and we are not satisfied that it could not have been done or successfully commenced during the time he remained in Presque Isle. A removal of a part would have enabled him to protect the residue on board; and there is no sufficient ground from the evidence to conclude that he would have encountered any serious difficulty in finding places enough for storing to have enabled him to remove from the steamer all of that class of goods exposed to damage, and store them on shore. At that time the goods had not received any considerable injury, and most of them, in all probability, none whatever. Prompt attention would have saved the property and protected the shipper from loss. It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, when it is practicable for human exertions, skill, and prudence, to save them from the impending peril.

This view of the evidence renders it unnecessary to consider the other grounds of defence set up by the respondents.

The decrees, therefore, of the District Court in the respective cases are affirmed, with costs, in each case for the libellants.

THE UNION INSURANCE COMPANY, PLAINTIFFS IN ERROR, *v.* JOHN BLAIR HOGE.

Under a general act of the Legislature of New York, passed on the 10th of April, 1849, which authorized the incorporation of insurance companies in the State under it, held that the eighth section in the charter of a mutual insurance company formed under the general act, which provided for the payment of cash premiums, at the election of the insured, as well as premiums secured by notes, was authorized by the general act, and that a policy issued upon a payment of the premium in cash was legal and valid.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the northern district of New York.

It was an action brought by Hoge upon a policy of insurance upon a paper-mill in Virginia. The insurance company were

incorporated by the Legislature of New York, and their place of doing business was in that State. The law of New York and charter of the company are set forth in the opinion of the court.

The declaration stated that the policy of insurance was made in November, 1851, for the consideration of fifty-six dollars, and that for that sum the company agreed to insure the mill for one year to the amount of $2,500. The plea was, that the business of the company was to be conducted on the plan of mutual insurance, and that the receiving of a definite sum of money, in lieu of a premium note for the policy of insurance, was not warranted by the act of 1849, and that the policy was void, as made without authority, and in violation of the statute.

To this plea there was a demurrer.

The Circuit Court decided that the policy was a valid policy, and the company brought the case up to this court.

It was argued by *Mr. Van Der Lyn* for the plaintiffs in error, and *Mr. Mygatt* for the defendant.

Mr. Van Der Lyn made the following points:

Point First.—The issuing of policies upon the plan of stock companies, and the receiving of a definite sum in lieu of a premium note, is not warranted by the act of 1849, and is in violation of its manifest spirit; and therefore the policy declared on is void, being made without authority and in violation of the statute.

We say this for several reasons:

1. This is a mutual insurance company, formed to do business on the plan of mutual insurance, and is so declared in the charter, in pursuance of the act of 1849, sec. 10. (See 2d sec. of the charter.) "Its business shall be conducted on the plan of mutual insurance." The company was organized without a dollar of cash capital, and with $100,000 of premium notes, (secs. 5 and 11,) and was prohibited from commencing business without $100,000 of premium notes. The act has not a word, or a provision, indicating the right to do business after the stock or cash plan, and a corporation can exercise no powers not expressly granted, or that are not necessary to carry

into effect those that are granted. (See authorities cited under point third, *post.*) And, moreover, that statute expressly prohibited the commencing business on the stock plan without $50,000 of *cash capital.*

2. The company, being organized under the general act as a *mutual* company, and with a capital made up of premium notes, by direction of the statute, the Legislature, by the term "*mutual insurance,*" used in the act, must be deemed to have adopted the term as it had become known in the legislation of the State, and as expressed in the Jefferson and Madison County Mutual Insurance Company charters. (Laws of 1836, pages 42 and 89.) In these acts of incorporation, the members were "all persons who should insure." (Sec. 2.) "Each person, before he received his policy and became a member, *must deposite his premium note*, and pay a sum in cash not exceeding five per cent.," (sec. 6,) and the members were bound for losses to the extent of the said note, and, in addition, one dollar for every $100 of the sum insured on the mutual principle. (Secs. 8 and 11.) Over thirty companies were chartered the same session after this pattern act; and in subsequent sessions, I may say, that out of New York city nearly or quite every mutual insurance company was chartered after this pattern act, there being twenty or thirty charters each session referring to and adopting it. In May, 1834, the Saratoga Company had been organized under a similar act, requiring a premium note; and previous to that, the Scoharie Company and the Washington Company were chartered, with similar provisions, except the omission of the premium-note feature. We say, therefore, that in 1849, when a general act was to be passed, it had become a settled feature in the mutual insurance companies, that a *premium note*, instead of a cash premium, was essential to the idea of a mutual company; and that interpretation of the word "mutual" was clearly indicated by the requirement, in *mutual companies*, of a capital made up of *premium or deposit notes*, instead of a *cash capital*, which was required in companies organized on the plan of stock companies and in life insurance. (Act of 1849, p. 441, secs. 5 and 6.) It certainly will not be insisted that the Legislature intended

to follow the example of the companies which had been chartered in New York, with a cash premium instead of a premium note; if so, they would have required the capital to consist of cash premiums; and, besides, the failure of those companies operated as a beacon of warning to the law-makers against any such system. An additional reason to the almost universal prevalence in the State of New York of the mutual companies, on the plan of the Jefferson County Company, and the great success of that system, and to the requirement by the act of a capital in the mutual companies composed wholly of premium notes, and the entire omission of any authority in the act to allow a business to be commenced by the mutual companies in part or in whole on the stock plan; and the impracticability of pursuing the mutual principle when part of the members are obtaining policies on the cash or stock plan, and a part on the mutual plan, and the entire abandonment of the *mutual principle* by such a course; I say, an additional reason to infer the intent of the Legislature is found in the prevalence of this premium-note principle in the other States. (Angel, 424, sec. 418.)

In Indiana, Connecticut, Maine, Massachusetts, Vermont, Illinois, New Hampshire, Pennsylvania, and many others, the Legislatures, at the time of the act in 1849, had adopted the premium-note system, as we claim it to be. I infer this from the decisions of their courts, without an actual examination of the acts in the several States.

3. It is some evidence of the necessity of having legislative authority for issuing policies for a definite sum paid in cash in lieu of a premium note, that a special enactment has been resorted to for that purpose, instead of coming in under the 14th section of the general act, which would have given the power, if it were possible, under the provisions of that statute.

(Session Laws of New York, 1849, pp. 436, 184; ibid, 1850, p. 337; ibid, 1852, pp. 27, 399, 65; 3 Ohio, N. S., 348.)

