the public had the right to regard all acts done by him as rightfully done, so long as they had no reason to suspect the contrary."

Certainly it is so, if you limit the rule to the original three millions of stock; but it is not so in regard to any transactions which he chose to make in fraudulent certificates. Again he says: "While acting within those limits, and in his character of transfer agent, and in the performance of that very business, his acts were binding on the Company, without showing their assent or participation." Then he says, in order to show the ground upon which we are made liable, conceding that it was not our act, nor a legal act:—

"It is true that this act of Schuyler was one never contemplated in his appointment, nor was he appointed to do what his principals could not rightfully do; but that makes no difference in the application of the principle. He was employed to do lawful and proper acts, as all agents are in contemplation of law; and it was in the execution of the powers of that lawful employment, and in doing an act which, upon its face, in itself was lawful and within the express limits of his power, and an act of the very description of those which he was appointed to do, that he committed the fraud."

So that the right of an agent to do an act, and whether his principal is bound by it or not, is to be judged of by the act as apparent upon its face, without regard to the original power under which the act is performed; and if one is authorized to sign notes in the business of the principal, and does so although not in the business of the principal, the latter is liable if it was apparently within the business of the principal, although in truth it was not. So then, according to this doctrine, it is appar-

ently upon its face within the scope of the agent's duties, and there is a liability. But this position, as will be shown in another stage of the argument, is opposed to all the authorities upon the subject in England and in this State.

Then the learned judge reaches the third ground upon which our liability is based, that of estoppel upon the Company by these representations thus made, in a matter which it is clear the Company never authorized the agent to perform, and could not itself lawfully perform.

He says: "I consider the action as virtually upon the certificate; and that that instrument creates a binding obligation on the defendants *which they are precluded from denying, as against these plaintiffs, to be their act;* the same having been created by their lawfully constituted agent, within the scope of his legitimate powers, and in the very exercise of them, though an abuse of them; and that though the defendants may not be able, by reason of the limitation imposed by their charter upon the amount of their capital and number of their shares, to admit the plaintiffs to the rights of stockholders by permitting a transfer of this stock upon their books, they are not on that account at liberty to repudiate the act, as the act of the corporation, but must make compensation to the innocent holders of the certificate, equally as an individual who has undertaken to do an act, which he finds himself unable to perform, and whose default in performance has caused an injury to another, would be bound to do."

So that the real powers of the corporation are of no sort of importance in the consideration of this question, or as to their liability for the act of their agent. It is placed precisely upon the same footing as if the Company was a natural person capable of doing any thing not for-

bidden by law, and bound in the same way that a natural person is bound for the acts of the agent, irrespective of the limits placed upon its chartered existence. While, therefore, the chartered rights of the Company are preserved in this opinion, in reference to its not being obligatory upon us as stock, they are thrown aside in reference to the legal obligation to make good what is said to be the legal representation in the certificates; and we are excluded upon the doctrine of estoppel, from saying that no such right existed as stated in the certificate. It is placed upon false representations for which we are responsible, creating a case for the application of the doctrine of the estoppel, forbidding us to deny their truth, forbidding us to set up what the truth of the transaction really was.

I refer also to the opinion of JUDGE BOSWORTH on this subject, who says: "The corporation could act only through the agency of officers. It is unlike a natural person, who can transact his business in person or through the agency of others, according to his volition. All the acts in behalf of a corporation done by its proper officers, are its acts—if they are done within the scope of their actual authority, *or are apparently within the limits of their actual authority.*"

If there be a possible apparent case in which the agent of the corporation might do this thing, then the corporation is bound by all his acts of the same description; and that, irrespective of the actual power, and of the limits contained in that actual power, though it be a public legislative act; so that the liability of the principal is to be determined by the act of the agent, by his representations while performing it, and by inquiring whether it be like acts which might rightfully have been performed upon the concurrence of precedent conditions,

and without any regard to the actual power conferred. Again he says: "In issuing such certificates, he was acting, *apparently, within the limits of the authority conferred upon him* by the Company, under its charter, by-laws, rules, and regulations."

He concludes, although not in the same language as Judge Slosson, that the Company cannot, therefore, be permitted to deny that the act was performed upon due authority.

Judge Campbell delivered the dissenting opinion, which commends itself much more to my judgment than the others; but I commend it to the Court without reading it.

Chief Justice Oakley doubted, but finally, and with much hesitation, went with the majority. He says, speaking of Schuyler: "His power as such agent, in my opinion, was confined to the superintendence of the transfer of stock on the books of the Company, and to renewing and canceling the outstanding certificates which might be surrendered on such transfers, *he not having any power to permit a transfer without a corresponding surrender. As transfer agent merely, I cannot see that he had authority to issue a certificate, or to furnish any evidence of title to stock, that title depending solely on a transfer on the books of the Company. The agency of Schuyler, therefore, seems to me to have been not of a general but of a special character. His power as transfer agent was limited and restricted by the provisions of the by-laws of the Company, and could only be rightfully exercised under the circumstances prescribed by those by-laws.* It is conceded that, in the present case, there was no surrender of stock by any person, when this certificate to Kyle was issued; nor was there any stock, as far as appears, even nominally placed in his name on the Company's transfer books. *The issuing of the certifi-*

cate to Kyle, was therefore without any authority, and clearly void and inoperative in itself, being made by Schuyler in violation of his special instructions, even if he could be considered as having the right under any circumstances to issue such certificates.

"If this case, therefore, depended upon the question whether this certificate creates a contract binding on the defendants, and obliging them to transfer the stock to the plaintiffs on their books, and subjecting them to an action in case of refusal, the claim of the plaintiffs might be considered at least doubtful, and as calling for the solution of the following questions:

"1st. Whether as it is quite clear that the certificate was utterly void in the hands of Kyle, he could transfer any right under it to the plaintiffs, the *bona-fide* holders of it.

"2d. Whether, under the circumstances, the plaintiffs can be considered as *bona-fide* holders."

Then he says: "Now, what is the effect of this certificate viewed in this light? If application had been made directly by the plaintiffs to the defendants, and they had declared that Kyle was the owner of the stock, as appeared on their books, it can scarcely be doubted that the plaintiffs would have had a right to rely on the truth of such a declaration.

"*The act of Schuyler in making such a representation, being done by the implied authority of the defendants*" [Implied, because they had permitted him, under the rules regulating transfers, to issue genuine certificates of stock], "*must be followed, I think, by the same legal consequences.*"

"*The plaintiffs, acting in good faith in the matter, and in the absence of any circumstances to put them on inquiry, had a right to rely on the truth of Schuyler's certificate.*

They did so, advanced their money, and were cheated. *Schuyler betrayed the confidence reposed in him by both parties. Who shall bear the loss? They who placed Schuyler in a position to enable him to commit the fraud*," [they placed him in a position enabling him to commit a fraud, only by appointing him agent in the discharge of a legal duty,—that is all, and then they are liable, because, and only because, they appointed an agent.]

"*Or they who trusted to his representations*, made in behalf of the Company, and by their clearly implied authority? It seems to me that there can be but one answer to this question. *The defendants must suffer by the acts of their dishonest agent.*"

In a business which they did not delegate power to him to do, and of which they had no knowledge whatever, and never sanctioned. Again he says:

"The only doubt that has existed in my mind of the soundness of the conclusion to which I have thus come, has arisen from the view of this case taken by my brother CAMPBELL, in his opinion just delivered. He considers that a principal cannot be made liable for the frauds of an agent where it is necessary to reach the principal through such fraud; but that where the case turns solely on the contract entered into by the agent in the name of the principal, the only inquiry is whether the agent, in making the contract, acted within the scope of his authority; and if he did so, the principal cannot repudiate the contract because the agent acted fraudulently in making it; but that in all other cases, where damages resulting from the act of the agent are claimed on the ground of fraud, the principal is not responsible."

