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IN THE SUPREME COURT.

E. H. BARTON, ET AL.,

vs.

THE CITY OF NEW ORLEANS.

BRIEF OF APPELLANTS.

This is a suit brought by six gentlemen, the late "Sanitary Commission" of the City of New Orleans, against the City of New Orleans, for compensation of services rendered said City, by said "Commission," in the years 1853 and 1854.

The facts involved are fully detailed in the Record; the services performed, together with their value, are proved beyond cavil; and the only question for the resolution of the Court is one of pure law, to wit: is the City of New Orleans, under the facts, responsible for the moneyed value of the services rendered?

The appellants in their petition alledge that the City of New Orleans "is justly indebted to them, in the sum of seventeen thousand dollars, (\$17,000) for this, to wit: that

said City did, by virtue of an ordinance of its Common Council, establish a Board of Health in and for said city; that said Board of Health did, by virtue of the powers conferred upon it, and in accordance with the requirements of the City of New Orleans, and of the objects and purposes of said Board; create and establish a Sanitary Commission whose duties were to inquire into the origin and progress of the yellow fever in the City of New Orleans, and its propagation in adjacent localities; to search out the causes of yellow fever in ports having intercourse with New Orleans; to obtain information touching Quarantine laws, the modes of their administration, and their effect in protecting cities, towns and communities from yellow fever, cholera and other infectious diseases; to procure the necessary information touching the advantages to be derived from the construction of sewers and common drains in cities, and touching their adaptability to New Orleans; to make examinations into the sanitary condition of New Orleans, and into the existence of all agents influencing said sanitary condition, during the year 1853, and during previous years; and finally, to report whatever in its wisdom would be to improve and preserve the health of said city; that said Board of Health did elect and appoint the appellants to be members of, and compose said Sanitary Commission; that the appellants did accept said appointment, and did, in accordance with instructions given by said Board of Health, and in accordance with the duties of their said appointment, enter upon, and perform the labors required of them, as aforesaid; and that said city of New Orleans did recognize, accept of, and confirm the creation of said Sanitary Commission, and the appointment of appellants as the constitu-

ent members thereof, and did accept of and receive the labors of appellants in that behalf, as aforesaid."

The appellee answers with a general denial.

The Court will perceive that the labor thus required, at the hands of the "Sanitary Commission," was large indeed; how that labor was performed, its worth and value will be found clearly set forth in the testimony of some of the most distinguished savans of our country. Hunt, and Newman, of Buffalo; Brown, of Fredericksburg; Laroche, Jewell, and Bell, of Philadelphia; Morland, Clark, and Shattuck, of Boston; Jarvis, of Dochester; Griscom, Francis, and Parker, of New York, and Hume, and Milroy, of London, endorse, in the most satisfactory manner, and with expressions of the highest praise, the work of the appellants; they fix, too, the value of the work at a sum much larger than that which is here demanded of the city. Counsel would refer the Court to a printed copy of the "Report," an octavo volume of 542 pages, which accompanies and forms a part of the record in this case, for a true basis upon which to estimate the value of the labors of the late Sanitary Commission; a "report" which should be studied, without reference had to the equitable disposition of the present litigation, by every public officer of Louisiana.

Counsel will now give, in the order of their dates, the various acts of the city, and of its agents, which, in his opinion, authorize the demand made by the appellants.

1st.—"An ordinance to establish a Board of Health, for the City of New Orleans."

"Be it enacted by the Common Council of the City of New Orleans:

"Art. 1. That the Common Council shall elect, imme-

diately after the passage of this Ordinance, fifteen persons, of whom not more than one half shall be practising physicians, who shall form a Board of Health in and for the City of New Orleans. The Mayor shall be ex-officio President of said Board, and shall have no vote, except on an equal division of the members.

“Art. 2. That said Board shall elect a Secretary, who shall receive a salary, to be fixed by said Board, not to exceed fifty dollars per month. Said Board shall prescribe the duties of said Secretary. A majority of all the members of said Board may remove said Secretary for incompetency, or neglect of duty; and may appoint another in his place. A majority of said Board shall constitute a quorum for the transaction of business.

“Art. 3. *Said Board shall have authority to establish regulations for the preservation of cleanliness in the Streets, Alleys, Hotels, Restaurants, Boarding Houses, and Houses, in the city; to abate any nuisance that may exist, likely to prove injurious to the public health; to establish regulations for the returns of burials by the Sextons of the several cemeteries of the city, and by practising physicians, and families of the deceased persons, in the manner and form to be designated by said Board; and generally to supervise and compel the enforcement of any ordinance, or law, having reference to the public health.*

“Art. 4. Said Board shall appoint not less than two citizens in each ward, to be known as the Health Wardens, in and for said Ward. It shall be the duty of said Health Wardens to visit and inspect, from time to time, and during the summer months at least weekly, the condition of all the Streets, Alleys, Hotels, Restaurants, Dwellings, and Lots,

in their respective wards ; and should they discover therein any nuisance, it shall be the duty of any Health Warden of the ward in which said nuisance may be found, to report its existence in writing to the Street Commissioner, whose duty it shall be to cause the removal of said nuisance forthwith. If, within the twenty-four hours following said notice to the Street Commissioner, the said nuisance still exist, it shall be the duty of said Health Wardens to report the same to any member of the Board of Health, who may order the immediate removal of said nuisance, at the expense of the tenant, or owner, of the property on which the same may be found.

“ Art. 5. In the case of any existing ordinances of the Common Council having reference to the public health, or any regulation of the Board of Health be violated, it shall be the duty of the Health Warden, in whose ward the same has been violated, to report the same promptly to the Assistant-Attorney of the city, who shall immediately institute suit, in the name of the city, for the penalty imposed by said ordinances, or by said regulations, by said Board of Health, as the case may be.

“ Art. 6. The said Board may fix the compensation of the Health Wardens hereby contemplated, provided the same shall not exceed thirty dollars each per month ; *and shall publish, weekly, the proceedings of the Board in the official journal of the city, and report the same monthly to the Common Council.*

“ Art. 7. The Assistant Attorney is hereby required to prosecute all persons denounced to him by the Board of Health for a violation thereof, and shall receive, as a compensation, five per cent. of the amount recovered,

“ Art. 8. That the Board of Health shall appoint a Physician, whose duty it shall be to board all vessels entering the harbor of New Orleans, from foreign ports, and who shall receive a compensation, for said service, of five dollars, to be paid by the vessel.