4. Another and to our minds a conclusive objection to the exercise of this power of receiving a definite sum in lieu of a premium note (without an express legislative sanction) is, that it destroys the principle of *mutuality*, which is the leading char-

acteristic of mutual companies formed under the act of 1849, and confounds the operation of a company "*organized to do business on the mutual plan*," with that of those companies which are *organized on the plan of stock companies*, and which are in their nature and principles *antagonistic* to the mutual companies.

To illustrate this idea, suppose that an individual desires to make an insurance in a mutual company. He makes his application, and receives a policy for $1,000, and executes a premium note for $100, and pays in addition five per cent. of that sum in cash. If the company is prudently and successfully managed, this five per cent. will pay expenses and all ordinary losses. But he is liable to pay, if any exigency like a disastrous fire renders it necessary, upon a just assessment, the whole of his $100 note, to satisfy the losses of any of his associates, who have also given their premium notes; and *all* who have given premium notes *share in this contribution*, which constitutes the principle of *mutuality*. Now, let us suppose that he applies to and is insured in a stock company; he gets his policy for $1,000, and pays for it one per cent., $10. He is entitled to the same indemnity in case of a loss as he was in the mutual company; but when he pays his premium, he ceases to have any further interest in the successful operation of the company; he is the *insured*, but not the *insurer;* and whether the company make gains or suffer losses, matters not to him, provided the company continues solvent. In the *mutual* company, he was not only *the insured*, but he was also *one of the insurers*, and suffered a loss by the loss of any one of his fellow-members. Now, suppose he insured in a mutual company by paying a definite sum in lieu of a premium note; and we will suppose that he pays one per cent., (for unless a mutual company insures at the ordinary stock rates, it would soon cease to make cash insurances;) he would pay $10, and get his policy. And, now, what is his situation as to his fellow-members of the company? He gets the same indemnity as he did in the mutual company, on giving his premium note, and the same he got in the stock company, but he is no longer interested in the successful operation of the company; he suf-

fers nothing by the losses of his associates, and is not liable to contribute in any manner for their relief; he is the *insured party*, just as he is in the stock company, but he is not the *insurer;* on the contrary, *all the premium-note makers are the insurers*, and stand in precisely the condition of stockholders in a stock company; and in this way, and by this device, the *makers of the premium notes* are turned into a *stock company*, and *become insurers* to stock policy holders, to a ruinous amount, without any liability on their part to contribute to any loss whatever.

Rhinehart *v.* All. Mut. Co., 1 Barr Penn. Rep., 359.

Angel, p. 424.

Bangs *v.* Gray, 2 Kernan, 477, 479.

7 Watts and Sergt., 349, 351, after saying, "That any person insured is a member of the company," Gibson, Chief J., says: "And on no other plan could a *mutual company* be constituted, the object of the members being to share each other's losses for the general weal, and *not to bear the risk of losses for a premium*"—which is quite significant, when we remember that the stock companies *bear the risk of losses for a premium.*

Mutual Benefit Company *v.* Jarvis, (22 Conn., 133, 145.) This was a mutual life insurance policy, and a case where the policy was payable in cash. The court adopt a particular construction to sustain the *mutual principle:*

"This makes between all the members that *mutuality* in regard to profits and losses which was contemplated by the charter and the organization of the company; and if the company can collect such notes as it pleases, without making an equal assessment on all, it is clear that there is an end of everything like *mutuality.*"

5. There is another consideration which serves to show that this practice of receiving a definite sum in lieu of a premium note is wholly unwarranted by the spirit of the act of 1849. It is quite easy to demonstrate that a company might, in the course of two or three years, entirely change the charter of a mutual insurance company into that of a stock company, without having at the outset a dollar of cash capital. Suppose that, when a company is organized, it received notes to the required sum of

$100,000, and issued policies thereupon, all of which expire in one and two years. The officers, under a charter framed by themselves, (but in violation of the act, as we say,) commence doing business on the cash principle, and proceed for a year or two, issuing cash policies, but no policies on premium notes. In the mean time, all the mutual policies have expired, and the company finds itself doing business on the *stock* instead of the *mutual principle*, and is transmuted into a stock company (if we are to believe our opponents) by a legitimate exercise of their powers as a mutual company. It has lost its identity, and the character impressed upon it by its organization, and has become a company of a totally antagonistic character. It has done this without a dollar of cash capital, and in defiance of the prohibition in the 7th section, by which the company was forbidden to *commence*, that is, to *do any business*, as a stock company, without a stock capital. Such is the absurdity into which our opponents are driven by their own hypothesis.

6. In opposition to the views above expressed, it is argued by our opponents that the phraseology of the act, and the meaning of the words "capital" and "premiums," as used in the act, justify a construction that would allow the directors of a mutual company to receive a cash premium in lieu of a premium note. This argument is founded on the idea, that the word "premium" means a "*cash premium*," and the word "capital" a "fund" *absolutely* devoted (like a stock capital) to the payment of the debts of the corporation, and not *merely subject to the payment of the debts on the mutual principle.*

To this we answer:

1. That the act in question was drawn by an unpracticed hand, and words are used in it without a precise and constant signification, so that the meaning of the law-makers is to be ascertained by the collocation of the words and the context, and manifest intention of the Legislature.

2. Adopting this rule, it is manifest that the word "capital" is used in a general sense, as embracing all the funds of the association. In the 5th section, the deposit notes on which the business is to be commenced are said to be *a part*

of the capital, looking to the future premium notes with the five per cent. cash added; and if any investments be made under section 8th, to those also as constituting the *whole capital.* In section 11th, it represents the *whole capital in possession* of the associates at the time of organization, consisting of "premiums," that is, "premium notes or engagements of insurance." In section 13th, it means the *whole fund* of the company, embracing (1) the premium notes on which the company commenced business; (2) those to be received afterwards, in the course of its business; (3) with the cash part of the premium, or five per cent., in addition to the premium note; and in the 21st section, it means the same thing as in the 13th section, with the addition of a cash capital united under the provisions of that section.

3. So also the word "*premium*" is used in a general sense to represent "the consideration of a policy," whether *paid*, as in the case of a stock policy, or *secured* by a premium note, as in the case of a mutual policy. Such is its meaning, *necessarily*, in the 5th section, because the $100,000 is to be composed wholly of notes; and equally so in the 11th, because the act is describing precisely the *same fund.* Though, from a looseness of language, the act appears to regard the fund as composed of the *notes*, OR the *engagements of insurance*, before they have been consummated into notes, though the 5th section requires them to have been perfected by and merged in notes; and in the 13th section, the word "premiums" clearly represents the premium notes, including the original $100,000, and such as have been subsequently taken, with the five per cent. in cash added, to make up the entire premium in any given case; and the word means the same thing in the 21st section.