We concede, if he makes a contract *for the Company*, which is tainted with a fraud by him, especially where the

Company seek to avail themselves of it, they are responsible; but we deny that where he does a fraudulent act upon his own account, although he may do it in something which rightfully, if a certain condition of things existed, might be in the business of the Company, that they are liable for that fraud. He acts in those cases for himself, and not for his principal. In other words he is not employed to commit a fraud, or make a false representation, and does neither for or in *the business* of the Company. We are not made liable in this case as upon a contract, nor because there was any power upon the part of Schuyler to make it as a contract; but we are made responsible upon it as a fraudulent representation made by Schuyler, within the scope of his authority, which we are not permitted to contradict in any respect, upon the principle of estoppel. Now, there is a limit to human agency; and there must be some limit to corporate agency. There must be a limit to the liability of every human being who constitutes an agent, and of every artificial being, who must necessarily act by agents. If it be not so, then the delegation of authority to another is one of the most dangerous things which can possibly be given. We say that the limit is found in the power which has been conferred, unless the principal after he has conferred the power, has permitted things to be done enlarging it, or permitted the agent to do acts, and ratified those acts, so as to authorize the persons dealing with him to believe that it comprehends those acts sought to be brought within it, which in reality were not within it; but that, where nothing has been done or permitted by the principal, by way of ratification or adoption, or otherwise, which could enlarge the clear and well-defined limits of the power—the delegated power given by the principal—he is not

liable, in any form, not even for the representations made while performing the unauthorized act, much less upon the contract which is the result of it.

Our *fifth* point is that Schuyler was not the agent, nor was he acting or professing to act as the agent of the Company, either when he forged the certificate or delivered it to Kyle to borrow money upon it for his own use.

He was not agent of the Company.

The Company did not possess and could not delegate, and never attempted to delegate, to him the power to make a certificate for stock which did not and could not exist.

The only authority the Company ever possessed, and all he ever had, was when a transfer of existing shares had been made, to give a certificate of the fact, as a muniment of title: he could not create a share, nor give a valid certificate of an interest in one not actually existing, nor could the Company.

Nor had he any authority or power to admit new members into the corporation; or, indeed, to admit any members at all. This could only be done by a shareholder assigning his shares to such new member. The Company itself could not admit a new member, except in virtue of his ownership of shares. The right of membership attaches to the shares *as owner*, and not otherwise; and if a person is owner of a share, he is a member, deriving his title as such under the charter, and not by any act of the Company; and all its stockholders combined cannot exclude him. (*Kortright* vs. *Com. Bk. Buffalo*, 22 Wend., 348. A. and A. on Cor., 2d ed. 69, 348, 451. *Overseers, &c.*, vs. *Sears*, 22 Pick., 122. *Seargeant* vs. *Franklin Insurance Co.*, 8 Pick., 90.)

I refer also to *Natuche* vs. *Irving*, reported in Gow on Partnership, Appendix, 398. There was a joint stock com-

pany formed, and some of the parties attempted to divert it from the purposes for which it was originally created, by adding the power of marine insurance; but one of the proprietors objected. The others were willing to do any thing to get rid of him, and did all they could to exclude him, by offering to purchase his interest, and otherwise; but Lord Chancellor Eldon held that even in case of a joint-stock company, he had a right to compel them to go on under the original contract, and that they could not get rid of him in any way without his consent, or change the nature of the business. They were restrained by injunction from changing the business of the Company.

In the next place we say, nor could the Company confer, nor had Schuyler, any authority or power to *exclude* members, who, of course, must have been such in virtue of their ownership of shares, without their consent. Nor could it be done by a direct vote upon good consideration, nor indirectly, by issuing certificates for new shares, and receiving the par for them. When the three millions of capital was paid in, the power of the Company over it was gone, and its control belonged to the respective shareholders as owners.

From that time Schuyler was only the agent, to permit and register the transfers, when and as often as the existing shares of the stock were transferred and the certificates surrendered.

The Company never held out Schuyler as possessing any apparent power or authority to issue stock; he was only known as authorized to certify to the transfer of existing shares, when an owner sold them and made the transfer.

Nor did the Company possess, or attempt to delegate to him, any authority or power to admit new members, as

part owners of the original three millions of capital. They could not reduce the capital stock or diminish the old shares, nor affect in any way the rights of the absolute owners of them or their quantum of ownership ; as they could not annihilate, they could not partially destroy them, by admitting to the joint ownership of the original limited capital a new set of proprietors.

It is a well-settled principle, that no member of a corporation which has a transferable stock can be disfranchised in respect of it ; nor can his interest in the shares be divested, impaired or affected by any act of the Company, unless authorized by the charter, or by his consent ; and of course the company cannot confer any such power on an agent. (A. & A. on Cor. 2d ed., 69, 347, §§ 1, 2 ; 437, § 2. *Searjeant* vs. *Franklin Insurance Co.*, 8 Pick. 90, 92, *per* Aylwin, *arguendo.*)

The utter invalidity of such certificates as these, and that they furnish no claim against nor impose any obligation upon the corporation, was determined in an able opinion by JUSTICE MORRIS, of the Supreme Court, in the case of *The People* ex rel. *Jenkins* vs. *The Parker Vein Coal Co.*, Dec. 1854, MS., a copy of which has been handed to the Court.

I say, in the next place, under this head, that it never has been decided, where the question came directly up, that a corporation is liable under circumstances of this description, until so decided in this case, by the court below. I will call the attention of the Court to all the cases that have in any way considered this question. The first is *Davis* vs. *The Bank of England*, (2 Bingham, 393.) That was an action like the *National Bank* vs. *Pollock*, (3 Selden, 274,) for stock which the Bank permitted to be transferred upon a forged power; and the question was, who should bear the loss—the Bank, or the original real

holders of the stock. These were registered annuities of the government, the dividend being payable at the Bank of England and registered there. There was no limitation to the quantity of stock which could be issued, as there is in this case; for the English national debt may be increased *ad libitum*. In that case JUDGE BEST, in delivering the opinion of the court, used this language:

"*We are not called upon to decide* whether those who purchase the stock, transferred to them under the forged powers, might require the Bank to confirm that purchase to them, and to pay them the dividend on such stock, or *whether their neglect to inquire into the authenticity of the power of attorney* might not throw the loss on them that has been occasioned by the forgeries. But to prevent as far as we can the alarm which an argument urged on behalf of the Bank is likely to excite, we will say that the Bank cannot refuse to pay the dividend to subsequent purchasers of these stocks. If the Bank should say to such subsequent purchasers, 'the persons of whom you bought were not legally possessed of the stocks they sold you,' the answer would be, 'the Bank, in the books which the law requires them to keep, and for the keeping of which they receive a remuneration from the public, have registered these persons as the owners of these stocks; and the Bank cannot be permitted to say that such persons were not the owners.' If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him?"

Now, it is obvious that all this was *obiter*; besides the judgment in that case was reversed, (5th *Barnwall & Creswell*, 185,) upon a question of pleading; the defect being that it was not averred that the Bank had received money from the government to pay the dividends.

In *Angell & Ames* on Corporations, 2d ed. 456, the

authority of that case is questioned, and a note from *Woolrych* on Commerce and Manufacturing Law is cited, in which he says, speaking of the reversal of *Davis* vs. *The Bank of England*, "The guarded language which was used in delivering '.judgment of reversal,' *so as to avoid giving any sanction* to the decision in the Common Bench, gives reason to suspect that this case is not to be considered as unquestioned law." The opinion, therefore, was not only extra-judicial and of no authority, but was overruled by the court in reviewing it, and is in bad repute among our best law writers.

Then the next case relied upon against us, is the *Kentucky Bank* vs. *Schuylkill Bank*, 1 Parson's Select Equity Cases, 180; and as the time allotted to me is limited by the rules of the Court, I must pass rapidly over that case, in order to bestow proper attention upon our remaining points. That was an action against the fraudulent transfer agent, for fraudulently discharging his duties—as if we had sued Schuyler for fraudulently issuing the false certificates. The Schuylkill Bank was the transfer agent of the Kentucky Bank, conducting its business by Levis, its cashier; and he as cashier of the Schuylkill Bank, and transfer agent of the Kentucky Bank, issued false certificates of stock, of that Bank. It was alleged that the Bank had received some of the proceeds, that the business was all done *in the Bank*, and apparently on its account, and that the Bank had been indemnified by Levis to a certain extent. That is a Pennsylvania case, decided by JUDGE KING while the original bill was pending. There was an act by the legislature of Kentucky, which authorized the Bank to increase its capital and to assume the position of all the *bona-fide* holders of the spurious stock, and indemnify them; and being clothed with this new equity, they brought it before the court by supplemental bill, and pre-

vailed. This was, therefore, a case brought by the principal against its own agent, adopting the fraudulent act as its own, and indemnifying the parties injured, and claiming indemnity from the agent. Upon a well-settled principle, the act, though fraudulent and without original authority, was capable of ratification, and the principal could claim from the agent the fruits of the act, as, here, we might adopt all the spurious stock, paying the defrauded holders the amount they paid for it to Schuyler, if none of the genuine stockholders objected, and then claim from him the several amounts he had received upon it. This, however, could not be done to the extent of adopting it as part of the three millions of original capital. This case, therefore is no authority against us.

