

9FED.CAS.—39

Case No. 4,993.

FOWLE v. ALEXANDRIA.

{3 Cranch, C. C. 70.}¹

Circuit Court, District of Columbia.

April Term, 1827.²

MUNICIPAL CORPORATIONS—AUCTIONEER'S LICENSE—FAILURE TO REQUIRE BOND—LIABILITY FOR DAMAGES.

1. Under the law of Virginia the defendant may demur and plead to issue, to the whole declaration.
2. The act of Virginia of 1796. "concerning corporations," which requires bond and security to be given by auctioneers, does not prescribe the condition of the bond, but leaves it to the discretion of the respective corporations; but when the condition has been fixed by a by-law, it cannot be dispensed with at the will of the corporation, unless that will be expressed in such a formal manner as to repeal the by-law.

{See note at end of case.}

3. A corporation aggregate, having, or supposed to have, a corporate fund, is liable in an

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action at common law for negligence of its duty.

4. The inhabitants of Alexandria, as such, are no part of the corporation.
5. A judgment against the corporation cannot be levied on any inhabitant who is not a member of the common council.
6. The "Common Council of Alexandria" is an entirely new corporation erected by the act of congress in 1804 [2 Stat. 256], and derives all its powers from that act.
7. By that act, this new corporation is neither authorized to grant licenses to auctioneers nor to restrain them from exercising their business without license.
8. The old corporation erected by the Virginia statute of 1779, by the name of "The Mayor and Commonalty of the Town of Alexandria," was, by its own consent, destroyed by the repeal of that statute by the act of congress of 1804 erecting the new corporation.
9. The Virginia act of 1796, "concerning corporations," was applicable only to corporations then existing, and created no duty or obligation upon any corporation subsequently erected.

This was an action upon the case [by William Fowle], against "the common council of Alexandria," for negligence in licensing an auctioneer without taking bond and security according to the Virginia act of 1796 [Laws 1796, p. 22, c. 13], "concerning corporations," and the by-law of "the mayor and commonalty" of the 5th of February, 1800. By an act of the legislature of Virginia in the year 1779 [Hening's Laws 1779, p. 173, c. 25], the mayor, recorder, aldermen, and common councilmen, elected in the manner therein prescribed, were made a body corporate and politic by the name of "Mayor and Commonalty of the Town of Alexandria." By the Virginia act of December 22, 1796, "concerning corporations," it is enacted that "the mayor, aldermen, and commonalty of the several corporate towns in this commonwealth, and their successors, shall, upon request of any person or persons desirous thereof, grant licenses to exercise, in such town, the trade or business of an auctioneer; provided that no such license shall be granted until the person or persons requesting the same, shall enter into bond with one or more sufficient sureties payable to the mayor, aldermen, and commonalty of such corporate town and their successors in such penalty, and with such condition as by the by-laws and ordinances of such corporate town, shall be required." By the by-law of February 5, 1800, it is enacted that "the mayor and commonalty shall grant to any person or persons desiring the same, a license to exercise the trade or business of an auctioneer, within the town; provided that no such license shall be granted, until the person or persons applying, shall enter into bond with one or more good securities, in the sum of \$20,000 payable to the mayor and commonalty, and conditioned for the payment of the annual rent of \$500 to the mayor and commonalty, in quarterly payments, for the said office; and for the due and faithful performance of all the duties of the same; which bond shall not become void on the first recovery, but may be put in suit and prosecuted, from time to time, by, and at the costs of any person injured by a breach thereof, until the whole penalty shall be recovered." The by-law regulates the fees and commissions of the auctioneer and prescribes his duties; one of which is that he shall, in three days after any sale made, deliver, to the owner of the goods sold, a