4. The above is a reasonable and natural construction, and is to be preferred to one that would *confound* the two companies, and their practice and operations; would destroy the principle of mutuality, which is the basis of the mutual companies, and lead to a constant violation of the 7th section of the act.

POINT SECOND.—There is no force in the pretence that the *definite sum*, which is to be taken in *lieu* of a premium note, is

really an *equivalent* for a premium note. This pretence is deceptive and fraudulent, and so transparently absurd as to deceive no one.

1. It can never be an *equivalent* for a premium note, unless the sum is as large as that expressed in the premium note. In the case I have supposed, it would be $100 on an insurance of $1,000. Was it a supposable case that such a sum would be paid, and were it within the spirit of the act, that would be an *equivalent;* but the idea that any sane man would ever take an insurance in a mutual company, and pay for it anything over the ordinary cash rates of a sound stock company, is preposterous, and requires no answer. This must have been well understood by the officers when they devised this substitute for a premium note.

2. It was never the intention of those persons who procured an amendment of their charters, and obtained by statute an authority to do what this company has done by *usurpation and without authority*, to do anything but a business *on the plan* of stock companies, as well as the mutual. The premium note was intended to be so large as to meet all possible contingencies, and no one was expected to have to pay the whole of it, if the company was conducted prudently. How, then, was it expected that individuals would pay in cash any such sum? What motive was there to pay over the ordinary stock rates?

See the Statutes cited in sub. 3, under Point First.

3. There can be no mistake in the case of this company, because the directors, who framed the by-laws, have stated the definite sum to mean the ordinary stock rates in the fundamental laws for the practical operation of the company.

Point Third.—Conceding that the receiving a definite sum in lieu of a premium note was a practice not authorized by the statute of 1849, and in violation of its provisions, the insertion of such a power in the charter would not legalize such practice, especially as those who dealt with the company on the plan of stock insurance had legal notice of the powers of the mutual company.

1. Those who are insured on the basis of the stock principle are chargeable with *legal notice of the powers of the corporation.*

a. The act of 1849 is a public act, of which all must take notice; and the act requires a copy of the charter to be filed in the office of the Secretary of State, and of the county of Montgomery, which is sufficient notice.

Dutchess Cotton Manuf. *v.* Davis, 14 John., 238, 245. See the latter page.

b. The *name* of the company indicates that it was a *mutual insurance company*, and the by-laws and conditions attached show the principle of assessment on which the premium notes were liable; and a dealer who knew that the company was a *mutual one* was bound to take notice that the officers of a mutual company, under the act, had no power to insure on the plan of stock insurances.

c. All who deal with a corporation are bound to know the powers of the corporation with which they deal or connect themselves.

4 McLean's Rep., 8.

Root *v.* Goddard, 3 McLean's Rep., 102, 276.

Mumma *v.* Potomac Co., 8 Peters's Rep., 287.

Though not a *technical estoppel*, it is nevertheless *notice.*

2. The corporation was an artificial person with limited powers, embracing only those *expressed*, and such as are necessary to carry into effect the expressed powers.

1 R. S. of N. Y., 599, 600, secs. 1, 2, 3.

2. Kent, 279, 299; their powers are to be *strictly construed.*

Angel and Ames on Corporations, (2d ed.,) 64 to 67, 192, 193, 200.

Chitty on Contracts, 536, 539.

People *v.* Utica Ins. Co., 15 J. R., 383.

Thomas *v.* Achilles, 16 Barb., 494, 495.

N. Y. F. Co. *v.* Ellery, 2 Cowen, 709, 699.

N. R. Ins. Co. *v.* Lawrence, 3 Wend. Rep., 574, 583, 482.

Beatty *v.* M. Ins. Co., 2 John. R., 109, 114.

W., 31, 34.

Safford *v.* Wykoff, 1 Hill, 11; 2 ib., 243.

Eng. L. and Equity, 7, 505; 16 ib., 180; 30 ib., 120.

3. The corporation not only had *no power* to issue stock pol-

icies by the act, but the doing of these acts was expressly *prohibited* by section 7 of the act, and were *void* for that reason.

Tracy *v.* Tallmadge, (4th Kernan, 179,) Selden, J.: "It has long been settled that contracts founded on an illegal consideration," "or prohibited by some positive statute, are void." "That a contract by a corporation which it has no legal power to make, is void, and cannot be enforced, it would seem difficult to deny."

Page 204, Comstock, to the same effect in the note.

Mr. Mygatt, for the defendant in error, stated that the claim of the defendant in error was, that the assets of the company were liable to pay pro rata all the liabilities.

The leading questions presented are:

1. Was the cash policy of insurance on which this action was brought *ultra vires?*

2. Are the premium notes of the company capital stock, and, as such, liable to pay *pro rata* the losses and liabilities of the company?

POINTS AND ARGUMENT.

First.—The issuing of policies by this company for a cash advance premium was not unlawful. It was not the exercise of a power not granted or forbidden by the act of April 10, 1849, but it was the exercise of a lawful, a necessary, and a proper act.

1. This question was distinctly presented for the decision of the Court of Appeals of New York, in the case of White, receiver, against Haight, which case was decided at the last December term, and the judgment in favor of the receiver affirmed, on the ground that the note in that action formed part of the original capital of $100,000, and was collectable without any allegation of losses, and without an assessment. That case is reported in 16 New York Reports, 310, but the opinion of Denio, C. J., only is reported. Opinions were written by two others of the then members of the Court of Appeals, and this question is debated by said two of the members, to wit: Mr. Justice Brown and Mr. Justice Shankland.

[The extracts from these two opinions, as cited by the counsel, are too long to be inserted.]

It appears, from said opinions, that said justices regarded the payment of an *advance cash premium* as the lawful and proper exercise of the powers granted by the statute and the charter, and as beneficial to the members; and that, by the well-known and continued course of business of the company, the policies issued therefor precluded the company from repudiating these contracts issued to those who parted with value upon the faith of, and in consideration of, their interest in the company.

It is claimed by the plaintiff in error, that the aforesaid opinions of Judges Brown and Shankland discussed questions not material to the decision of the case before them, and not decided in the Court of Appeals. It may be said that the reported opinion by Judge Denio does not debate the questions here presented, as the court decided that case on a point not material to this case. It may, however, be proper to state that the opinions of Judges Brown and Shankland are referred to as above, as it is respectfully submitted, that although that case was decided on a point before coming to the questions that were debated by Judges Brown and Shankland, yet that the questions debated by them were in fact in that case, and the opinions of these able judges are authority, if not decisive, on the questions in this case.