I now proceed to the full consideration of this proposition:

Schuyler did not act or profess to act as the agent of the Company, when he forged the certificate and raised money upon it for himself.

The directors had no power generally and indefinitely to issue certificates of stock. They could not, and never did, either expressly or impliedly, attempt to confer upon Schuyler such general power to issue certificates of stock.

Such an agency or power, must be created in express terms, by one authorized to confer it, or be implied from a general course of corresponding action on behalf of and with the assent of one authorized to confer it expressly. (1 Am. Lead. Ca., 3d ed. 544, note. Story on Cor., §131—2—3. Story's Agency, § 131, 165.)

He was not performing any act on behalf of the Company, but one simply for himself; and this the plaintiffs

knew, or with reasonable diligence and inquiry might have known.

He could take no steps in it as agent, for he had no duty to perform for the Company in the transaction. The moment he commenced it he continued the fraudulent departure from his duty and engaged in a new crime.

It is not proved to have been done in the office, or apparently or ostensibly in the business of the Company, or as its agent. It was a mere criminal act of his own; having no relation to any transfer of its stock, or to any interests of the Company, but hostile to, and in fraud of them, and a *willful* departure from his duty.

The plaintiffs were not dealing with the Company, or upon its credit, when they received the certificates, nor did they pay to the defendants, nor did they receive, any consideration whatever.

Schuyler was not at all times and under all circumstances the transfer agent. He was only such when acting in reference to, and in connection with, a transfer by an owner of stock, of some of the shares in the ordinary course of its business and in the prescribed mode. At all other times, he was a mere private person, having no authority to act for or to bind the Company. (A. & A. on Cor., 250 and Notes. *Foster* vs. *Essex Bank*, 17 Mass., 507. *Thayer* vs. *City of Boston*, 19 Pick., 516—17.)

In *Foster* vs. *The Essex Bank*, just cited, a special deposit had been made of a large amount of specie in the Bank. It was done with the knowledge and approbation of the directors, although it did not go into the funds of the Bank, but was kept in kegs, aside from its other funds. The money was stolen by the cashier from the vaults of the Bank, and appropriated to his own use; and the Bank was held not responsible for it. As this case is of great

importance, and the opinion of CH. J. PARKER, a concurrent one, I will read a few extracts from it.

After examining several authorities, he says: "I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do wrong either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The cases of innholders, common-carriers, and perhaps ship-masters, or seamen, where goods are embezzled, are exceptions to the general rule, founded on public policy. If it be asked, for what acts, then, of a cashier or clerk the bank would be answerable, I should answer: for any which pertain to their official duty; for correct entries in their books, and for a proper account of general deposits; so that if by any mistake or fraud in these particulars, any person is injured, he would have a remedy. The undertaking of banking corporations, with respect to their officers, is that they shall be skillful and faithful in their employments; *they do not warrant their general honesty and uprightness.*"

In reference to the hardship of the case, which has been so vehemently urged against us, in the Court and elsewhere, the learned judge says, what should be prominently remembered by this Court:

"It has been said to be a hard case on the part of the plaintiffs, whose trustee confided a large amount of property to a place, as he thought, of perfect security, under the management at least of common prudence and skill; and, indeed, it is a hard case, as all cases are, where property is lost by violence or fraud. But it is not less hard on many members of the corporation, who, had by the same wicked conduct been deprived of their earnings and

savings. All that can be done by the court is to lament the common misfortune, and take care not to add injustice to hardship, by relieving one sufferer at the expense of others, until the principles of law demand such interposition."

If, therefore, Schuyler was ever and always transfer agent, then this was his act; but if only while doing something, or professing to do something, on account of the Company, or its business, we are not responsible for his acts. The case of *Foster* vs. *The Essex Bank*, it seems to me is conclusive on that point.

We say that forgery and issuing the certificate, was a fraudulent and willful act, entirely beyond the scope of any authority he possessed from any quarter. It cannot be that an act extending beyond the subject, and of course beyond the limits, of the agent's authority can be valid, when it also transcends the power and authority of the principal, and, more especially, when in thus transcending the authority of the principal it is at the same time illegal and criminal and against the policy of the law.

For acts of this character, it is well settled that the agent is personally liable to those who suffer by them; the principal is only liable for the misfeasance and the nonfeasances and omissions of duty of the agent, *in the course of his agency* and while executing it; but for acts of *misfeasance* and for *positive wrongs*, committed by the agent, not in the immediate course of the agency, he alone is responsible. (Story on Agency, §§ 308, 309, 452, 456, 458, 459, 461.)

The principal is never liable for the torts of his agent in any matters beyond the agency, unless he has expressly authorized them to be done, or has subsequently adopted them for his own use and benefit, having originally authority to do the act himself. Hence it is, that the

principal is never liable for the unauthorized, willful or malicious act or trespass of his agent. (Black. Com., 429, 431. Story on Agency, §§ 452, 456, and notes 459, 460, 461. *McManus* vs. *Cricket*, 1 East., 106. *Croft* vs. *Alison*, 4 B. & Ald., 590.) I refer the Court particularly to *Story on Agency*, as there cited, § 456.

Now I will call the attention of the Court to some other cases, to illustrate the general doctrine that where a special or limited agency is created, the principal is not responsible if the agent exceeds that special authority, in any case. I refer to the note in 1 American Leading Cases, already cited, p 544, and I will read a portion of it:

"A *general* agent is one who has been generally or usually employed to do certain things, though of the most limited range, and a *special* agent is one who has been specially authorized to act, though it may be in the most extensive and discretionary way. But by whatever name these different agencies may be called, the important distinction in the law is between these express and special or intentional authorizations, in which the agent has no powers but such as the principal meant should be exercised by him,—and those implied or unintentional agencies in which the agent becomes vested with power in law to bind his principal beyond the limits to which he meant to be bound, or altogether against his intention—a power derived from the acts of the principal in relation to the agent and the public.

"1. If there be an express or special authority, the agent cannot, by virtue of that authority bind the principal beyond its express terms, or beyond those implied powers which are legally to be considered as accompanying and being involved in the appointment of an agent for the purpose in question. The rule of the common law is that no man can be bound by the act of another, with-

out or beyond his consent ; and when an agent acts under a special or express authority, whether written or verbal, the party dealing with him is bound to know, at his peril, what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal power, the act, as concerns the principal is void; * * * * and this though the act done be more beneficial than the one authorized ; for in fact the powers of the agent, and rights of the person dealing with him, as against the principal, depend upon a legal construction of the instrument or language of authorization, and that, of course, depends upon the intention, as legally signified, of the principal. The power must be pursued with legal strictness, and the agent not go beyond it nor beside it. The act done must be legally identical with that authorized to be done, or the principal is not bound."

In other words, the minds of the parties must meet upon the contract, the mind of the principal being determined by the extent of authority he has conferred; and it depends upon the fundamental rule in the making of the contract—the union of the intentions of the parties—that such a contract should be made.

Now, upon this subject, and order to condense my argument within the time required by the rule, I pass over the printed points in regard to willful violation of duty, and the consequences deducible from them, requesting your Honors to read them at leisure. [They were as follows :]

There are modern cases on this point, and also those of great antiquity; and they are uniform in excluding the liability of the principal in cases like the present, on the ground that they are not acts in the course of the agency. These are a few of them :

Bro. Abr. Trespass, pl. 345. "If my servant contrary to my will, chase my beasts into the soil of another, I shall not be punished."

2 Roll Ab. 553. "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser and not I."

Noy's Maxims, Ch. 44. "If I command my servant to distrain, and he ride on the distress, he shall be punished, not I."

In Middleton *vs.* Fowler, Salk. 282, *Holt, Ch. J.*, said, "No master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him."