“ Art. 9. That the Physician of the Port be, and he is hereby directed to board all vessels coming into the harbor of the city of New Orleans, at or below Slaughter-House Point; and any vessel coming to the wharves of the city of New Orleans, or passing Slaughter-House Point, before receiving the permission of the boarding physician, shall be fined in a sum of not less than fifty, nor more than a hundred dollars, recoverable before any Court of competent jurisdiction, for the use and benefit of the Charity Hospital of the city of New Orleans; and the Assistant Attorney is hereby directed to prosecute all suits under this ordinance, and he shall receive, as his compensation, five per cent. of all fines so collected.

“ Art. 10. That the Branch Pilots of the Port of New Orleans be requested to notify all masters of ships or vessels bound to this port from foreign voyages, that they are forbidden to come alongside of the Levee of New Orleans, until they have been visited at, or below, the Slaughter-House Point, by the Physician of the Port. See page 5 of Record.

2d. Election of the Board of Health.

“ BOARD OF ASSISTANT ALDERMEN,)
 “ Secretary's Office, November 5, 1857. }

“ I hereby certify, that in a joint session of the Boards of Aldermen and Assistant Aldermen, on the 25th day of July, 1853, for the purpose of electing a Board of Health for the city of New Orleans, the following members having

received a majority of the votes of the Common Council, were declared duly elected, viz. : Messrs. G. Kursheedt, J. M. Howell, Lafayette Guyol, M. Murray, T. J. Ivy, L. Greenleaf, J. E. Caldwell, W. L. Robinson, J. M. Vandergriff, Capt. Thos. Snow, and Doctors Lemonier, Wood, Folwell, and Baldwin.

“JAS. A. HOPKINS,

“Secretary of the Board of Assistant Aldermen.”

See page 160 of Record.

3rd. Creation of a Sanitary Commission.

“BOARD OF HEALTH,
“New Orleans, Sept. 15, 1853. } ”

“PRESENT—The Mayor, Messrs. Boulemet, Kursheedt, Robinson, Vandergriff, Guyol, Elder, Captain Ivy, Doctors Baldwin and McNeil.

“The usual disposition was made of the Reports from the Street Commissioner, and of the few Reports from the Health Wardens.

“Mr. Kursheedt presented the following, which, at his request, was laid upon the table subject to call: Whereas, this city has been afflicted with yellow fever, assuming the form of an epidemic, whereby an immense increase to our list of mortality has been produced; and, whereas, the prevalence of said disease has involved us in an almost incalculable loss; and, whereas, the present epidemic has spread very extensively throughout the neighboring cities and towns, thereby indicating communicability, if not proving contagion or infection,

“Therefore, Be it Resolved—That this Board should create a Sanitary Commission to enquire into the origin and

progress of yellow fever in this city, and its propagation in adjacent localities.

“ The Board then adjourned.

“ J. C. SIMONDS, M. D.,

“ Secretary Board of Health.”

“ BOARD OF HEALTH, }
“ New Orleans, Sept. 26, 1853. }

“ The Board met at the usual hour. Present—The Mayor, Messrs. Boulemet, Kursheedt, Robinson, Vandergriff, Howell, Elder, Captains Ivy and Robertson, and Doctors Baldwin and McNeil.

“ The minutes of the preceding meeting were read and approved.

“ Mr. Kursheedt called up the resolution offered by him on the 15th inst., and moved its adoption, which was unanimously agreed to. Mr. Kursheedt then offered the following resolution :

“ *Resolved*, That this Board will now proceed to the election of three physicians, who shall constitute the said Sanitary Commission; and that the Commission is hereby empowered to employ a clerk or secretary.

“ Dr. Baldwin moved to amend the above, by substituting for ‘ three physicians,’ five persons, of whom at least three shall be physicians, which substitute was accepted. The resolution as amended was then adopted.

“ It was further *Resolved*, That twenty-five hundred dollars be appropriated for the use of said Commission.

“ The Board then adjourned.

“ J. C. SIMONDS, M. D.,

“ Secretary Board of Health.”

See pages 168–169 of Record.

4th. Election of the members of the Sanitary Commission.

“ BOARD OF HEALTH. }
 “ New Orleans, Sept. 27, 1853. }

“ The Board met pursuant to adjournment; the following members being present. His Honor, the Mayor, President—Messrs. Boulemet, Kursheedt, Robinson, Vandergriff, Elder, Captains Ivy and Robertson, and Doctors Folwell, Baldwin and McNeil.

“ The Board proceeded to the election of members of the Sanitary Commission, in accordance with the resolution adopted at the last meeting.

“ Nominations having been made, Mr. Kursheedt and Captain Ivy were appointed tellers to receive and count the votes. Doctors Axson, McNeil, Simonds and Baldwin, were declared elected, having received a majority of the votes.

“ Dr. Baldwin having declined serving in the Commission, another ballot was taken, when Doctors Riddell and Barton were elected to fill the Commission.

“ On motion of Dr. McNeil, the President of the Board was added to the Commission. On motion of Mr. Kursheedt, it was ordered, that the Secretary notify the members elected to said Commission of their appointment.

“ The Board then adjourned.

“ J. C. SIMONDS, M. D.,
 “ Secretary of the Board of Health.”

See page 169 of Record.

5th. Instructions delivered to the Sanitary Commission.

"BOARD OF HEALTH,
"New Orleans, October 3, 1858. }

"The Board met at the usual place and hour. Present, His Honor the Mayor, President; Messrs. Kursheedt, Robinson, Vandergriff, Guyol, Murray, Elder, and Doctors Baldwin and McNeil.

"Mr. Kursheedt presented the following resolution, which was adopted :

"*Resolved*, That the Sanitary Committee be instructed to inquire into the causes of yellow fever in ports and other localities having intercourse with New Orleans. To obtain full information of all quarantine laws; of their mode of administration, and of their influence and effect in protecting cities, towns, and communities in general, from yellow fever, cholera, and other diseases. To procure the necessary information on the advantages derived from the construction of sewers and common drains on the health of towns and cities, and of their adaptability to New Orleans. To make thorough investigations into the sanitary condition of this city; all agents, or causes, influencing it during the present year, and previous years; and to suggest whatever, in their wisdom, will tend to improve and preserve the general health of this metropolis."