2. *This is not a mutual insurance company, with a stock branch engrafted on it. It is purely a mutual insurance company, and as such has power to issue policies of insurance for a cash premium or premium note, or both.*

This company was formed under a general law which was passed at the next session of the Legislature after an amendment of the charter of the Albany County Mutual Insurance Company. By its charter, like to the Albany Company, it expressly allows of the cash premium in the place of the premium note, or of both the cash premium and the premium note.

In order to correctly examine this point, it is indispensable well to understand the peculiar characteristics of mutual insurance companies. Stock companies insure at their own risk, "but the leading principle of mutual insurance compa-

nies is, that each person whose property is insured becomes a *corporator*, or a member of the company."

Angel on Fire and Life Insurance, 45, sec. 10.

Susquehanna Ins. Co. *v.* Perviere, 7 Watts and S. Penn. R., 348.

Liscomb *v.* Boston Mutual Fire Ins. Co., 9 Metcalf, 205.

"A mutual insurance company in its origin was a body of persons, each of whom was desirous of effecting an insurance, and he agreed with the rest of the members to contribute his premiums to a common fund, on the terms that he should be entitled to receive out of that fund."

Dodeswell, 22.

Angell on Fire and Life Ins., 422, sec. 413.

"The whole body becomes reciprocally bound to make good the losses, and are literally mutual insurers." Ib.

Parsons says that there are "mutual companies in which every one who is insured becomes thereby a member."

Parsons on Mercantile Law, 489.

Reynolds on Life Assurance, p. 180, refers to the difficulty of collecting assessments on notes which are often of trifling amount, and are liable to be called on for frequent assessments, and then remarks: "To obviate these objections, another modification of the mutual system has been introduced by some companies, which is for the assured to pay the whole premium in cash."

"The giving of the premium note is not necessary to the consummation of the contract of insurance."

Blanchard *v.* Waite, 28 Maine, 51.

This company was purely a mutual insurance company.

The case of the Utica Insurance Company *v.* Bristol, decided at the general term in the 5th district of New York, in which case the opinion of the court is by Justices Allen and Pratt, was the case of a stock branch engrafted on a mutual insurance company. That action was upon a subscription to the stock branch, and the charter in that case was held to be in conflict with the provisions of the law.

The opinion of Mr. Justice Pratt in that case shows that said action was not on a premium note, but on a subscription

to the stock branch. The cash capital in that company was not united with the premium and stock notes as security for the members generally, for it was provided in that company that this cash capital should not be held as security for or liable for the losses of the mutual company.

This company had no such provision. The premium notes, and cash paid for policies in lieu thereof, were alike capital stock, and liable for the losses.

Mutual insurance companies were formed in Ohio in 1844, with charters like the one in question. In the Ohio Mutual Insurance Company *v.* Marietta Woollen Factory, (3 Ohio State Reports, new series, 348,) it was held, that in cases of losses on policies issued on cash premiums, the cash fund must be first exhausted to meet said losses, and then resort may be had to the premium notes. The charter of that mutual insurance company provided for the payment "of a certain definite sum of money in full for such insurance, which said sum shall be in lieu and place of a premium note;" and the charter further declares that this cash "fund, and the premium notes deposited with the company, shall constitute the capital stock of the company, for the payment of losses and expenses."

This same question has been adjudicated in the Superior Court of the city of New York. In the case of Tuckerman, receiver, *v.* McLean, in the Superior Court of New York, where the defence in an action on a premium note was, that it was assessed to pay cash-policy losses. By the court, Duer, Justice: "This is clearly no defence. The company had the right by statute and their charter to receive cash premiums, and issue policies on them, and the defendant's note has been greatly relieved by the practice. It was the best thing the company could do. These notes are the basis of the transactions of the company, and they must be paid when the cash is exhausted. The plaintiff is entitled to judgment."

In the said case, Tuckerman was receiver of the Cherry Valley Mutual Insurance Company, a company with a charter like the one in question, and the action was for an assessment to pay cash-policy as well as premium-note-policy losses.

This question was also decided at the general term of the

Supreme Court of New York, in the sixth district, in the said case of White, receiver, *v.* Haight; Justices Mason, Gray, and Balcom, concurring in the decision.

Justice Harris held, in Shaughnessy *v.* The Rensselaer Insurance Company, (21 Barb., 610—Supreme Court,) that in a company incorporated under the act of 1849, which company had issued policies for cash premiums, "that the deposit notes were liable to assessment only when, after applying the funds of the company to the payment of the losses, it should be found necessary."

The cash premiums had "been expended in the payment of losses and expenses, and thus relieving former members from assessments upon their notes, and leaving others to be assessed for the payment of subsequent losses."

So in the company under consideration. The cash premiums were expended.

3. This company had power to issue policies of insurance for a cash premium.

The plaintiff in error's argument is, that these cash policies engrafted a stock branch upon a mutual insurance company, and that said cash policies should be repudiated as *ultra vires.*

Admit, for the argument, that the act of April 10, 1849, contains no express authority to the corporation to issue policies for a cash premium, it does not follow that the corporators are not answerable for losses arising from said policies, in their corporate capacity. The company have received value for them in cash, and it hardly comports with fair dealing that they should seek to exonerate themselves from a debt on this account, contracted by and through their accredited directors. It is not true that a corporation cannot bind the corporators beyond what is expressly authorized in the act of incorporation. There is power to make policies of insurance; and if a series of such contracts, based on a cash premium, have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted, *unless it can be established that cash in hand is not as good as a premium note.*

The Court of Appeals in New York say, in Conover *v.* The Mutual Insurance Company of Albany County, (1 Comstock, 292,) "Incorporated companies, whose business is necessarily conducted altogether by agents, should be required at their peril to see to it that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually, and as a part of their system of business, transcend those powers. How else are third persons to deal with them with any degree of safety?"

As it is the object of all law to promote justice and honest dealing, when that can be done without violating principle, what principle is violated by holding this corporation liable for the contracts of its accredited agents, even if not expressly authorized, when these contracts were entered into publicly, and in such a manner as by necessity and irresistible implication to be within the knowledge of this company, and of the corporators generally? The circumstance that the corporation itself received the benefit of these cash premiums renders the conclusion irresistible, that the corporation should pay these cash losses from any and every available means.

The affairs of this company are, by its charter, to be managed by its directors, and the directors are "elected by persons holding the policies of insurance in this company, or their proxies, and one vote shall be allowed on every one hundred dollars insured."