In McManus *vs.* Cricket, *supra*, LORD KENYON said, "When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given to him; and, according to the doctrine of LORD HOLT, his master will not be answerable for such act;" and it was held that a master, riding in his own chariot, was not liable for the act of his servant who willfully drove it against a chaise on the highway, by which the plaintiff was thrown from it, and greatly hurt.

Croft *vs.* Alison, decided in 1821, *supra*, is to the same effect, so that from a time prior to Brooke's Abr., 1568, to the present, the English decisions are all one way. Lyon *vs.* Martin, 8 A. and Ellis, 512; The Druid, 1 W. Rob. 391.

In Wright *vs.* Wilcox, 19 Wend. 345, the same doctrine is reiterated and enforced.

Vanderbilt *vs.* Rich. Turnpike Co., 2 Comst. 479, S. P. These cases are decided on the ground that the injuries were committed *by force*, but upon the broad distinction that in committing them he did not act as agent, having departed from the scope of his duty. Where a quantity of coin in kegs was deposited in a bank for safe keeping, and it was fraudulently taken out by the cashier of the bank and applied to his own use, it was held that the bank was not liable for the amount. Foster *vs.* Essex Bk., 17 Mass. 479 to 507 to 514, *per* Parker, C. J.; Wyman *vs.* Hallowell Bk., 14 Mass. 58; Bk. of Bengal *vs.* E. India Co., 2 Knapp, 245.

The acts of DIRECTORS and *agents* of a corporation, not authorized by its charter, or prohibited by law, are illegal and void; and no valid claims can be founded upon them by any person. Miner *vs.* Mech. Bk. of Alex., 1 Peters, 45–71, *per* Story, J.; Dawes *vs.* N. River Ins. Co., 7 Cow. 462; Bank U. S. *vs.* Dunn, 6 Peters, 51, and *per* M'Lean, J., p. 59; Penn. D. and M. Steam Nav. Co. *vs.* Danbridge, 8 Gill and J. 248; Life and Fire

Ins. Co. *vs.* Mech. Ins. Co., Wend. 31; Root *vs.* Wallace, 4 M'Lean, 8; Salem Bk. *vs.* Gloucester Bk. 17 Mass. 1, 25, 28, 30, *per* Ch. J. Parker; Wyman *vs.* Hallowell Bk., 14 Id. 58–63; Broughton *vs.* Salford Water Works, 3 B. and Ald. 1; Hodges *vs.* City of Buffalo, 2 Denio, 118; M'Cullough *vs.* Moss, 5 Denio, 567; Boone *vs.* City of Utica, 2 Barb. S. C. 104; Hoyt *vs.* Thompson, 1 Selden R. 320; Halsted *vs.* Mayor of N. Y., 3 Comst. 430; Talmage *vs.* Pell and State of Ohio, 3 Seldon, 328; Hood *vs.* N. Y. and N. H. R. R. Co., 22 Conn. 302; New London City *vs.* Brainard, Id. 552; East Anglian R. Co. *vs.* E. Counties R. Co., 11 Com. B. 775, 811, *per* Ch. J. Jarvis; McGregor *vs.* Deals & Dover R. W. Co., 16 Law and Eq., 180, S. C., 17 Jurist, 21; Mayor of Norwich *vs.* Norfolk R. W. Co., 19 Id. 344.

It follows, therefore, as a necessary consequence, that upon an act which neither the Company itself, nor any of its officers could lawfully perform, and for the doing of which the particular parties concerned were indictable and punishable for a felony, that no valid claim or cause of action could arise against the Company; because,

1. It was illegal and void, as already shown under Point III.

2. It was a *willful* violation of law and duty; in respect of which a principal is never liable for the act of his agent. M'Manus *vs.* Cricket, 1 East. 106; Vanderbilt *vs.* Richmond T. Co., 2 Comst. 479; Story on Agency, and notes, p. 456; The Druid, 1 W. Rob. 391; Smith on Master and Servant, 160; Coleman *vs.* Riches, 16 Com. B. R. 104; S. C., 29 Law and Eq. 323.

3. The act involved a forfeiture of the Company's charter and two felonies, and no right to a civil remedy against a corporation can be founded upon such an act; the remedy is against the parties committing the act, not against the innocent Company.

4. The certificate, being a *forgery*, affords no ground of action whatever; in order to form such a basis, it must not only be genuine, but represent genuine stock. Smith *vs.* Assignees of Bagnall, Chitty and Hulme, 261; Hall *vs.* Fuller, 5 B. and C. 750.

5. It is an attempt to recover against the Company on the ground of the false pretense employed by Schuyler and Kyle to raise money, in which the Company had no interest or agency, and for which there is no precedent or authority. Sherman *vs.* Rock. R. R. Co., 15 Barb. 577, *per* Welles, J.

6. No consideration of any kind was ever paid to or received by or for the Company, or professed so to be. It was a mere private fraud of Schuy-

ler for his own benefit, not done or professed to be done while transacting any business of the Company whatever.

The Company cannot be charged with the consequences of any act or representation of Schuyler, unless the authority for it be found in its charter and by-laws; the charter is a public act accessible to all, and presumed to be known to all, and is in fact a part of the plaintiff's title. Those who deal with agents having only special powers, or even general powers with limitations or restrictions attached to them, cannot charge the principal because they relied on the agent's conduct and representations, but must prove that the conditions actually existed which authorized the exercise of the power, and that the act was done or representation made in the business of the principal, and within the scope of the authority conferred by the principal. Clinan *vs.* Cook, 1 Sch. and Le Froy, 32; Gibson *vs.* Colt, 7 John. R. 390; N. Y. L. & Trust Company *vs.* Beebe, 3 Selden, 364, 368–9.

It is upon this principle that under a power to executors to sell, if necessary, to pay debts, the person purchasing and seeking to avail himself of the title thus acquired, must prove that the necessity did exist; and the assértion of the right to sell by the executors, and a *representation* of the necessity for a sale, are utterly unavailing without such proof. Dike *vs.* Ricks, Cro. Car. 335; Sudgen on Powers, 473; Jackson *vs.* Ferris, 15 J. R. 346; Roseboom *vs.* Mosher, 2 Denio, 61; Allen *vs.* DeWitt, 3 Comst. 276.

Our next and *ninth* main proposition is, that Schuyler's agency in regard to making and issuing a certificate of stock, did not arise until an actual owner of stock had transferred it, and the transferee had become entitled to and had requested a new certificate. These were necessary preliminaries, without which he was not authorized to give a certificate; they were made so by the charter and by-laws, and all dealers in the stock knew it, or were bound to know it. It is like the cases where a master of a vessel gives a bill of lading for property never shipped, in which it has been uniformly held, that though he is the agent for loading the ship, yet he is not to be considered as the agent of the owner, to give bills of lading for pro-

perty not shipped, so as to make the latter responsible, by way of action, for a false representation or otherwise, to one who has made advances upon the faith of bills of lading so assigned, and who but for them would not have made the advances. And to sustain it we refer to these authorities: *Grant* vs. *Norway*, 10 Com. B. 665; S. C., 15 Lon. Jurist, 296; *Hubbertsey* vs. *Ward*, 8 Exch. R. 330; S. C., 18 Law and Eq. 551; *Coleman* vs. *Riches*, 29 Eng. L. and Eq. 323; S. C., 16 C. B. 104; *Saltus* vs. *Everett*, 20 Wend. 267; *Covill* vs. *Hill*, 2 Selden, 379–80.

These cases establish that the master of a ship, who is the general agent of the owner, for the purpose of loading the ship, and for the purpose of giving bills of lading, binds the owners by such bills *only* for the cargo actually on board; but in no case where he gives a bill of lading for cargo on board if he has previously given a bill of lading: in other words, a duplicate bill of lading is void. *Grant* vs. *Norway* decides the first principle, and *Hubbertsey* vs. *Ward* the second. *Coleman* vs. *Riches* decides the same thing in relation to warehouse receipts: that the agent in charge of a warehouse has no authority whatever to give receipts, unless the property is actually within the warehouse; and if he does so in fraud of the owner, the owner is not responsible, because he, the warehouse-keeper, is limited by the authority conferred upon him, and cannot go beyond it. Parties who deal with him, or with the master of a ship, know of the limitation, and if they take the receipt or bill of lading, must see that the property is in the warehouse or the goods on board the vessel.