"The Board then adjourned.

"J. C. SIMONDS, M. D.,
"Secretary of the Board of Health."

See page 170 of Record.

6th. Extract from the message of Mayor Crossman, to the Common Council of New Orleans, dated October 18, 1853, informing said Council of the appointment, by the Board of Health, of a Sanitary Commission.

"The advent of the yellow fever after six years of unin-

errupted good health, coupled with the extreme malignity of the disease, and its appearance in its most fatal form, in localities that have always been deemed exempt from the malady, have led many to embrace the theory, that the late epidemic was not of domestic origin, but imported. This belief has induced very many of our fellow citizens to advocate the establishment of a permanent and rigid quarantine, as the only measure calculated to afford security for the future. And it is argued, moreover, that even if quarantine laws should be found not only an expensive protection, but also an obstruction to free commercial intercourse, embarrassing the trade, and ineffectual, perhaps, in securing the end for which they were established, that the experience of the past two months having proved the transmissibility of the disease to points where the fever never before prevailed, we owe it less to ourselves than to those doing business with us in the interior, and with whom our intercourse is of the most intimate and constant character, to adopt such steps as will allay the panic and alarm engendered in their minds by the ravages of the cruel malady, and thus afford to them the impression of future security and exemption.

“It is contended, on the other hand, that the fever being of local origin, quarantine regulations are useless and cumbersome; that the experience of other places favorable to the development of the disease, has condemned this protection as utterly inefficacious; that the alledged importation of the malady this year cannot be substantiated by facts, and that we should not, for the justification of a mere popular prejudice at home, or with the view of allaying a misguided excitement abroad, fasten upon ourselves a costly and superfluous yoke.

“On ground so debateable, honest and candid minds may well afford to differ. Opinions maintained with much plausibility, and a strong show of argument on both sides, are not readily reconciled to the adoption of a system hostile to their preconceived views. It became important, therefore, that a minute and searching investigation be made of the causes and origin of the late epidemic, that a complete history of the same be presented to the world, and that all possible information be elicited in connection therewith, for the purpose of establishing conclusively the value of quarantine regulations so far as yellow fever is concerned. *Entertaining those opinions, the Board of Health, in the discharge of the responsible duties delegated to them, have recently appointed a Sanitary Commission, composed of eminent medical gentlemen, who have been in daily session for some time past, and are now actively engaged in prosecuting their researches into the rise and progress of the late fever. In due course of time the result of their observations will be laid before your honorable body, and it is to be hoped that the light thrown on the subject may enable all parties to determine the question dispassionately.*”—See addition to Record.

7th. Approval of Mayor Crossman's Message of the 18th of October, 1853, by the Board of Aldermen.

“BOARD OF ALDERMEN,
“Secretary's Office, November 5th, 1857. } ”

“I hereby certify that at a meeting of the Board of Aldermen, held on the 15th day of November, 1853, a message of the Mayor, dated 18th October, 1853, relating to the Board of Health, etc., which was read at the sitting of 27th October, 1853, was ordered to be filed.

“CHAS. CLAIBORNE,

See p. 161, of Record.

“Secretary.”

8th. Approval of Mayor Crossman's Message of the 18th of October, 1853, by the Board of Assistant Aldermen.

“BOARD OF ASSISTANT ALDERMEN, }
“Secretary's Office, November 5th, 1857. }

“I hereby certify that at a meeting of the Board of Assistant Aldermen, held on the 18th day of October, 1853, a message of the Mayor, of same date, relating to the Board of Health, etc., was read; when Mr. Purvis submitted the following resolution, viz:

“‘*Resolved*, That this Board entirely concurs in the views so ably expressed by his Honor the Mayor, in his message relative to the late epidemic, and the means of preventing and alleviating future epidemics of a similar character, and that 500 copies of said message be printed in pamphlet form, for general distribution.’

“Mr. Donovan moved that 1,500 copies be printed. The amendment was accepted, and the resolution passed—Yeas, 18; nays, 1.

“JAS. A. HOPKINS,
“Secretary.”

See p. 183 of Record.

9th. Message of Mayor Crossman, notifying the Common Council of the completion of the Report of the Sanitary Commission.

“MAYORALTY OF NEW ORLEANS, }
“March 13, 1854. }

“*To the Hon. the Members of the*

“*Common Council of New Orleans:*

“GENTLEMEN—I have the honor to transmit herewith a resolution adopted by the Sanitary Commission, requesting the Common Council to make provision for the printing of

the report of that body, which is now prepared, and ready to go before the public. I most cheerfully recommend to your Hon. Body to take the necessary steps for the accomplishment of this object. The Sanitary Commission have bestowed great pains and labor in the preparation of this Report, and in the vast array of facts which it embodies in reference to the epidemic of last year. And as we are now approaching the warm season, when precautionary measures should be exercised to guard against the recurrence of such a visitation, I deem it both advisable and necessary that the public should be made acquainted with the result of the investigation of the Sanitary Commission, the members of which have devoted so much time and energy to the discharge of the responsible duties confided to them.

“With respect, I have the honor to be

“Your obedient servant,

“A. D. CROSSMAN.

“*Resolved*, That the President of the Sanitary Commission convey to the Common Council notice that the Report of the Commission is ready for presentation; and that the Council be required to take such measures as will secure its printing and publication, and at as early a day as possible.’”

See page 177 of the Record.

10th. Resolution of the Common Council, providing for the printing of the Report of the Sanitary Commission.

“*Resolved*, That the sum of \$2,500 be appropriated for printing and publishing the Reports of the Sanitary Commission appointed by the late Board of Health; the whole to be done under the supervision of the said Sanitary Commission, and the money to be paid by the Treasurer, on the warrant of the Comptroller, when the same

shall be received and approved of by the said Sanitary Commission: said Reports and accompanying documents, tables and maps, when printed and published, to be the property of the city, and subject to the disposal of the Common Council thereof.