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fair account of the sale, and pay the amount of the money received, deducting therefrom his fees and commissions. By the act of congress of the 25th of February, 1804 (2 Stat. 255), "to amend the charter of Alexandria," after providing for the election of a common council, it is enacted "that the common council, so elected, and those thereafter to be elected and their successors shall be and hereby are made a body politic and corporate by the name of 'The Common Council of Alexandria,' with the usual corporate powers; and all the estate, rights, and credits now vested in the mayor and commonalty of the town of Alexandria, shall be vested in the said common council when elected, and may be recovered in their name for the use of the said town, and in like manner all claims and demands against the mayor and commonalty of Alexandria, prior to the operation of the present act, may be prosecuted and recovered against the aforesaid common council." They were authorized to appoint all officers deemed necessary for the execution of their laws; but no power was thereby given to appoint or to license auctioneers. The 12th section enacts "that so much of any act or acts of the general assembly of Virginia, as comes within the purview of this act, shall be and the same is hereby repealed. Provided that nothing herein contained shall be construed to impair or destroy any right or remedy which the mayor and commonalty of Alexandria now possess or enjoy, to or concerning any debts, claims, or demands against any person or persons whatsoever, or to repeal any of the laws and ordinances of the mayor and commonalty of the said town now in force, which are not inconsistent with this act" In June, 1817, the common council of Alexandria passed "An act to amend the act for licensing auctioneers, and for other purposes," by which it is enacted "that every person obtaining a license to exercise the business of an auctioneer within the town of Alexandria, shall annually apply for, and obtain a renewal of his license, and shall also annually renew his bond in the manner provided by law; and every person failing to renew such license, and give bond annually, shall cease to exercise the business of an auctioneer, and shall be proceeded against accordingly."

The declaration contained three counts. The first count, after setting forth the by-laws of the 5th of February, 1800, and 3d

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of June, 1817, avers that on the—day of—, 1815, the common council of Alexandria granted a license to one Philip G. Marsteller, to exercise the trade of auctioneer in Alexandria, and continued to renew the same from year to year until the—day of—, 1819, during which time he sold at auction for the plaintiff goods to the amount of \$—, which sum he failed to pay to the plaintiff, who recovered judgment against him for that sum, and obtained a fieri facias, which was returned nulla bona; at the time of which judgment, long before, and ever since, he was and is wholly insolvent; by reason whereof the plaintiff became entitled to the benefit of the bond and security required to be taken as aforesaid by the said “common council” previous to granting the said license, as aforesaid; yet the defendants, not regarding their duty in that behalf, but contriving, &c, did not, nor would not, take any bond and security as aforesaid, from the said P. G. M. “during the time when the transactions aforesaid, between the plaintiff and the said Philip took place, but on the contrary thereof, so carelessly, negligently, and improperly conducted themselves in the premises, that by and through the negligence, carelessness, and default of the defendants in the premises, no bond and security was taken from the said Philip to which the plaintiff can resort, and the money due to him as aforesaid is wholly lost to the plaintiff,” &c. Second count: “And whereas also the said common council of Alexandria, on the 1st of April, 1815, did license and permit one P. G. M. to carry on the trade and business of auctioneer in the town of Alexandria, and so from year to year to the 1st of February, 1819, and the said Philip, in virtue of the said license and permission, did carry on the said trade and business of auctioneer in the said town during the whole of the period aforesaid, and the plaintiff believing that the said common council had well and faithfully performed their duty in taking from the said Philip, bond and security for the faithful discharge of his duty as auctioneer aforesaid, and confiding in the same, did deliver to him the said Philip, from time to time during the years 1815, 1816, 1817, and 1818, goods, wares, and merchandise to the value of \$10,000 and upwards, to be sold by him as auctioneer as aforesaid; and the said Philip as auctioneer aforesaid did sell the said goods, wares, and merchandise at auction aforesaid, and did become indebted to the plaintiff, by means of the said sales at auction as aforesaid in the sum of \$1,583.09, which said sum the said Philip, although often required, altogether failed and refused to pay to the plaintiff. And the said plaintiff saith that the said Philip was at the time he became so indebted, altogether insolvent and unable to pay the said sum of money, by means of which said premises the plaintiff became entitled to the benefit of the bond and security required by law to be taken by the said common council upon granting the license to the said Philip to exercise the trade and business of auctioneer as aforesaid. Yet the said common council not minding their duty in the said premises, but contriving to injure and deceive the plaintiff, altogether failed to take any bond or security from the said Philip for his license to carry on the trade and business of auctioneer for the years 1815, 1816, 1817,