It is upon the same general doctrine that a general power to sign notes in the business of the principal will not support a recovery upon a note made out of that

business, though in the hands of a party who received it *bona fide*, and upon the agent's representation that it was made in the business of the principal. (*Aymar* vs. *North River Bk.*, Court of Errors, Dec., 1843, reversing S. C., 3 Hill, 266; *Stainer* vs. *Tyson*, 3 Hill, 280–1; *Alexander* vs. *Mackenzie*, 6 Com. B. 766; *Awde* vs. *Dixon*, 6 Exch. R. 869; 1 Am. Lead. Cas., 3d ed., 556, note to *Batty* vs. *Carswell*, &c.; *Stark* vs. *Highgate Archway Co.*, 5 Taunt. 792.)

In the case of *Aymar* vs. *The North River Bank*, an agent was authorized to give notes on account and in the business of his principal, who was in Europe. He gave such notes, representing that they were in the business of his principal, and they were discounted by the bank relying upon his act and representation; but they were not in fact given in the business authorized. It was a question, too, with the bank, who were plainly *bona-fide* holders; and although the Supreme Court held that the principal was responsible, the Court of Errors reversed the judgment. In the 1st "American Leading Cases," the *Editor*, in writing that note, without knowing of the reversal, adopted the dissenting opinion of Judge Nelson in the Supreme Court, which was affirmed by the Court of Errors, and cites a long array of authorities showing that he was right, and that there was no just ground for the principal's liabilities.

Alexander vs. *McKenzie*, was a case where the agent was limited by his power to the business of the principal. The act was done "*per procuration*;" and the court held, as it was not in fact in the business of the principal, although the party received it *bona fide*, relying upon the representation that it was in the business of the principal,—that the latter was not responsible. It was placed upon the ground that the party must not rely upon the act or

representation of the agent, but there must be distinct and positive authority to do the act; else, if the authority is limited or express, the principal is not responsible.

It was also a case against the public officer of a company, the same as against a corporation. The court will find that *Alexander* vs. *Mackenzie* is sustained by *Nixon* vs. *Bartlett* (4 Sel. 388), where it is adopted and approved. I also request the attention of the court to the cases cited in the note by *Messrs. Hare & Wallace* (1 Am. Lead. Ca. 544), to sustain the principle which I have read from the point; and you will find in every instance where an agency has been special or express, definite and limited, that the principal is not responsible for the act or representation of the agent, unless the agency has been strictly pursued; and the cases are indiscriminately those in which the party dealing with the agent is held to have had notice, and in which he had not notice, all establishing the same rule. No distinction whatever is made in the cases, requiring actual notice that the authority has not been pursued. I intended to examine each case to show that it is so; however, I have no time, and only refer in addition to *Beach* vs. *Vandewater* (3 Sandford's S. C. R. 265) for the same general doctrine. The rules I have extracted from these cases are,

1. There must, where the authority under which the agent acts is defined or expressed, be a strict pursuing of the power, in order to bind the principal.

2. In no such case is the principal bound upon an act not within the limits of the authority, unless he has permitted the agent to do similar acts, and has recognized them; then it is an *implied* agency extending by those acts beyond its original limits, and then to be judged of by the ostensible powers apparently conferred by the recognition of these acts beyond the original power.

3. Where the party dealing with the agent has no actual knowledge as to the extent of the agency, dealing with the agent, as such or as attorney or in any other way as acting for another, is notice to him that the agency is defined or express; and he must take care that the agent does not exceed such authority. If he does not, he acquires no rights by the act, unless he can show a recognition of similar acts, as already stated.

4. Where the agency is thus defined or express, it gives no validity whatever to the unauthorized acts of the agent, that the latter declares himself authorized; he can make no representation or declaration that will in any respect enlarge his actual powers.

And upon this last proposition I refer your Honors to cases collected under our eighth point, and to the cases of bills of lading and wharfingers' receipts, which are to the same effect, because in those cases the agent represented orally as well as by the act that he performed, that he had authority to do the act. Indeed, action is an assertion to that effect.

5. In the cases mentioned under the last head express notice of the extent of the agency, or that the agent is exceeding his powers, is not necessary.

6. If, relying on the act of the agent as assuming authority, or upon his absolute declaration that he is authorized, one contracts with the agent as to a matter to which his powers did not extend, or in a manner not authorized by them, he acquires no right as against the principal, and if he loses anything, it is attributable "to his own temerity."

Here the power was definite and express, to give a certificate when a transfer was made and the old one surrendered, like giving notes in the business of the principal (as in *North River Bank* vs. *Aymar* and *Awde* vs.

Mackenzie); and no such thing having been done, the whole act was without authority and void.

And the defendants here must be charged, if at all, upon a contract which they authorized an agent to make; but having no power to give, and having never given any such authority, they are not bound by his act.

Now I will call the attention of the Court for a moment to a ground upon which the liability of the defendants is sometimes put: that the principal, whether a natural person or a corporation, guaranties or warrants the fidelity of the agents which he appoints. Now, we say there is no such general warrant. A natural person does not guaranty the fidelity of his agent *generally*; though *he* need not appoint one, as he may act in person. He only guaranties it while acting for him and in his behalf, within the scope of his employment. With him, when acting for himself, or in his own affairs, or even willfully and maliciously in the business of his principal, he has nothing to do, and is under no liability for his acts.

A natural person is only bound to that extent; and your Honors will remember the case, *Dexter* vs. *Adams*, (2d Denio, 646) in an action for an escape. One was employed by another to watch a man, and while he was off the gaol limits, to commence a suit and charge the sheriff. The agent, however, without the knowledge of the principal, enticed him off and then commenced a suit. It was held that the principal in that case was responsible for the acts of his agent, who had decoyed the defendant off the limits; and that he could not recover for the escape, because he affirmed the act of his agent by suing upon it and affirming it. It was conceded in that case that any wrongful act which the agent had committed, if the prin-

cipal had not sought to avail himself of it, could not be imputed to him; nor can any fraud of an agent affect his principal unless he has authorized or adopted it, or it had been committed for his benefit and in his business. Such is the rule as to a natural person, who may do any thing. Much less should corporations be held to guaranty the fidelity of their agents; for they cannot act in person, but must act by agents. The appointment is from necessity, and not of choice. They are public agents; as such exercising, as delegates of the State, in many instances the right of *eminent* domain, in doing which they must act by agents; and in the exercise of all their powers and franchises they must act by agents. The duty and right to appoint them are implied in their creation; and indeed the creation of a corporation is a command to appoint them. Not doing so is *non user*, which would authorize the taking away of the charter, if long continued.

The liability, then, must be confined to cases in which the agent acts within the powers of the corporation, for it has no right to authorize him to act beyond or without those powers; and there should be less liability on the part of a corporation, which must act in a prescribed mode, than on that of a natural person, who may do any thing. There is, then, the superadded requisite, in order to bind or affect the corporation, that it must be within the powers of the corporation, or in the course of the agent's employment, as limited by the charter of the company; which is a limitation beyond and in restraint of the powers conferred upon him as agent, and to which even the powers conferred must always yield. The undertaking of a corporation can, therefore, only be for the fidelity of the agent while acting for the corporation, and in *its* business, and in matters within the scope of the powers of the com-

pany and the employment of the agent. There may be a guaranty of the faithfulness of the agent, while assuming to do, and actually doing, business on behalf of the principal; but unless he does act within the range of the power of the Company, and also in pursuance of the power delegated, the corporation is not bound. The case of *Foster* vs. *The Essex Bank*, already cited, establishes this; and the case of the *Bank of Bengal* vs. *E. India Company* (2 Knapp's Privy Council R., 245), is to the same effect. It was there decided in an action against the E. I. Company, by the holder of a forged imitation of one of their promissory notes, issued by the Governor-General in council at Calcutta, that the Company were not bound by the acknowledgment of it as genuine by a clerk in their Accountant General's office, who was authorized by him to compare all such notes with the register, but not authorized to certify their genuineness; although it appeared that it had been his practice to do so for several years, and the Bank of Bengal had discounted the notes on the faith of his certificate.