The tenth article of the charter before referred to provides, that "the directors may determine the rates of insurance and premium notes therefor," and "that any person applying for insurance may pay such advance cash premium on the amount insured as may be fixed by the company, and give no premium note."

The eleventh section, which provides that the charter be examined by the Attorney General, requires, if a mutual company, that it has the requisite capital, premiums, or engagements of insurance to the extent of the $100,000. Nothing is here said about premium notes, but the word *premium* is used. It was never intended that these companies should limit their business to those who entered into the first agreements of in

surance, but, as allowed in the first section, the company was formed to make insurance.

When the charter and act of incorporation and the statute are silent as to what contracts a corporation may make, as a general rule, it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created.

Angel and Ames on Corpor., 2d Am. ed., 200, and cases

The creation of a corporation for a specified purpose implies a power to use the necessary and usual means to effect that purpose; and though their charters were entirely silent on the subject, banks would necessarily be empowered to issue and discount promissory notes and bills of exchange, and insurance companies to make contracts of indemnity against losses by fire.

Ketchum *v.* The City of Buffalo, 21 Barb., 300.

Broughton *v.* Manch. Water Works Co., 3 Barn. and Ald., 11, 12.

Yarborough *v.* Bank of England, 16 East., 6.

Murray *v.* East India Co., 5 Barn. and Ald., 204.

Edie et al. *v.* East India Co., 2 Burr., 1216.

Corporations are liable even for torts and trespasses, but their charter does not authorize them.

Beach *v.* Fulton Bank, 7 Cowen R., 485.

Life and Fire Ins. Co. *v.* Merchants' Fire Ins. Co., 7 Wend. R., 31.

The case of Stoney *v.* The American Life Ins. Co. et al. (11 Paige, 635) decides that the negotiable security of a corporation which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company, and in violation of the laws of the State where it was actually issued.

When corporations "confine themselves to the purposes and objects of their incorporation, they should not be deemed as transcending their authority, but should be regarded as acting within the scope of those implied incidental powers

necessary to the full and advantageous development of those which are expressly given."

Mead *v.* Keeler, 24 Barb. N. Y. Sup. Ct. R., 24.

Where a statute authorizes a company to construct certain works, as a harbor, it is to be presumed they have power to execute all works incidental to their main purpose, and which they deem necessary, provided they act *bona fide.*

Wright *v.* Scott, (in House of Lords,) 34 Eng. Law and Equity, 1.

"If the charter be wholly silent as to the power of the insurance company to give credit for premiums, and to take notes in payment, such a power necessarily results from its power to make insurances, and to enable it advantageously to conduct its business."

McIntyre *v.* Preston, 5 Gilm. Ind. R., 48.

When by its charter a company is prohibited to insure on property to an amount exceeding two-thirds of its value, yet if the company voluntarily insure to a greater amount, without any fraud on the part of the insured, the policy is not thereby void.

31 Maine, 220.

By the 21st section of the act, the company may "*unite a cash capital to any extent, as an additional security for the members, over and above their premium and stock notes.*"

This word "premiums," as here used, establishes the right of this company to receive advance premiums for policies. The certificate of the Comptroller is, "that the company are in possession of the capital, premiums," or "engagements of insurance," as the case may be.

To constitute a mutual insurance company after the statute capital of $100,000, it is not required that the premiums consist of premium notes, as assumed by this company.

The 13th section of the act regards the premiums as the capital stock of the company, for it reads: "And if, upon due examination, it shall appear to the Comptroller that the losses and expenses of any company chartered on the plan of mutual insurance, under this act, shall, during the year, have exceeded the premiums."

The word "premiums," as here used, may consist of premium notes, or cash paid for policies. The "premium," as defined by the early writers, "is a sum of money paid by the assured to the underwriters, in consideration of his taking upon himself a *risk*—the risk of having to indemnify the assured from any loss that may be sustained by an exposure to the perils of the sea, and to fire upon land, or the event of death." Lord Mansfield says: "The underwriter receives a premium for running the risk of indemnifying the assured."

Tyne *v.* Fletcher, Cowp. R., 666.

Webster defines the word "premium," "The recompense to underwriters for insurance, or for undertaking to indemnify for losses of any kind."

Bouvier defines "premium" "as the consideration paid by the insured to the insurer, for making an insurance. It is so called because it is paid *primo*, or before the contract shall take effect."

In Hone and another, receivers, *v.* Allen & Paxson, reported in the note to Brouwer *v.* Appleby, (1 Sand. Sup. Ct. R., 184,) Jones, Ch. J., says: "The company purports to be a mutual insurance. Originally, mutual insurance was where all the insurers agreed to apportion all the losses among themselves ratably." The learned Chief Justice says, further: "The system underwent various modifications. Notes were dispensed with, to rely on premiums only, or on insurances agreed for, as soon as the company was ready to make them. In this respect, the parties were left much to fix their own standard."

Article 10 expressly allows this premium to be paid in a definite sum in money, in full for said insurance, and in lieu of a premium note.

The receipt of cash premiums is but the necessary exercise of the corporate powers allowed by statute. There is no prohibition against taking the cash premiums, and would it be a legitimate satisfaction of the law to deny a recovery, and thus, instead of punishing, to reward the wrong-doer, and that at the expense of the innocent and injured creditors?

In Beers *v.* The Phœnix Glass Company, (14 Barb. N. Y. Sup. Ct., 363,) the court say:

"It would be difficult if not impossible to specify every act which might be necessary or useful to effectuate the objects for which the corporation is created. The general principle that corporations must confine their operations to their legitimate business, is sufficiently definite. It is not necessary, nor would it be useful, to restrict them in the manner of conducting such business."

In the State of New York, the principle of mutual insurance was sought to be worked out, not only by premium notes, and by the payment of a cash advance premium, but, in the same company, the premium on some of the policies is frequently secured by the premium note, and on other policies by cash paid in lieu of the note.

The act incorporating the Schoharie Mutual Insurance Company allowed the making of contracts of insurance "for such term or terms of time and for such premium or consideration as may be agreed on."

Session Laws of New York, 1831, p. 280, sec. 2.

The act to incorporate the American Manufacturers' Mutual Assurance Association also allowed contracts of insurance to be made for "such premium and consideration as may be agreed on."

Session Laws of New York, 1832, p. 129, sec. 2.

The act incorporating the Washington Co. Mutual Insurance Company also allowed contracts of insurance "for such premium or consideration as may be agreed on."