“JAS. H. CALDWELL,

“President of the Board of Aldermen.

“L. H. PLACE,

“Pres. *pro tem.* Board of Assistant Aldermen.”

See page 159 of Record.

11th. Message of Mayor Lewis, presenting the printed Report of the Sanitary Commission to the Common Council.

“MAYORALTY OF NEW ORLEANS, }
“*City Hall, Dec. 12, 1854.* } ”

“*To the President and Members of the Common Council:*

“GENTLEMEN—I herewith present the Report of the Sanitary Commission, appointed by the City Council to investigate the origin and mode of transmission of the great epidemic fever of last year, together with all causes affecting the salubrity of the city.

“It is with feelings of just pride that I call your attention to this voluminous record of the labors of the Commission, which does nearly as much honor to the city’s liberality as to the gentlemen comprising it, being the first of its kind in this country. No subject affecting these important relations has been left unexamined. These researches have extended back to the first origin of the great enemy of our prosperity (yellow fever) among us; and each year of its progress and causation traced to the present time, embracing, it is believed, nearly every record of value. No less

minute have been the details of remedies to meet the conditions pointed out; and it is most gratifying to me to say to you, that although our condition has subjected us to calamitous visitations of disease, it is the unanimous opinion of the scientific and intelligent gentlemen comprising that Commission, that it is entirely removable, and that as bountiful a store of health can be enjoyed here as in any large city of our Union, if the proper steps are taken to ensure it. These are specially pointed out. The project of a Health Department is given as the organ to carry out these views; and, to this subject I particularly invite your earliest attention. No large city is without a Board of Health of some kind; no city suffers so much for the want of one as this. We have had occasional Boards without much power, and but of very transient duration, for some thirty years back. It is full time something permanent was organized, for its important bearing upon our sanitary condition, and to remove the reproach of carelessness and recklessness to which we have been so long subject in relation to health and life. There is another reason for immediate action, which a cursory examination of this valuable work will suggest to you. Many of our public works, of the greatest moment to us can only be carried on with safety to the public health during the cool months, which are already passing away.

“And again, the subject of Quarantine, so deeply interesting to the public, I am pleased to find this Commission reporting upon with entire unanimity, and taking the only rational ground, that, while it is not recommendable as a substitute for sanitary measures, it should be enforced only upon unsound subjects, and filthy vessels. This, I am

sure will entirely fulfill the public wants, and meet public expectation, without placing any unnecessary restriction upon commerce.

There is an urgent demand, at this moment, for the action of such a Board. Vessels are constantly arriving here requiring their instant surveillance and attention, with authority to make such temporary arrangements for a quarantine establishment as may supply the present necessities, until the Legislature (soon to convene) shall make such appropriations as will put it upon a permanent footing.

No great improvement, affecting our sanitary relations, can be expected without attendant expenses. These are necessarily incidental to all benefits; they are, as it were, its price. A full organization of a Health Department will probably cost, the first year, \$20,000, and during subsequent years, about two-thirds of that sum. It may, and probably would save, directly and indirectly, millions to this city; remove her reputation for perennial insalubrity, now retarding her prosperity, preventing immigration, and enhancing the price of every marketable commodity.

The improvements required, in the opinion of the Commission, to produce this invaluable change in our sanitary condition, are recommended to be met by sources of revenue and means entirely independent of any additional burden upon our tax-ridden community, and are highly worthy of your most serious consideration.

In addition to them, I would take the liberty of suggesting that as the Canal of the Canal Bank will soon become the property of the State, by expiration of its chartered privileges, an early application should be made to the Legislature for the transfer of the State's rights to the city,

that a credit may be predicated upon its value or income, and appropriated to the purpose of our sanitary condition.

With the developments made in this report, taken in connection with our great railroad improvements, it is clear to my mind that we have arrived at an era of the most critical magnitude to our city. With the adoption of both, now clearly demonstrated to be within our reach, there can be no limit to our advancement, and we shall be enabled to realize all the fond anticipations of our true-hearted citizens.

“Very respectfully,

“JOHN L. LEWIS.

“Mayor.”

See p. 161 of Record.

And 12th, a joint resolution of the Common Council, appropriating one of the rooms of the City Hall to the use of the Sanitary Commission.

“Resolved, That the use of room No. 22 be, and is hereby granted to the Board of Health and Sanitary Commission, during the pleasure of the Common Council.

“J. J. LUGENBUHL,

“President *pro tem.* of the Board of Aldermen.

“S. W. DALTON,

“President of the Board of Assistant Aldermen.

“Approved 1st February, 1854.

“A. D. CROSSMAN,

“Mayor.”

See page 158 of Record.

This resolution, the ninth, in the order of its date, of those facts which counsel has deemed it proper to enumerate as authorizing the demand of appellants, is here placed last in position, as an act of unmistakable ratifica-

cation of the proceedings of the Board of Health creating the Sanitary Commission; and as unmistakable evidence of the recognition of said Commission, at the time its members were almost exclusively occupied in the discharge of the very important duties confided to their learning, their wisdom, and high professional integrity.

Looking at this array of consecutive acts; the establishment by the authorities of the city of a Board of Health; the creation of a Sanitary Commission by said Board, under the authority supposed to be conferred by the several provisions of article 3 of the ordinance of the 25th of July, 1853; the publication of the proceedings of said Board in the official journal of the city, in accordance with the requirements of Article 6 of said ordinance; the communication to the Common Council, by message of Mr. Mayor Crossman, under date of October 18, 1853, of the facts of the creation of said Sanitary Commission, the appointment of the members thereof, and their actual employment in an active discharge of the very important duties imposed upon them; the approval and endorsement of said message, by both Boards of the Common Council; the appropriation, by the Common Council of a portion of the City Hall for the use of the Sanitary Commission in the prosecution of its duties; the message of Mr. Mayor Crossman, of the 13th of March, 1854, informing the Common Council of the completion of the labors of the Sanitary Commission, and recommending the printing of the report of that body; the resolutions of the Common Council, providing for the printing of said report; and the message of Mr. Mayor Lewis, of the 12th of December, 1854, presenting to the

Common Council the printed report of said Commission; we must conclude, that however much the Board of Health may have acted without authority in creating the Sanitary Commission, yet the City of New Orleans was duly notified of said act, adopted it, transacted with said Commission as with a body responsible to the city for its conduct, accepted its labors, claimed the ownership of their result, and printed and finally disposed of their report as of property belonging, beyond dispute, unto itself.