Now I will call the attention of the Court—having, for want of time, considered somewhat hastily the question as to the strict matter of agency—to the doctrine that an individual is never responsible for the fraudulent or willful acts of his agent, and especially where they constitute a departure from the scope of the agency. That was decided some centuries ago. The case referred to in *Brooke's Abridgment*, and the cases of the bills of lading and of the wharfinger's receipts, were all fraudulent acts and representations of the agent. They establish that, although he may be at the time in the employment of his principal, yet if he does a willful or fraudulent act, which is not a performance of any duty he owes to the principal, the latter is not liable. If a servant, while driving his

master's coach, his master being in it, strikes a passing horse, willfully, and causes it to run away, and commit injury upon some person or vehicle, the master is not responsible to any of the sufferers. If even the master is in his carriage, and the servant makes a *detour*, and runs against a person willfully, the master is not liable for the injury. If he does it while on his regular line of travel *willfully*, the master is not responsible, he being in the carriage. If the servant should leap from the carriage-box and strike a person, the master is not responsible. If a cartman, required by his master to put up the cart at a particular place, goes a round-about way to do it, upon business of his own, and runs over anybody, the master is not responsible. The cases cited plainly establish these propositions.

I refer your Honors to the case of *Joel* vs. *Morrison*, (6. Car. and Payne, 501), and also to *Sleath* vs. *Wilson* (9. Car. and Payne, 607), where Judge Erskine says: "If a servant, without his master's permission, takes his master's carriage out of his coach-house, and with it commits an injury, the master is not liable; because he has not in such case entrusted the servant with the carriage; but if he entrusts him with its control, it is no answer that the servant acted improperly in managing it. "Therefore, where a servant, having set down his master in Stamford street, was directed by him to put up in Castle street, but instead of doing so, went to deliver a parcel of his own in the Old-street road, and in returning along it, rode against an old woman and injured her,—it was held the master was not liable."

I also refer to *Smith* on *Master and Servant*, p. 159, and to *Mitchell* vs. *Croswelle*r (13 *Com. B. R.*, 237), where *Chief Justice* JARVIS said, "I think, at all events, if the master is liable where the servant has deviated, it

must be where the deviation occurs in a journey, or where the servant has originally started on his master's business; in other words, he must be in the *employment* of his master at the time of committing the grievance."

Then Mr. *Justice* MAULE said, "The master is liable even though the servant, in the performance of his duty, is guilty of a deviation or failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and is therefore not responsible for the negligence of the servant in doing it."

The English rule in Admiralty agrees with the common law rule and our own. Dr. LUSHINGTON decided, in the case of the Druid (1 W. Rob., 391), that where the master of tug propelled by steam, entrusted by the owner to tow vessels and collect the compensation, became exasperated because the master of a schooner which he had towed down the river did not pay him, and willfully ran into and injured her, that the owner of the tug was not liable. The opinion in that case is alike able and instructive. *Vanderbilt* vs. *Rich. Turn. Co.* (2 Comst. 479), is a powerful illustration and application of the same principle.

Orr vs. *The Union Bank of Scotland*, is an authority embodying the same principle in a commercial case; and my learned associate Mr. HILL, reminds me of another, which I ought to cite for the same doctrine, *Peachy* vs. *Roland* (16 Eng. L. & Eq., 442). I submit, then, that the rule in this respect, whether it be applicable to cases of contract, or to cases of wrongs committed by the agent, is precisely the same: he must be acting within the scope of his employment, or in the actual discharge of the business of and the duty he owes to his principal; or he must be

professing to do some act for his principal and in his business, and it must relate to matters within the agency. The moment he undertakes to do an act for himself, especially where it is willful and criminal in its character, it is his own act and not the act of the master. If it be not so, then there is no limit whatever to the responsibility of the principal.

I now call your Honors' attention to the twelfth point: The case against the Company derives no aid from the maxim, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party, who has placed confidence in him. That doctrine is said to be established in *Young* vs. *Grote* (4 Bing. R., p. 253); but it is qualified in 29 Law and Eq. R., p. 10 (*Orr* vs. *The Union Bank of Scotland*), already cited; for there, where a letter of credit was sent to a person who was absent from home, and his clerk opened the letter and forged an indorsement upon it, and upon the strength of the possession of the letter of credit, the bank paid it,—it was held to be no act of negligence to have a clerk, entrusted with opening letters, who proved dishonest, and that there was in this nothing for which the principal was liable to sustain the loss occasioned by the forgery.

The case of *Young* vs. *Grote* was this: A man left with his wife a blank check, to which he affixed his signature. She filled in the amount of £50 2, but in such an unskillful way that the clerk to whom she delivered it to cash easily altered it to £350 2; and it was held to be an act of negligence to leave a blank check with so incompetent a person, and the drawer was compelled to pay it. This case was never very good authority, and is now, as will be shown hereafter, entirely overruled in England,

as well as in this country. But the doctrine upon which it was made to act, as between principal and agent, is only applicable to a case where a *natural person*, who may do any thing by an agent which is not forbidden by law, has held out his agent as being authorized to do what he was not in fact authorized to do, or was by his private instructions forbidden to do (Story's Agency, §127, and note to p. 118).

This doctrine proceeds entirely upon the ground of *constructive fraud*, and that a false impression as to the extent of the authority has been created by permitting the agent to exercise more power than he really possessed, whereby others have been drawn into some act or contract injurious to their interests; the necessary legal consequence of which is, that the principal should suffer the loss, because by apparent connivance he has induced them to deal with the agent upon his credit, (1 Story's Eq. Juris., §§ 384 to 394).

It obviously has no application to a corporation restricted in the exercise of its powers by its charter and by-laws, and who cannot give and in this instance never gave, any express or implied assent to, and who had no knowledge whatever of, the unauthorized and illegal acts of Schuyler.

Besides, the appointment of an agent was an act which the Company, as trustees of the stock for the stockholders, *Portland Bank* vs. *Gray* (3 Mass., 364, and per Sewall, J., 378), and under the charter (§ 3, Case, p. 16), were bound to perform, so as to transfer existing shares—to know to whom dividends are payable, to regulate voting at elections; and no fault whatever can be attributed to them in making the appointment. It was simply the exercise of a corporate duty, and faithfully discharged.

They have in no just or legal sense, therefore, enabled Schuyler to commit a fraud upon any one. They have neither assented to nor known of any unlawful or unauthorized act of his which enabled him to commit a fraud, or which induced others to confide in him.

If the maxim referred to does apply to such a case as this, then every principal who appoints an agent is liable for frauds committed by him as such, without any regard to the authority actually conferred; for it is the *position of agent* which enables him to commit them, and the fault arises from appointing an agent, which to some extent gives him credit, and enables him to do the wrongs; so that the principal is liable altogether, irrespective of the power conferred upon the agent. The true answer is that the rule does not apply at all, except to a principal who was competent to confer power to do the acts, and has connived at the acts of the agent, ostensibly within, but really beyond his actual powers, whereby another has been defrauded; because in every other case the principal, when he appoints the agent, as well as when he continues him, does so in the expectation that he will perform and is performing only his duty.

If this rule apply to the present case, it should have controlled a large class of cases with which, by universal assent, it had nothing to do. *Hatfield* vs. *Phillips* (12 A. & Fin., 343),—In this case a party entrusted another with bills of lading, by which he was enabled to get dock warrants for the goods mentioned in the bills, upon which an advance was made in good faith; but it was held it did not confer a title to the goods, nor was the principal responsible for the fraud. That case would have also controlled *Brower* vs. *Peabody*, in this court (2 Abbott's R. 211), where a party who had sold cotton and received bills

of lading, which he intended to deliver to the purchaser upon payment being made, but left them upon his desk, and the purchaser coming in stole the bills of lading, and transferred them to a *bona-fide* holder, who claimed the cotton; and it was held that he acquired no right, and that the rule did not apply.

It would have controlled *Goodman* vs. *Eastman* (4 New Hampshire R. 455), where a note, filled up, was given to a person to use, and he fraudulently altered the amount, and transferred it to a *bona-fide* purchaser; yet it was held that the maker was discharged.