Session Laws of New York, 1834, p. 182, sec. 2.

The word premium-notes finds no place in said acts, and the last-named company issued more than 200,000 policies of insurance.

See Comptroller's Reports on Insurance Companies.

The Albany County Mutual Insurance Company was incorporated in 1836, (Session Laws of New York, 1836, p. 315,) subject to the same restrictions and limitations as the Jefferson County Mutual Insurance Company, and was incorporated the same year; and yet, in 1848, the Albany charter was amended

by allowing the payment of a cash premium in lieu of the premium note; which cash premium is made the primary fund for the payment of losses and expenses, and both the cash premium and the premium notes constitute the capital of the company for the payment of losses and expenses.

Important is this amendment, as the charter in question assimilates thereto. Said amendment is as follows:

"SEC. 1. It may and shall be lawful for any person or persons applying for insurance in the Mutual Insurance Company of the city and county of Albany, at his, her, or their election, to pay to said company a certain definite sum of money in full for such insurance, which said sum shall be in lieu and place of a premium note; and such person or persons shall not be liable to said company, during the continuance of his, her, or their policy, for any sum beyond the amount thus originally paid.

"SEC. 2. Such sum or sums of money as shall be paid to said company, as aforesaid, shall be retained as a fund for the payment of losses and expenses which may happen or accrue in and to said company, which said fund shall be exhausted before a resort shall be had to assessments upon the premium notes deposited with said company; and this said fund and the premium notes deposited with said company shall constitute the capital of the company for the payment of losses and expenses."

Session Laws of New York, 1848, p. 66.

The universal course of business of over fifty companies formed in the State of New York under this act, was to insure for a cash premium.

The real question here is, whether this company, by its agents and the consent of its corporators, could carry on its business in any given mode, and act contrary to the general course of business of such corporations, so long as it prove profitable to the company, and, when a disaster occurs, be allowed to shield themselves from liability by a resort to a more than literal construction of their charter powers, which they themselves had extended by a liberal construction of its terms.

It would seem that there could be but one answer; and such is the uniform current of the more recent decisions upon the subject.

The law of the Court of Appeals of New York, as applicable, is well stated in the recent case of Curtis et al. *v.* Leavitt, (15 New York Reports, 9,) where the faith of promises and the inviolability of contracts are maintained as follows:

Comstock, J.: "Corporations, it is said, can act only in accordance with the law which creates them. But if law authorizes them to do acts specifically, and is silent as to the manner and means of doing those acts, where is the restriction, except such as the nature of the business implies?"

Brown, J.: "Can the corporation take to its own use the moneys realized from third parties upon the faith of its validity, and then repudiate the authority by which it was created? If the act done was within the power of the corporation, it must fall within the law of ratification and confirmation so universally applied to the conduct of those who maintain towards each other the relation of principal and agent. This law should apply with quite as much force to corporate bodies as to natural beings, because, in respect to the latter, the principal may and often does act without the intervention of an agent, and, in case of doubt, recourse may be had to the prinpal himself. Not so with an artificial being. It can only act by and through its officers."

Paige, J.: "Every corporation has certain powers and capacities, which are at common law incidental to its existence. Among these are the powers to take and grant property, and to contract obligations. (2 Kent's Com., 278; 15 Johns., 383; 4 Wheat., 568; 1 Kid. on Cor., 13, 69, 70.) These general powers may be curtailed by the act of incorporation, and restrained and qualified by the nature and object of the corporation. When the charter is silent as to the contracts which a corporation may make, it has, as incidental to its existence, the power of making all such contracts as are necessary and usual in the course of the business it transacts, as a means to attain the object for which it was created. (Ang. and A. Corp., 83, 84, 245, 3d ed.; 2 Kent's Com., 218, note c, 7th

ed.; 15 John., 383, per Thompson, J; 1 Sand. Ch. R., 288, 289.")

"The general understanding in respect to the construction of a statute, and the usage of all persons in a particular business in accordance with such understanding, is always regarded as of great weight in fixing the construction of such statute, '*contemporanea expositio est optima, et fortissima in lege.*' (Broom's Legal Maxims, 532.")

In the case of Eastern Counties Railway Co. *v.* Hawkes, in the House of Lords, the Lord Chancellor, (Lord Cranworth,) and Lords Brougham, Campbell, and St. Leonards, concur in opinion. (35 Eng. Law and Equity, 8.) The final opinion concludes as follows:

"I trust that this decision, and the decisions of this House during the present session, in the cases of the National Exchange Company *v.* Drew, 2 Macq., (Sc. Ap. cas.,) 103, and in Bargate *v.* Shortridge, 4 H. L., cas. 297, (s. c. 31 Eng. R., 1) will place the powers and liabilities of directors and their companies, in making contracts and in dealing with third parties, upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established, but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their acts, and which cannot clearly be shown not to fall within them; and they further hold companies to be bound by a continued course of dealing by their directors with third persons in relation to their shares, although that mode of dealing is contrary to the regulations of their deed of management. I hope that we shall have no other cases before us, where the defence of a company rests upon the want of power to make a contract which the directors deliberately entered into, and under which they took a benefit, or upon the irregularities of their own proceedings."

Point Second. The premium notes of this company constitute its capital stock, and, as such, are liable to pay all the losses and liabilities thereof.

It is stated in the plea "that there are no assets to pay

the losses of said company, other than the premium notes; and that the avails of said premium notes will not pay the losses arising on the policies of insurance, which policies were founded on premium notes."

As there are no assets to pay the liabilities of this company, except the premium notes, and as the premium notes will not pay the premium-note-policy losses, the question is distinctly presented for the decision of this court: Are said premium notes the capital of the company, and, as such, liable to pay *pro rata* all its liabilities?

This question has been frequently determined in the courts of New York, in suits brought by the receivers of insolvent insurance companies.

The company under consideration is admitted in the plea to be insolvent.

By the 17th section of the act annexed to the plea, this corporation is subject to "all the provisions of the revised statutes in relation to corporations, so far as the same are applicable."

By 2 R. S. of N. Y., 469, 1st ed., sec. 69: "If there shall be any sum remaining due upon any share of stock subscribed in said corporation, the receiver shall immediately proceed and recover the same."

In the case of Brown, receiver, *v.* Crooke & Fowks, 4 Comst., 51, the defendants, after the giving of their notes, took out no policies, and resisted the payment, on the ground that there was no consideration; *held*, that the notes were valid, and that the receiver of the company, which had become insolvent, was entitled to collect the amount thereof, to be applied in the liquidation of losses and liabilities.