The maxim of the common law is, *Omnis rati habitio retrotrahitur, et mandato priori æquiparatur*: that of the Roman law, *Si quis ratum habuerit, quod gestum est, obstringitur mandati actione. Rati enim habitio mandato comparatur.*

“As an authority may be presumed from employment in similar acts,” says Paley, “so the same presumption arises from subsequent acts of assent or acquiescence; and a small matter will be evidence of such assent.” Agency. Chap. 3, pt. 1, sec. 2, sub sec. 3.

“When a party assumes to act, not for himself, but for another, without any authority whatever, or by an excess of the authority delegated to him, in all such cases, if the principal subsequently ratifies the act, he is bound by it, whether it is for his detriment, or for his advantage; and whether it be founded upon a tort or upon a contract. A ratification, when fairly made, will have the same effect as an original authority has, to bind the principal. And not only will the principal be bound by a ratification of the unauthorized act of his agent, but if the latter has improperly substituted another agent under him, the ratification by the principal of the acts of the sub-agent will, to all intents and purposes, bind him in the same manner as

if he had originally given the agent a power of substitution. The Roman law recognized the same doctrine." Story, Agency. Secs. 242, 244, 249.

"By far the largest class of cases of ratification of unsealed contracts arises by implication from the acts and proceedings of the principal *in pais*; for it is by no means necessary, that there should be any positive or direct confirmation. And for this purpose, the acts and conduct of the principal are construed liberally in favor of the agent. Slight circumstances, and small matters, will sometimes suffice to raise the presumption of a ratification. Long acquiescence, also, without objection, and even the silence of the principal, will, in many cases, amount to a conclusive presumption of the ratification of an unauthorized act. Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act." Story, Agency. Secs. 253, 255, 256.

Let us apply these principles to the facts of the case before the Court.

The Board of Health, in creating the Sanitary Commission, certainly supposed that it was acting for its principal, the City of New Orleans. The Sanitary Commission was created at the sitting of the 27th September, 1853; the resolution, setting forth the duties of said Commission, was adopted at the sitting of the 3d October, 1853; and Mr. Mayor Crossman, the presiding officer of the Board of Health, by message of the 18th of October, 1853, informs the Common Council of New Orleans, that "the Board of Health, *in the discharge of the responsible duties delegated to them, have recently appointed a Sanitary Commission, com-*

posed of eminent medical gentlemen, who have been in daily session for some time past, and are now actively engaged in prosecuting their researches into the rise and progress of the late fever. In due course of time the result of their observations will be laid before your honorable body, and it is to be hoped that the light thrown on the subject may enable all parties to determine the question dispassionately." It must be remembered, too, that this communication of the Mayor, with all proceedings of the Common Council, was, by virtue of a law of the State, the Charter of the city, duly published in the official journal of the city; thus bringing home to both parties, principal and agent, the several acts of each.

That the Sanitary Commission believed that it was authoritatively organized, and that in all its labors it was laboring for, and at the instance of, the city, is clearly shown by its occupancy of the room appropriated to its use by the Common Council; by its resolution accompanying the Mayor's message of the 13th March, 1854, informing the Common Council that the report of the Commission was ready for presentation; by the language used by the Commission in presenting its report to the "Mayor and the Honorable the Members of the Boards of Aldermen and Assistant Aldermen"; language which could not be misunderstood by either party, and was permitted by the city to stand uncorrected; "Gentlemen: you will be pleased to accept herewith a report, embodying the results of the labors of the Sanitary Commission, *upon the special and various matters committed to their charge by the Council;*" and by a knowledge, brought home to it by the official journal, of all the facts connected with the transmission, from time

to time to the Council of the city, of intelligence of its organization and of its labors. See printed record, 1st page of the book—Baldwin's testimony, cross-examination, p. 156, of Record.

Do not these facts prove, does not this silence prove, ratification by the city? When the Board of Health, by its action, created the Sanitary Commission; and when Mr. Mayor Crossman, by his message of the 18th of October, informed the Common Council of the fact; what was the Council's response? A resolution, appropriating a room in the City Hall to its use. When the Sanitary Commission, through the Mayor, by message of March 13th, 1854, notified the Common Council that its report was ready for presentation, what was the Council's response? A resolution, approved June 28, 1854, ordering the report to be printed and published; and taking possession of the same, as of property belonging to the city. "As an authority may be presumed from previous employment in similar acts, so the same presumption arises from subsequent acts of assent or acquiescence, and a small matter will be evidence of such assent," says Paley. Here is something more than "a small matter," proving acquiescence on the part of the city in the action of the Board of Health creating the Sanitary Commission. "Long acquiescence, without objection, and even the silence of the principal, will, in many cases, amount to a conclusive presumption of the ratification of an unauthorized act," says Story. Here was an acquiescence, and a silence, so far as anything like objection to the action taken by the Board of Health, and to the subsequent action of the Sanitary Commission, is concerned, of many months; from the 27th of September, 1853, the date of the

creation of the Commission, until long after the 12th of December, 1854, the date of the reception by the city, from the hands of its Mayor, of the completed labors of the Commission.