This doctrine which they hold on the other side is qualified in recent cases, if not overruled, and especially in the case of *The Bank of Ireland* vs. *Evan's Trustees* (32 Eng. L. and Eq. 23), to which I have already referred. In this case the Bank of Ireland held stock belonging to Evans's trustees, who were a corporation. It was a charitable corporation under Evans's will. It had, of course, a common seal, which was left in the possession of the secretary, although he never had affixed it, and never was authorized to do so. By having it in his possession he was enabled to make a fraudulent use of it to forge transfers of stock standing in the name of Evans's Trustees in the Bank of Ireland, and by means of this forged power procured all the stock to be transferred to his transferees, and appropriated the avails to his private use. Then Evans's Trustees sued the Bank for the stock that had been transferred under the forged power of attorney, but under their own common seal. The case of the *Bk. of Vergennes* vs. *Warren* (7 Hill, 95), decides that the possession of a common seal by the officer of an institution is evidence of his right, *prima facie*, to affix it to deeds and other instruments. The secretary had possession of that seal. It was claimed upon the trial, and CHIEF JUSTICE

BLACKBURNE ruled, that if the jury believed that putting the seal in the possession of this secretary was such an act of negligence as enabled him to commit the offense, and get the stocks transferred to his own name, and thus dispose of them, that was enough to justify a verdict for the Bank of Ireland. The ground taken was, that the trustees had facilitated the doing of the act by negligence, and could not therefore recover; and the jury found for the Bank of Ireland. The Court of EXCHEQUER CHAMBER in Ireland reversed the judgment; and upon appeal in the HOUSE OF LORDS, in England (the opinions of the judges being taken, and Lord Brougham and Lord Cranworth delivering theirs), that opinion was unanimously affirmed.

I will read over one or two passages from the opinion of the Irish Judges:

BALL, J., said, "It may be admitted that in leaving the seal in the custody of Grace, the trustees afforded him, to a certain extent, an opportunity of attempting the commission of forgery; that the possession of the seal even furnished him with the temptation to commit it, and that the trustees may thus, in some sense, have contributed indirectly and remotely to the perpetration of the offense; but if this were to amount to negligence on their part, constituting a defence to this action, could they have acted in almost every respect with reference to the seal, in such a way as to be secure against the charge of having been the indirect or ultimate occasion of the forgery being committed?"

It is so with us. *We* must appoint a man. We must have an agency. We must have blanks to use, and it is a natural consequence that they may be used. But it is not a natural consequence, which a prudent man could guard against, that a fraudulent use would be made of them. We must deal upon the supposition that men are

honest; and that Schuyler was supposed to be, at that time there admits of no doubt.

Again, the same judge says, "Take the case of a party having an account at a banker's, and not being in the habit of taking up his check book; and suppose some person in the establishment to abstract from it a bank check and forge his name to it, and thereby obtain money from the banker; the omission of the party to lock up his check book may have indirectly enabled the other to commit the forgery, and yet could that omission be relied on successfully as a defence to an action for a recovery of the amount obtained by the forgery? If it could, where would you draw the line between acts or omissions on the part of the plaintiff in such an action, which would disentitle him to recover, and those which would not have that effect?" "Under all the circumstances, it appeared to me that to establish a case of negligence in the trustees which would disentitle them to recover in this action, *some thing done or omitted by them, in reference to the very act of forgery itself, should have been shown; that they should have been proved to have been directly concerned, to some extent at least, in framing the forged instrument.*"

I will not trouble your Honors with the opinions of the court at large, but will simply call your attention to the opinion of Baron Parke, who delivered the opinion of the Judges to the House of Lords. He states the charge, and then says,—

"Without adverting to the former part of the summing up, upon which many criticisms have been made, we think the last part cannot be sustained. The Lord Chief Justice evidently means, that though the instruments were forgeries, there was evidence adduced on the part of the defendants of such default or neglect on the part of the plaintiff as to warrant a finding for the defendants. Now,

we all concur in the opinion that the evidence given—which was only of a supposed negligent custody of their corporation seal by the trustees, in leaving it in the hands of Grace, whereby he was enabled to commit the forgeries—is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiff was disentitled to insist on the transfer being void. We concur in the opinion of the majority of the Court below, in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid, *must be negligence in, or immediately connected with the transfer itself. Such was the case of Young* vs. *Grote.*"

Then Lord Cranworth said, "For the reasons which have been so clearly stated on the part of all the learned judges, my opinion is, that it is clear there ought to have been a *venire de novo;* because the direction of the very learned judge who tried the cause, was not warranted by law. The direction was that if the transfer was caused by such negligence as that of which evidence had been given on the part of the corporate body, then the bank was absolved. *I apprehend there is no such principle of law. I think it has been fairly put* (whether, in the argument or in some case, I forget), *that there must be either some thing that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer.*"

Now, that is a reasonable and intelligible principle; and it reconciles all the cases upon this subject, where a claim has been made and sustained on behalf of *bona-fide* claimants upon an act which the agent was not authorized to perform. The *principal*, in all the cases, has done something which amounts to an estoppel. It is not the agent who makes the estoppel, but the principal himself; or *he*

has done or permitted some act which has ratified it, and which is equivalent to an original authority.

Then, speaking of the case of *Young* vs. *Grote*, Lord Cranworth said, "Now, in the case of *Young* vs. *Grote*, between the banker and his customer, it went on that ground (whether correctly arrived at in point of fact is immaterial), that the plaintiff there was estopped from saying that he did not sign the check for £350; and if the circumstances are such, whether arising from negligence or any other cause, that as a good answer between the banker and his customer, the customer is estopped from saying that he did not sign the check for a particular amount, it is just the same as if he had signed it. Therefore, taking that view of the facts, the case may be well sustained and appears to have been well decided. The other doctrine, that of ratification, is well illustrated by the case of *Coles* vs. *The Bank of England* (10 Ad. & Ellis, 437). There the Court of Queens Bench considered that the conduct of the owner of the stock, in subsequently signing from time to time receipts for reduced sums, when the sums had been reduced by a previous forgery, was in truth a ratification of what had previously taken place. Whether I should have arrived, upon the question of fact, at the same conclusion, is a matter upon which I do not feel myself called upon to speculate. That certainly seems to me rather a strong result. But, coming to that result, the consequence must naturally and necessarily follow, whether forgery or no forgery, that if the party injured by the forgery chooses subsequently to ratify what has been done, then as between him or her and the person who acts upon it, the ratification would be just as good as if it had been the previous act of the party."

Lord Brougham concurred in this opinion; and the

judgment was affirmed, thus deciding that the imputed negligence constituted no valid defence.

If you apply the doctrine of estoppel, when properly considered, to all the cases, or the doctrine of ratification by the principal—the estoppel being by some affirmative or negligent act of the principal, and the ratification being by an equally affirmative or negligent act of the principal,—then the cases are all consistent; and it comes back to the proposition, that a person giving a power of attorney is responsible for his own act in the first instance, if he authorized it to be done under the power; and in the next place, if he did not, but has himself done or permitted something to be done, which operates as an estoppel to deny that he had authorized it to be done under a power, or has by any act or omission plainly ratified it, then he is bound as if he had done it himself.

I wish to call your attention upon this subject of estoppel, to the case of *Fairtitle* vs. *Gilbert* (2 Durnford and East, p. 171), which decides that a plaintiff corporation is not estopped to deny that they had no power to execute a mortgage deed of their toll houses, which they had actually executed; and to *Day* vs. *Greene* (4 Cushing, 433, 439), where the Mayor of Cambridge was held to be not estopped from denying his authority to license the removal of a house through the streets of that city, when sued in trespass for taking it away, after it had been placed there and was in the course of removal under his own authority.

This doctrine of estoppel proceeds upon the ground, that the party has done some improper or willful act to which the other has given credence, and which he has acted upon; and that it would operate as a fraud to permit the validity and legality of the act to be denied. I ask your Honors also to take some additional authorities

upon that subject: 1 Greenleaf's Ev., § 113; *Howard* vs. *Hudson*, 75 Com. L. R., 10; *Carpenter* vs. *Stilwell*, 1 Kernan, 73, 74; *Freeman* vs. *Cooke*, 2 Exchequer R., 654; *Frost* vs. *Saratoga Mut. I. Co.*, 5 Denio, 157; opinion of Ch. J. Beardsley.