The Supreme Court and Court of Appeals of the State of New York have determined these premium notes to be the capital stock of the company.

In Hyde, receiver, *v.* Beardsley, the opinion of the Court was delivered by Shankland, presiding justice. He says: "The deposit notes of the members of these mutual insurance companies constitute the capital stock of these companies."

Van Buren *v.* Chenango Co. Mut. Ins. Co., 12 Barbour's R., at page 676.

At page 674 of the case last cited, the court, by Mason, J., say: "It has been adjudged in the Supreme Court of Pennsylvania that the deposit or premium notes of these mutual insurance companies are to be regarded as the capital stock of their companies, and the same has been held by this court in several cases which have been before it in reference to this same company. This was so adjudged in the case of Hyde, receiver, *v.* Beardsley, and Hyde, receiver, *v.* Marvin, decided at the May general term, 1848. These cases have been followed by several adjudications since."

In the case of Hyde, receiver, *v.* Sawyer, decided in the Supreme Court of New York in the 6th district, the Court by Morehouse, J.:

"The following principles have heretofore been debated, and fully decided and settled by this court:

"*First.* That every person effecting insurance in a mutual company becomes thereby a member of the corporation, and continues such member, not only during the period he shall remain insured by the corporation, but until he has contributed his proportion of all losses and expenses which accrued during the term of his insurance, or until the surrender of his policy upon the payment of his portion of all losses and expenses to which he was at any time liable to contribute as a member."

"*Second.* That the premium notes of the members of the corporation, deposited with the treasurer upon effecting insurance, together with the per cent. immediately paid, constitutes the capital stock of the company, consecrated to the mutual security of the insured, and all persons with whom the company may contract liabilities; and that no corporator can withdraw the same, or any part thereof, from the corporation, so as to release himself from any existing or contingent liability to pay the whole or any proportionate share of his deposit note."

It has been decided in Pennsylvania that the deposit or premium notes of a mutual insurance company are a part of its capital. Such was the decision in Rhinehart *v.* The Alleghany Co. Mut. Ins. Co., (1 Barr Penn., 359,) and the Court of Appeals of New York, in Hyde, receiver, *v.* Lynde, (4 Comst.,

391,) by Bronson, Ch. J.: "I agree with the Supreme Court, that the deposit or premium notes are to be regarded as capital for the security of those who may deal with the company."

As these premium notes are a security for all who may deal with these companies, and as this company, as appears by the pleadings, has issued more policies for a cash advance premium than for premium notes, and has received forty-three thousand dollars for said cash policies, and expended the same in payment of the general liabilities of said company, common justice and mutuality would seem to require that said premium notes be applied equally to pay all the just creditors of this company.

Finally, the cash-premium-policy creditors of these New York companies, many of whom reside in Missouri, Illinois, Ohio, Virginia, and Pennsylvania, and most of whom are non-residents of New York, and whose interest in this and other like companies to an amount of more than one million of dollars is to be determined by the decision of this case, invite the several members of this high court to an examination thereof.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the northern district of New York.

The suit was brought against the defendants on a policy of insurance against fire, in the sum of $2,500, upon a paper-mill, machinery, and stock, of one R. K. Kounsler, of the State of Virginia, the property situate in that State. The defendants are incorporated under the laws of the State of New York, and the place of business at the village of Fort Plain, an interior town of that State. The policy and all interest under the same have been duly assigned to the plaintiff.

There is no question in the case upon the loss, or upon the preliminary proofs; the defence being placed exclusively upon a defect of authority in the defendants to issue the policy. The act of the Legislature of New York, passed April 10, 1849, under which they were incorporated, provided, section 1, that any number of persons, not less than thirteen, might associate and form an incorporated company, among other things to

make insurance on dwellings, houses, &c., against loss or damage by fire; section 3, that these persons should file in the office of the Secretary of the State a declaration, signed by them, expressing their intention to form a company for transacting the business of insurance, which declaration should comprise a copy of the charter proposed to be adopted by them, and requiring notice of their intention to be published in a newspaper a given number of weeks. Section 4 provides for opening books of subscription to the capital stock, and that in case the business of the company was to be conducted on the plan of mutual insurance, then to open books to receive propositions and enter into agreements in the manner afterwards specified; which in substance is, that the company shall not commence business until agreements shall have been entered into for insurance, the premiums on which shall amount to one hundred thousand dollars, and notes have been received in advance for the premiums on such risks, payable at the end of or within twelve months from date, which notes shall be considered a part of the capital stock, and shall be deemed valid, negotiable, and collectable, for the purpose of paying losses or otherwise. Section 11, that the charter of the company should be examined by the Attorney General of the State, and if found in accordance with the requirements of the act, and not inconsistent with the Constitution or laws of the State, he should certify the same to the Comptroller of the State; and thereupon the Comptroller should institute an examination to ascertain if the company had received, and had in its actual possession, the capital, premiums, &c., to the full extent required by the act; and upon a certificate to this effect by the Comptroller, filed in the office of the Secretary of State, this officer should furnish the company with a certified copy of the charter and certificates, which, upon being filed in the office of the clerk of the county in which the company is located, shall be its authority to commence business and issue policies.

By section 10 it is made the duty of the corporators to declare in the charter the mode and manner in which the corporate powers conferred by the general act are to be exercised; and by section 12 the corporators, trustees, or directors, as the case

may be, shall have power to make such by-laws, not inconsistent with the Constitution or laws of the State, as may be deemed necessary for the government of its officers and the conduct of its affairs.

By the fifth section of the charter formed under this general act, it is provided that the rights, powers, &c., conferred by law on the company, shall be vested in and exercised by a board of directors, to consist of thirteen persons, to be elected by persons holding the policies of insurance in the company or their proxies, and one vote shall be allowed on every one hundred dollars insured. The eighth section of the charter provides that the rates of insurance shall be fixed and regulated by the company; and premium notes therefor shall be received from the insured, and shall be paid at such time or times and in such sum or sums as the company shall from time to time require; and any person applying for insurance, so electing, may pay *a cash premium*, in addition to a premium note, or a *definite sum in money*, to be fixed by the company, in full of said insurance and in lieu of a premium note.

The policy in question was issued on the payment of a cash premium, under this eighth section of the charter, the insured paying a gross sum of fifty-six dollars and twenty-five cents for the insurance of his paper-mill and stock to the amount of $2,500 for one year.

The ground taken in the defence is, that, according to the general act under which the defendants were organized, they were empowered to make contracts and issue policies of insurance to such persons only as became members of the company by giving premium notes; and that the eighth section of the charter, providing for the payment of the premium in cash, was without authority, and the policy therefore void.