That the Board of Health, in creating the Sanitary Commission, intended that it should be compensated for its labors, appears from Baldwin's testimony, pp. 156, 176 of the Record; and that the Commission expected remuneration is evident from the testimony of Bailey, p. 179 of the Record. *Nemo præsumitur donare.* "It is a maxim common to the jurisprudence of all countries, that no one is permitted to profit by the labors of another, without compensating him for it. *Jure naturæ equum est, neminem cum alterius detrimento et injuria fieri locupletiores.* On this principle, the Roman jurists held, that he who acted for another by transacting his business, or by making repairs on his property, could recover the amount of the expenses incurred, or the value of the repairs; provided the acts of the *negotiorum gestor* were necessary and useful to the person for whom he acted. This doctrine has descended to us, and makes a part of the positive legislation of the State. *Dig. Liv. 50, tit. 17, L. 206, ib. Liv. 3, tit. 5, L. 10, 8, 1, Toullier, Droit Civil Français, Vol. 11, tit. 4, Cap. 1, No. 49, C. C. 2274, 2278.*" Per Porter, Justice, 5 N. S. 392. Rost, Justice, in the case of *O'Reilly vs. McLeod*, 2 A. 147. affirming the doctrine above laid down, said: "That question has long since been settled. It came before the Supreme Court of this State in the case of the *Police Jury vs. Hampton*, 5 N. S., p. 389. The Court there went into a long and elaborate examination of the law applicable to it, and concluded their able opinion as follows: "The failure of the

Police Jury to give notice cannot defeat this action. It is founded on the great principle of equity, that no man shall profit by the labor of another, without compensation; and neither *error nor bad faith* on the part of the *negotiorum gestor* will prevent him from recovering the amount to which he has benefitted another, if the work *was useful and necessary.*" And in *Campfrancq vs. Pilié, et al.*, 1 A. 197, Slidell, Justice, said: "The principle *nemo præsumitur donare* was carried so far in the Roman law, that in the case of a *negotiorum gestor* the greatest proximity of relation, even that of mother and child, was not sufficient to found a presumption that the expense, which one has laid out for another, was intended as a mere bounty."

If this were a question between man and man, there could be no doubt as to the right upon one side, and as to the obligation upon the other; is the law a respecter of persons; and is it less just, when a corporation is subjected to its commands?

The Civil Code of Louisiana, with that want of precision and completeness which justified Edward Livingston in the withdrawal of his responsibility, when an impatient Legislature hastily adopted its provisions as they were read, chapter by chapter, from the Secretary's chair, says:

"Corporations are of two kinds: political and private. Political corporations are those which have principally for their object the administration of a portion of the State, and to whom a part of the powers of government is delegated to that effect. All others are private corporations.

"Private corporations are divided into civil and religious, and this distinction results as well from the quality of the persons who generally compose these kinds of corporations,

as from the difference of the object of their establishment.

“Civil corporations are those which relate to temporal police; such are the corporations of the cities, the companies for the advancement of commerce and agriculture, literary societies, colleges or universities founded for the instruction of youth, and the like. Religious corporations are those whose establishment relates only to religion; such are the congregations of the different religious persuasions.” Arts. 420, 421, 422.

The City of New Orleans is, then, a private corporation, although most assuredly endowed with large political powers; and, “by the whole course of decisions in this country, corporations in their contracts are placed upon the same footing with natural persons, open to the same implications, and receiving the benefit of the same presumptions.” Angel & Ames, Corporations, Chapter VII., Section 8.

In the case of the *Bank of the United States vs. Dundridge*, 12 *Wheaton* 64, the doctrine of presumed assent, as applied to corporations aggregate, was brought under the consideration of the Supreme Court of the United States; and upon great deliberation, and a full review of all the authorities, it was there held, that the same presumptions are applicable to a corporation as to a natural person. “Suppose,” said Mr. Justice Story, in the case cited, “a deed pole granting lands to a corporation; can it be necessary to show that there was an acceptance by the corporation by an assent under seal, if it be a corporation at the common law; or by a written vote, if the corporation may signify its assent in that manner? Why may not its occupation and improvement, and the demise of the land by its

agents, be justly admitted by implication, to establish the fact in favor and for the benefit of the corporation? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained in virtue of such actual assent? The validity of such a grant depends upon the acceptance, not upon the mode by which it is proved. It is no implied condition, that the corporation shall perpetuate the evidence of its assent in a particular way."

And that these presumptions possess an equal vitality when resorted to in the assertion of a right against a corporation, is shown by the decision rendered in the case of *Mechanics' Bank of Alexandria vs. Bank of Columbia*, 5 *Wheaton* 326, where it was held, that although the charter of a bank enacted "that all bills, bonds, notes, and every other contract or engagement, on behalf of the corporation, should be signed by the President, and countersigned by the Cashier, and that the funds of the corporation should in no case be liable for any contract or engagement, unless the same should be signed and countersigned as aforesaid," yet this section did not extend to contracts and undertakings implied in law; so that a recovery was had against the bank for money advanced upon a check made in the course of business, and signed by the Cashier alone.

The resolution of the Board of Assistant Aldermen, approving of the message of Mr. Mayor Crossman, of October 18, 1853, comes up with a bill of exceptions, to be found on page 182 of the Record; the Court *a quo* ruling its inadmissibility in evidence, as being the action of only one

Board of the Common Council. But the learned Judge of the Court below was evidently unfamiliar with the practice of legislative bodies. A message from the Executive, when of a nature to be communicated to the two legislative bodies, is made to both on the same day; and the action taken thereon, if merely in approval thereof, is never concurrent, but separate; that is to say, a resolution of the character of that under consideration, is never sent from the House in which it originates, to find approval with the coördinate body. The resolution of the Board of Aldermen, p. 161 of the Record, ordering the message "to be filed," was equally a resolution in approval thereof; and was all that was required for its final disposition. Either body may print, without concurrence, its own proceedings. See Jefferson's Manual; and Rules and Practice of the two Houses of Congress.

A special committee of the Board of Assistant Aldermen, appointed by resolution of that body of the 30th of November, 1853, call, in discharge of the very important duties required at its hands, upon the Sanitary Commission, as a body whose time and labor belong indisputably to the City of New Orleans, for coöperative and efficient aid.

This call is to be found upon page 186 of the record, and is as follows :

"Sanitary Commission of the City of New Orleans.

"GENTLEMEN: In pursuance of the duties confided to us by the Common Council, we request you to cause to be prepared a draft of an ordinance fitted to carry into effect a system of quarantine, formed on such principles as may

seem to you judicious. This we do in the confidence that your body is best qualified for the service, as well from scientific qualifications, as from the mass of facts, collected by you, bearing on the question.

“Very respectfully, your obt. servts.,

“THEODORE O. STARKE, }
 “WM. DALTON, } Committee.”