and 1818 as aforesaid; in consequence and by means of which said failure the plaintiff hath altogether lost the debt so due to him from the said Philip to the plaintiff as auctioneer aforesaid, and therefore the plaintiff saith he is injured and hath sustained damage to the value of \$3,000," &c. The third count sets forth the act of Virginia of 1796, entitled "An act concerning corporations," and the by-laws of 1800 and 1817, and avers that the common council of Alexandria did knowingly suffer and permit the said P. G. M. to exercise the trade and business of an auctioneer within the said town from the 1st of January, 1815, to the last day of December, 1819; and during that period did take and receive from the said P. G. M. the annual sum of \$500 as a rent for exercising the said trade and business of auctioneer as aforesaid, and the plaintiff believing that the said common council had taken bond and security from the said P. G. M. for the faithful performance of his duties of auctioneer, &c, did from time to time during the said period, deliver to him goods to be sold by him as auctioneer; and that he so sold them to the amount of \$1,583.09, and failed to pay the same to the plaintiff; and was, when he so became indebted, altogether insolvent; by means of which premises the plaintiff became entitled to the benefit of the bond and security required by law to be taken by the common council as aforesaid; yet the said common council, not minding their duty in the premises, but contriving, &c, failed to take such bond and security; in consequence of which failure the plaintiff has lost the debt due from the said P. G. M. to the plaintiff, whereby he is injured, &c. To this declaration there was a general demurrer and joinder. The defendants were also permitted to plead sundry matters of fact in bar, under the Virginia statute of the 12th of December, 1792, § 40, which enacts "that the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact as he shall think necessary for his defence."

Mr. Taylor, for defendants, contended that no action for a tort lies against a public corporation; that the "common council" had no power to grant licenses to auctioneers either under the charter of 1779 or 1804. The Virginia law of 1796 does not prescribe the condition of the bond; it might have been only for payment of the rent or

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tax. They were not bound to provide for the security of those whose goods should be sold by the auctioneer. If the plaintiff has any remedy it is rather against the individual members of the common council, than against the public body which is a municipal corporation; and would have no right to pay the damages out of the public funds; nor would it have a right to lay a tax for such a purpose. The act of 1796 only gives the power of licensing auctioneers to the mayor, alderman and commonalty of the several corporate towns within the commonwealth. That act was applicable only to corporations then existing. The corporation known by the name of "The Mayor and Commonalty of the Town of Alexandria," which then existed, was dissolved, with its own consent, by the act of congress of 1804 (2 Stat 255), which erected a new corporation by the name of "The Common Council of Alexandria." This new corporation derived no power from the Virginia act of 1796. It had no right to require the bond. The act of 1796 requires the bond to be made payable to the "mayor, alderman and commonalty,"—the by-law requires it to be made payable to the mayor and commonalty only.

Mr. Swann, contra, contended that the corporation is liable for torts done within the sphere of its powers, and has power to raise money to pay the damages. *Townsend v. Susquehanna Turnpike*, 6 Johns. 91; *Yarborough v. Bank of England*, 16 East, 6; *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169; *Holmes v. Remsen*, 20 Johns. 230; *Patterson v. Bank of Columbia*, 7 Cranch [11 U. S.] 306. The charter of 1804, does not repeal the Virginia act of 1796, nor the bylaw of 1800.

Mr. Jones, in reply. The people of the town are no part of the corporation. The corporation is the government, the inhabitants are the governed. No action can be maintained by the governed against their governors for neglect of duty. The people are not responsible for the neglect of their government. The corporation cannot tax the people for the torts or negligence of the corporation. It is not the subject of a private action. All the powers of the new corporation are those given by the charter of 1804

Before CRANCH, Chief Judge, and MORSELL and THRUSTON, Circuit Judges.

CRANCH, Chief Judge. The act of Virginia of 1796, "concerning corporations," requires that bond and security shall be taken; the condition, however, is left to the discretion of the corporation; but that condition, when once fixed by a by-law, is necessary, and cannot be dispensed with at the will of the corporation, unless that will be expressed in such a formal manner as to repeal the by-law.