It is stated in the plea upon which the question in the case is raised, that from the time the company began business (August, 1850) till June, 1853, when it became insolvent, over two thousand policies were issued, founded upon premium notes, and over two thousand five hundred founded upon cash premiums; and that the amount of forty-three thousand dollars was received by the company for policies issued upon cash premiums.

The general act, conferring the power upon companies organized under it to make contracts of insurance against fire and issue policies, provides for a certain amount of capital, ($100,000,) secured by premium notes upon engagements of insurance entered into by the companies, as a condition to the right of commencing the business of insurance. This capital, thus obtained, is essential to a complete organization under the act; for, without it, the corporation is forbidden to enter upon the business of insurance.

These preliminary engagements and the giving of premium notes were designed as an immediate security to persons who, confiding in the responsibility of the company, should make application for insurance on its going into operation.

The notes thus constituting capital are to be made payable at or within a year from their date; they may be made payable, therefore, within the terms of the act, on demand, or at any short period; and they are made negotiable and collectable for the payment of any losses which may accrue in the business of insurance or otherwise. And it has been held in the Court of Appeals, in New York, that they are collectable by the company, irrespective of losses, or assessments to pay losses. (16 New York R., 310; 2 Smith R.)

Now, although the general act provides for premium notes upon these preliminary engagements of insurance to be consummated on the organization of the company, and with a view to capital upon which to begin the business of insurance, there is no provision to be found in it prescribing the mode or manner in which premiums shall be paid or secured after the company has become organized and commenced operations. That seems to have been left to be regulated in the charter formed under the act.

The provision prescribing the giving of notes in advance for premiums, with a view to create capital, has no necessary relation to the subject of premiums to be received by the company after its organization, and in the course of conducting its ordinary business. The act had in view a different object in requiring the giving these notes, and provided specially for their disposition and use with reference thereto. They

are made a part of the capital stock of the company, and negotiable and collectable for the payment of losses or otherwise, and, as we have seen, collectable as such capital, irrespective of loss or assessment for losses; and as they may be made payable on demand, or at a short day, are convertible into money, according to the decision in the Court of Appeals of New York, immediately on the company's becoming organized and ready for business.

Even if this provision could be regarded as bearing upon the subject of premiums after the organization of the company, it would furnish but feeble support to the argument against cash premiums, the difference being simply between cash and a note payable and collectable immediately. According to the act, and construction given to it in the case referred to, these notes have no necessary existence after the organization of the company. They may then be converted into money. They seem to have been made necessary under this system of insurance while the company was in the process of organization, by way of furnishing the incipient amount of capital required by the act.

It is argued, however, that the company in question is a mutual insurance company, as declared by the act; that, according to this system, the insured must be a member of it, and that a person insured upon a cash premium, without any further liability, cannot be a member. This argument is not well founded, either upon principle or authority. Admitting that the insured must be a member of the company, he is made so by the payment of the cash premium. The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property constitute a common fund, devoted to the payment of any losses that may occur. Now, the cash premium may as well represent the insured in the common fund as the premium note; and this class of companies has been so long engaged in the business of insurance, it may well be that they can determine, with sufficient certainty for all practical purposes, the just difference in the rates of premium between cash and notes. These mutual companies, possessing the authority contained in the eighth section

of this charter, namely, to take cash premiums or premium notes, are, at the present day, in operation in several of the States, and it has never been supposed that the mutual principle has been thereby abrogated.

3 Ohio R., 348, N. S.

It has also been argued, that inasmuch as the defendants have been organized upon the principle of a mutual insurance company, its business must be conducted, as it respects the premiums to be received, according to the plan of mutual companies previously chartered in the State of New York. If the previous companies were required by their charters to receive premium notes, and not cash, then this requirement distinguishes them from the one before us. If their charters contained no such provision, then they were left, like the present one, to regulate the mode of payment at discretion. Besides, mutual companies upon both plans had been chartered by the Legislature of New York previous to the act of 1849, and hence no inference can be drawn, as it respects the charters of previous companies, from the unexpressed intent of the Legislature in this act, if otherwise admissible.

The true answer, however, to this argument, we think, is, that in the absence of any reference to previous charters, by which the provisions of the same might have been incorporated in the present one, the court must look to the law itself for the purpose of expounding its provisions and ascertaining the intent of the Legislature.

The general act prescribed the outlines of the system, and all the conditions and guards that were deemed essential to the security of persons applying for insurance, leaving the details and interior regulations to be arranged and determined by the company in their charter. Large powers were conferred, in general terms, as in the 10th section, "to declare in the charters" "the mode and manner in which the corporate powers given under and by virtue of this act are to be exercised;" and again, in the 12th section, the company "shall have power to make such by-laws" "as may be deemed necessary for the government of its officers and the conduct of its affairs." And, besides these general powers, inasmuch as the company

is incorporated for the express purpose of insurance of property against fire, in the absence of any prescribed mode of payment of premiums, the power to prescribe it by the company is necessarily implied; otherwise, the object for which it was created would be defeated.

This question has been indirectly before several of the courts of New York, and in all of them, so far as any opinion has been expressed, as I understand, it has been in favor of the validity of these policies.

The practical construction of this act of 1849 by the public officers of the State, including the Attorney General, who were required to supervise the preliminary steps made necessary to the organization of the company, and to certify that it had conformed to the provisions of the act, and the latter officers especially, that the charter was in accordance with it, is deserving of consideration. Under the construction thus given, numerous companies have been organized with charters like the present, providing for cash premiums, or premium notes, at the election of the insured, and an extensive business of insurance carried on in New York and several of the sister States; and, although this practical construction cannot be admitted as controlling, it is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt, or where the error is not plain.

The judgment of the court below is affirmed.

Mr. Justice DANIEL dissents, on the ground of want of jurisdiction.

THOMAS LEGGETT, JUNIOR, SAMUEL SMITH, AND SMITH LAWRENCE, APPELLANTS, *v.* BENJAMIN G. HUMPHREYS.

There was a suit brought in the Circuit Court of the United States for the southern district of Mississippi, against a sheriff and his sureties upon the sheriff's official bond, in which judgment was given for the defendant. Being brought to this court by writ of error, the judgment was reversed, and a mandate went down, directing the Circuit Court to enter judgment for the plaintiffs. (See 2 Howard, 28.)

Whilst the suit was pending in this court, judgment against the sheriff and his sureties was given in a State court, and execution was issued against one of