This action of the special committee of the Board of Assistant Aldermen, together with the proceedings of said Board of Assistants, is also brought before this Court by a bill of exceptions, to be found on pp. 183, 184, of record; the learned Judge of the Court, *a quo*, ruling the inadmissibility thereof, upon the ground “that the same went to show the action of only one Board of the Common Council of New Orleans.” Here, again, the learned Judge of the Court below erred from a want of familiarity with Parliamentary practice; or with the rules which regulate the proceedings of Legislative bodies. Where the Legislative power is deposited with a department in the Government, composed of two Houses, each House acts independently, and without the concurrence of the coördinate body, in the appointment of its committees, whether general or special, and in the entertainment and discussion of all reports of said committees, upon matters submitted to their consideration. And in as far as either House, in the performance of acts not requiring the concurrence of the coördinate body, keeps within the limits of its independent power, such acts are as binding upon the Government of which it is a part, as anything which both Houses may see fit to do by concurrent

legislation. And this completeness, this power of recognition, this power to bind, attaches itself to, and is existant in, each committee of each House, when acting within the line of its duties. See Jefferson's Manuel; and Rules and Practice of the two Houses of Congress.

The Commission's response to the call of the special committee of the Board of Assistant Aldermen, is to be found in its special report on quarantine, page 517 of the printed record. "Although the Commission believe," says the response, "that the law of 1825, repealing the quarantine of 1821, vests in the Common Council of the present consolidated City of New Orleans, full power to establish a quarantine, yet it is deemed advisable that these powers should be rendered more full and definite. Further, that a quarantine, though intended to protect, in the first instance, the city, will, if effectual, protect indirectly and directly the whole State. The expense thereof should not be thrown upon the city alone, but should be assumed chiefly by the whole State, and the city would therein and thereby be compelled to bear its proportion of the expense thereof. The Commission, therefore, recommend that the Common Council memorialize the Legislature, requesting that full powers to establish, govern, supervise, and direct, a quarantine for the port of New Orleans, including therein all the routes, road-passes, bayous, and railroads, in any and every direction, be conferred on the corporate authorities of the city, and that an appropriation of — hundred and — thousand dollars be set apart, subject to the order of the proper authorities, under proper restrictions, to defray the expenses thereof."

This wise suggestion of the "Commission," resulted in

“An Act to establish Quarantine for the protection of the State,” approved, March 15, 1855; in the administration of which the City of New Orleans has a proportionate representation. See Acts of 1855, p. 471, sec. 2.

The evidence as to the value of the services rendered by the Sanitary Commission, is most full and complete. There is no variance upon this point to be found in the large mass of testimony taken by commission, and given by men eminently fitted to speak upon the subject matter under consideration.

Dr. John W. Francis, whose reputation, as a master in all the departments of knowledge which adorn humanity, is bounded by the limits of civilization alone, says in his answer to the ninth interrogatory, “I have no doubt upon this interrogatory. The examination of their labors, from the documents before me, have led to the conclusion that they have achieved a great work. They might individually be satisfied with some twelve or fifteen dollars per diem, provided the same occupation was conducted most of the year, and might be protracted to two years. Five thousand dollars per annum might be stated as very reasonable for each member for two years. Their labors have been immense”—p. 126 of Record.

Dr. Hunt, of Buffalo, says: “I do believe, that supposing the measures recommended in said report were adopted by the City of New Orleans, and thoroughly enforced, that the salubrity of said city would be greatly increased. I believe, and base this belief on my knowledge generally of the results of sanitary reforms. In one

instance within my knowledge, the mortality per annum of a public institution, was one in nine. The introduction of sanitary reforms decreased the mortality, in two years, to one in twenty, per annum. In relation to the effect of a sanitary reform on the population and material interests of New Orleans, I can only answer in general terms, that health is essential to the prosperity of any city. I am unable to set any price upon the labor of the Committee. I should regard \$15,000 as nothing more than a moderate compensation for their labor; and in naming this sum, I do not intend to estimate the benefits which the city would derive.”—pp. 26, 27, of Record.

Dr. Brown, of Fredericksburg, Virginia, says: “For the mass of matter it—the Report—contains, its great diversity, and the various sources to which the members of the Commission had to resort to obtain the information they have embodied in it, I should think, unless extraordinary diligence was employed, and their time entirely devoted to the faithful accomplishment of their object, twelve months would be a short time for so voluminous and satisfactory an exposé as this Report contains. I do not think I should be willing to encounter the labor and responsibility of so important a trust, even here, where professional services are very inadequately compensated, for less than five thousand dollars for my individual services.”—pp. 47, 48, of Record.

Dr. La Roche, of Philadelphia, the author of an extensive work upon yellow fever, of the highest reputation, says: “I have paid attention to sanitary commissions and investigations for upwards of thirty years, in reference particularly to the yellow fever. I am of opinion that if

the Plaintiffs received the sum of fifteen thousand dollars in remuneration for the labor and time they have bestowed on the investigation referred to them, they would not receive one dollar more than they are fairly entitled to.”—p. 81 of Record.

Dr. Jewell, of Philadelphia, says: “For a number of years I have devoted special attention to sanitary investigations. . . . I devoutly believe that if the measures recommended in the said report were faithfully adopted by the authorities, they would save the City of New Orleans, annually, hundreds of valuable lives, thousands of dollars, and greatly enhance its advantages for health, commerce, and wealth. . . . All things considered, the claim of fifteen thousand dollars made by the Plaintiffs for their services, is, in my opinion, much below what I would consider a fair remuneration for the arduous labor bestowed by them upon the Commission.”—pp. 84, 85, of Record.

Dr. Bell, of Philadelphia, one of the ablest writers upon the hygiene of cities, says: “I am apprized of the wide field of investigation which it was made the duty of the Sanitary Commission to enter upon; and of the number and complexity of the subjects over which their inquiries were to extend; embracing, in fact, some of the most difficult and important problems in public hygiene. . . . In a case like the present, in which precedents are wanting on this side of the Atlantic, and in the omission of municipal or legislative enactments bearing on such questions, it seems to me that the labor itself, and the benefit accruing to a great community, as soon as it chooses to avail itself of the results of this labor, must be considered in determining the amount

of pecuniary remuneration. Looking first, and merely, at the amount of labor performed, and the time necessarily taken up in its performance, the strain on the faculties of the persons engaged in it, frequent and long interruptions to their regular and gainful pursuits, as in part indicated in my reply to the fifth interrogatory; and, secondly, at the invaluable benefits to the City of New Orleans, on the score of improved health, and uninterrupted commerce of the city, as stated in my answers to the sixth and seventh interrogations; I cannot consider the sum of fifteen thousand dollars, claimed by the Plaintiffs, to be disproportioned to the actual labor, or to the prospective good which would grow out of it, when the City of New Orleans chooses to act efficiently in the matter. Ten times the amount, now claimed by the Plaintiffs, would be thought a small compensation for him who should offer a certain remedy for the cure of yellow fever. The Sanitary Commission point out more than a remedy for this terrible pestilence; it shows how the evil may be entirely prevented.”—pp, 87, 90, of Record. See also testimony of Dr. Morland, of Boston; answer to the ninth interrogatory; p. 102, of Record. Also testimony of Dr. Clark, p. 105, of Record.