The first question is, whether the corporation is liable in an action upon the case at common law, for negligence of its duty. In the case of *Yarborough v. Bank of England*, 16 East, 6, it is decided that trover will lie against a corporation aggregate; a fortiori an action upon the case for negligence, which requires no evidence of any act done by the defendants, but is for a mere omission. In the case of *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, it is decided that case lies against a corporation aggregate, for neglect

to make the canal as wide and deep as required by statute, whereby the plaintiff suffered damage. In that case Mr. Chief Justice Parsons takes “a distinction between proper aggregate corporations and quasi corporations, such as counties and towns in Massachusetts, which are invested with particular powers without their consent. No private action can be maintained against them for breach of their corporate duty, unless such action be given by statute; and the reason is, that, having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any Judgment rendered against the corporation. This burden the common law will not impose but in a case where the statute is an authority to which every man must be considered as assenting. But in regular corporations which have, or are supposed to have a corporate fund, this reason does not apply.” In such cases, where an action is given by statute, it is cumulative. Is the common council of Alexandria such a regular corporation, having or supposed to have such a corporate fund? I think it is. The inhabitants of Alexandria, as such, are no part of the corporation. The judgment cannot be levied on any inhabitant who is not a member of the common council. None of the inconveniences mentioned by the court in the case of *Russell v. Men Dwelling in the County of Devon*, 2 Term R. 667, can occur in this case. If the corporation granted the license contrary to law, without taking the bond and security required by law, and the plaintiff has thereby sustained a special damage, I think he may maintain his action upon the case, at common law, against the corporation.

But it is said, that the “Common Council of Alexandria” is an entirely new corporation, erected by the act of congress in 1804, and derives all its powers from that act. That by that act this new corporation is neither authorized to grant licenses to auctioneers, nor to restrain auctioneers from exercising their business without license. That the old corporation, “The Mayor and Commonalty of the Town of Alexandria,” which was erected by the statute of Virginia in 1779, was, by its own consent, destroyed by the repeal of that statute by the act of congress erecting the new corporation. That the act of Virginia of 1796, “concerning corporations,” which imposed the duty upon corporations to license all such auctioneers as should apply

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and offer the requisite bond and security, was applicable only to corporations then in existence, and could give no authority, nor impose any duty upon a corporation subsequently erected; and therefore that the new corporation had no authority, and was not bound to require the bond and security. That the by-law of the 5th of February, 1800, although not expressly repealed, was virtually of no effect, because the authority, upon which it was founded, had ceased to exist, and could create no obligation upon the "common council" to require bond and security. In this view of the case I am inclined to concur. They cannot be bound by their own bylaw unless they had authority to pass such a by-law; nor can the by-law of the old corporation bind the new, when the authority upon which that by-law rested is taken away. I am therefore of opinion that the judgment upon the demurrer should be for the defendants, upon all the counts.

It may be observed, also, that the first count does not state that the said P. G. M. ever received any money for the plaintiff; nor that the plaintiff ever demanded any from him; nor does it expressly aver that the loss happened in consequence of the negligence of the defendants; nor that the plaintiff believed that security had been given. The second count does not refer to the by-laws, or to the Virginia act of 1796; nor does the plaintiff aver it to be the duty of the common council to require the bond and security; nor that P. G. M. received the money for the sales, but says that he became indebted to the plaintiff "by means of said sales." There is nothing in this count which shows the obligation of the defendants, or the title of the plaintiff. The third count does not state that the defendants granted any license, but knowingly permitted and suffered the said P. G. M. to carry on the business of auctioneer, and took no bond and security; but received the annual rent of 500 dollars. It does not state that the said P. G. M. received any money for the goods sold. This count I think is clearly bad.

Judgment for the defendants upon the demurrer.

[NOTE. Plaintiff brought error, and the judgment of the circuit court was duly affirmed by the supreme court, Mr. Chief Justice Marshall delivering the opinion, in which it was held that there is no precedent for holding a municipal corporation, established for the general purposes of government with legislative powers, liable for losses consequent on its having misconstrued the extent of its powers in granting a license, which it had not authority to grant without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require. *Fowle v. Alexandria*, 3 Pet, (28 U. S.) 398.]

[For a former hearing in this case before the supreme court, which was on demurrer to the evidence, and at which the judgment of the circuit court was reversed, see *Fowle v. Common Council of Alexandria*, 11 Wheat. (24 U. S.) 320.]

¹ [Reported by Hon. William Cranch, Chief Judge.]

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