It will be found also that this rule, as to the liability of the Company for the representations of the agent, independently of this doctrine of estoppel, is precisely the same as the rule which admits the declarations of an agent to be given in evidence against the principal upon a trial. That is a familiar rule. The agent must be doing some act for the principal at the time the representation is made, otherwise the declaration cannot be admitted. "A kindred principle governs in regard to the *declarations* of agents. The principal constitutes the agent his representative in the transaction of certain business; whatever, therefore, the agent does, in the *lawful prosecution* of that business, is the act of the principal, whom he represents." And "where the acts of the agent will bind the principal, there, his representations, declarations, and admis sions, respecting the subject matter, will also bind them, if made at the same time, and constituting part of the *res gestæ*." They are of the nature of original evidence, and not hearsay; the representation or statement of the agent being the ultimate fact to be proved, and not an admission of some other facts.

Greenleaf says, in § 113, "But it must be remembered that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of the agent binds *only* when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervit opus*. It is because it is a verbal act, and part of

the *res gestæ*, that it is admissible at all; and therefore it is not necessary to call the agent himself to prove it; but whenever what he did is admissible in evidence, it is competent to prove what he said about the act while he was doing it; and it follows, that where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations; they being mere hearsay.

For an exemplification of the rule as applied to affairs of a corporation, I refer also to the *Hartford Bank* vs. *Hunt* (3 Day, 495). There, it was offered to be proved, that the Directors of the Bank had said, that they knew certain facts which went to invalidate the note sued upon, when it was discounted by the bank. But the evidence was excluded, as they were not then *acting* for the bank. It was like the *United States* vs. *Davis* (2 Hill, 451), where such declarations were also held inadmissible unless made at the time the directors were doing or professing to do something, in the business of the bank or on *its account.* How could we be estopped, then, by a representation made by Schuyler, in his own business, when we are not bound by the act itself,—as well because he had no authority to do it, as because of a want of power in the Company to perform it? And especially, when what he said in doing it would not, upon well settled principles, be evidence against us? How is it possible, when he departs from his duty, although he holds at the same time the office of agent, and commits this fraud—a mere criminal act of his own—that we can be held responsible for it upon the doctrine of estoppel, or as being bound by his representations. It can only be said that it was our act because he said it was; but he was doing nothing for us, and had no authority to say so, or to do the act. The cases all show that that is not sufficient. The case of

the *Am. Life and Trust Ins. Co.* vs. *Beebe* (3 Selden R., 364), shows that a declaration of the agent that he is duly authorized, does not establish the agency, or bring the act within his power, and that we are not bound by such representation; the party dealing with the agent must at his peril ascertain the extent of his power. The case of the *North River Bank* vs. *Aylmar*, and the other cases cited in the points, all decide that such a representation is not binding upon and cannot affect the principal in any manner, and is not evidence against him. I do not see, then, how the principle of estoppel can apply in any way, as it is based only on an unauthorized act or representation of the agent, and not upon any thing done or said by the principal.

There are several subordinate points which I have not time to discuss at length, but I refer for a moment to the 14th, viz:

"The Company had no dealings, nor was there any privity of contract, with the plaintiffs, in respect of this or any other stock or certificate of stock. Nor were they under any duty or obligation of any kind to furnish to the plaintiffs any certificate of stock, or to aid them in safely making loans. If they owed such duty at all, it was only to the lawful transferee of valid stock, and not to third parties. The following authorities show that in such a case they are not responsible for the act of Schuyler in making the certificate, and that the plaintiffs took it at their own risk, *Grant* vs. *Norway* (10 Com. B., 665); *Coleman* vs. *Riches* (29 Eng. L. and Eq., 323); *Thomas* vs. *Winchester* (2 Selden, 397).

It was made a point below that this was a negotiable certificate, and that a *bona-fide* holder took it discharged of any vice in its origin and could recover upon it as upon a negotiable promissory note. I do not know whether it

will be insisted upon here; but our fifteenth point and the cases cited under it, are deemed an ample answer to it, viz.: "The certificate was not negotiable paper so as to confer any rights upon the plaintiffs as *bona-fide* holders or purchasers; they took it subject to every defence existing against it in the hands of Kyle and Schuyler" (1 American Leading Cases, 3d ed., 326; *Birkhead* vs. *Brown*, 5 Hill, 635, 646; S. C., 2 Denio, 375; Keyser on Stocks, 48, 222; *Com. Bank Rochester* vs. *Colt*, 15 Barb., 506; *Orr* vs. *Union Bank of Scotland*, 29 Eng. L. and Eq., 1; *Gurney* vs. *Behrend*, 3 Ellis & Blackburne, 633–34; *Fatman* vs. *Leback*, 1 Duer, 334).

I have also made a point that this certificate conferred no rights as against the Company, because it was not registered according to the statute; but I do not intend to consider the question at length. It is only necessary to say, in regard to it, that your Honors will find the rule definitely settled by the cases in Connecticut, and that it has long been the established law of that State.

Calling the attention of the Court to the other points presented, and not saying anything about them, because I have already exceeded the time allowed by the rules, and thanking the Court for its indulgence, I leave the cause and the interests of my clients to the adverse observations of the opposing counsel, and to the care and protection of my learned associates.

The remaining points not specifically argued, were as follows:

XVII. The certificate, though left with the bank, gave them no rights as against the Company, as it was not registered, nor the stock actually transferred to the bank, nor offered to be transferred in due season.

1. It was their duty to see that the stock existed, and was transferred as the by-laws of the Company required. They trusted Kyle, and chose to omit all proper care; and having trusted him without exercising due caution, they should be left to bear the loss they have thus incurred. Bk. Augusta *vs.* Erle, 13 Peters, 588–9; Mumma *vs.* Potomac Co., 8 Peters, 281; Root *vs.* Goddard, 3 McLean, 102; Leavitt *vs.* Palmer, 3 Comst., 19; Marlboro Co. *vs.* Smith, 2 Conn., 579; Northrop *vs.* N. and B. Turn. Co., 3 Id., 544; Same *vs.* Curtis, 5 Id., 247; Oxford Turn. Co. *vs.* Bunell, 6 Id., 52.

2. Their omission to do so was a fraud upon third parties, viz.: the innocent stockholders represented by the corporation, and should be protected. Possession by one, while the real or ostensible title is in another, is always a badge of fraud. Rob. on Fr. Con., 548; Randell *vs.* Cook, 17 Wend., 56; Smith *vs.* Acker, 23 Wend., 653.

XVIII. The Court below placed the plaintiffs' right to recover on the ground of a fraudulent representation of Schuyler, contained in the certificate, when no such cause of action was stated in the complaint, which was simply upon the certificate as a genuine one, and for not permitting the transfer of stock claimed to be valid. This was erroneous; because,

1. If any fraud was committed, it was upon Kyle; and such a cause of action in his favor was not assignable. Code, § 111.

2. The plaintiffs cannot rely upon a fraudulent representation as constituting the cause of action, as it is not stated in the complaint, and especially not after being defeated as to the one alleged. Fanaby *vs.* Hobson, 2 Phil. Ch. R., 255; Wilde *vs.* Gibson, 1 Ho. of Lords Cases, 627; Chatauque Co. Bk. *vs.* White, 2 Selden, 235.

XIX. Even if the certificate was a valid one, the plaintiffs were not entitled to recover.

1. The charter and by-laws conferred upon the Company ample power to regulate the transfer of stock, and not to permit any transfers, whenever the directors in the exercise of their discretion saw fit so to do. Charter, § 7, Case, fols. 56 and 25 to 32, fol. 70.

The answer and the facts found, show a good reason for temporarily closing the books and not permitting any transfer, and that the books were actually closed; and the refusal to transfer was put upon this ground, as well as the invalidity of the certificate. Case, fol. 42 to 51, 68, 69.

XX. The rule of damages adopted was erroneous.

The stock, if valid, still exists, and the bank has not been deprived of it. The only damages sustained by the refusal to transfer it are such as necessarily resulted from the delay in transferring.

The judgment if sustained, in effect, compels the defendants to purchase two millions of their own stock; which they cannot do.

The damages claimed by the plaintiffs might have been avoided by the exercise of ordinary care and diligence; and such damages are not recoverable. Bush *vs.* Brainerd, 1 Cowen, 78; Harlow *vs.* Hirmiston, 6 Id., 189; Rathburn *vs.* West, 19 Wend., 399; Barnes *vs.* Cole, 21 Id., 188; Pluck *vs.* Wilson, 6 C. and P., 375; Sedgwick on Dams., 2d ed., 94, 143, 468.

The bank had other securities of the same character; and the amount should have been apportioned between the two securities.