Dr. Shattuck, of Boston, a name of eminent authority in all matters touching public hygiene, says, answering the fourth interrogatory: “I have paid more or less attention to sanitary investigations for the last twenty years. I have repeatedly written and published facts and opinions on the subject. I have had all the experience of study and observation. I have examined this city—Boston—with a special view to the influence of localities on the health of the city, and other places. I have made a sani-

tary survey of several towns in this Commonwealth. I have collected most of the reports on sanitary matters, that have been published in Great Britain and Europe during the last twenty years, and read most of them. I was appointed by the State of Massachusetts in 1850, Chairman of the Commission to draw up a plan for a sanitary survey of the State, and made the report of the Commission entirely."

And in answer to the seventh, ninth, and tenth interrogatories, he says: "I have no doubt that the salubrity of the city would be greatly increased, its population greatly augmented, and its material interests greatly enhanced, if the measures recommended in said report were adopted by the city of New Orleans, and thoroughly enforced. I should say that the fifteen thousand dollars, claimed by the Plaintiffs, was a small compensation for the services rendered. I should think the City of New Orleans could make no more judicious expenditure than to pay the claim of the Plaintiffs."—pp. 107, 108, of Record.

Dr. Shtatuck speaks with authority.

See also testimong of Dr. Jarvis, pp. 111, 112, of Record.

Dr. Griscom, of New York, says: "I would regard ten dollars per diem, for each member of the Commission, as a reasonable remuneration for their labors during the time spent in the investigation and preparation of this report for the press, in addition to the reimbursement of the expenses incurred by them. I deem the labors of the gentlemen composing the Commission, of the highest interest and value to the community to be effected by their recommendations. Their duties have been performed with eminent fidelity and

ingenuity. A large amount of important facts have been brought to light; and their suggestions are highly judicious and important. They are deserving of the thanks, not only of the authorities and citizens of New Orleans, but of the civilized world."—pp. 122, 123, of Record.

Dr. Parker, of New York, says: "I have been in the profession about thirty-one years, and a large share of that time I have been connected with hospitals, and have been required to give much thought and attention to sanitary measures of every description. Considering the talent necessary, and the great toil and experience requisite for the execution of the Commission, I unhesitatingly aver that, in my opinion, five thousand dollars per annum to each member of said Board of Commission would be only a fair, or moderate compensation."—pp. 128, 129, of Rec.

The testimony of Milroy, Hume, and Simon, of London, to be found on pp. 137 to 152, inclusive, of Record, comes up with a bill of exceptions. The testimony of these distinguished men is lost to the Plaintiffs, owing to a want of knowledge of the formal duties of a Commissioner, on the part of the United States Consul at that port. Yet when Milroy says, "I have read with great care and oftener than once, the Report of the Sanitary Commission of New Orleans, on the epidemic year, 1853; it is a document of great value, and is worthy of taking a place beside the Report of the French Academy on the Plague and Quarantine, and that of our General Board of Health, on the epidemic cholera of 1848-9"; and when Simon says, "The usual remuneration in this country, for such services as those of the Sanitary Commission, is at the rate of three guineas a day, to each member, while engaged in active

work of the Commission, in making inquiries, or examinations, inspecting locations, etc.; travelling and hotel expenses, extra; besides an additional remuneration for drawing a report"; they do but corroborate the testimony of our own savans upon the subject matters spoken of. See pp. 144, 145, of Record.

Counsel would also call the attention of the Court to the testimony of Dr. Lemonier, of New Orleans.—p. 176, of Record.

In conclusion, counsel must express a regret, that the municipal authorities of our city have made themselves so little conversant with the contents of the very able report of its late Sanitary Commission, and are so unmindful of the evils which it is its purpose to correct, as to render a suit of this character necessary.

The geographical position of New Orleans, in its commercial aspects, is unequalled by ~~those~~ of any other city in the world. With more than thirty thousand miles of inland navigation, stretching through every variety of clime, and embracing the whole of the broad valley of the Mississippi; seated upon the Gulf, at the crossing point of the great paths of ocean trade, between the Northern and the Southern, the Eastern and the Western hemispheres; it is the physical, and should be the economical, centre of the commercial movement of existing civilization. How, then, has it happenèd that St. Louis and Cincinnati, its natural feeders, already exceed it in population; that Chicago, at the base of a lake navigation which is closed one third of the year, is rapidly pressing forward to occupy the same relative position; and that four cities of the Atlantic board,

New York, Boston, Philadelphia, and Baltimore, two of them, Philadelphia and Baltimore, essentially provincial towns, greatly surpass it, not only in the number, but also in the wealth, of their inhabitants? This is one of the most important problems of our time, growing out of the internal traffic of our country; its solution may be found, by a diligent inquirer, very clearly set forth in the report which has been so wrongfully turned from its proper purpose to become the subject of the present litigation.

Let us, by compelling the municipal authorities to do justice, teach them a wisdom which will never be acknowledged until paid for. Let us, by an argument more persuasive than words, bring them to a consciousness of the condition of a city whose population is decimated on an average of every two years; and in the words of the late New York Senate Committee upon the sanitary condition of the City of New York, tell them that "the supervision of the public health, involving the preservation of the people's lives by the discovery and suppression of preventible diseases, and embracing, as it does, the great subject of public hygiene, or sanitary science, is the most important and serious obligation that can engage the attention of the officers of Government."

Respectfully submitted,

EDW. H. DURELL,

Of Counsel.